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FUNDAMENTAL INTERESTS AND THE QUESTION OF SAME-SEX MARRIAGE

I. INTRODUCTION

There has been an increasing demand by the homosexual community for governmental and societal recognition of the individual rights and human dignity of homosexuals. Homosexuals and others have contested state sodomy laws¹ and employment discrimination,² as well as state prohibitions against same-sex marriage.³ Challenges to crimi-

1. State regulation of private sexual conduct between consenting adults through criminal sodomy and fornication statutes has been the topic of many legal publications. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 941-48 (1978); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974) [hereinafter cited as *Private Homosexual Conduct*]; Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252 (1978). The thrust of the arguments raised by homosexuals, and heterosexuals as well, is that such laws, when applied to consensual adult activity, infringe upon the individual's right to privacy as enunciated in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and as developed in a line of Supreme Court decisions. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (the right of privacy includes a woman's decision to have an abortion); *Stanley v. Georgia*, 394 U.S. 557 (1969) (although decided on first amendment grounds, it was noted that the right to be free from governmental intrusion into an individual's privacy is fundamental); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

2. For an excellent discussion of the economic problems faced by homosexuals, see Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687 (1973) [hereinafter cited as *The Homosexual's Legal Dilemma*]. As pointed out by the author of that comment, "fair employment for the homosexual has as its tragic flaw the subconscious prejudices inherent in human decision." *Id.* at 687.

3. Challenges to such prohibitions have been based on a number of constitutional amendments, including the first, eighth, ninth and fourteenth amendments. *See Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972). The major attack against same-sex marriage prohibitions, however, has been based on the due process and equal protection clauses of the fourteenth amendment. *See* notes 15-28 *infra* and accompanying text. For a discussion of the probable disposition of the other constitutional challenges levied against existing marriage definitions, see Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 573-74 n.3 (1973).

The argument has also been advanced that the passage of an Equal Rights Amendment, presumably on either the federal or state level, would subject present marriage definitions to critical judicial scrutiny. *Id.* at 583-88. It is argued that marriage laws which permit a man to marry a woman but prohibit him from marrying another man draw impermissible sex classifications in derogation of an Equal Rights Amendment. This situation is compared to that in *Loving v. Virginia*, 388 U.S. 1 (1967), wherein the Court held that an antimiscegenation statute, which treated all races equally in the sense that Caucasians were prohibited from marrying Negroes and vice-versa, violated the equal protection clause. *Id.* at 584-85. The difficulty with this analogy, however, is that the proposed Equal Rights Amendment creates no new rights; it merely ensures that presently existing and future rights shall not be denied on the basis of impermissible sex classifications. *See generally* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971). Unless it can be shown,

nal sodomy statutes have met with a measure of success based upon a privacy right of sexual choice between consenting adults.⁴ Similarly, there has been some favorable recognition that employment should be based upon ability and job performance rather than the sexual preference of the employee.⁵ There has yet to be, however, any successful challenge to state definitions of marriage which preclude homosexuals from entering into that relationship.⁶ Such challenges have been defeated because of the way in which state courts have defined the right to marry.⁷ In other words, the state courts addressing the issue have held that the individual's right to marry is merely the right to enter a heterosexual relationship.⁸ A homosexual who wishes to marry another homosexual has no right that can be exercised or protected.

In the light of these state opinions, it is apparent that the right to marry is based upon the marital relationship itself. It is the purpose of this comment to explore the nature of that relationship, and in so doing attempt to discover the parameters of the right to enter into that relationship. It is suggested that it is the intimate, lifelong commitment between two people⁹ which gives the marital relationship its special and protected status. Viewed in such a manner, the relationship is

therefore, that the right to marry is broader than state definitions of marriage, the Equal Rights Amendment would have no impact on same-sex marriage prohibitions. *Cf. Singer v. Hara*, 11 Wash. App. 247, ___, 522 P.2d 1187, 1194 (1974) (state Equal Rights Amendment creates no rights or responsibilities, but rather merely requires that existing and future rights be equally available to both sexes).

4. See discussion notes 93, 118 *infra* and accompanying text.

5. See *TRIBE*, *supra* note 1, at 941 n.3. See also *The Homosexual's Legal Dilemma*, *supra* note 2, at 706-14.

6. Only a few state court decisions have directly addressed the validity of same-sex marriage prohibitions. See *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (1971). *Cf. B. v. B.*, 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974) (where wife is transsexual, but was male at the time of marriage, the marriage is void). In each of these cases, the prohibition was upheld.

7. Thus far, the determination of the scope of the right to marry has been left to the states. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court held that the freedom to marry is a vital personal right protected by the due process clause of the fourteenth amendment. *Id.* at 12. More recently, the Court has stated that the right to marry is of fundamental importance to the individual. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). Neither of these cases, however, explored the parameters of that right in relation to same-sex marriage.

8. See notes 15-28 *infra* and accompanying text.

9. Limiting marriage to two people has long been recognized in this country. See *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding criminal conviction of bigamy because of polygamous marriage). See also Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 672-75 (1976) [hereinafter cited as Glendon] for a discussion of various forms of simultaneous marriage in this country, some acceptable and some not.

broad enough to encompass homosexual couples.¹⁰ It is therefore contended that the freedom to marry is a right which inheres in each individual regardless of sexual preference. Furthermore, under the equal protection clause of the fourteenth amendment, state prohibitions against same-sex marriage cannot stand unless supported by compelling state interests and effectuated by means closely tailored to reach only those interests.¹¹

Following a brief discussion of the state court decisions that have addressed same-sex marriage prohibitions, the marital relationship and the permissible scope of the fundamental right to marry will be examined. Thereafter, the focus of the comment proceeds upon the basis that the right to marry is broader than a right to merely enter into a particular heterosexual relationship. Upon this basis, state interests in support of exclusive marriage definitions will be explored.

II. STATE COURT DECISIONS RESTRICTING THE RIGHT TO MARRY

There have been but a handful of decisions in which the question of same-sex marriage was in issue.¹² Typically, these cases arose out of the denial of a marriage license to the applicants on the ground that they were of the same sex.¹³ In only two of these cases did the courts confront the constitutional issues raised by the denial of a marriage license under these circumstances.¹⁴ In examining these two opinions, the limitations on the scope of the right to marry and the reasons for the limitations become fairly apparent.

In *Baker v. Nelson*,¹⁵ the Minnesota Supreme Court was confronted with the equal protection and due process arguments of two

10. See discussion notes 31-62 *infra* and accompanying text. For a discussion of a legislative solution to the question of homosexual marriage see Comment, *Homosexual's Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979).

11. This was the equal protection analysis applied by the Court in *Zablocki v. Redhail*, 434 U.S. at 388, invalidating a Wisconsin support statute which significantly interfered with the decision to marry. See notes 70-78 *infra* and accompanying text.

12. See note 6 *supra* and accompanying text.

13. See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (two women applied for and were denied a marriage license). *But cf.* *B. v. B.*, 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974) (license was issued but marriage was subsequently held void).

14. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974). In *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973), however, the court expressly declined to address the constitutional issues. *Id.* at 590. The court simply stated that the relationship proposed by the women was not a marriage. *Id.* at 589.

15. 291 Minn. 310, 191 N.W.2d 185 (1971).

males who were denied a marriage license. In construing the statute,¹⁶ the court found an implicit prohibition against same-sex marriages.¹⁷ Moreover, the court found that, as construed, the statute violated no constitutional rights of the petitioners.¹⁸

The court reached this result because it determined that the right to marry was a right only to enter into a heterosexual relationship. It was the court's belief that the due process clause of the fourteenth amendment was not a charter for restructuring the historic and deep-rooted concept of the marital relationship.¹⁹ In other words, marriage, "as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."²⁰ The court did not perceive the right to marry as changing this concept of the marital institution.²¹

16. The applicable statute, MINN. STAT. ANN. § 517.01 (1969) made no reference to the required sex of the applicants.

Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do.

Id.

17. The court found such a limitation based upon the "common usage" of the word marriage as a union between one man and one woman. 291 Minn. at __, 191 N.W.2d at 185-86 & n.1.

18. *Id.* at __, 191 N.W.2d at 186. The court was not persuaded that the right to marry without regard to the sex of the parties was a fundamental right of all persons. Apparently, the court viewed the right as one inhering in the heterosexual "couple" and not in the individual. *See Id.*

19. *Id.*

20. *Id.*

21. In addition to finding that the right to marry did not encompass the relationship sought by the petitioners, the court also found that the state classification of marriage did not violate the equal protection clause. *Id.* at __, 191 N.W.2d at 187. The petitioners had argued that if the state purpose served by the classification of marriage as a union of a man and a woman was in promoting procreation, the statute was unconstitutional because it was not rationally related to that purpose. The petitioner's basis for this argument was that not all heterosexuals are capable of bearing or willing to bear children, yet they are permitted to marry while homosexuals are not. The court's answer to this contention was that the Constitution does not require abstract symmetry.

Id.

The court's concise response is supported by the traditional equal protection analysis applied to classifications which neither impinge a fundamental interest nor affect a suspect class. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (to satisfy equal protection it must be determined that the legislative scheme rationally furthers some legitimate, articulated state purpose and, therefore, does not constitute an invidious discrimination). *See also* *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (the classification must be reasonable and bear some fair and substantial relationship to the object of the legislation such that persons similarly situated are treated alike). While it might be theoretically desirable to have a perfect fit between the state purpose and the means used to achieve that purpose, many courts have been willing to tolerate both overinclusive and underinclusive classifications in recognition of the practical difficulties of achieving such perfection. *See, e.g., Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949). *See generally* *Tussman and tenBroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). For an extensive discussion of the intricacies involved in the rational

Three years later, in *Singer v. Hara*,²² the Washington Supreme Court also addressed the issue of same-sex marriage prohibitions. Predictably, the court rejected the constitutional challenges of two men who were denied a marriage license.²³ As in *Baker*, the Washington court construed the silent state marriage statute as permitting a marriage only between persons of opposite sex.²⁴

Although the *Singer* decision is by far the most reasoned discussion of the equal protection issues raised by same-sex marriage prohibitions, the court simply declared that the right sought by the appellants did not exist for them.²⁵ The court found that this resulted from the nature of marriage itself and its recognized definition as a union between one man and one woman.²⁶ Relying upon the language enunciated in the *Baker* opinion,²⁷ the Washington court justified this concept of marriage upon the historic purpose of marriage as involving procreation and the rearing of children within a family.²⁸

While it has been established that the freedom to marry is a vital personal right protected by the due process clause²⁹ and that the decision to marry is of fundamental importance to the individual,³⁰ the state courts have built a condition into the exercise of the right. Thus, while there is a right to marry, the condition tied to that right is entry into a *heterosexual* relationship. The right cannot be viewed apart

basis test used in equal protection analysis, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-87 (1969).

22. 11 Wash. App. 247, 522 P.2d 1187 (1974).

23. In addition to arguing that the prohibition against same-sex marriage violated the eighth, ninth and fourteenth amendments to the United States Constitution, the appellants also argued that such prohibitions violated the Equal Rights Amendment to the Washington Constitution. WASH. CONST. art. 31, § 1. In disposing of the Equal Rights Amendment issue the court stated that the prohibitions did not deny the appellants entry into marriage on the basis of their sex, but rather, denial was based on the nature of marriage itself. 11 Wash. App. at ___, 522 P.2d at 1192. See note 3 *supra* and accompanying text.

24. The applicable statute provides:

Marriage is a civil contract which may be entered into by persons of the age of eighteen years, who are otherwise capable: *Provided*, That every marriage entered into in which either party shall not have attained the age of seventeen years shall be void except where this section has been waived by a superior court judge of the county in which the female resides on a showing of necessity.

WASH. REV. CODE ANN. § 26.04.010 (Supp. 1979) (as amended 1970). The court found significance in the reference to "female" in the proviso of the statute as well as the reference to male and female in other statutes. The court noted that these statutory references indicated a legislative intent to prohibit same-sex marriages. 11 Wash. App. at ___, 522 P.2d at 1189 & n.3.

25. *Id.* at ___, 522 P.2d at 1192.

26. *Id.* at ___, 522 P.2d at 1192, 1196.

27. See notes 19-20 *supra* and accompanying text.

28. 11 Wash. App. at ___, 522 P.2d at 1197.

29. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

30. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

from the nature of the marital relationship itself. To determine the scope of the right to marry, it is necessary to discuss the characteristics and purposes of the relationship.

III. EVOLVING CONCEPTS OF THE MARITAL RELATIONSHIP

The word marriage may mean different things to different people, but it is capable of at least two distinct meanings. Marriage has been viewed as a civil contract between two people.³¹ As a contract, the union must be voluntarily entered into; therefore, each party must be capable of consenting to the contract.³² If this were the only meaning attributable to marriage, then there would appear to be no obstacle to homosexual individuals to enter the marriage contract as long as they are capable of contracting and have consented to the contract.³³ Marriage, however, is capable of another meaning as well: that of a particular kind of relationship or legal status that exists between two people. The relationship has traditionally been viewed as existing between one man and one woman.³⁴ Yet, this characterization of the marital union says nothing about the relationship itself and gives no clue as to why this relationship stands apart from other male-female relationships.

It has been stated by one sociologist that the institution of marriage probably

developed out of a primeval habit. It was, . . . even in primitive times, the habit of a man and a woman (or several women) to live together, to have sexual relations with one another, and to rear their offspring in common, the man being the protector and supporter of his family and the woman being his helpmate and the nurse of their children. This habit was sanctioned by custom, and afterwards by law, and was thus transformed into a societal institution.³⁵

It has been further observed that the origin of the "habit" of extended cohabitation between men and women is rooted in the instincts of the human animal. By comparing various human cultures and comparing human beings to other species, it has been proposed that the origin of the habit lies in: the instinct to preserve the next generation and, there-

31. See G. MAY, MARRIAGE LAWS AND DECISIONS IN THE UNITED STATES 7 (1929).

32. *Id.* at 8.

33. An argument based upon the contractual nature of marriage was made by the petitioners in *Singer* and was rejected by the court. *Singer v. Hara*, 11 Wash. App. 247, ___, 522 P.2d 1187, 1189 (1974).

34. See notes 19-20 *supra* and accompanying text.

35. E. WESTERMARCK, THE HISTORY OF HUMAN MARRIAGE 27-28 (1921).

fore, the species;³⁶ the instinct to care and provide for defenseless offspring;³⁷ and the instinct to remain with a partner who has been the source of sexual pleasure even after the sexual relations have ceased.³⁸ It was this habit which evolved into custom and which, in turn, resulted in the social institution of marriage.³⁹

A number of characteristics of the marital relationship are revealed in this account of the origins of marriage. It recognizes that marriage is the union of two people for mutual help, protection, and companionship. It is living together, for an extended period of time and involves sexual relations as well as the raising of any children born to the couple. On the other hand, while this account of the origin of marriage recognizes sexual pleasure as an element of intimate relations between the couple, the major purpose for sexual relations under this hypothesis is the instinctive purpose of preserving the species.⁴⁰ Further, not only are marriage and family intrinsically connected to one another, but it has been proffered that marriage is but an offshoot of family.⁴¹ Under this reasoning, marriage would be quite a different relationship for people who are incapable of producing children or who are resolved not to bear children.

36. *Id.* at 35. See also L. STOCKTON, MARRIAGE CONSIDERED FROM LEGAL AND ECCLESIASTICAL VIEWPOINTS 19 (1912).

37. *Id.* at 72.

38. *Id.* at 70.

39. *Id.* at 69-70.

40. The belief that natural and normal sexual relations between human beings is that which results in procreation is also embodied in modern criminal statutes which prohibit certain sexual contacts. See notes 90-95 *infra* and accompanying text. State attempts to criminalize the consensual activities of adults are tied to widespread religious beliefs that any sexual act not leading to procreation is sinful. See *United States v. Brewer*, 363 F. Supp. 606, 607 (M.D. Pa. 1973) (dicta). See also note 57 *infra* and accompanying text. Religious dogma, however, is not the only basis for the belief that normal sexual activity is that which would result in procreation. In the context of infra-human mammals, Alfred Kinsey has observed:

The impression that infra-human mammals more or less confine themselves to heterosexual activities is a distortion of the fact which appears to have originated in a man-made philosophy, rather than in specific observations of mammalian behavior. Biologists and psychologists who have accepted the doctrine that the only natural function of sex is reproduction, have simply ignored the existence of sexual activity which is not reproductive. They have assumed that heterosexual responses are a part of an animal's innate, "instinctive" equipment, and that all other types of sexual activity represent "perversions" of the "normal instincts." Such interpretations are, however, mystical.

A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 448 (1953). As further noted by Kinsey, "sexual contacts between individuals of the same sex are known to occur in practically every species of mammal which has been extensively studied." *Id.*

41. E. WESTERMARCK, *supra* note 35, at 72. See also S. KNOX, THE FAMILY AND THE LAW 25 (1941), wherein the authors argue that people marry not out of love or out of an instinct to perpetuate the human race, but rather out of a need to live in a family.

The concept of marriage as a relationship deriving its primary function from the propagation of children and the constitution of a family has not been confined to the observations of sociologists. Writing for a majority of the United States Supreme Court in 1888, Mr. Justice Field observed that marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of family and of society . . ."⁴² The viewpoint that marriage derives its fundamental character from procreation and the raising of children within the family has often been expressed by the Court since 1888.⁴³ It was this characterization of marriage that led the state courts to hold that the right to marry is limited to heterosexual marriage.⁴⁴

It cannot be doubted that many people who marry do bear children.⁴⁵ On the other hand, it is not uncommon for young married couples to choose to remain childless.⁴⁶ Nor is it unusual for older persons beyond the age of childbearing to marry. Such occurrences indicate a contemporary concept of marriage beyond mere procreation and the raising of children within the traditional family setting.⁴⁷ This contemporary concept of marriage is also revealed by recent Supreme Court decisions concerning the individual's decision to bear children.

In *Griswold v. Connecticut*,⁴⁸ a majority of the Supreme Court struck down a state statute that attempted to prohibit the use of contraceptives by married couples. The Court determined that the law had a maximum destructive impact upon the marital relationship—a relationship lying within the zone of privacy protected by various, explicit guarantees of the Constitution.⁴⁹

42. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

43. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is fundamental to our very existence and survival).

44. This section does not address the possible and permissible interests a state may assert in justification of its marriage definition. Those interests and the means used to justify them will be examined at notes 81-118 *infra* and accompanying text. This section is concerned only with a concept of marriage that exists apart from state definitions of that relationship.

45. Marriage and the raising of a family within a traditional family unit continues to be a cornerstone of societal and political institutions in this country. *See Heymann & Barzeley, The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765, 772-74 (1973).

46. Approximately five percent of married couples between the ages of twenty and thirty choose not to bear children. *PSYCHOLOGY TODAY*, Nov. 1979, at 30.

47. *TIME*, March 5, 1979, at 42, wherein it is observed that large segments of the American populace no longer consider children to be an inevitable or necessary part of marriage.

48. 381 U.S. 479 (1965).

49. The specific guarantees of the Bill of Rights had previously been construed to include certain unarticulated rights. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (first and fourteenth amendments protect the right of a parent to educate his child as he chooses);

While the immediate concern of the Court in *Griswold* was with the privacy rights surrounding the marital relationship, the opinion is also important for what it indicates about contemporary concepts of marriage. The nature of the case itself indicates that not all people who marry and are capable of bearing children wish to do so. Moreover, the use of contraceptives by married people suggests that while the couple may decide to bear children, they have chosen to limit the number of children they will produce. These are not particularly startling revelations. If, however, it is argued that marriage attains its fundamental character solely because of procreation and the raising of children, it must be questioned why people who cannot or will not fulfill these purposes enter into marriage or why married couples would attempt to limit the size of their families. The evident answer, and the one apparently endorsed by the Court,⁵⁰ is that the marital relationship involves much more than the bearing and raising of children. In other words, the decision whether to bear children is but one aspect of the marital relationship.⁵¹

The *Griswold* opinion is also enlightening because of the Court's observation with respect to the nature of marriage. The Court stated:

Marriage is a coming together for better or for worse, hope-

Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) (first and fourteenth amendments protect the right to learn the German language in private school). The *Griswold* opinion, however, expressly recognized "[t]hat specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." 381 U.S. at 484. The Court found that within this constitutionally protected zone of privacy is the marital relationship and the married couple's decision concerning procreation. *Id.* at 485.

50. *Id.* at 482. The Court noted that "[t]his law . . . operates directly on an intimate relation of husband and wife and their physician's role in *one* aspect of that relation." *Id.* (emphasis added).

51. It should be observed that the decision to bear children is not confined merely to married persons. This is made clear by the Court's decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which involved an equal protection challenge to a Massachusetts penal statute which prohibited the sale or giving away of contraceptives by anyone other than certain specified individuals. *Id.* at 441 n.2. Moreover, only married persons could receive articles and information pertaining to contraception. *Id.* While the Court's decision rested upon the equal protection clause, its discussion of the privacy right involved is illuminating. The Court stated:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (emphasis in original). See also *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (state may not impose a blanket provision requiring parental consent for abortion of an unmarried minor); *Roe v. Wade*, 410 U.S. 113 (1973) (right of privacy protects a woman's decision to have an abortion).

fully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁵²

Above all else, marriage is two people living, working, and loving together.⁵³ It is the public and voluntary commitment⁵⁴ of one individual to spend a lifetime with another.⁵⁵ If children are born, they are born as a *result* of this deep emotional bond between the spouses. If no children are born, the bond nevertheless remains.

Undoubtedly most people who have given thought to the special nature of the marital relationship would not disagree with the conclusions reached thus far. Yet, most people would also strongly argue that underlying this concept of marriage is the existence of a relationship between a man and a woman.⁵⁶ To contend that this belief has not been the traditional perception of marriage would be foolhardy. On the other hand, homosexuals have endured a long history of discrimination, hatred and misunderstanding.⁵⁷ In considering this history, it is

52. 381 U.S. at 486.

53. In discussing the opposite side of the marital relationship, the termination of the relationship, one commentator has noted:

The meaning of marriage has undergone profound changes in the last few generations. . . . Husband and wife, often uprooted from their home communities, are facing each other in isolation as never before. . . . True, legal partnership is the goal, with a highly personal bond, "a commitment in depth and complexity," between the spouses.

Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 189 (1968) (footnotes omitted).

54. *Id.* at 190. The commitment is a public one, for upon entering the legal marital relationship the parties bind themselves to the responsibilities and obligations to each other imposed by the state. See generally Glendon, *supra* note 9. See also Comment, *Constitutional Aspects of the Homosexual's Right to a Marriage License*, 12 J. FAM. L. 607, 622-24 (1972-73) [hereinafter cited as *Right to a Marriage License*].

55. It has been stated that there is disagreement in the homosexual community as to why some homosexuals desire to marry. Glendon, *supra* note 9, at 677 n.60. Some homosexuals have declared that their reason for marriage is to acquire the benefits received by other married couples. *Id.* While it may be true that some individuals marry in order to obtain the benefits of that status, it is also true that those entering the relationship are saddled with the same obligations imposed on other married couples. See *Right to a Marriage License*, *supra* note 54, at 622-24. Moreover, an individual's motivation to enter the marital relationship should not detract from the concept of marriage itself.

56. See notes 19, 20, & 24 *supra* and accompanying text.

57. The condemnation of homosexual acts dates from at least biblical times. See *Leviticus* 18:22, 20:13; *Romans* 1:27; 1 *Corinthians* 6:9. It has been argued that this condemnation is based upon an erroneous assumption that the ancient cities of Sodom and Gomorrah were destroyed by Divine judgment because of the prevalence in those cities of homosexual activity. D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 1-28 (1955). Repugnance to homosexual acts has also been embodied in criminal statutes which punish both private and public homosexual conduct through torture, death, or castration. *Id.* at 148-52. See also *The Homosex-*

not surprising that only heterosexuals have openly lived with one another and that laws have been developed to protect these relationships. Moreover, the belief that homosexual couples cannot share as intimate an emotional and sexual relationship as do heterosexuals is illfounded.⁵⁸ While, therefore, marriage has been confined to heterosexuals, this traditional and historic perception of marriage should not prevent its existence in alternative forms in the future.⁵⁹

The concept of marriage as a permanent, monogamous union of a man and a woman for the purposes of procreation and the raising of children within a family unit is a concept deeply embedded in the political, religious, and social systems of this country. This point cannot be overlooked. Yet, as has been seen, contemporary attitudes toward the marital relationship have changed and are continuing to change. Marriage is not a permanent relationship for many people, nor is it of necessity the exclusive domain of the family.⁶⁰ Moreover, in those states in which the penal sanctions levied against the sexual conduct of consenting adults have been removed, marriage cannot even be viewed as the only legal avenue of cohabitation and sexual intimacy between

ual's Legal Dilemma, supra note 2, at 688-90. While present legal sanctions are not as severe as those in times past, many states still punish private, consensual homosexual conduct. *See* note 98 *infra* and accompanying text. In addition to the threat of prosecution, homosexuals face public harassment and humiliation, the loss of employment, as well as the loss of custody or termination of parental rights. *See generally* V. Myers, *Sexual Preference Study: Community Relations Commission—City of Tulsa, Oklahoma* (1976); Comment, *The Law and the Problem Parent: Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcerated Parents*, 16 J. FAM. L. 797 (1977-78) [hereinafter cited as *Problem Parent*].

58. One author has noted that the word homosexuality implies love for a person of the same sex, and is part and parcel of the whole concept of sensations, feelings and emotions for which the word love is the symbol.

Homosexuality is, in fact, an *emotional* disposition which leads to close and intimate contact between people of the same sex, a contact which may or may not be expressed sexually.

C. WOLFF, *LOVE BETWEEN WOMEN* 11-12 (1971) (emphasis in original). While it might be popularly thought that homosexuality is nothing more than perverse sexual satisfaction, the fact remains that homosexuals are human beings with human feelings. Moreover, if homosexual relationships are at present unstable, this instability is more likely the result of social and legal pressure imposed upon the couple rather than an inherent inability of two people of the same sex to live together. *Cf. Private Homosexual Conduct, supra* note 1, at 1632-33, wherein the author argues that the promiscuity among homosexuals and the high incidence of venereal disease among homosexuals is a result of criminal laws that prohibit homosexual acts.

59. *Cf. Glendon, supra* note 9, at 672-75; *Right to a Marriage License, supra* note 54, at 619 n.46, wherein the authors discuss the viability of alternative forms of marriage.

60. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977) wherein the Court struck down as constitutionally infirm an ordinance that impinged on the familial living arrangements of related individuals. The Court clearly recognized the diversified family living arrangements in modern American society, particularly among the poor. *Id.* at 504-06. *See generally* Glendon, *supra* note 9.

adults.⁶¹ In other words, while marriage is a viable institution, the relationship should not continue to be viewed in terms that no longer have significance. The marital relationship, in contemporary terms, embodies many purposes. It is a voluntary public commitment of two people to accept certain socially imposed obligations toward each other. It contemplates living together for some period of time. It involves sexual relations and the possibility of the birth or adoption of children. Yet, above all else, the bond of the relationship is the mutual love and respect each of the partners has for the other. Viewed in these terms, including the possible existence of children,⁶² the marital relationship is broader than its accepted definition might indicate and is flexible enough to encompass adult partners of the same sex.

IV. EQUAL PROTECTION UNDER THE EXPANDED RIGHT TO MARRY

One commentator has noted that “[t]he right to choose one’s spouse is complimentary to the right to marry.”⁶³ Yet, even if the concept of marriage is broad enough to include homosexual relationships, and even if the right to marry encompasses the right to enter same-sex marriages, a state could still attempt to restrict an individual’s choice of a spouse to a person of the opposite sex.⁶⁴ To come within the requirements of equal protection, however, the burden is upon the state to justify any direct interference with the exercise of a fundamental right.⁶⁵

A. *The Standard of Review*

As discussed earlier, the state courts that have considered the issue of same-sex marriage have applied the deferential rational basis test to state statutes classifying marriage as a union between persons of the opposite sex.⁶⁶ In light of the limited scope these courts have attributed to the right to marry, this deferential scrutiny was not incorrect.⁶⁷

61. See discussion notes 110-114 *infra* and accompanying text.

62. See notes 88-89 *infra* and accompanying text.

63. Glendon, *supra* note 9, at 672.

64. Cf. *Roe v. Wade*, 410 U.S. 113 (1973) (right of privacy protects the decision to have an abortion but at some point during the pregnancy, the state’s interest becomes compelling enough to interfere with that decision).

65. *Zablocki v. Redhail*, 434 U.S. 374 (1978). See generally *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

66. See notes 15-22 *supra* and accompanying text.

67. But see *The Legality of Homosexual Marriage*, *supra* note 3, at 574-83, wherein the author argues that the rational basis test used in equal protection analysis should not be applied to the question of same sex marriage because the interests involved are more than purely economic in

When a court is faced with a classification which affects a fundamental interest,⁶⁸ however, deference must give way to heightened judicial scrutiny.⁶⁹

The Court, in *Zablocki v. Redhail*,⁷⁰ was faced with an equal protection challenge to a Wisconsin support statute which prohibited persons from marrying without court approval if those persons were obligated to support minor children not in their custody.⁷¹ The approval order would not be granted unless the applicant could prove compliance with the state support obligation laws.⁷² Moreover, it had to be shown that the child would not become a public charge.⁷³ Failure to comply with the statutory scheme rendered the marriage a nullity.⁷⁴ The majority opinion, delivered by Mr. Justice Marshall, reaffirmed the

nature. The author argues that the proper standard of review is the analysis applied by Mr. Justice Marshall dissenting in *Dandridge v. Williams*, 397 U.S. 471 (1970). Under this standard "concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Id.* at 520-21 (Marshall, J., dissenting). The author of the note concludes that not even this equal protection analysis would ensure homosexuals of a right to marry. *Legality of Homosexual Marriage, supra* note 3, at 582-83. The application of this analysis would require, however, a closer examination of all the interests involved in the issue of same sex marriage rather than merely deferring to the unexplained wisdom of the state legislature.

68. A stricter judicial scrutiny is also applied where a state classification affects a suspect class, such as race. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 9 (1967). In *Matthews v. Lucas*, 427 U.S. 497 (1976), the Court, in speaking about the legal status of illegitimacy, identified some of the characteristics of a suspect class. One such criteria is the possession of a characteristic determined by causes not within the control of the individual, and which bears no relation to the individual's ability to participate in and contribute to society. *Id.* at 505. Other criteria have also been formulated: groups that are the victims of hostile myths and stereotypes, groups with little or no voice in the political process, and groups that are historically discriminated against. *See Right to a Marriage License, supra* note 54, at 611-15. While homosexuals have not been regarded as a suspect class, a convincing argument has been made that these criteria are applicable to homosexuals. *See generally id.* at 615-18; *Private Homosexual Conduct, supra* note 1, at 1625-27. *See also* TRIBE, *supra* note 1, at 944 n.17.

69. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (state poll tax which burdens fundamental right to vote must be carefully and meticulously scrutinized). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1120 (1969).

70. 434 U.S. 374 (1978).

71. WIS. STAT. § 245.10 (1973) provided in part:

(1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of the court of this state which granted such order or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order.

Id. § 245.10(1) (1973). Section 245.10(5) of the statute provided that the statute would have extra-territorial effect. Section 245.10 was repealed by 1977 Wisc. Laws, c. 418, § 747c.

72. *Id.* § 245.10(1) (1973).

73. *Id.*

74. *Id.* § 245.10(5) (1973). WIS. STAT. § 245.30(1)(f) provided criminal sanctions for violation of § 245.10. Section 245.30(1)(f) was repealed by 1977 Wisc. Laws, c. 418, § 747c.

Court's earlier decisions establishing the right to marry as a liberty protected by the due process clause of the fourteenth amendment.⁷⁵ After explicitly characterizing the decision to marry as a right of fundamental importance,⁷⁶ the Court determined that any state classification which significantly interferes with the exercise of that right cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate those interests.⁷⁷ The Wisconsin statute, by prohibiting a class of Wisconsin residents from marrying in the absence of a court order, directly infringed the exercise of a fundamental right.⁷⁸

The *Zablocki* decision is significant in the context of same-sex marriage for two important reasons. First, it establishes that for equal protection purposes, the decision to marry is of fundamental importance. State statutes which directly impinge the exercise of that right will be subjected to critical judicial scrutiny.⁷⁹ State marital definitions which exclude homosexual marriages directly interfere with the decision to marry; because these statutes affect the exercise of a fundamental right, they too should be subjected to critical examination. Second, the opinion speaks in terms of the individual and of the importance this personal decision holds for the individual. In the light of the *Zablocki* decision, it appears that future equal protection challenges to state marriage definitions will have to involve close and careful examination of the interests and the means proffered by the states in support of those definitions.

B. *The State Interests*

Two state interests have been identified in support of classifica-

75. 434 U.S. at 383-87.

76. *Id.* at 383.

77. *Id.* at 388.

78. The interests advanced by the state in support of the classification were that "the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected." *Id.* The Court determined that even if these interests were legitimate and substantial, the means used to achieve those interests unnecessarily impinged the right to marry. *Id.* The Court found that the statute neither required nor provided for counseling and the classification, therefore, could not be seen as ensuring the counseling interest advanced by the state. *Id.* at 388-89. Further, insofar as indigent applicants were concerned, the statute merely restricted their right to marry without delivering any money to the applicant's children. Moreover, the Court noted that numerous other alternatives were open to the state to exact compliance with its support obligations. *Id.* at 389-90.

79. The Court noted that reasonable regulations which do not significantly interfere with the decision to marry are permissible. Only a direct interference with the right to marry is constitutionally forbidden. *Id.* at 386.

tions of marriage which restrict the relationship to heterosexuals. The first of these involves the historic societal concern with the continuance of the human race.⁸⁰ The state's interest in promoting procreation has been held to be legitimate,⁸¹ and, in some circumstances, may even be compelling.⁸² The second interest, the societal interest in assuring a favorable environment for the growth of children,⁸³ is dependent upon the first because it assumes the birth of children. This interest is undoubtedly based upon a public policy consideration that a child's emotional and moral well-being is best protected by a heterosexual family unit.⁸⁴ It thus appears that both of these interests are sufficiently important to justify the exclusion of homosexuals from the marital relationship. The question remains, however, whether such an exclusion is closely tailored to achieve these state interests.

While there is a correlation between present definitions of marriage and state interests in procreation, the fact remains that no state requires, as a condition to marriage, a couple to promise to bear children once the relationship is established.⁸⁵ Moreover, as long as the couple is heterosexual, states do not prohibit sterile people from marrying even though these people cannot fulfill the state's purported interest.⁸⁶ In other words, heterosexual marriage classifications do not, of

80. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967). "Marriage is . . . fundamental to our very existence and survival." *Id.* at 12.

81. In *Maier v. Roe*, 432 U.S. 464 (1977), the Court held that a state scheme that paid medical benefits to indigent women for the costs of child birth or therapeutic abortions but not for nontherapeutic abortions did not violate the equal protection clause. While recognizing the protected right of a woman to elect to have an abortion, the Court found "a basic difference between direct interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475. In upholding the medical aid program, the Court stated that "*Roe* itself explicitly acknowledged the State's strong interest in protecting the potential life of the fetus. . . . The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth,' an interest honored over the centuries." *Id.* at 478. (footnotes omitted).

82. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

83. *Singer v. Hara*, 11 Wash. App. at ___, 522 P.2d at 1197.

84. *Id.* The state interest in producing a certain type of environment for the growth of children is frequently expressed in custody disputes. See, e.g., *Brim v. Brim*, 532 P.2d 1403 (Okla. 1975). In custody battles in which one of the parents is a homosexual, courts frequently find that the best interests of the child are not served in an environment in which homosexuality is the norm. See generally *Problem Parent*, *supra* note 57.

85. Even if a state should attempt to require such a precondition to marriage, the constitutionality of such a law is in doubt. See notes 101-104 *infra* and accompanying text. In *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974), the court expressly recognized that the state could neither force married people to bear children nor even to engage in sexual relations. *Id.* at ___, 522 P.2d at 1197.

86. See, e.g., OKLA. STAT. tit. 43, § 3 (Supp. 1978) which provides in part: "Any unmarried person of the age of eighteen (18) years or upwards and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex" There is no requirement that the person of the opposite sex be capable of bearing children.

necessity, relate to the state interest in procreation. The means used by the state in achieving its interest are too broad to justify impinging the exercise of the right to marry by homosexuals. Under the criteria set forth in *Zablocki*, present state definitions of marriage deny homosexuals equal protection.

Similarly, it appears that the means employed by the states—exclusion of homosexuals from marriage—is broader than necessary to achieve the state's interests in providing a protective environment for children. At present, there is no danger that two people of the same sex, by their union,⁸⁷ could produce a child. Further, a state could restrict the adoption of children by homosexuals.⁸⁸ This would ensure

87. There is, of course, the very real possibility that a homosexual, who has or wants custody of his or her child, may wish to marry. Courts have held that the homosexual activities of a parent are relevant to the question of the child's best interests. *See, e.g., Whitehead v. Black*, 2 Fam. L. Rep. 2593 (Me. Super. Ct. Cumberland Cty., June 14, 1976); *A. v. A.*, 15 Ore. App. 353, 514 P.2d 358 (1973). Some courts are willing to allow a homosexual parent to gain or retain custody of a child who is otherwise well adjusted; however, the courts put drastic limitations on the custodial parent's homosexual activities and relationships. *Cf. Townend v. Townend*, 1 Fam. L. Rep. 2830 (Ohio C.P. Portage Cty., March 14, 1975) (custody awarded to non-petitioning grandparents where lesbian mother was involved in a homosexual relationship). Should a homosexual parent choose to enter a same-sex marriage, it is not likely that courts would find that a home in which homosexuality is the norm is in the best interests of the child. *But see People v. Brown*, 49 Mich. App. 35, 212 N.W.2d 55 (1973) (evidence did not warrant the finding that two women who lived together in a homosexual relationship rendered their home unfit for their children).

If the state's true interest in limiting marriage to heterosexuals is to provide a certain environment for children, the custody cases illustrate alternative means available to the state for the achievement of that end. Clearly, terminating custody is a more effective and more closely tailored means of confining children to heterosexual parents than is denying a marriage to all homosexuals. Whether this alternative is, in itself, a desirable one, is beyond the focus of this comment. *See generally Problem Parent, supra* note 57, at 799-802.

88. Section 60.3 of the Oklahoma Uniform Adoption Act, OKLA. STAT. tit. 10, § 60 *et seq.*, sets forth the persons eligible to adopt. At first glance, this section could be read to include homosexuals whether single or married. Moreover, in *In re Del Moral Rodriguez*, 552 P.2d 397 (Okla. 1976), the Oklahoma Supreme Court determined that there is "no distinction between the right of procreation of children and the adoption of children." *Id.* at 399. The Oklahoma court, however, was not confronted with the issue of the suitability of the adoptive parent. *Id.* at 400. It has been noted that:

The mere fact that an adoptive couple meets the statutory requirements does not assure their acceptance as adoptive parents. In determining adoptive suitability, child welfare agencies give consideration to a wide variety of social factors. These are reflections of value judgments that may or may not be the consensus of the wider community. Of these, race and religion are perhaps the most important, although others such as ethnic background, age, social position, income, and general life style are also considered . . .

S. KATZ, *WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN* 123 (1971) (footnotes omitted). If in considering the best interests of the child the state determines that only heterosexual individuals can best meet the needs of the child, the state could restrict adoption to heterosexuals. As was discussed in the context of custody disputes, courts have been willing to consider a parent's homosexuality in determining the optimal environment in which a child should be raised. *See* note 88 *supra*. In the light of these decisions, it is not unreasonable to conclude that where strangers to a child have openly displayed their homosexuality by entering a same-sex marriage, a court or agency would find them to be unsuitable adoptive parents. Again,

the state's interest in the child's environment without interfering with the right to marry. In short, the state interest in providing a protective environment for children is contingent upon the existence of a child. Excluding homosexuals from marriage, whether a child exists or is likely to exist, sweeps too broadly.⁸⁹

Although there is difficulty in upholding heterosexual marriage classifications on the basis of the state's interest in the rearing and protection of children, there remains an additional state interest that requires examination.⁹⁰ It could be argued that state definitions of marriage are supported by the state's "undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people."⁹¹ In other words, a state could argue that it restricts marriage to heterosexuals because, if it permitted homosexuals to marry, the state could be condoning activity that it punishes through its criminal sodomy statutes. It could be argued that the societal value judgment as to the propriety of homosexual conduct is embodied within such statutes.

State statutes regulating the sexual conduct between consenting adults take numerous forms.⁹² Some states prohibit oral and anal copulation,⁹³ with consent being neither an element of nor a defense to the crime.⁹⁴ Many other states simply prohibit the "detestable and abomi-

while such a result may be unacceptable, it is a more effective and less restrictive means of achieving the state's interest in a child's welfare.

89. *Cf. Griswold v. Connecticut*, 381 U.S. 479 (1965).

90. None of the state courts addressing the question of same-sex marriage discussed other interests which might support state definitions of marriage. The *Singer* court was confident that other important interests existed, but the court did not feel compelled to explore what those interests were. 11 Wash. App. at ___, 522 P.2d at 1197.

91. *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring in judgment). Mr. Justice Powell observed:

State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. Likewise, a showing of fault on the part of one of the partners traditionally has been a prerequisite to the dissolution of an unsuccessful union. A "compelling state purpose" inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.

Id. at 399. Not only does Justice Powell's statement make clear his dissatisfaction with the strict standard of review announced by the majority, but it also appears to recognize that bans on homosexual marriage could be attacked under such a standard.

92. This discussion is limited to private and consensual sexual activities between adults. It should be noted, however, that state sodomy statutes also regulate sexual conduct between adults and minors, as well as penalize non-consensual activity.

93. *See, e.g., MINN. STAT. ANN. § 609.293*, as amended (1977): "Subdivision 1. Definitions. 'Sodomy' means carnally knowing any person by the anus or by or with the mouth."

94. *MINN. STAT. ANN. § 609.293(5)*, as amended (1977). *See also Gooch v. State*, 31 Md. App. 331, 367 A.2d 90 (1977) (whether the act is voluntary or involuntary is immaterial).

nable crime against nature,"⁹⁵ which presumably regulates more than sodomy.⁹⁶ A few states specifically punish the sexual activities of consenting adults who are of the same sex.⁹⁷ With the exception of these latter state statutes, most statutes which prohibit all sexual conduct other than penile-vaginal intercourse apply to both homosexual and heterosexual activity.⁹⁸ Moreover, many of these statutes make no express exception for married couples.⁹⁹ It is no small wonder, therefore, that such statutes have been assailed as impermissibly impinging the right of privacy held by consenting adults.

As of yet, the Supreme Court has not determined whether the due process right of privacy encompasses a right of sexual privacy.¹⁰⁰ With

95. See, e.g., OKLA. STAT. tit. 21 § 886. This section, entitled Crime Against Nature, provides: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten years." *Id.* Although the language of this type of statute is inflammatory and vague, the Supreme Court has held that these statutes are valid. See *Rose v. Locke*, 423 U.S. 48, *rev'g per curiam*, 514 F.2d 570 (6th Cir. 1975) (Tennessee crimes against nature statute not constitutionally void for vagueness). The courts have justified the non-descript language of these statutes on the ground that the legislature was avoiding graphic sexual descriptions, *State v. Lair*, 62 N.J. 388, 301 A.2d 748 (1973); the crime is too disgusting and well known to articulate, *Horn v. State*, 49 Ala. App. 489, 273 So. 2d 249 (1973); or that the sexual behavior is such as should not be described among Christians, *Berryman v. State*, 283 P.2d 558 (Okla. Crim. 1955). It is difficult to comprehend the reluctance of the state legislatures and society in general to describe the intimate sexual conduct they publicly drag into the courts. See generally Note, *Criminal Law: An Examination of the Oklahoma Laws Concerning Sexual Behavior*, 23 OKLA. L. REV. 459 (1970); Note, *Sodomy Statutes: The Question of Constitutionality*, 50 NEB. L. REV. 567 (1971).

96. See, e.g., *Johnson v. State*, 380 P.2d 284 (Okla. Crim. 1963) (statute proscribes not only sodomy but any other bestial act or unnatural copulation).

97. See, e.g., KAN. STAT. ANN., § 21-3505 (Vernon 1971) which provides: "Sodomy is oral or anal copulation between persons who are not husband and wife or consenting adult members of the opposite sex . . ."

98. See, e.g., *Gooch v. State*, 34 Md. App. 331, ___, 367 A.2d 90, 94 (1977); *William v. State*, 316 So. 2d 362, 363 (Ala. Crim. App. 1975). See generally Comment, *Doe v. Commonwealth's Attorney: Closing the Door to a Fundamental Right of Sexual Privacy*, 53 DEN. L.J. 553 (1976).

99. In *Hughes v. State*, 14 Md. App. 497, 287 A.2d 299 (1972), the court observed that Maryland's sodomy statute could conceivably apply to the consensual acts of a married couple, although it doubted that this would happen. *Id.* at ___, 287 A.2d at 304. See also *State v. Nelson*, 199 Minn. 86, ___, 271 N.W. 114, 118 (1937) (dictum), *overruled on other grounds*, *State v. Tahash*, 166 N.W.2d 710 (Minn. 1969).

100. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n.5 (1977). In *Carey* a plurality of the Court noted that the question of sexual privacy, with regard to consenting adults, is still open. *But see id.* at 718 n.2 (Rehnquist, J., dissenting) (certain consensual conduct—adult homosexual conduct—has been determined to be within the state's regulatory authority.). Mr. Justice Rehnquist based his contention upon the Court's summary affirmance of *Doe v. Commonwealth's Attorney*, 425 U.S. 901, *reh. den.*, 425 U.S. 985, *aff'g*, 403 F. Supp. 1199 (E.D. Va. 1976). The district court in *Doe* had denied the declaratory and injunctive relief sought by the plaintiffs who contended that enforcement of Virginia's sodomy statute was unconstitutional as applied to the private and consensual conduct of adult males. The court found that the right of privacy protected marriage, home, and family but not the private and consensual activities of homosexuals. 403 F. Supp. at 1200-02. *Accord*, Heymann & Barzeley, *The Forest and the Trees: Roe v. Wade and Its*

the advent of *Griswold v. Connecticut*¹⁰¹ and *Eisenstadt v. Baird*,¹⁰² however, some courts have found a constitutionally protected right of sexual privacy. Relying primarily upon *Griswold*, these courts have found that the privacy right surrounding the marital relationship encompasses the consensual and private sexual activity of married couples.¹⁰³ While most of these courts have been less willing to extend this right to unmarried couples,¹⁰⁴ a few courts have found that the right is applicable to all private and consensual activities of adults.¹⁰⁵

In those states in which a right of sexual privacy exists with respect to married couples, the state has been held to have no interest in the sexual decisions of the spouses in the absence of compelling reasons.¹⁰⁶ The fact that society, through the state, deems sodomy unnatural or abominable is not compelling justification for intrusion into the couple's decisions and activities.¹⁰⁷ It is not that sodomy is any less a

Critics, 53 B.U.L. REV. 765, 774 (1973) (right of privacy does not necessarily require protection of all consensual sexual activity).

The Supreme Court's summary affirmance of *Doe* is of precedential value. See R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 230-31 (4th ed. 1969). It has been argued, however, that because no threat of prosecution was involved in *Doe*, the Court affirmed the denial of relief because the case was not ripe for adjudication and not because there is no sexual privacy right for all adults. TRIBE, *supra* note 1, at 943. See also *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977).

101. 381 U.S. 479 (1965). See notes 44-48 *supra* and accompanying text.

102. 405 U.S. 438 (1972).

103. See, e.g., *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976); *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968).

104. The distinction the courts have made between married and single people rests upon the reverence Justice Douglas held for the marriage relationship in *Griswold* and the particular privacy right found in that case. See notes 48-50 *supra* and accompanying text. These courts have not been persuaded that the due process discussion in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extended the right of privacy developed in *Griswold* to single individuals. See note 51 *supra*. See *State v. Lair*, 62 N.J. 388 ___, 301 A.2d 748, 753 (1973). See also *Lovisi v. Slayton*, 539 F.2d 349, 352 (4th Cir.) (addendum), *cert. denied*, 429 U.S. 977 (1976). For an extensive discussion of the existence of a sexual privacy right for heterosexuals, married or single, see Note, *Fornication, Co-habitation, and the Constitution*, 77 MICH. L. REV. 252 (1978).

105. See *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977); *State v. Cuiffini*, 164 N.J. Super. 145, 395 A.2d 904 (1978). See also *State v. Callaway*, 25 Ariz. App. 267, 542 P.2d 1147 (1975), *rev'd sub nom.* *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6 (1976); *State v. Elliott*, 88 N.M. 187, 539 P.2d 207 (1975), *rev'd*, 89 N.M. 305, 551 P.2d 1352 (N.M. 1976).

106. For example, in *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968), the circuit court set aside the conviction of a defendant who had entered a plea of guilty to having committed the "crime against nature" with his wife. The court, noting that there was no claim of force, held that the state could not punish the consensual sexual activity of married persons absent a "clear showing that the state had an interest in preventing such relations, which outweigh the constitutional right to marital privacy." *Id.* at 875. The court based its conclusion on the Supreme Court's decision in *Griswold*. *Id.*

107. Cf. *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976), wherein the court noted that whatever sexual activities in which married couples engage, within the privacy of their bedrooms, is beyond the state's scrutiny.

crime or unnatural simply because it is undertaken by married couples.¹⁰⁸ Rather, it is the shield of privacy surrounding the marital relationship which these courts have held thwarts the state's attempt to regulate sexual intimacies between the spouses.

If a state has no legitimate interest in the consensual and private decisions of married couples, even if that couple's decisions are contrary to societal conceptions of proper sexual conduct, prevention of homosexual marriage upon the basis of morality loses much of its force. It is beside the point that married homosexual couples would engage in only sodomitical activities while heterosexual couples would have a wider range of sexual possibilities. The point is that the marital relationship closes the bedroom door to state intrusion, thereby protecting intimate and personal activity from the state's gaze.

The identical result would seem to be dictated in those states in which the right of privacy shields all consensual adult sexual activity. Both the type of sexual activity and the choice of sexual partner are not within the state's legitimate scope of concern.¹⁰⁹

The question of whether a state has a sufficiently important interest in denying homosexuals the right to marry also arises where a state has repealed its sodomy statutes as to all consenting adults.¹¹⁰ The repeal of a sodomy statute, of course, is not indicative of whether a sexual privacy right exists. De-criminalization of private sexual conduct, how-

108. For example, in *State v. Nelson*, 199 Minn. 86, 271 N.W. 114 (1937), *overruled on other grounds*, *State v. Tahash*, 166 N.W.2d 710 (Minn. 1969), the Minnesota Supreme Court observed:

It is not the normal sexual act that this [the sodomy] statute aims at. Rather and only it is the unnatural and prohibited ways of satisfying sexual desires that the statute is designed to punish. Thus husband and wife, if violating this statute, could undoubtedly be punished, whereas the normal sexual act would not only be legal but perhaps entirely proper.

State v. Nelson, 199 Minn. at ___, 271 N.W. at 118.

109. In *State v. Saunders*, 75 N.J. 200, ___, 381 A.2d 333, 339 (1977), the Supreme Court of New Jersey determined that the right of privacy embodied the right of personal behavior and choice. In invalidating the state's fornication statute the court said:

[T]he conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice. Thus, the statute infringes upon the right of privacy. Although persons may differ as to the propriety and morality of such conduct . . . such a decision is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard.

Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate "remedy" for such conduct cannot come from legislative fiat. *Id.* at ___, 381 A.2d at 342.

One year later, relying upon the reasoning of *Saunders*, the Appellate Division of the New Jersey Superior Court found that the right of privacy extends to the private acts of consenting homosexual adults. *State v. Ciuffini*, 164 N.J. Super. 145, 395 A.2d 904 (1978).

110. *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 772(b), (c), 766 (1974).

ever, does indicate that the state is no longer asserting an interest in the consensual activities of its adult citizens, whether the adults are of the opposite or same sex.¹¹¹ If a state recognizes that the private sexual activity or preference of its citizenry is a matter of private morality, it is difficult to justify a state definition of marriage which precludes people of the same sex based upon a secular morality interest. The state might argue that while it no longer criminally punishes homosexual conduct or relationships, neither does it seek to encourage or foster such relationships by permitting same sex marriages. Yet, even if the state has a proper interest in promoting heterosexual relationships, the state cannot achieve that interest by the direct interference with the exercise of the fundamental right to marry.¹¹² It should not be sufficient to argue that a homosexual can marry so long as he or she marries someone of opposite sex.¹¹³ The right to marry is the freedom to marry the person of one's choice. When a fundamental right hangs in the balance, the state should not be permitted to eliminate one choice simply because it seeks to promote another.

A somewhat different situation arises in those few states that only

111. Hawaii, for example, has revised its criminal statutes such that only forcible sexual conduct, sexual conduct with a child, or with someone incapable of consent, and offensive conduct are the subjects of penal sanction. HAWAII REV. STAT. §§ 707-730. In the introductory comment to Part V., Sexual Offenses, of the Hawaii Penal Code, the commentator observes that the code "adopts the position . . . that a secular penal code should not be used to enforce purely moral or religious standards." *Id.* at 360. The comment recognizes that the consensual sexual activities of adults is an area of private morality, more properly within the concern of spiritual authorities than within the state's sphere of concern. *Id.* at 361.

112. *Cf.* Maher v. Roe, 432 U.S. 464 (1977), wherein the Court found no equal protection offense in a state scheme that promoted childbirth but which did not eliminate a woman's decision to have an abortion. *See* note 78 *supra*.

113. A legal analogy between homosexual marriage prohibitions and the interracial marriage prohibitions struck down in *Loving v. Virginia*, 388 U.S. 1 (1967), could not, at present, be properly drawn. This is a result of the inherently suspect character of laws drawn on racial grounds. *See id.* at 9 (fact of equal application does not remove statutes containing racial classifications from the heavy burden imposed by the fourteenth amendment); *Strauder v. West Virginia*, 100 U.S. 303 (1880). At present, homosexuals have not been considered a suspect class. *See* note 68 *supra*.

Despite this legal difference, there is great similarity between societal repugnance for interracial and same-sex marriage. This attitude is exemplified by a Virginia trial judge who, in his disposition of the *Loving* case stated the following:

Almighty God created the races white, black, yellow, malay and red, and he [*sic*] placed them on separate continents. And but for the interference with his [*sic*] arrangement there would be no cause for such marriages. The fact that he [*sic*] separated the races shows that he [*sic*] did not intend for the races to mix.

Quoted in Loving v. Virginia, 388 U.S. 1, 3 (1967).

Evidently, the purpose of antimiscegenation statutes was to preserve marriage not only as a union between a man and a woman, but as a union between people of the same race. As the Court's opinion in *Loving* made clear, however, the state could not, absent strong justification, prevent an alternative form of marriage—interracial marriage. *Id.* at 12.

make sexual activity between consenting adults of the same sex a crime. In these states, the concern does not appear to be a societal condemnation of the type of sexual activity in which the participants engage.¹¹⁴ Rather, the state interest is with the participants themselves. In these few states the immorality does not appear to be sodomy *per se*, but rather sodomy practiced between individuals of the same sex. In these states, it could be argued that state definitions of marriage which exclude homosexuals are justified by the state's interest in upholding the moral judgment of the community as embodied in its sodomy statute. Moreover, the exclusive marital definition is closely tailored to achieve the morality interest.

This moral judgment is consistent with Judeo-Christian teachings condemning homosexual activity.¹¹⁵ It finds support in a long and well developed history of discrimination against homosexuals.¹¹⁶ Moreover, it perpetuates the repugnance and disgust the majority of people harbor against a minority of human beings. If the Constitution permits a state to infringe upon the exercise of a fundamental right based upon personal religious beliefs, discrimination, and hatred, then there is no obstacle to a definition of marriage that excludes homosexuals in these states. Endorsing such a conclusion, however, undermines the security of a constitutionally protected right. Past attempts by states to restrict the freedom to marry based upon deeply held discriminatory beliefs have been thwarted by the courts,¹¹⁷ and the burden has been upon the states to justify their restrictions. The burden of justification should be no less severe in the context of same-sex marriage prohibitions.

V. CONCLUSION

It is clear that the right to marry is a fundamental right inhering in the individual. It is a right relying heavily upon individual personal choice. While the freedom to marry is essential to the individual, the state courts defining the right have made it a conditional one. The

114. The Kansas statute, for example, on its face, recognizes that sodomitical activity can be practiced by heterosexuals—married or single. See note 98 *supra* and accompanying text. Kansas, however, chooses only to punish all homosexual conduct.

115. See note 57 *supra* and accompanying text.

116. Discrimination against homosexuals is perhaps clearest in the area of employment. See, e.g., *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340 (1977), *cert. denied*, 434 U.S. 879 (1978) (upholding school board's decision to discharge teacher as "immoral" on the basis of the teacher's homosexuality). See generally *The Homosexuals Legal Dilemma*, *supra* note 2.

117. See *Loving v. Virginia*, 388 U.S. 1 (1967); note 114 *supra* and accompanying text.

right to marry has been interpreted by these courts to be the freedom merely to enter a heterosexual union. This interpretation of the right is founded upon traditional perceptions of the marital relationship itself.

While tradition supports this interpretation of the right, much of the basis of the tradition itself is changing. Marriage is no longer the exclusive domain for the bearing and raising of children. Moreover, many people do not view the purpose of marriage to be the bearing of children. Further, in many states marriage is no longer the only legal avenue of cohabitation and sexual intimacy between adults. Finally, marriage is being viewed as an equal partnership between two adults, instead of a relationship wherein one spouse, the husband, has the sole duty to support and rule his household. These changes in the concept of the marital relationship and its purposes affect traditional perspectives of that institution. In contemporary terms, marriage is the voluntary and public commitment of two people to live together under certain legally imposed obligations to each other. It is a relationship built on love, trust, and companionship. It is a particular familial relationship which may or may not include children. It is a highly personal union of two people which transcends bias and prejudice. Viewed in such a manner the relationship is flexible enough to include homosexual partners. The individual's fundamental right to enter the marital relationship, therefore, is broad enough to encompass same-sex marriage.

Modern domestic relations statutes, either specifically or through state court interpretation, define marriage as a union between a man and a woman. These exclusive marital classifications can permissibly restrict a homosexual's right to marry, but the heavy burden of justification is upon the state. Under the strictures of the equal protection clause of the fourteenth amendment, the state can only interfere with the individual's decision to marry if it has sufficiently compelling interests in so doing and uses means closely tailored to achieving only those interests. The reasons thus far advanced by the states and the courts that have addressed the issue of same-sex marriage have not met this heavy constitutional burden. The long tradition of discrimination, hatred, and repugnance toward a group of human beings with an emotional and sexual preference different from the majority of people should not be sufficient justification for denying basic human rights.

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