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BYSTANDER DISTRESS AND LOSS OF CONSORTIUM: AN EXAMINATION OF THE RELATIONSHIP REQUIREMENTS IN LIGHT OF *ROMER V. EVANS*

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INTRODUCTION

In San Francisco, two individuals were crossing the street together to catch the number 19 Polk Street bus.[1] The first individual noticed the bus approaching and bearing down upon them. He then realized the bus was not going to stop, and attempted to pull his companion to safety. His efforts failed, however, and he stood by watching helplessly as the bus ran over his companion, inflicting critical injuries. Some time later, the uninjured party commenced an action against the bus driver for negligent infliction of emotional distress, having suffered great distress from witnessing this accident and the resulting harm to his loved one.

The seminal case *Dillon v. Legg*[2] governs whether a bystander may recover for negligent infliction of emotional distress ("bystander distress") in California. At first blush, the above plaintiff's case for bystander distress seems to satisfy the *Dillon* criteria:[3] plaintiff was present at the scene of the accident; plaintiff's observation of the accident was simultaneous with the actual accident, and; the relationship between plaintiff and the injured individual was extremely close—plaintiff had been living with the injured individual for a year, they shared a stable, emotionally significant, and intimate relationship, and they had agreed to live as "exclusive life partners."

Nonetheless, in a similar California case, both the trial and appellate courts held that the plaintiff could not state an action for bystander distress.[4] Why? Because the two individuals were gay men living together as life partners. The appellate court held that their homosexual relationship could not constitute a relationship that would satisfy the *Dillon* criteria.[5] The court, however, was similarly clear that a heterosexual couple in the same situation could allege a de

1. This hypothetical is a composite of the facts of Coon v. Joseph, 237 Cal. Rptr. 873, 874 (Ct. App. 1987), and Trombetta v. Conkling, 626 N.E.2d 653, 653-54 (N.Y. 1993).

2. 441 P.2d 912 (Cal. 1968).

3. *Dillon* sets out three factors to determine whether a bystander can recover for negligent infliction of emotional distress: (1) the bystander must be near the scene of the accident; (2) the distress must result from a contemporaneous observation of the accident; and (3) the bystander must be closely related to the victim. *Id.* at 920; *see infra* text accompanying note 55. For a more detailed discussion of the *Dillon* criteria, see text accompanying *infra* notes 54-58.

4. *Coon*, 237 Cal. Rptr. at 878.

5. *Id.* at 877-78.

facto marriage, which, if proven, would satisfy *Dillon*'s close relationship requirement.[6]

Most jurisdictions (including California) permit a plaintiff who has a sufficiently close relationship with an injured party to recover for bystander distress or loss of consortium.[7] Although unmarried heterosexuals have, on occasion, been successful in these actions, no jurisdiction currently recognizes the standing of homosexuals to assert the causes of action.[8] In considering the relationship requirements, courts typically weigh several factors in deciding whether a relationship satisfies the requirements: the state's interest in protecting marriage, the need to limit liability, and the potential burden on the courts.[9] In addition, some courts focus on the state's interest in promoting a familial relationship, rather than the actual existence of marital, blood, or adoptive ties.[10] Regardless of the focus or considerations, no court has held that a homosexual relationship satisfies the relationship requirements for loss of consortium or bystander distress.

This Note argues that precluding a stable and significant homosexual partnership from satisfying the relationship requirements for bystander distress or loss of consortium violates the Equal Protection Clause of the Fourteenth Amendment.[11] Part I of this Note explores the development and background of the torts of loss of consortium and bystander distress, with emphasis on the establishment of the respective relationship requirements. Part II discusses the policy factors and rationales courts give to explain the judicially created relationship restrictions for loss of consortium and bystander distress. Part III contends that the relationship requirements are judicially created classifications that violate the Equal Protection Clause of the Fourteenth Amendment,[12] to the extent that depriving homosexuals these rights of action does not pass the rational relationship scrutiny dictated by *Romer v. Evans*.[13] Part IV proposes that a stable and significant rela-

6. *Id.* ("[An] allegation [of a de facto marriage cannot] be made because appellant and [his companion] are both males and the Legislature has made a determination that a legal marriage is between a man and a woman."). In Ledger v. Tippitt, 210 Cal. Rptr. 814, 828 (Ct. App. 1985), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (en banc), the court held that a de facto marriage could satisfy the close relationship requirement. This case had not been overruled when *Coon* was decided, and therefore was valid precedent at that time.

7. See *infra* notes 23-24, 59-60, 63 and accompanying text for surveys of the states recognizing causes of action for loss of consortium and negligent infliction of emotional distress to a bystander.

8. *Developments in the Law—Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1620-21 (1989) [hereinafter *Developments*].

9. *See Elden*, 758 P.2d at 586-88.

10. *See* Dunphy v. Gregor, 642 A.2d 372, 373-76 (N.J. 1994).

11. U.S. Const. amend. XIV, § 1.

12. *Id.*

13. 116 S. Ct. 1620 (1996). For a discussion of the *Romer* rational relationship test, see *infra* notes 139-49 and accompanying text.

tionship is sufficient to satisfy the relationship requirements, and argues that the proposed standard would pass the *Romer* rational relationship test. Accordingly, this Note concludes that courts should adopt this stable and significant relationship standard to satisfy the relationship requirements for loss of consortium and bystander distress. This standard would pass the *Romer* rational relationship test, allow participants in stable and significant relationships, including homosexuals, to recover for emotional injuries, and recognize the more modern version of family.

I. BACKGROUND AND DEVELOPMENT OF THE TORTS OF LOSS OF CONSORTIUM AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS TO A BYSTANDER

Loss of consortium and negligent infliction of emotional distress to a bystander are torts that compensate an individual for harm done to another. To recover for either of these torts, a certain relationship must exist between the plaintiff and the injured party. This section will examine the development of these torts, discussing their requirements and their prevalence in jurisdictions today.

A. *Loss of Consortium*

The loss of consortium tort is meant to compensate an individual for the loss of another's "society, guidance, companionship, and sexual relations."[14] Historically, the right of action for loss of consortium was available only to husbands, based on both a property interest[15] and a relational interest.[16] The emphasis was originally on the property interest, focusing on the wife's status as the husband's property; accordingly, any injury to the wife was an economic injury to her husband.[17] In contrast, the relational interest results from "the relation in

14. Black's Law Dictionary 309 (6th ed. 1990); *see also* Millington v. Southeastern Elevator Co., 239 N.E.2d 897, 899 (N.Y. 1968) (defining consortium as "embrac[ing] such elements as love, companionship, affection, society, sexual relations, solace and more").

15. *See* Comment, *Limiting the Cause of Action for Loss of Consortium*, 66 Cal. L. Rev. 430, 432 (1978) [hereinafter *Limiting the Cause of Action*]; *see also* Martin v. Southern Pac. Co., 62 P. 515, 515 (Cal. 1900) (discussing injury to a wife as economic injury to property).

16. Laurie J. Barsella, Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 Nw. U. L. Rev. 794, 796 (1983); *see, e.g.*, Chicago, B. & Q. R. Co. v. Honey, 63 F. 39, 42 (8th Cir. 1894) ("[T]he husband's right to sue for loss of society and services grows out of the marital relation, and is incident to the rights thereby acquired.").

17. *Limiting the Cause of Action*, *supra* note 15, at 432; Kelly M. Martin, Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest?*, 58 S. Cal. L. Rev. 1467, 1468-69 (1985); *see, e.g.*, *Martin*, 62 P. at 515 (stating that a wife's services are community property).

which the plaintiff stands toward one or more third persons."[18] To protect the relational interest, courts recognize a tort for interference with the continuation of the relationship.[19] As society's norms and values evolved, the law's focus shifted from the proprietary interest to the relational interest.[20]

As a result of this shift, wives received the right of action for loss of consortium. In the landmark case of *Hitaffer v. Argonne Co.*,[21] the D.C. Circuit Court first recognized a wife's cause of action for loss of consortium. The *Hitaffer* court recognized that "[t]he husband owes the same degree of love, affection, felicity, etc., to the wife as she to him. . . . [I]t would be a judicial fiat for us to say that a wife may not have an action for loss of consortium . . . ."[22] Currently the majority of the states recognize the cause of action for both wives and husbands,[23] although several jurisdictions do not recognize the cause of

18. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 124, at 915 (5th ed. 1984) [hereinafter Prosser]; *see* Butcher v. Superior Court, 188 Cal. Rptr. 503, 506 (Ct. App. 1983), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (en banc).

19. *Butcher*, 188 Cal. Rptr. at 506 (quoting Sawyer v. Bailey, 413 A.2d 165, 167 (Me. 1980)).

20. Comment, *Extending Consortium Rights to Unmarried Cohabitants*, 129 U. Pa. L. Rev. 911, 917, 920-21 (1981) [hereinafter *Extending Consortium Rights*].

21. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

22. *Id.* at 819 (emphasis omitted).

23. The right to recover for loss of a spouse's consortium is recognized in 47 states and the District of Columbia. *See* Colo. Rev. Stat. § 14-2-209 (1987); La. Civ. Code Ann. art. 2315 (West Supp. 1997); Me. Rev. Stat. Ann. tit. 19, § 167-A (West 1981) (repealed as of Oct. 1, 1997); Miss. Code. Ann. § 93-3-1 (1972); N.H. Rev. Stat. Ann. § 507(8-a) (1983); Okla. Stat. Ann. tit. 43, § 214 (West 1990); Or. Rev. Stat. § 108.010 (1990); S.C. Code Ann. § 15-75-20 (Law. Co-op. 1977); Tenn. Code Ann. § 25-1-106 (1980); Vt. Stat. Ann. tit. 12, § 5431 (Supp. 1996); W. Va. Code § 48-3-19a (1996); Ouachita Nat'l Bank v. Tosco Corp., 686 F.2d 1291, (8th Cir. 1982) (applying Arkansas law), *modified*, 716 F.2d 485 (8th Cir. 1983) (en banc); Luther v. Maple, 250 F.2d 916 (8th Cir. 1958) (applying Nebraska law); Johnson v. United States, 496 F. Supp. 597 (D. Mont. 1980) (applying Montana law), *modified*, 704 F.2d 1431 (9th Cir. 1983); Williams v. Alabama Neon Sign Co., 304 So. 2d 895 (Ala. 1974); Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974); City of Glendale v. Bradshaw, 503 P.2d 803 (Ariz. 1972) (en banc); Pesce v. Summa Corp., 126 Cal. Rptr. 451 (Ct. App. 1975); Lee v. Colorado Dep't of Health, 718 P.2d 221 (Colo. 1986) (en banc); Hopson v. Saint Mary's Hosp., 408 A.2d 260 (Conn. 1979); Lacy v. G.D. Searle & Co., 484 A.2d 527 (Del. Super. Ct. 1984); Romer v. District of Columbia, 449 A.2d 1097 (D.C. 1982); Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Smith v. Tri-State Culvert Mfg. Co., 191 S.E.2d 92 (Ga. Ct. App. 1972); Towse v. State, 647 P.2d 696 (Haw. 1982); Rindlisbaker v. Wilson, 519 P.2d 421 (Idaho 1974); Kolar v. City of Chicago, 299 N.E.2d 479 (Ill. App. Ct. 1973); Troue v. Marker, 252 N.E.2d 800 (Ind. 1969); Childers v. McGee, 306 N.W.2d 778 (Iowa 1981); Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970); Deems v. Western Md. Ry., 231 A.2d 514 (Md. 1967); Olsen v. Bell Tel. Lab., Inc., 445 N.E.2d 609 (Mass. 1983); Montgomery v. Stephan, 101 N.W.2d 227 (Mich. 1960); Dawydowycz v. Quady, 220 N.W.2d 478 (Minn. 1974); Tribble v. Gregory, 288 So. 2d 13 (Miss. 1974); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963) (en banc); General Elec. Co. v. Bush, 498 P.2d 366 (Nev. 1972); New Hampshire Ins. Co. v. Bisson, 449 A.2d 1226 (N.H. 1982); Ekalo v. Constructive Serv. Corp., 215 A.2d 1 (N.J. 1965); Romero v. Byers, 872 P.2d 840 (N.M. 1994); Millington v. Southeastern Elevator Co., 239 N.E.2d 897 (N.Y.

action at all.[24]

Beginning in the 1980s, some courts began to recognize another expansion of the consortium tort, allowing children to sue for loss of parental consortium. The first case allowing this cause of action was *Ferriter v. Daniel O'Connell's Sons, Inc.*[25] The *Ferriter* court allowed a man's children to state a claim for "loss of parental society . . . [if they could prove] economic requirements, . . . [and] filial needs for closeness, guidance, and nurture."[26] Other states have followed *Ferriter*'s lead, either recognizing the cause of action by statute or common law.[27] A parent's claim for loss of consortium, where permitted, is more difficult to establish, and usually involves a very serious injury to the child.[28] In *Howard Frank, M.D., P.C. v. Superior Court*,[29] where an adult child had suffered severe brain damage, the court held that the parents had a cause of action for loss of consortium against a party who negligently injured their child.[30] An increasing number of states have recognized a parent's cause of action for loss of consortium of a child, and the trend seems to be to allow this cause of action.[31] Several states, however, have considered the parental claim for loss of consortium and have rejected it.[32]

Another expansion of the consortium tort occurred for a brief pe-

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1968); Nicholson v. Hugh Chatham Memorial Hosp., Inc., 266 S.E.2d 818 (N.C. 1980); Hastings v. James River Aerie No. 2337—Fraternal Order of Eagles, 246 N.W.2d 747 (N.D. 1976); Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230 (Ohio 1970); Middlebrook v. Imler, Tenny & Kugler, M.D.'s, Inc., 713 P.2d 572 (Okla. 1985); Snodgrass v. General Tel. Co. of the Northwest, 549 P.2d 1120 (Or. 1976); Hopkins v. Blanco, 320 A.2d 139 (Pa. 1974); Mariani v. Nanni, 185 A.2d 119 (R.I. 1962); Hoekstra v. Helgeland, 98 N.W.2d 669 (S.D. 1959); Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978); Whitney v. Fisher, 417 A.2d 934 (Vt. 1980); Lundgren v. Whitney's, Inc., 614 P.2d 1272 (Wash. 1980) (en banc); King v. Bittinger, 231 S.E.2d 239 (W. Va. 1976); Peeples v. Sargent, 253 N.W.2d 459 (Wis. 1977); Weaver v. Mitchell, 715 P.2d 1361 (Wyo. 1986).

24. Utah, Virginia, and Kansas do not recognize a cause of action for loss of consortium. *See* Utah Code Ann. § 30-2-4 (1953); Va. Code Ann. § 55-36 (Michie 1950); Schmeck v. City of Shawnee, 647 P.2d 1263 (Kan. 1982).

25. 413 N.E.2d 690 (Mass. 1980).

26. *Id.* at 696.

27. Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 Ariz. St. L.J. 1321, 1321-22 (1992). As of 1992, twelve states, including Massachusetts, had recognized the cause of action at common law, and three states have recognized the cause of action by statute. *Id.* at 1321-22 & nn.2-3.

28. Prosser, *supra* note 18, § 125, at 130 n.49.5 (Supp. 1988).

29. 722 P.2d 955 (Ariz. 1986) (en banc).

30. *Id.* at 961.

31. Roy C. Howell, *The Parental Claim for Loss of Consortium Resulting from the Negligent Injury of a Child*, 19 S.U. L. Rev. 313, 318 (1992). Fifteen states had recognized this cause of action as of 1992. *Id.* at 318-19.

32. *Id.* at 319-20. Fourteen states had rejected this cause of action as of 1992, although many jurisdictions had not addressed the issue. *Id.* at 319.

riod in the mid-1980s, when California, in *Butcher v. Superior Court*,[33] allowed an unmarried cohabitant to state a cause of action by showing a "stable and significant [relationship] . . . parallel to the marital relationship."[34] Five years later, however, the California Supreme Court overruled this decision in *Elden v. Sheldon*,[35] holding that only married people have the right of action for injury to a spouse.[36] Thus, in states recognizing loss of consortium, the cause of action is available only to the spouse, parent, or child of the injured party, depending on the jurisdiction.[37]

B. *Negligent Infliction of Emotional Distress*

In contrast to the growing acceptance of loss of consortium as a compensable tort, courts generally have been reluctant to award damages for emotional distress, particularly when the distress resulted from a negligent act.[38] This section first discusses the approaches courts employ when a plaintiff claims distress suffered as a result of peril to the plaintiff himself, and then discusses the approaches used in assessing negligent infliction of emotional distress to a bystander.

During the last century, courts have recognized mental distress as a compensable tort when such distress is inflicted intentionally.[39] The tort of negligent infliction of emotional distress, however, has not achieved this same level of recognition and uniformity.[40] At first, courts permitted recovery only when the plaintiff suffered a contemporaneous physical impact.[41] This rule, known as the "impact rule," bases recovery for distress on whether the plaintiff suffered any physical contact at the time of injury.[42] Courts typically relied on the impact rule to deter fraudulent claims.[43]

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33. 188 Cal. Rptr. 503 (Ct. App. 1983), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (en banc).

34. *Butcher*, 188 Cal. Rptr. at 512.

35. 758 P.2d 582 (Cal. 1988) (en banc).

36. *Id.* at 588.

37. *See supra* notes 23-24, 27, 31 and accompanying text.

38. Anne E. Simerman, Note, *The Right of a Cohabitant to Recover in Tort: Wrongful Death, Negligent Infliction of Emotional Distress and Loss of Consortium*, 32 U. Louisville J. Fam. L. 531, 534 (1994).

39. Thomas T. Uhl, Note, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties that Bind*, 61 Brook. L. Rev. 1399, 1410 (1995).

40. *Id.* at 1410-11.

41. *See* Dennis G. Bassi, Note, *It's All Relative: A Graphical Reasoning Model for Liberalizing Recovery for Negligent Infliction of Emotional Distress Beyond the Immediate Family*, 30 Val. U. L. Rev. 913, 921-22 (1996); Nicholas M. Coquillard, Note, *Negligent HIV Testing and False-Positive Plaintiffs: Pardoning the Traditional Prerequisites for Emotional Distress Recovery*, 43 Clev. St. L. Rev. 655, 668-69 (1995).

42. *See* David Sampedro, *When Living as Husband and Wife Isn't Enough: Reevaluating* Dillon's *Close Relationship Test in Light of* Dunphy v. Gregor, 25 Stetson L. Rev. 1085, 1093-94 (1996).

43. *Id.* at 1094.

Over time, however, most jurisdictions abandoned the impact rule in favor of the "zone of danger" rule.[44] In order to recover under this rule, the plaintiff must be within the immediate vicinity of the accident.[45] The defendant's act must physically endanger the plaintiff, but the act need not ultimately result in physical impact. Thus, if the plaintiff suffered emotional distress and was within the allowable area or "range of apprehension,"[46] he could recover for that emotional distress.[47] If the plaintiff suffers emotional distress that has physical consequences, most courts allow recovery for negligent infliction of emotional distress.[48] This permits a plaintiff to recovery for fear she suffers when the defendant's conduct threatens her own safety; although the distress may need to be physically manifested, it need not result from actual physical contact.

Courts have employed several different approaches when a plaintiff tries to recover for distress resulting from a defendant's acts which harm or injure others. This is known as bystander distress. A few jurisdictions rely on the impact rule to bar claims for a bystander's mental disturbance upon witnessing injury to another.[49] Under the impact rule, a plaintiff may not recover for mental distress unless she suffered an accompanying personal injury.[50] In these few states, because a bystander does not suffer any personal injury, she would be unable to recover for mental distress.[51]

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44. *Id.* at 1096-98.

45. *See* Uhl, *supra* note 39, at 1412.

46. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y.), *reh'g denied*, 164 N.E. 564 (N.Y. 1928).

47. *See* Sampedro, *supra* note 42, at 1096-97.

48. *See, e.g.*, Falzone v. Busch, 214 A.2d 12, 13, 17 (N.J. 1965) (allowing recovery for emotional distress by a pedestrian who was almost struck by a car). *But see* Anderson v. Scheffler, 752 P.2d 667, 669 (Kan. 1988) (holding that general physical symptoms such as insomnia and headaches do not support a cause of action for negligent infliction of emotional distress). Not all jurisdictions require physical manifestations of distress, if the situation is such that mental distress was the normal human reaction. Jurisdictions that have abandoned the physical manifestation requirement include California, Connecticut, and New Jersey. *See* Molien v. Kaiser Found. Hosps., 616 P.2d 813, 820 (Cal. 1980) (en banc); Montinieri v. Southern New England Tel. Co., 398 A.2d 1180, 1184 (Conn. 1978); Portee v. Jaffee, 417 A.2d 521, 527-28 (N.J. 1980).

49. Prosser, *supra* note 18, § 54, at 365. See *infra* note 63 for a list of jurisdictions following the impact rule.

50. *See Scheffler*, 752 P.2d at 669.

51. *See, e.g.*, Selfe v. Smith, 397 So. 2d 348, 350 (Fla. App.) (plaintiff, a passenger in a truck in a collision, was denied recovery for mental distress suffered upon witnessing injury to her child based upon the impact rule, as plaintiff could recover only for distress due to plaintiff's own injury), *review denied*, 407 So. 2d 1105 (Fla. 1981); Carlinville Nat'l Bank v. Rhoads, 380 N.E.2d 63, 65 (Ill. App. Ct. 1978) (applying impact rule and declining to recognize cause of action for negligent infliction of emotional distress for woman who witnessed husband's death in car accident, when distress did not arise from a contemporaneous injury to plaintiff. but was caused by witnessing injury to another). It is worth noting, however, that courts may stretch this doctrine to find "impact," and allow the plaintiff to recover. For instance, in Comstock v. Wilson, 177 N.E. 431, 431, 434 (N.Y. 1931), a court found the required impact

Most states, however, allow recovery for a bystander's distress typically under either the zone of danger rule or the bystander proximity test.[52] The zone of danger rule is the approach embodied in the Second Restatement of Torts.[53] This rule denies recovery for mental distress unless the defendant's conduct had threatened the plaintiff himself with physical injury. If the plaintiff had been in the zone of danger, is a member of the injured party's "immediate family," and has suffered distress, he may have a cause of action for negligent infliction of emotional distress.

The California Supreme Court departed from the zone of danger test and developed the bystander proximity test in the landmark case of *Dillon v. Legg*.[54] In *Dillon*, the court allowed a mother and sister who witnessed the death of a child to recover for negligent infliction of emotional distress. The sister was in the zone of danger, but the mother was not. The *Dillon* court set out a three-part test to determine if a plaintiff could assert the cause of action:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) *Whether plaintiff and the victim were closely related*, as contrasted with an absence of any relationship or the presence of only a distant relationship.[55]

The California Supreme Court modified *Dillon* in *Thing v. LaChusa*.[56] In *Thing*, the mother of an accident victim sought to recover for distress she suffered upon arriving at the scene of an accident in which a car struck her child. The court denied the mother recovery, because she had not actually seen the car hit her son. The *Thing* court modified the *Dillon* guidelines, addressing concerns about "widening circles of liability."[57] The court established a narrower test for bystander proximity, holding that a plaintiff may recover for bystander distress,

> if, but only if, said plaintiff: (1) is *closely related to the injury victim*; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond

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in a fall suffered when the plaintiff fainted after a collision. Most jurisdictions, however, have abandoned the impact rule. See *infra* note 63 for a list of jurisdictions still adhering to the impact rule.

52. Prosser, *supra* note 18, § 54, at 366.

53. *See* Restatement (Second) of Torts § 436 (3) & cmt. f (1965).

54. 441 P.2d 912 (Cal. 1968) (en banc).

55. *Id.* at 920 (emphasis added).

56. 771 P.2d 814 (Cal. 1989).

57. *Id.* at 819.

> that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.[58]

Most states have followed the California Supreme Court's *Dillon* decision, and have abandoned the zone of danger and impact tests in favor of some version of the bystander proximity test.[59] Several states, however, still follow the zone of danger test,[60] positing that this test allows recovery for distress with sufficient limitations. These jurisdictions find the zone of danger test palatable because the defendant has "violated an original duty to the plaintiff" (by putting the plaintiff in danger of physical injury),[61] and the distress suffered is "merely a matter of the unexpected manner in which the foreseeable harm has occurred."[62] Only few jurisdictions still retain the impact rule, denying recovery to anyone who was not directly physically affected by defendant's conduct.[63]

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58. *Id.* at 829-30 (emphasis added) (citations omitted).

59. Currently, twenty six jurisdictions have adopted *Dillon*'s bystander proximity text in some form. *See* Croft v. Wicker, 737 P.2d 789 (Alaska 1987); Thing v. LaChusa, 771 P.2d 814 (Cal. 1989) (en banc); Clohessy v. Bachelor, 675 A.2d 852 (Conn. 1996); Champion v. Gray, 478 So. 2d 17 (Fla. 1985); Leong v. Takasaki, 520 P.2d 758 (Haw. 1974); Fineran v. Pickett, 465 N.W.2d 662 (Iowa 1991); Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990); Cameron v. Pepin, 610 A.2d 279 (Me. 1992); Stockdale v. Bird & Son, Inc., 503 N.E.2d 951 (Mass. 1987); Nugent v. Bauermeister, 489 N.W.2d 148 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 904 (Mich. 1993); Entex, Inc. v. McGuire, 414 So. 2d 437 (Miss. 1982); Maguire v. State, 835 P.2d 755 (Mont. 1992); James v. Lieb, 375 N.W.2d 109 (Neb. 1985); Buck v. Greyhound Lines, Inc., 783 P.2d 437 (Nev. 1989); Wilder v. City of Keene, 557 A.2d 636 (N.H. 1989); Frame v. Kothari, 560 A.2d 675 (N.J. 1989); Folz v. State, 797 P.2d 246 (N.M. 1990); Johnson v. Ruark Obstetrics & Gynecology Assocs., 395 S.E.2d 85 (N.C. 1990); Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983); Sinn v. Burd, 404 A.2d 672 (Pa. 1979); Reilly v. United States, 547 A.2d 894 (R.I. 1988); Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465 (S.C. 1985); Freeman v. City of Pasadena, 744 S.W.2d 923 (Tex. 1988); Gain v. Carroll Mill Co., 787 P.2d 553 (Wash. 1990) (en banc); Heldreth v. Marrs, 425 S.E.2d 157 (W. Va. 1992); Contreras v. Carbon County Sch. Dist. No. 1, 843 P.2d 589 (Wyo. 1992).

60. The zone of danger test is followed in fourteen jurisdictions. *See* Keck v. Jackson, 593 P.2d 668 (Ariz. 1979) (en banc); Towns v. Anderson, 579 P.2d 1163 (Colo. 1978) (en banc); Robb v. Pennsylvania R.R. Co., 210 A.2d 709 (Del. 1965); Williams v. Baker, 572 A.2d 1062 (D.C. 1990) (en banc); Rickey v. Chicago Transit Auth., 457 N.E.2d 1 (Ill. 1983); Resavage v. Davies, 86 A.2d 879 (Md. 1952); Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980) (en banc); Asaro v. Cardinal Glennon Memorial Hosp., 799 S.W.2d 595 (Mo. 1990) (en banc); Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978); Boucher v. Dixie Medical Ctr., 850 P.2d 1179 (Utah 1992); Vaillancourt v. Medical Ctr. Hosp., 425 A.2d 92 (Vt. 1980); Garrett v. City of New Berlin, 362 N.W.2d 137 (Wis. 1985).

61. Restatement (Second) of Torts, § 436 cmt. h (1965).

62. Prosser, *supra* note 18, § 54, at 365.

63. Georgia, Idaho, Indiana, Kansas, Kentucky, Oklahoma, Oregon, and Virginia continue to follow the impact rule. *See* OB-GYN Assocs. of Albany v. Littleton, 386 S.E.2d 146 (Ga. 1989); Walston v. Monumental Life Ins. Co., 923 P.2d 456 (Idaho 1996); Shuamber v. Henderson, 579 N.E.2d 452 (Ind. 1991); Anderson v. Scheffler, 752 P.2d 667 (Kan. 1988); Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980); Kraszewski v. Baptist Medical Ctr. of Okla., Inc., 916 P.2d 241 (Okla. 1996); Hammond v. Central

Zone of danger jurisdictions and bystander proximity jurisdictions both predicate the right of action on the existence of a "close relationship" between the plaintiff and the injured party. Courts typically interpret this required relation as a relation by blood, adoption, or marriage.[64] The close relationship requirement limits the class of plaintiffs that may assert the cause of action. This limitation serves an important purpose; without it, the number of potential plaintiffs could be enormous, as anyone could claim emotional distress caused by any event he saw, heard, or even read about.[65] For instance, if a distressing event were televised, all the viewers could claim emotional distress. Because it provides one type of limitation on liability, courts have interpreted the close relationship prong very narrowly in both zone of danger and bystander proximity jurisdictions.[66]

The narrow interpretation of the relationship prong is exemplified in *Kately v. Wilkinson*,[67] where the court denied recovery to a mother and daughter who witnessed the death of the daughter's best friend, who was like a sister and daughter to them.[68] Similarly, in *Coon v. Joseph*,[69] another California court also denied recovery for emotional distress where a male plaintiff witnessed a bus driver assault his male "exclusive life partner[ ]."[70] The court found that the relationship between the plaintiff and the injured party did not satisfy the close relationship requirement.[71] In contrast, a child in Hawaii successfully stated a cause of action for negligent infliction of emotional distress when he witnessed a car hit his stepfather's mother, with whom he alleged a very close relationship.[72]

Lane Communications Ctr., 816 P.2d 593 (Or. 1991) (en banc); Hughes v. Moore, 197 S.E.2d 214 (Va. 1973). Alabama and Arkansas have no cause of action for negligent infliction of emotional distress, either for a direct victim or a bystander. *See* Gideon v. Norfolk Southern Corp., 633 So. 2d 453 (Ala. 1994) (per curiam); Dalrymple v. Fields, 633 S.W.2d 362 (Ark. 1982). South Dakota requires physical manifestations of distress and proof of a causal nexus between the distress and the defendant's conduct. *See* Nelson v. Web Water Dev. Ass'n., 507 N.W.2d 691 (S.D. 1993).

64. See *supra* notes 52-53 and accompanying text for a discussion of the prongs of the zone of danger test, and *supra* notes 54-58 and accompanying text for a discussion of the prongs of the bystander proximity test.

65. *See* Prosser, *supra* note 18, § 54, at 366 (expressing concerns about unlimited liability); *see also* S. Claire Swift, Note, *Bystander Liability After* Dunphy v. Gregor: *A Proposal for a New Definition of the Bystander*, 15 Rev. Litig. 579, 595-96 (1996) (discussing the concerns about unlimited liability).

66. *See* Dunphy v. Gregor, 642 A.2d 372, 376 (N.J. 1994) ("We have . . . encouraged narrow applications of the other prongs [of *Dillon*] . . . ."); *id.* at 381 (Garibaldi, J., dissenting) (noting the previously narrow interpretation of the elements of the *Dillon* test).

67. 195 Cal. Rptr. 902 (Ct. App. 1983).

68. *Id.* at 903 ("[W]here, as here, the relationship is not a family relationship but one akin to a family relationship because of friendship and past associations, the relationship guideline is not satisfied.").

69. 237 Cal. Rptr. 873 (Ct. App. 1987).

70. *Id.* at 874.

71. *Id.* at 874, 876-78.

72. Leong v. Takasaki, 520 P.2d 758, 767 (Haw. 1974).

Another notable recent exception to the strict interpretations of "close relation" occurred in *Dunphy v. Gregor*,[73] where the Supreme Court of New Jersey allowed recovery by a woman who was not married to the injured party, but was engaged to and living with him. The court found the relationship of the engaged cohabitants to be "stable, enduring, substantial, and mutually supportive . . . cemented by strong emotional bonds . . . [providing] a deep and pervasive emotional security," and held that the relationship was an "intimate familial relationship."[74] Although New Jersey's expansion of bystander liability is notable, it is largely an anomaly.[75] Most jurisdictions that allow bystander recovery for negligent infliction of emotional distress interpret "closely related" as meaning spouse, parent, or child.[76] Thus, standing to recover is strictly delineated to a narrowly defined category for bystander distress as well.

C. *Summary of Relationship Requirements*

In short, the loss of consortium cause of action is available only to a limited segment of society. The law recognizes the cause of action for husbands and wives, and occasionally for children and parents. Bystander distress is similarly limited in states recognizing the tort, as both the zone of danger test and the bystander proximity test require that the plaintiff be closely related to the injured party. The close relation requirement is typically interpreted as a biological, adoptive, or a marital relationship, although there are scattered exceptions. Other types of relationships exist where injury to one would occasion a loss of companionship or distress to another, but these individuals do not have standing to assert a cause of action under the current law. The next part examines the rationales and policy reasons for limiting the types of relationships that satisfy the relationship requirements.

II. RATIONALES FOR THE RELATIONSHIP REQUIREMENTS

Courts faced with possible expansion of the relationship requirements of these torts consider several factors in deciding whether to

73. 642 A.2d 372 (N.J. 1994).

74. *Id.* at 380.

75. The only other jurisdiction that has permitted an engaged person to recover for emotional distress is Indiana. *See* Pieters v. B-Right Trucking, Inc., 669 F. Supp. 1463, 1471 (N.D. Ind. 1987) (holding that Indiana's impact rule would permit a fiancée's recovery for emotional distress suffered as a result of witnessing fiancé's death in a car accident). Several other jurisdictions, however, have held that a relationship by blood, marriage, or adoption between the plaintiff and the injured party is not necessary to bystander recovery. *See, e.g.*, *Leong*, 520 P.2d at 766 (permitting child to recover for emotional distress suffered from witnessing a car hit his stepfather's mother). Although New Jersey and Indiana have permitted unmarried heterosexual couples to recovery, there is no case law from either state granting or denying recovery to homosexuals. This Note assumes that these jurisdictions would deny recovery to homosexuals if and when they are faced with the issue.

76. *See* Restatement (Second) of Torts § 436 & cmts. f-h (1965).

allow the plaintiff to assert the cause of action. Typically, the court will examine whether the asserted relationship is worthy of the state's recognition and protection. In addition, the court will consider administrative reasons, such as the need to limit liability and avoid overburdening the courts. Once the court has weighed these factors, it determines whether the particular asserted relationship in fact satisfies the relationship requirements necessary to state the cause of action.

A. *Administrative Concerns: Limiting Liability and Burden on the Courts*

Courts are rightfully concerned with limiting the liability associated with accidents. Any number of people may witness an accident, and allowing all witnesses to recover for emotional distress would be impracticable and unfair.[77] Lines must be drawn to limit the number of people to whom a defendant owes a duty,[78] and courts have seen fit to use this concern as a basis for denying recovery for loss of consortium or bystander distress to a party who is not related to the injured party by blood, adoption, or marriage.[79]

Courts have also claimed that permitting recovery by those who are not related by blood, adoption, or marriage would require the court to make sensitive and difficult inquiries into the status and relevance of the relationship between the plaintiff and the injured party.[80] Because this would require an evaluation and examination of the private lives of the plaintiff and her partner, courts have found these inquiries to be intrusions into the plaintiff's privacy.[81] Therefore, courts have de-

77. *See supra* note 65 and accompanying text.

78. Prosser, *supra* note 18, § 54, at 366; *see also* Howard J. Kaplan, *Bystander Recovery: A Policy Oriented Approach*, 32 N.Y.L. Sch. L. Rev. 877, 899 (1987) (noting the danger in subjecting a tortfeasor to "potentially crushing liability [and] incurring liability without end").

79. *See, e.g.*, Sollars v. City of Albuquerque, 794 F. Supp. 360, 363-64 (D.N.M. 1992) (holding that a decedent's daughter, but not his live-in companion who was mother of the daughter, could state a cause of action for negligent infliction of emotional distress, adopting rationale of Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (en banc)); Medley v. Strong, 558 N.E.2d 244, 247 (Ill. App. Ct. 1990) (denying woman a loss of consortium claim stemming from medical malpractice in treating her live-in lover, because of fear of indiscriminate expansion); Trombetta v. Conkling, 626 N.E.2d 653, 655-56 (N.Y. 1993) (discussing how expansion beyond immediate family would result in an "unmanageable proliferation of such claims").

80. *See Sollars*, 794 F. Supp. at 363 (discussing difficulties in making principled distinctions between relationships); *Elden*, 758 P.2d at 587 (discussing the resulting burden on courts).

81. *See Elden*, 758 P.2d at 587; *see also* Norman v. Unemployment Ins. Appeals Bd., 663 P.2d 904, 907 (Cal. 1983) (en banc) (discussing the problems of proof when examining a claim based on a meretricious relationship).

clined to undertake these inquiries and determinations, finding them distasteful and too burdensome.[82]

B. *Protection of a Formalist Family Relationship*

In addition to these administrative concerns, some courts decline to expand the relationship requirements due to an interest in protecting and encouraging traditional family relationships. These courts have employed a formalist view of family to determine which relationships deserve protection.[83] The formalist approach is a strict and conventional conception of what relationships constitute a family. Terms like "spouse," "family," "parent," and "child" refer only to the nuclear family, absent express exceptions or intent.[84] Under this approach, factors such as duration of the relationship or level of commitment carry no weight. The focus is solely the presence or absence of a blood, adoptive, or marital relationship.[85]

The formalist approach dictates that only those relationships comporting with the traditional definition of family can satisfy the relationship requirements for loss of consortium and bystander distress.[86] Thus, under the formalist view, marriage is the only relationship between two adults not related by blood that can give way to recovery for these torts. The formalist approach was followed in *Elden v. Sheldon*,[87] where the California Supreme Court held that the plaintiff could not recover for loss of consortium of his injured fiancée.[88] The court summarily stated: "[T]he right to recover for loss of consortium

82. *See Sollars*, 794 F. Supp. at 363-64; *Elden*, 758 P.2d at 587; *see also* Childers v. Shannon, 444 A.2d 1141, 1142-43 (N.J. Super. Ct. Law Div. 1982) ("It is not the function of this court to sift through the myriad relationships of a party in a negligence action to determine which of those near and dear have suffered an injury.... [I]t is an ill-conceived intrusion into the private lives of individuals.").

83. *See, e.g.*, Sollars v. City of Albuquerque, 794 F. Supp. 360, 363 (D.N.M. 1992) (denying recovery to woman who lived with and had children with decedent because they were not married); Medley v. Strong, 558 N.E.2d 244, 247 (Ill. App. Ct. 1990) (denying woman cause of action for loss of consortium because she was not married to the injured party); *see also* Paula J. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & Pol'y 107, 122 (1996) (discussing how the benefits and privileges created to benefit families are available only to families related by blood, adoption, or marriage).

84. *See* Mary P. Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 Gonz. L. Rev. 91, 96-97 (1991); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 Harv. L. Rev. 1640, 1640-41 (1991) [hereinafter *Looking for a Family Resemblance*].

85. James D. Esseks, Recent Development, *Redefining the Family*—Braschi v. Stahl Associates, 25 Harv. C.R.-C.L. L. Rev. 183, 183 (1990); *Looking for a Family Resemblance*, *supra* note 84, at 1645; *see also* Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 Seton Hall L. Rev. 347, 368 (1993) (noting the use of the traditional dictionary definitions of marriage and family by the courts).

86. See *supra* part I.C for a summary of the relationship requirements.

87. 758 P.2d 582 (Cal. 1988) (en banc).

88. *Id.* at 589-90.

is founded on the relationship of marriage, and absent such a relationship the right does not exist."[89] The court similarly denied the plaintiff's claim for bystander distress based upon the absence of a marital relationship at the time of injury, relying on the same rationale.[90]

The formalist approach focuses heavily on marriage to satisfy the relationship requirements, as evidenced by the court's opinion in *Elden*. This corresponds with the importance the United States places upon the institution of marriage, as emphasized by the Supreme Court in several decisions. In *Maynard v. Hill*,[91] the Court stated: "[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress."[92] The Court has echoed this sentiment in more recent cases, including *Griswold v. Connecticut*,[93] *Loving v. Virginia*,[94] and *Zablocki v. Redhail*.[95]

Marriage is traditionally the foundation of the family,[96] and as such it serves several important functions: procreation, promotion of individual happiness and stability, and promotion of societal stability.[97] Procreation, including bearing and raising of children, is necessary to perpetuate the human race, and it is argued that this is best accomplished within a marital relationship.[98] Therefore, the marital relationship deserves vigorous and vigilant protection.[99] Marriage also

89. *Id.* at 589.

90. *See id.* at 587 ("Formally married couples are granted significant rights and bear important responsibilities toward one another which are not shared by [unmarried people].").

91. 125 U.S. 190 (1888).

92. *Id.* at 211.

93. 381 U.S. 479, 486 (1965) ("[Marriage] 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.").

94. 388 U.S. 1, 12 (1967) (stating marriage is a "'basic civil right[ ] of man,' fundamental to our very existence and survival" (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))).

95. 434 U.S. 374, 386 (1978) (noting that marriage is "the foundation of the family in our society").

96. *See Extending Consortium Rights*, *supra* note 20, at 923.

97. *See* Martin, *supra* note 17, at 1475-76; Robert M. Moroney, The Family and the State: Considerations for Social Policy 15 (1976).

98. *See* Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); Shirley S. Simpson, Note, *The Parental Claim for Loss of Society and Companionship Resulting from the Negligent Injury of a Child: A Proposal for Arizona*, 1980 Ariz. St. L.J. 909, 923-24.

99. *See* Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 Berkeley Women's L.J. 134, 161 (1987-88) (articulating the argument regarding the state's interest in procreation); *see, e.g.*, Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("The legal protection . . . afforded to marriage . . . has historically . . . been rationalized as being for the purpose of encouraging the propagation of the race."), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *Singer*, 522 P.2d at 1195 ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.").

provides emotional and psychological support,[100] which bears an important connection to individual happiness and stability. This, in turn, encourages societal stability,[101] which involves preservation of family unity and traditional values,[102] including promotion of heterosexual marriages.[103]

The partnership formed by a marriage encourages a cooperative effort and increases the stability of individuals, which results in the increasing stability of society.[104] Social policy also favors and encourages marriage because the institution is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society."[105] In sum, "marriage promotes community and individual values, and is viewed as essential to the maintenance of liberty and government."[106]

Another justification offered to support the state's interest in traditional marriage is encouragement of heterosexuality and morality.[107] Proponents of this justification espouse the belief that a "homosexual lifestyle" should not be supported and condoned by the states.[108] Furthermore, it has been suggested that if the states were to condone homosexuality, that individuals would choose same-sex relationships rather than a heterosexual marriage,[109] which would undermine the other state interests in traditional marriage, such as procreation, and promotion and protection of individual and community values.

C. *Protection of a Functionalist Family Relationship*

In contrast to the formalist approach, which emphasizes the legal status of marriage, the functionalist approach to family focuses on the quality of the asserted relationship. This approach acknowledges the shared relationship that is the emotional and functional counterpart to a nuclear family relationship, regardless of the presence or absence of

100. *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1285-86 (1980).

101. *See* Martin, *supra* note 17, at 1476.

102. *Developments*, *supra* note 8, at 1607, 1609.

103. *See* Friedman, *supra* note 99, at 165 (articulating the argument that denying legal recognition to gays and lesbians serves a state's interest in discouraging homosexuality and encouraging marriages).

104. *See* Martin, *supra* note 17, at 1476 (citing Grace G. Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev. 1125, 1137 (1981)).

105. Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983); *see also* Treuthart, *supra* note 84, at 92-93 (discussing the general social policy favoring marriage).

106. Heeb, *supra* note 85, at 351 (citations omitted).

107. *See* Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering* Baehr*: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 Fordham L. Rev. 921, 976-77 (1995).

108. *See* Arthur A. Murphy & John P. Ellington, *Homosexuality and the Law: Tolerance and Containment II*, 97 Dick. L. Rev. 693, 697-99 (1993).

109. *See* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 Stan. L. Rev. 503, 518 (1994); Murphy & Ellington, *supra* note 108, at 694; Strasser, *supra* note 107, at 976.

biological, adoptive, or marital ties.[110] Courts recognizing functional families place importance on the quality of the relationships rather than the terminology attached to it.[111]

The functionalist view of family "inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs."[112] Thus, the functionalist approach considers specific characteristics of a particular relationship to determine if the relationship constitutes a family.[113] Proponents of this approach posit that a relationship exhibiting characteristics of a traditional family relationship merits the same legal recognition as the traditional relationship.[114]

In *Braschi v. Stahl Associates Co.*,[115] the New York Court of Appeals used the functionalist approach to the definition of family, and held that the term "family" in a non-eviction provision of rent-control laws included a lifetime gay partner.[116] The court stated:

> The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family in-

110. *See, e.g.*, Mobaldi v. Board of Regents of Univ. of Cal., 127 Cal. Rptr. 720 (Ct. App. 1976) (permitting a foster mother to recover for emotional distress upon witnessing hospital personnel give her foster child a fatal dose of glucose solution, and holding the child in her arms as he suffered convulsions and entered a coma), *overruled by* Baxter v. Superior Court, 563 P.2d 871 (Cal. 1977) (en banc); Leong v. Takasaki, 520 P.2d 758 (Haw. 1974) (permitting a child to state cause of action for bystander distress due to his witnessing a car hit his stepfather's mother); Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (allowing one party in an unmarried cohabitating heterosexual relationship to recover for bystander distress after witnessing injury to the other); Garcia v. San Antonio Hous. Auth., 859 S.W.2d 78 (Tex. Ct. App. 1993) (holding that an uncle, who suffered emotional distress after rescuing his nephew with whom he lived from a fire, could state a cause of action for bystander distress).

111. *See* Ettelbrick, *supra* note 83, at 130-31. A prominent use of the functional approach to defining family was that of the California courts in the years between Butcher v. Superior Court, 188 Cal. Rptr. 503 (Ct. App. 1983), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (en banc), and the decision overruling *Butcher*. Thus, although many of the California decisions employing a functional definition of family have been overruled, they provide a useful example of the functional approach.

112. *Looking for a Family Resemblance*, *supra* note 84, at 1646.

113. *Id.* Considering specific characteristics of a particular relationship gives judges much discretion in determining what factors are important and the respective weight of each factor. *Id.* at 1653. The author suggests that legislatures should eliminate this judicial discretion by establishing recognition mechanisms to formalize relationships, like domestic partnership statutes, that would be unassailable by judges. *Id.* at 1657-59. These statutes, however, are extremely rare, and often do not live up to their promise of equality between traditional and non-traditional families. *See* Treuthart, *supra* note 84, at 101 & n.32 (discussing the limited number of jurisdictions with domestic partnership measures); *Looking for a Family Resemblance*, *supra* note 84, at 1658.

114. *See* Martin, *supra* note 17, at 1477-78.

115. 543 N.E.2d 49 (N.Y. 1989).

116. *Id.* at 53-54.

> cludes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.[117]

A key factor in the court's decision was the extent to which Braschi and his partner's relationship looked like a marriage. The court looked at the exclusivity and duration of the relationship, the level of emotional and financial commitment, whether they had held each other out as a "spouse," and their reliance upon each other in family life.[118] This exemplifies the functionalist approach to family, because the relationship of Braschi and his partner did not correspond with formalist terminology. Thus, the court examined the relationship to determine if it had the essential characteristics of marriage and fulfilled the same personal needs, and concluded that the relationship did constitute a family.[119]

The criteria used in *Braschi* to determine the possible existence of a functional family bear a strong resemblance to those advanced in *Butcher v. Superior Court*[120] to determine a "stable and significant" relationship. In *Butcher*, the court held that an unmarried cohabitant who could demonstrate a stable and significant relationship could state a cause of action for loss of consortium.[121] Although this decision was overruled five years later by *Elden v. Sheldon*,[122] it still provides a useful example of a functionalist approach to family. In *Butcher*, the court held that the existence of a mutual contract, the level of economic cooperation and interdependence, presence and exclusivity of sexual relations, and the raising of children could show the stability and significance of the relationship.[123] The court explained the import and application of these guidelines:

> While the particular items of evidence will vary from case to case, and some of these suggested criteria may be absent, and other different ones present, the plaintiff will bear the burden of demonstrating both that the relationship is stable and that it has those characteristics of significance which one may expect to find in what is essentially a de facto marriage.[124]

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117. *Id.*
118. *Id.* at 55.
119. *Id.* at 53-55; *see also* Carroll v. City of Miami Beach, 198 So. 2d 643 (Fla. Dist Ct. App. 1967) (holding that a group of nuns constituted a family for zoning purposes); Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. Ct. App. 1954) (holding that a group of nurses constituted a family for zoning purposes); Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J. 1990) (per curiam) (holding that ten unrelated male college students constituted a family for zoning purposes); Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627 (Wis. 1954) (holding that a group of priests constituted a family for zoning purposes).
120. 188 Cal. Rptr. 503 (Ct. App. 1983), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (en banc).
121. *Id.* at 512.
122. 758 P.2d 582 (Cal. 1988) (en banc).
123. *Butcher*, 188 Cal. Rptr. at 512.
124. *Id.*

In other words, the court suggested an examination of the relationship to determine whether it shares the essential qualities and provides the emotional support of a traditional family relationship—here, a marriage. This inquiry and examination of a relationship are the crux of the functionalist approach.[125] To the extent that these nontraditional relationships have the same characteristics and serve the same valid and valuable purposes as a traditional family, they should be afforded the same legal protections and benefits.[126] Although many courts have employed a functionalist approach in defining family that has included homosexual couples,[127] no court has allowed a homosexual couple to recover for loss of consortium or bystander distress.[128]

III. EQUAL PROTECTION AND *ROMER V. EVANS*

This part argues that denying homosexuals the rights of action for loss of consortium and bystander distress violates the Equal Protection Clause of the Fourteenth Amendment,[129] because denying these rights of action is not rationally related to state purposes, or, in some instances, the state purpose is, in fact, illegitimate. First, this part discusses *Romer v. Evans*[130] and determines that the *Romer* rational relationship test is applicable to the judicially created relationship requirements. This part then examines the proffered state purposes to determine if they satisfy the rational relationship test. This part concludes that denying gays and lesbians the rights of action does not pass the *Romer* rational relationship test.

A. Romer v. Evans *and the Rational Relationship Test*

The Equal Protection Clause of the Fourteenth Amendment establishes the principle that no person shall be denied equal protection of the laws.[131] Last year, in *Romer v. Evans*,[132] the Supreme Court used the Equal Protection Clause to strike down Colorado's anti-homosex-

125. *See supra* notes 110-13 and accompanying text.
126. *See supra* note 114 and accompanying text.
127. *See, e.g., In re* Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991) (holding that a lesbian partner had a right to be appointed guardian of her disabled partner because the relationship constituted a "family of affinity"); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (holding that the term "family" in a non-eviction provision of rent-control laws included a lifetime gay partner); State v. Hadinger, 573 N.E.2d 1191 (Ohio Ct. App. 1991) (permitting the state to charge a lesbian partner under the state's domestic violence statute).
128. For a discussion of ways the law has changed to give gay and lesbian couples various protections and legal rights, see Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J. Fam. L. 497 (1991).
129. U.S. Const. amend. XIV, § 1.
130. 116 S. Ct. 1620 (1996).
131. U.S. Const. amend. XIV, § 1.
132. 116 S. Ct. 1620 (1996).

ual Amendment 2, a decision heralded as "the seminal decision in the jurisprudence of equal protection for gay people."[133]

Amendment 2 was a voter referendum adopted in response to ordinances passed by Colorado municipalities that prohibited discrimination based on sexual orientation in education, employment, health and welfare, housing, and public accommodations.[134] Amendment 2 was designed to repeal these ordinances to the extent that they prohibited discrimination based on sexual orientation.[135] The state argued that the amendment merely denied gays, lesbians, and bisexuals special rights and, in fact, put them in the same position as everyone else.[136] The plaintiffs alleged that the amendment would subject them to "immediate and substantial risk of discrimination on the basis of their sexual orientation."[137] The Supreme Court side stepped the issue of whether gays and lesbians are a suspect class, which would merit a higher level of scrutiny, by holding that the law failed even to pass the lowest level of scrutiny, the rational relationship test.[138]

1. The *Romer* Rationality Review

It is uncommon for a state law to fail rational relationship scrutiny, as occurred in *Romer*.[139] But the *Romer* rational relationship test seems more stringent than the usual rational relationship test. One commentator has called *Romer*'s application of the standard a "muscular rational basis review."[140] So, although the Court purported to apply a mere rational relationship standard, requiring that "the classi-

133. Tobias B. Wolff, Case Note, *Principled Silence*, 106 Yale L.J. 247, 248 (1996); *see also* Andrew M. Jacobs, Romer *Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 Wis. L. Rev. 893, 951 ("*Romer* is the culmination of ten years of progress in gay rights litigation and twenty five years of gay rights advocacy, as well as a milepost on a longer journey."); *id.* at 963 ("*Romer* clearly portends a major change in our law of sexual orientation.").

134. *Romer*, 116 S. Ct. at 1623.

135. *Id.*

136. *Id.* at 1624.

137. *Id.*

138. *Id.* at 1627; *see* Anthony M. Dillof, Romer v. Evans *and the Constitutionality of Higher Lawmaking*, 60 Alb. L. Rev. 361, 374 (1996) (noting that the *Romer* majority did not need to reach the question whether Amendment 2 deserved a higher level of scrutiny, because the Court held that the amendment failed the rational relation test). For an argument that *Romer* is a stepping stone to a future determination that sexual orientation classifications require a heightened level of scrutiny, see Wolff, *supra* note 133, at 251-52.

139. Treuthart, *supra* note 84, at 109; Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. Cal. L. Rev. 797, 808 (1984) (discussing how most laws pass the rationality review and referring to the rational relationship test as merely a "rubber-stamp review"). The last case previous to *Romer* to fail the rational relationship test was City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). Dillof, *supra* note 138, at 384.

140. Jacobs, *supra* note 133, at 963; *see also* Dillof, *supra* note 138, at 379 (referring to *Romer*'s "nudging of the rational relation test toward intermediate scrutiny").

fication bear a rational relationship to an independent and legitimate legislative end,"[141] the Court admitted that Amendment 2 "confounds this normal process of judicial review."[142] The peculiarity of the *Romer* rational relationship test is found in the Court's discussion of the overbreadth of Amendment 2. The Court stated that the amendment was so broad that it could not possibly be rationally related to the purposes advanced by Colorado.[143] Breadth of a statute, however, is usually a benefit when applying a rational relationship test: the broader the statute, the more likely that it will have some effect that can be characterized as a legitimate state purpose.[144] The Court declined to recognize Colorado's proffered purposes as legitimate, however, and focused on animus as the underlying motivation. The Court states that "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[145] In finding the state purposes illegitimate, it seems that the Court was not applying the regular rational relationship standard.[146] The *Romer* rational relationship test has more bite than the usual rational relationship test,[147] although, strangely, the Court did not actually engage in the rational relationship analysis.[148] The Court did not discuss the legitimacy of the state

141. *Romer*, 116 S. Ct. at 1628.

142. *Id.* at 1627-28.

143. *Id.* at 1629.

144. Dillof, *supra* note 138, at 378-79; *see, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (applying rational relationship scrutiny and holding that a Texas school financing system based on property tax was constitutional), *reh'g denied*, 411 U.S. 959 (1973).

145. *Romer*, 116 S. Ct. at 1628 (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

146. *See* Gayle L. Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779, 793-94 (1987) (discussing the Court's opinion in City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432 (1985), as an example of this stricter form of rational relationship review). The scrutiny level applied in *Cleburne* permits the Court to "look[ ] more closely at the relationship of the classification to achieving the state's goal [and to] not accept every goal proffered by the state." *Id.* at 801.

147. Dillof, *supra* note 138, at 379; Jacobs, *supra* note 133, at 963-64; Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 77 ("It should be clear by this point that the 1995 Term has modified traditional equal protection doctrine. *Romer* suggests that rationality review will not always result in validation; its form of rationality review is far more like the intermediate variety."). The view that *Romer*'s rationality review is in fact a heightened standard of scrutiny is not universal, although it is widely held. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 Const. Commentary 257, 263 (1996). For an argument that the Supreme Court invalidated Colorado's Amendment 2 without using a heightened scrutiny level, see generally *id.* This Note assumes that the rationality standard used in *Romer* is not mere rational relationship scrutiny nor intermediate scrutiny, but rather, what has been called "rational relationship with teeth," similar to the level of scrutiny applied in *Cleburne*, 473 U.S. 432.

148. Dillof, *supra* note 138, at 378 ("The Court simply makes no efforts to assess the effects, or lack thereof, that Amendment 2 will have relative to its alleged justifications.").

purposes because it found that this amendment could not possibly relate to any legitimate state purpose due to its overbreadth.[149]

Because the Court failed to actually apply the rational relationship test, the opinion provides little guidance for its application.[150] Thus, commentators have tried to offer potential explanations of the *Romer* case.[151] The opinion, however, does dictate the use of at least a rational relationship test where "[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint."[152] Amendment 2 "identifies persons by a single trait and . . . denies them protection across the board."[153]

2. The Equal Protection Purpose Requirement

Jurisdictions that do not permit a claim for a bystander's mental distress[154] or decline to recognize a cause of action for loss of consortium[155] do not encounter an equal protection problem, as they are treating all people alike in that no one—heterosexual or homosexual, married or unmarried—has a right of action for these torts. Jurisdictions that do recognize the torts,[156] however, encounter an equal protection problem under *Romer*.

The judicially created classifications embodied in the relationship requirements for loss of consortium and bystander distress actions discriminate in the same way as Amendment 2: they classify people according to their sexual orientation and deny them the rights of action for these torts. The relationship requirements, however, differ from Amendment 2 in a very significant way: they are not facially discriminatory, although they do produce disparate results. If a law is not facially discriminatory,[157] a party claiming an equal protection violation must show that the underlying purpose of the law is, in fact, to discriminate.

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149. Romer v. Evans, 116 S. Ct. 1620, 1629 (1996).

150. *See* Dillof, *supra* note 138, at 373 (discussing the brevity of the Court's opinion and the absence of extensive analysis and argument); *see also* Richard C. Reuben, *Gay Rights Watershed? Scholars Debate Whether Past and Future Cases Will Be Affected by Supreme Court's* Romer *Decision*, A.B.A. J., July 1996, at 30 (discussing the unclear impact of the opinion).

151. *See, e.g.*, Akhil R. Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 Mich. L. Rev. 203 (1996) (arguing that the Court's opinion in *Romer* is illuminated and clarified when considered in conjunction with the Attainder Clause of the Constitution); Steven A. Delchin, Comment, *Scalia 18:22: Thou Shall Not Lie with the Academic and Law School Elite: It Is an Abomination*—Romer v. Evans *and America's Culture War*, 47 Case W. Res. L. Rev. 207, 227-42 (1996) (offering several potential explanations of the decision).

152. *Romer*, 116 S. Ct. at 1627.

153. *Id.* at 1628.

154. *See supra* note 63 and accompanying text.

155. *See supra* note 24 and accompanying text.

156. *See supra* notes 23, 59-60.

157. *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

There are two ways to show a discriminatory purpose behind a law that is not facially discriminatory. First, the law may classify people through its application.[158] For example, the government may administer a law with different degrees of severity to different persons, based on a suspect trait.[159] Second, if the law results in a disparate impact on a class of people and a purpose to effect this discrimination may be discerned, the purpose requirement is fulfilled.[160]

Denying homosexuals the rights of action for loss of consortium and bystander distress falls into the second category, governed by *Washington v. Davis*[161] and *Arlington Heights v. Metropolitan Housing Development Corp.*[162] In *Washington*, the Supreme Court held that the Equal Protection Clause is violated only where the discrimination is the product of a discriminatory purpose.[163] In addition, a showing of disparate impact, while a factor in ascertaining intent, is never by itself sufficient to prove discriminatory intent.[164] The Court clarified the purpose requirement in *Arlington Heights*, holding that the motive to discriminate need not be the sole motive of the classification to invoke equal protection analysis.[165] Rather, it is enough if the discriminatory purpose was a motivating factor in the creation of the classification.[166]

There are basically two ways to determine the motive of state actors: "First, evidence of the institution's actions and the circumstances that may have affected those actions may establish an institution's motivation. . . . Second, evidence of the intent of individual decisionmakers may prove the motives of a decisionmaking body."[167] Acquisition and examination of such evidence, however, are substantial difficulties.[168] It is particularly difficult to ascertain a discriminatory purpose when dealing with judicially crafted standards, such as the relationship requirements. To determine the motivation of a decisionmaking body, courts may look to testimony of a decisionmaker,[169] "written embodiments" of the law or policy,[170] or legislative history. Such evidence does not exist, however, when examining judicially

158. *See* Yick Wo v. Hopkins, 118 U.S. 356, 362-63 (1886).

159. *Id.*

160. *See* Shaw v. Reno, 509 U.S. 630, 649 (1993); Washington v. Davis, 426 U.S. 229, 245-46 (1976).

161. 426 U.S. 229 (1976).

162. 429 U.S. 252 (1977).

163. 426 U.S. at 239-41.

164. *Id.* at 242-43; *see* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

165. 429 U.S. at 265-66.

166. *Id.*

167. Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. Rev. 879, 966-67 (1985).

168. *See id.* at 884-85.

169. *Id.* at 967.

170. Cook v. Babbitt, 819 F. Supp. 1, 14 (D.D.C. 1993).

crafted common law, such as the development and enforcement of the relationship requirements.

A discriminatory purpose is evident in jurisdictions employing a functionalist approach to permit unmarried heterosexuals to recover, assuming these states would deny recovery by similarly situated homosexuals. These jurisdictions would be blatantly discriminating on the basis of sexual orientation, evidencing the discriminatory purpose required to show an equal protection violation.

In contrast, the existence of an illegitimate purpose as a motivating factor to deny expansion of the relationship requirements in those jurisdictions adhering to the formalist approach is not as evident or ascertainable. Because these states do not allow unmarried heterosexuals to recover either, it seems as if they are not making a classification based on sexual orientation, but rather a classification based on marital status.[171] The disparate impact of these classifications on homosexuals, however, is evident.[172] Two homosexuals in a lifetime relationship would never be able to recover for loss of consortium or bystander distress, while a heterosexual couple would be able to recover as soon as they possessed a marriage certificate.

No state currently allows homosexuals to obtain a marriage license.[173] Marriage licenses are available only to heterosexuals who are marrying a person of the opposite sex. Prohibiting same sex marriage is unconstitutional because of the requirement of heterosexuality, and as such is discrimination against homosexuals.[174] These states deny homosexuals the ability to obtain a marriage license, predicate recovery for loss of consortium and bystander distress on the existence of a valid marriage, and have knowledge of the disparate impact

171. Marital status classifications usually dictate the use of the mere rationality standard. *See, e.g.*, Smith v. Shalala, 5 F.3d 235, 239 (7th Cir. 1993) (holding that a marital status classification for Supplemental Security Income purposes was to be examined under the rationality standard), *cert. denied*, 510 U.S. 1198 (1994). For an argument that laws distinguishing on the basis of marital status do not pass the mere rationality test, see Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 Ariz. L. Rev. 207, 220-34 (1988). Jaff also argues that the law's emphasis on marriage and traditional family, and conversely the law's treatment of unmarried individuals, favors racism, sexual oppression, and male-dominance, and that the legal and social preference for marriage negatively affects and burdens gender, racial, and sexual minorities. *Id.* at 236-38.

172. Mere disparate impact, however, is not enough to infer a discriminatory purpose. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

173. A circuit court judge in Hawaii, however, has ordered the state government to issue marriage licenses to same-sex couples. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694942 at *21 (Haw. 1st Cir. Ct. Dec. 3, 1996); Victoria Slind-Flor, *Same-Sex Case Poses Many Questions*, Nat'l L.J., Dec. 16, 1996, at A8. A stay has been issued pending appeal to the Hawaii Supreme Court. Carey Goldberg, *Hawaii Judge Ends Gay-Marriage Ban*, N.Y. Times, Dec. 4, 1996, at A1.

174. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994) (arguing that discrimination against homosexuals is sex discrimination which the state may not practice absent a sufficient state purpose).

the relationship requirements have on homosexuals. Therefore, a discriminatory purpose in the decision of a state actor (here, the judiciary) to deny recovery for bystander distress and loss of consortium to homosexuals may be inferred from the discriminatory purpose behind denying homosexuals marriage licenses plus the knowledge of the disparate impact on homosexuals regarding recovery for these torts, because the ability to recover is predicated on the existence of a valid marriage.[175]

Therefore, *Romer* level scrutiny is applicable to both types of jurisdictions: those permitting unmarried heterosexuals to recover for loss of consortium and bystander distress and those who predicate recovery on the existence of a valid marriage. Assuming the states in the former category would deny recovery to unmarried homosexual couples, permitting similarly situated heterosexuals the rights of action is clearly a classification based on sexual orientation, with the requisite purpose. The states in the latter category employ a back door method of discriminating of sexual orientation by focusing on marital status.[176] Unmarried heterosexuals have a means of recovery that homosexuals do not: marriage. Because marriage is not available to homosexuals, the purported marital status classification is particularly burdensome to homosexuals,[177] and to that extent it is actually a classification based on sexual orientation,[178] and is therefore subject to *Romer* rational relationship scrutiny.

B. *Applying the Rational Relationship Test to the Purposes Advanced in Denying Expansion of the Relationship Requirements*

Due to this discrimination based on sexual orientation, the *Romer* rational relationship test dictates first that the reasons given for limiting the relationship requirements[179] be legitimate state purposes, and second, that denying an expansion of the relationship requirement is rationally related to those purposes. This section applies the *Romer*

175. *But see* Model Penal Code § 2.02 & cmt. 2 (1985) (drawing a narrow distinction between purpose and knowledge in the criminal mens rea provisions).

176. *See* Stacey L. Boyle, Note, *Martial Status Classifications: Protecting Homosexual and Heterosexual Cohabitors*, 14 Hastings Const. L.Q. 111, 111-12, 134 (1987) ("Many laws discriminating against homosexuals classify by marital status rather than sexual orientation."); *Developments*, *supra* note 8, at 1604 ("The law's seemingly evenhanded treatment of unmarried couples in fact penalizes same-sex couples more severely, because gay men and lesbians do not have the option of marriage."); Heeb, *supra* note 85, at 368 (stating that reliance on the traditional definition of marriage results in disparate treatment of gays and lesbians); *see also* Evangelista Assocs. v. Bland, 458 N.Y.S.2d 996, 997 (Civ. Ct. 1983) (holding that cohabitation by two men was not entitled to marital status protection, but could be entitled to protection based on sexual orientation).

177. Jaff, *supra* note 171, at 237.

178. *See supra* note 176.

179. *See supra* part II.A.

rational relationship test to determine if the reasons given for denying homosexuals the causes of action are legitimate, and if so, whether the denial is rationally related to those ends.

1. Administrative Concerns: Limiting Liability and Burden on Courts

Limiting liability is a legitimate state purpose, especially in light of the large number of plaintiffs that could assert a cause of action for an occurrence such as a mass accident. The New York Court of Appeals has stated, "[e]very injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree."[180] Without any limitation, everyday human activity would be burdened and overwrought with risk if every defendant who has injured someone were forced to compensate every other person disturbed by the incident.[181] Liability must be limited to keep the defendant's accountability in proportion to his negligence.[182]

Having established that limiting liability is a valid state purpose, the *Romer* rational relationship test dictates that denying gays and lesbians the rights of action for loss of consortium and bystander distress must be rationally related to limiting liability, and therefore must fit that purpose. This test is not met, however, because permitting homosexuals the rights of action would not result in limitless liability. Other effective mechanisms exist to sufficiently limit the potential class of plaintiffs.

For example, the plaintiff would still need to prove that the defendant did, in fact, owe her the initial duty of due care dictated by traditional tort doctrine.[183] Additionally, a sufficiently close relationship must exist, and the plaintiff would also need to prove that the relationship is the functional equivalent of a family.[184] Extending the causes of action to gays and lesbians would simply prevent their automatic preclusion, because "[a] partner who could not demonstrate a reasonably lengthy involvement or financial interdependence with the injured party would [still] be ineligible for damages."[185]

Furthermore, the plaintiff would need to prove foreseeability, which is also a limiting factor.[186] Stating a cause of action for bystander dis-

180. Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969).
181. Prosser, *supra* note 18, § 54, at 366.
182. Thing v. LaChusa, 771 P.2d 814, 826-27 (Cal. 1989) (en banc).
183. *Developments*, *supra* note 8, at 1621-22.
184. Sampedro, *supra* note 42, at 1115-16 (1996); *Developments*, *supra* note 8, at 1621-22.
185. *Developments*, *supra* note 8, at 1622.
186. Dunphy v. Gregor, 642 A.2d 372, 377 (N.J. 1994). Perhaps, however, foreseeability is not a stringent limitation. "One can reasonably foresee that people who enjoy an intimate familial relationship with one another will be especially vulnerable to emotional injury resulting from a tragedy befalling one of them." *Id.*

tress would also require the plaintiff to show that she meets the other prongs of the *Dillon/Thing* test, which include presence and awareness of the injury producing event, and resulting serious emotional distress.[187] Thus, it seems unlikely that allowing lifetime homosexual partners to have the rights of action for bystander distress and loss of consortium would result in limitless liability. If anything, denying gays and lesbians the opportunity to prove functional family relationships because of fears of increased litigation is quite likely to preclude recovery by individuals who may in fact have suffered a real and legitimate loss.[188]

The second administrative state purpose advanced for the strict limitations on the relationship requirements is to prevent a burden on the courts.[189] The concerns courts cite, however, are not related to overcrowding of the docket or untimely disposition of cases. Rather, courts note that the fact finders would find it difficult to make the necessary inquiries.[190] Thus, it seems that the state purpose is to allow the courts to decline to hear and decide difficult cases that may involve sensitive and difficult inquiries. Essentially, this provides courts with the opportunity to avoid difficult cases because they require too much work. This is not a legitimate state purpose. Indeed, perhaps there is more reason for courts to hear and decide the difficult cases. Furthermore, courts and juries engage in these factual inquiries all the time, so their difficulty has not been a prohibitive factor in the past.[191] Thus, preventing an excessive burden on the courts is not a legitimate state purpose, at least regarding the type of burden about which the courts have expressed concern.

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187. *See supra* notes 54-58 and accompanying text.

188. *See Dunphy*, 642 A.2d at 379-80; *see also* Elden v. Sheldon, 758 P.2d 582, 593 (Cal. 1988) (en banc) (Broussard, J., dissenting) ("[T]he rights of a proposed new class of tort plaintiffs should be forthrightly judged on their own merits, rather than by indulging in gloomy speculation on where it will all end." (quoting Borer v. American Airlines, Inc., 563 P.2d 858, 870 (Cal. 1977) (Mosk, J., dissenting))); Sampedro, *supra* note 42, at 1115 (noting that "if unlimited liability is a sufficient justification for a court to prohibit unmarried cohabitants from recovery, valid emotional injuries would remain uncompensated").

189. *See* discussion *supra* part II.A.

190. *See Elden*, 758 P.2d at 587; *see also* Sollars v. City of Albuquerque, 794 F. Supp. 360, 363 (D.N.M. 1992) (discussing the difficulties in making distinctions between relationships); *Dunphy*, 642 A.2d at 381 (Garibaldi, J., dissenting) (voicing concerns about intolerable burdens on courts resulting from expansion of relationship requirements).

191. *Elden*, 758 P.2d at 592 (Broussard, J., dissenting) ("In the past, this court—including the author of the majority opinion—has soundly rejected the argument that compensation should be denied to all plaintiffs because of the difficulty of determining which plaintiffs are deserving and how much they deserve."); *see also* Coon v. Joseph, 237 Cal. Rptr. 873, 881 (Ct. App. 1987) (White, J., dissenting) ("Often the closeness of a relationship is analyzed in order to determine whether a plaintiff may recover for negligent infliction of emotional distress when plaintiff witnesses a particular person injured.").

Assuming, arguendo, this purpose is legitimate, denying the rights of action for loss of consortium and bystander distress to homosexual partners is not rationally related to prevention of an unreasonable burden on the courts. Courts make sensitive factual determinations all the time, as do juries.[192] For example, in a loss of consortium case involving a married couple, the court or jury must evaluate the relationship and assign a value to it.[193] Determining whether an unmarried plaintiff's relationship satisfies the relationship requirement requires the same type of inquiry. If a jury can assign a value to a relationship, jurors can likewise determine whether the relationship requirement is fulfilled.[194] We continually ask that courts and juries draw lines and interpret standards in applying tort law.[195] If they did not perform these interpretations, common law tort doctrine would develop no further.[196]

With regard to the related claim that the court will be forced to delve into the personal lives of the plaintiff and his partner, it is an invited inquiry, because the plaintiff commenced the action.[197] "In any case, denying legal standing to an injured plaintiff is a strange way to protect him or her from intrusive litigation."[198] Additionally, it is unfair to deny a plaintiff who has suffered a real and legitimate loss the opportunity to prove that loss and receive compensation, simply

192. *Elden*, 758 P.2d at 592.

193. *See* Howard H. Kestin, *The Bystander's Cause of Action for Emotional Injury: Reflections on the Relational Eligibility Standard*, 26 Seton Hall L. Rev. 512, 539 (1996) (noting that inquiries into the "nature, incidents, and qualities of a personal relationship . . . are normally undertaken in other contexts, including evaluation of typical loss of consortium claims and in determining some issues in divorce actions").

194. Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994) ("[A]ssessment of the quality of interpersonal relationships is not beyond a jury's ken and . . . courts are capable of dealing with the realities . . . of relationships to assure that resulting emotional injury is genuine and deserving of compensation."); *see* Kestin, *supra* note 193, at 538. Furthermore, courts employing a functionalist approach to family relationships do engage in precisely this type of analysis and examination of relationships. *See, e.g.*, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53-54 (N.Y. 1989) (discussing quality and characteristics of homosexual relationship in determining that the relationship constituted a family within the meaning of a non-eviction provision).

195. *Developments*, *supra* note 8, at 1621; *see* Cornelius J. Peck, *Comments on Judicial Creativity*, 69 Iowa L. Rev. 1, 13-24 (1983) (discussing examples of "judicial creativity" in developing and changing tort law); *see, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y.) (providing an example of judicial line-drawing regarding foreseeability of plaintiff), *reh'g denied*, 164 N.E. 564 (N.Y. 1928).

196. *See* Borer v. American Airlines, Inc., 563 P.2d 858, 869 (Cal. 1977) (Mosk, J., dissenting) ("When that crowd is marching in the wrong direction, we have not heretofore hesitated to break ranks and strike out on our own. I need not list the many instances in which this court has initiated new trends in the law of personal torts by extending the protection of the courts to previously neglected classes of accident victims.").

197. *See* Swift, *supra* note 65, at 600 ("[W]hen bystanders decide to sue for damages, they volunteer to allow the court to examine their relationships and their domestic lives.").

198. Elden v. Sheldon, 758 P.2d 582, 593 (Cal. 1988) (en banc) (Broussard, J., dissenting).

because of a fear of burdening the courts with difficult tasks and questions.[199]

2. Protecting the Formalist Relationship of Marriage

In *Bowers v. Hardwick*,[200] the Supreme Court held that the promotion of traditional family values was a legitimate state interest, and upheld Georgia's anti-sodomy law.[201] Therefore, at first blush, it may seem that *Bowers* dictates that protection of the formalist relationship is a legitimate state purpose. This is not the case, however. Although the Court's opinion in *Romer* did not expressly deal with *Bowers*, *Romer* clearly bears upon the value of *Bowers* as precedent.[202] It is important to consider, however, that *Bowers* concerned the Due Process Clause, and *Romer* concerned the Equal Protection Clause.[203] Because different constitutional provisions were at issue in these cases, even if *Romer* did not implicitly overrule or weaken *Bowers*, promotion of traditional family values under due process analysis is not necessarily controlling in an equal protection analysis.[204]

Indeed, protection of marriage may not be a legitimate state purpose under equal protection analysis, because the goals purportedly encouraged and embodied by marriage either are not valid areas for state concern, or are not fostered by marriage alone. A reason typically given for the importance of marriage and the preferential treatment afforded the institution is that marriage serves a procreative purpose.[205] Procreation, however, may not be a justifiable state goal. The Supreme Court's decisions in *Roe v. Wade*[206] and *Eisenstadt v. Baird*[207] regarding abortion and contraception indicate that procrea-

199. *See Borer*, 563 P.2d at 867, 870 (Mosk, J., dissenting).

200. 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

201. *Id.*; *see also* Sunstein, *supra* note 147, at 64-65 ("*Hardwick* seemed to say that it is legitimate for the state to express disapproval of homosexual conduct . . . .").

202. *See* Sunstein, *supra* note 147, at 65-69. Sunstein surmises that the Court did not deal with *Bowers* expressly because any in depth analysis on that point would not have commanded a majority opinion. *Id.* at 71. Ronald Dworkin has stated that the *Romer* decision has weakened *Bowers*, and has "begun the process of isolating and finally overruling it altogether, an event that would have enormous impact . . . on constitutional theory generally." Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. Rev. Books, Aug. 8, 1996, at 44, 49-50. Dworkin also speculates that if *Bowers* were challenged today, it would garner only three votes (Rehnquist, Scalia, and Thomas), in light of Justice Powell's statement that his vote in *Bowers* was the worst mistake of his career and Justice O'Connor's joining the majority in *Romer*. *Id.*

203. *See* Sunstein, *supra* note 147, at 67-68; *see also* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 975 (1989) (theorizing that *Bowers* may be reversible on equal protection grounds).

204. Sunstein, *supra* note 147, at 67-68.

205. *See* discussion *supra* part II.B.

206. 410 U.S. 113 (1973).

207. 405 U.S. 438 (1972).

tion and population may not be a legitimate area for state concern.[208] Furthermore, the country and the world are not in danger of becoming underpopulated; but, in fact, overpopulation is a valid concern.[209] Procreation as a policy objective underlying the protection of marriage also fails to recognize that not all heterosexual marriages serve a procreative function,[210] and homosexual couples can and do raise families, now in ever-increasing numbers.[211]

The additional reasons given for the preferential treatment afforded marriage are closely related: preservation of family unity and traditional values, and promotion of societal stability and productivity.[212] Courts, particularly those employing the functionalist approach to family, have allowed family to include homosexual relationships,[213] recognizing that these relationships do in fact encourage unity and individual happiness.[214] The notion that only the traditional family, consisting of those related by blood or marriage, encourages unity, stability, and productivity is outdated and increasingly unrealistic.[215] Social value is not confined solely to the institution of marriage. "[S]ame-sex and heterosexual couples embody many of the values and functions of a traditional family,"[216] and therefore serve society in the same way. Many gay men and lesbians have lifelong relationships with partners who provide psychological and emotional support, function as an economic unit, and provide an environment for raising chil-

208. *See* Friedman, *supra* note 99, at 161-62; Heeb, *supra* note 85, at 353-54. The *Roe* and *Eisenstadt* decisions focus on an individual's reproductive freedom. Therefore, denying a homosexual certain rights based on inability to procreate is at odds with these decisions and the right to privacy. *Id.* at 386-87.

209. *See* Friedman, *supra* note 99, at 161-62; *see generally* Alexander J. Stuart, Overpopulation: Twentieth Century Nemesis (1958) (discussing the risks and problems associated with overpopulation).

210. *See* Friedman, *supra* note 99, at 161-62; Heeb, *supra* note 85, at 387.

211. Libby Post, *The Question of Family: Lesbians and Gay Men Reflecting a Redefined Society*, 19 Fordham Urb. L.J. 747, 749, 756 (1992); Barbara Kantrowitz, *Gay Families Come Out*, Newsweek, Nov. 4, 1996, at 50, 52.

212. *See supra* part II.B.

213. *See supra* note 127.

214. *See* Bowers v. Hardwick, 478 U.S. 186, 205 (Blackmun, J., dissenting), *reh'g denied*, 478 U.S. 1039 (1986).

215. *See* Treuthart, *supra* note 84, at 96-97. Treuthart discusses a 1989 study done by the Massachusetts Mutual Life Insurance Company, in which 1200 random adults were asked to define "family." Almost 75% of the respondents chose the definition of "a group of people who love and care for one another" rather than "a group of people related by blood, marriage, or adoption." *Id.*

216. Melton, *supra* note 128, at 499-500 (noting that non-traditional family arrangements, including group living, unmarried heterosexual and homosexual cohabitants, and single parent families, preserve and encourage socially valuable qualities of family including, "support, loyalty, values, welfare and love and affection").

dren.[217] These relationships are equally as important to societal stability and productivity as conventional marital relationships.[218]

In addition, because promotion of heterosexual marriages is an underlying principle of societal stability,[219] the state policy should actually increase the number of heterosexual marriages.[220] It is illogical, however, to assume that more heterosexuals are marrying because homosexuals are prohibited from doing so,[221] or that individuals who would otherwise choose same-sex marriage are instead entering heterosexual marriages because same-sex marriages are prohibited.[222] Furthermore, when one considers that homosexuals cannot get married, the promotion of heterosexual marriages under the guise of societal stability is further jeopardized as a legitimate state policy reason for protecting marriage.[223] In *Marvin v. Marvin*,[224] the California Supreme Court stated that granting remedies to nonmarital partners would not discourage marriage, because "young couples live together [before marriage] to make sure that they can successfully later undertake marriage."[225] This holds true for homosexuals as well, in that granting gays and lesbians the right to recover will not discourage marriage, because gays and lesbians simply cannot currently get married.[226]

Another reason proffered for the state's vigorous protection of traditional marriage is an interest in heterosexual hegemony, that is, encouraging heterosexual lifestyles, while discouraging homosexual lifestyles. This, however, is not a legitimate state purpose. "[T]here is no reason to believe that allowing same-sex couples to marry would induce many people to choose same-sex rather than opposite-sex mar-

217. *Id.* at 500 & n.17 (citing Mary Mendola, The Mendola Report: A New Look at Gay Couples 197-213 (1980) (discussing long term lesbian and gay relationships)); *see* Martin, *supra* note 17, at 1477.

218. *See* Martin, *supra* note 17, at 1477; *see also Extending Consortium Rights*, *supra* note 20, at 928-31 (discussing how non-traditional family relationships serve the same functions and have the same attributes as the traditional family unit).

219. *See supra* notes 100-03 and accompanying text.

220. Boyle, *supra* note 176, at 131-32.

221. *Id.* at 132 ("There is no evidence that the current and long-standing policy of promoting marriage by penalizing the unmarried encourages a heterosexual to marry if he or she was not already so inclined . . . .").

222. Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 Suffolk U. L. Rev. 981, 992-93 (1991). The author notes, however, that there exists no data to directly establish this, because no states currently recognize same-sex marriages, thus no useful comparison can be made. *Id.* at 993.

223. *See* sources cited *supra* note 173.

224. 557 P.2d 106 (Cal. 1976) (en banc).

225. *Id.* at 122.

226. *See* sources cited *supra* note 173; *see also* Elden v. Sheldon, 758 P.2d 582, 592 n.2 (Cal. 1988) (en banc) (Broussard, J., dissenting) ("[T]he state's interest in marriage is not advanced by precluding recovery to couples who could not in any case choose marriage.").

riage."[227] In addition, even if discouraging homosexual lifestyles and homosexual marriage did increase the numbers of heterosexual marriages, it is unlikely that marriages between straight and gay individuals would be valuable to society or to the individuals involved.[228] Nor would state recognition of homosexual relationships necessarily promote immorality, for "according to a variety of theories, homosexual behavior is morally permissible."[229] Therefore, discouragement of homosexual relationship and fear of the state's recognition of such relationships are not legitimate reasons for touting protection of traditional marriage as a valid purpose behind denying homosexuals tort recovery.

If, however, protection of marriage to foster the goals discussed is found be a legitimate state purpose, denying gays and lesbians the rights of action for bystander distress and loss of consortium must be rationally related to this purpose. Depriving homosexuals standing to assert these causes of action does not further the end of promoting marriage, because homosexuals are currently unable to get married.[230]

Notably, however, a judge in Hawaii has held that the sex-based classification in the Hawaii Revised Statute section 572-1[231] violates the equal protection clause of the Hawaiian Constitution insofar as it is construed to prevent the issuing of a marriage license to a same-sex couple.[232] This established that marriage licenses must be issued to homosexual couples, thereby allowing them to have a state-recognized marriage. There are, however, several obstacles to the implementation of this ruling. First, a stay has been issued pending appeal.[233] Second, Congress has passed the Defense of Marriage Act,[234] which

227. Strasser, *supra* note 107, at 976; *see also* People v. Onofre, 415 N.E.2d 936, 941 (N.Y. 1980) ("Certainly there is no . . . empirical data submitted which demonstrates that marriage is nothing more than a refuge for persons deprived by legislative fiat of the option of consensual sodomy outside the marital bond."), *reh'g denied*, 420 N.E.2d 412 (N.Y.), *cert. denied*, 451 U.S. 987 (1981).

228. Strasser, *supra* note 107, at 976-77.

229. Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 Temp. L. Rev. 937, 966-67 (1991); *see also* Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980) (stating that morality changes with the times and social landscape, and "no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority").

230. *Developments*, *supra* note 8, at 1622 ("[C]ourts would not undermine the state's interest in promoting traditional marriage by granting gay and lesbian partners recovery for serious emotional harm caused by tortfeasors.").

231. Haw. Rev. Stat. § 572-1 (1985).

232. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694942, at *21-22 (Haw. 1st Cir. Ct. Dec. 3, 1996).

233. Goldberg, *supra* note 173, at A1. It may be years until the appellate procedure in this case is exhausted, and the result could very well be that the statute does not violate the Equal Protection Clause of the Hawaiian Constitution.

234. Defense of Marriage Act, Pub. L. No. 104-199 § 2(a) & 3(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1996) and 1 U.S.C. § 7 (1996)). Commentators have expressed serious doubt as to whether the Defense of Marriage Act is constitu-

provides that no state is required to give effect (that is, full faith and credit) to any same-sex marriage. Thus, a gay or lesbian couple validly married in Hawaii may not be recognized as married in any other state that has followed this act. Due to these measures, it seems unlikely that widespread recognition of same-sex marriage will occur in the near future.[235] Therefore, because homosexuals cannot get married presently, denying them the rights of action for loss of consortium and bystander distress in the name of protecting marriage is not rational, and therefore does not pass muster under *Romer.*

3. Protecting the Functional Family Relationship

Justice Blackmun, writing in dissent in *Bowers v. Hardwick*,[236] stated: "[W]e protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households."[237] Protecting a functional family unit is a legitimate state purpose, because encouraging a functional family is "consistent with the policy of encouraging the stabilizing social values that marriage and the family serve,"[238] and the traditional family is not the only relationship that possesses the valuable qualities society desires.[239] The family is a building block of American society,[240] and encouragement of the relationships that share the defining characteristics is beneficial to both the individual and society,[241] and is a legitimate state purpose. Precluding a homosexual partner from asserting claims deriving from injuries to his partner, however, is not rationally related to this legitimate state purpose. Homosexual couples with sta-

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tional. Advocates of same-sex marriage say the Congress cannot legislatively eradicate the full faith and credit cause of the Constitution. Paul Reidinger, *Politically Expedient*, A.B.A. J., Oct. 1996, at 79. There are also federalism concerns, as marriage is traditionally the province of the states, not the federal government. *Id.* at 80. Another compelling argument is that marriages should be treated like divorces and custody actions, two types of decrees that the Supreme Court has held are entitled to full faith and credit. *See* Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: In Recognition of Same-Sex Marriage*, 28 Colum. Hum. Rts. L. Rev. 97, 119-22 (1996).

235. Goldberg, *supra* note 173, at A1, A26. Proponents of same-sex marriage, however, have predicted that the first same-sex wedding will occur in Hawaii during 1997. Slind-Flor, *supra* note 173, at A8.

236. 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

237. *Id.* at 205 (Blackmun, J., dissenting).

238. Treuthart, *supra* note 84, at 97. For a discussion of these social values, see *supra* part II.C.

239. *See* Melton, *supra* note 128, at 499-500.

240. De Burgh v. De Burgh, 250 P.2d 598, 601 (Cal. 1952) (en banc) ("[F]amily is the basic unit of our society, the center of the personal affections that ennoble and enrich human life . . . it nurtures and develops the individual initiative that distinguishes a free people.").

241. *See* Treuthart, *supra* note 84, at 98.

ble and significant relationships are functional families,[242] and it is illogical to contend that these relationships do not satisfy the relationship requirements because the state is trying to encourage and protect functional families.

It is the functionalist approach to family, after all, that is perhaps more consistent with the "policy of encouraging the stabilizing social values that marriage and the family serve."[243] Use of the literal and traditional definition of family denies benefits and protection to an ever-increasing segment of society, those who cannot be pigeonholed into one of these strict categories.[244] Defining family and marriage using a functionalist approach would do more to promote the underlying values of family, recognizing all socially valuable relationships, not just those that can be described by the traditional terminology.[245] Even those relationships that can be tagged with a traditional term, such as a marriage, do not necessarily exhibit the values and stability that society wants to encourage. Using the formalist definition of marriage as the standard for determining the social value of a relationship is both overinclusive and underinclusive. It is overinclusive in that it protects marriages that may not be serving any valuable social purpose,[246] and underinclusive in that it does not recognize those relationships existing outside of a legal marriage that do encourage societal values and serve important social purposes.[247]

An example can clarify the distinction between the functionalist approach and the formalist approach. Consider two married heterosexuals who live apart, are economically independent, share no children, and give each other no emotional support. Using a formalist definition, this relationship would qualify as a marriage, and the two parties would be a family.[248] Using a functionalist definition, however, the relationship may not be deemed a family.[249] Furthermore, it is impor-

242. *Id.* at 96-99; *see also* Melton, *supra* note 128, at 517 ("[Courts] will need to discard previous attitudes of what constitutes a 'family.'. . . The law should focus on the societal interests of protecting long-term, supportive relationships.").

243. Treuthart, *supra* note 84, at 97; *see* Ettelbrick, *supra* note 83, at 157.

244. *Looking for a Family Resemblance*, *supra* note 84, at 1644-45; *see* Swift, *supra* note 65, at 588 (noting that many people who consider themselves a family are not so considered by the law).

245. Treuthart, *supra* note 84, at 98.

246. An example of this would be a married couple who have lived apart for years, are economically independent, have no children, but who have not ended the marriage due to religious beliefs. *Id.*

247. *See* Martin, *supra* note 17, at 1485-86.

248. *Looking for a Family Resemblance*, *supra* note 84, at 1644-45.

249. *See* Treuthart, *supra* note 84, at 98; *see also Looking for a Family Resemblance*, *supra* note 84, at 1646 (discussing the functionalist approach as considering characteristics of a relationship to determine if that relationship constitutes a family). Here, the relationship described between the married couple would carry the formalist term "marriage," but likely would not serve the emotional and functional purposes of a nuclear family relationship.

tant to consider whether this "marriage" is, in fact, serving a socially productive purpose, or enhancing societal values.

To summarize, the states have advanced only two legitimate state purposes: limiting liability and protecting a functional family relationship. Denying homosexual lifetime partners the opportunity to assert a cause of action for loss of consortium or bystander distress, however, is not rationally related to these legitimate purposes.

IV. PROPOSAL: THE STABLE AND SIGNIFICANT RELATIONSHIP TEST

To pass the *Romer* rational relationship test, a limitation must be established that is rationally related to the legitimate state purposes of limiting liability and protecting the functionalist family. A stable and significant relationship test, using the common law criteria of marriage to determine the stability and significance, would be rationally related to the need to limit liability and protect the functional family, and such a relationship between homosexuals would satisfy the relationship requirements for loss of consortium and bystander distress.

A. *Criteria of Common Law Marriage: Guidelines to Determine a Relationship's Significance and Stability*

The criteria to decide the existence of a common law marriage[250] vary in each jurisdiction recognizing common law marriages.[251] The typical criteria are: (1) an express or implied agreement to be husband and wife; (2) holding out;[252] and (3) cohabitation.[253] Once the propo-

250. In Travers v. Reinhardt, 205 U.S. 423 (1907), the Supreme Court examined the common law criteria of marriage. The Court stated,

> Marriage in fact, as distinguished from a ceremonial marriage, may be proven in various ways. Of course the best evidence of the exchange of marriage consent between the parties would come from those who were personally present when they mutually agreed to take each other as husband and wife, and to assume all the responsibilities of that relation. . . . It may [also] be shown by [cohabitation and reputation as husband and wife].

Id. at 436.

251. Homer H. Clark, Jr. & Carol Glowinsky, Cases and Problems on Domestic Relations 95 (5th ed. 1995). Currently, thirteen states and the District of Columbia recognize common law marriage. *Id.*

252. Holding out is defined as:

> holding forth to the world by the manner of daily life by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation.

Travers, 205 U.S. at 442.

253. *See* LeBlanc v. Yawn, 126 So. 789, 790 (Fla. 1930); Eaton v. Johnston, 681 P.2d 606, 608 (Kan. 1984); Russell v. Russell, 865 S.W.2d 929, 932 (Tex. 1993). *Eaton* also lists "capacity to marry" as a criteria for common law marriage. *Eaton*, 681 P.2d at 608. See *infra* note 255 for a discussion of this factor.

nents of the marriage have proven cohabitation and holding out, an implied contract to take each other as husband and wife and a common law marriage may be inferred.[254]

These same criteria, with appropriate modifications, should be the standard to determine whether a relationship is stable and significant, and therefore capable of satisfying the relationship requirements. These modifications would include focusing on the intent of the parties to coexist as life partners, rather than husband and wife, and eliminating any requirement of capacity to marry.[255] More specific factors have been suggested, and are appropriate to the extent they embody the ideas of cohabitating and holding out. For instance, consideration of "degree of emotional commitment and interdependence; interwoven social life . . . financial interdependence . . . cohabitation; longevity; and exclusivity"[256] of a relationship would indicate that the necessary intent, cohabitation, and holding out were part of the relationship.[257]

The suggested stable and significant relationship test would therefore include gay and lesbian life partners, but would continue to exclude friends, roommates, and distant relatives. This approach embodies the ideology of *Braschi v. Stahl Associates Co.*[258] and *Butcher v. Superior Court*,[259] and the functionalist approach to family. In addition, this test provides a standard that courts have used, and laws and guidelines exist to assist in the application of the standard. Even courts in jurisdictions that do not recognize common law marriage likely have experience in applying the criteria of common law marriage,[260] and much case law exists to guide those jurisdictions that do not have frequent occasion to examine and apply the common law marriage criteria.

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254. *Travers*, 205 U.S. at 436-37.

255. One necessary modification would be to eliminate "capacity to marry" as a criterion where that is required. *See Eaton*, 681 P.2d at 608. This is not a major obstacle, as this Note is not arguing that homosexuals contract common law marriages. This Note suggests that the applicable criteria, which are holding out and cohabitation, be used to determine a stable and significant relationship.

256. *See* Post, *supra* note 211, at 749-50.

257. The presence of sexual relations could also be an important factor, but this could be problematic, for in some states sexual relations between members of the same sex is a crime. *See* Bowers v. Hardwick, 478 U.S. 186, 187-88, *reh'g denied*, 478 U.S. 1039 (1986). In addition, the presence or absence of sexual relations is not necessarily a defining characteristic of a marriage.

258. 543 N.E.2d 49 (N.Y. 1989).

259. 188 Cal. Rptr. 503 (Ct. App. 1983), *overruled by* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (en banc).

260. *See, e.g.*, *In re* Estate of Watts, 294 N.E.2d 195, 197-98 (N.Y. 1973) (applying Florida law to determine if a common law marriage entered into in Florida would be recognized as valid in New York). *But see* Metropolitan Life Ins. Co. v. Chase, 294 F.2d 500, 504-05 (3d Cir. 1961) (holding that New Jersey would not recognize a common law marriage of another jurisdiction, therefore New Jersey courts do not have the opportunity to apply common law marriage criteria).

B. *Application of the* Romer *Rational Relationship Test to the Stable and Significant Relationship Test*

The stable and significant relationship test, guided by the criteria of common law marriage, is rationally related to limiting liability and promoting and protecting the functional family, and therefore conforms with the Supreme Court's decision in *Romer*. Genuine concerns exist regarding widening circles of liability. It is impracticable and unreasonable to permit everyone who witnesses an accident to recover for bystander liability, or to let someone recover for loss of consortium of a person she barely knows.[261] Courts have responded to these concerns with judicially created classifications to limit the number of possible plaintiffs, and have determined that a relationship requirement is necessary to limit recovery to those who have suffered a real and legitimate loss.[262] The stable and significant relationship test would maintain fairly strict limits on which relationships merit recovery, but would allow individuals the opportunity to prove that their relationship deserves recovery.[263] In addition, satisfaction of the relationship requirements would not automatically permit the plaintiff to recover, as the plaintiff would still need to prove foreseeability and that defendant owed him a duty.[264]

The stable and significant relationship test is also rationally related to the protection and promotion of the functional family relationship. Indeed, the terms "stable and significant relationship" and "functional family" are essentially synonymous,[265] evidenced by a case such as *Braschi*.[266] Recognizing the validity of the stable and significant relationship as a close relationship that satisfies the relationship prongs of loss of consortium and both the zone of danger and bystander proximity approaches to bystander distress would provide support to those who "function as a family by caring for and supporting one another on a daily basis."[267] The value of the family is "encouragement of stable, affectionate, and economically efficient human relationships."[268] The

261. *See supra* notes 65-66 and accompanying text.

262. *See supra* notes 64-72 and accompanying text.

263. The advocated stable and significant relationship test would allow the "life partners" in Coon v. Joseph, 237 Cal. Rptr. 873, 874, 876-78 (Ct. App. 1987), to satisfy the relationship requirement, but would still exclude a friendship like that asserted in Carlson v. Illinois Farmers Ins. Co., 520 N.W.2d 534, 538 (Minn. Ct. App. 1994) (holding a young woman could not recover for bystander distress suffered from witnessing the death of her best friend in a car accident).

264. *See supra* notes 183-87 and accompanying text.

265. See *supra* notes 110-14, 111-24 and accompanying text for discussions of how these terms are defined and used in this context.

266. 543 N.E.2d 49, 53-54 (N.Y. 1989). See *supra* note 127 for other cases demonstrating the similarity in meaning of these terms.

267. Ettelbrick, *supra* note 83, at 122; *see also* Post, *supra* note 211, at 749 ("[L]esbian and gay families reflect the same love and commitment as their heterosexual counterparts.").

268. *Looking for a Family Resemblance*, *supra* note 84, at 1647-48.

stable and significant relationship recognizes this, and is at least rationally related to accomplishing this end.

CONCLUSION

Currently, no jurisdiction allows homosexuals the right of action for bystander distress or loss of consortium, when the injured party is his or her life partner, because these same-sex relationships are not deemed to satisfy the respective relationship requirements of these torts. The Supreme Court's decision in *Romer v. Evans*[269] dictates the use of a rational relationship test when disparate treatment is predicated on a classification based on sexual orientation.[270] In those jurisdictions that recognize loss of consortium and bystander distress, precluding homosexuals from asserting the causes of action is a denial of equal protection that violates the *Romer* rational relationship test.

Of the state purposes advanced in support of denying the rights of action, the only truly legitimate purposes are limiting liability and protecting and promoting functional family relationships. Denying gays and lesbians the right of action, however, is not rationally related to these purposes. In contrast, a stable and significant relationship test, using the criteria of a common law marriage to determine the stability and significance, will provide equal protection in compliance with *Romer*. This test would allow homosexuals with socially valuable relationships standing to recover for injury to their partners, equivalent to the benefits and protection afforded similarly situated heterosexuals.

269. 116 S. Ct. 1620 (1996).
270. *Id.* at 1627.