woman in her capacity as a mother have been held compensable.[46] The parent-child relationship is largely reciprocal and it should be assumed that damages are as real to one as the other. Loss of comfort and society have been held in other states to be compensable for the loss of a wife[47] or husband.[48] Clearly, the child-parent relationship is just as meaningful as the husband-wife relationship and destruction of either should result in compensation to the survivor.

Contrary to the expectation that only nominal damage may be awarded under a pecuniary loss doctrine, awards of substantial damages are commonplace.[49] In case after case, excessive verdicts have been allowed in amounts which have apparently exceeded the measure permitted by the pecuniary loss rule and apparently allowing compensation for damages which are not strictly of a pecuniary nature.[50] It is probably the emotional harm and not the pecuniary harm that is being recognized by the jury.[51] These judicial gymnastics are no longer necessary in view of recent developments in tort law.[52] It is time to recognize loss of society and companionship and infliction of mental anguish as proper elements in determining damages for the wrongful death of a minor. They need not be pigeonholed as "pecuniary" losses to fit the statutes or decisions in a given jurisdiction. They are nonpecuniary but nevertheless real damages to the beneficiaries of the deceased child.

Wardlow is a step in the right direction but it did not go far enough. Loss of society and companionship should be recognized as valid nonpecuniary damages. In addition, mental grief, anguish, and suffering of the parents should be recognized as proper nonpecuniary damages compensable in the wrongful death of a minor. The Iowa legislature should amend Iowa Rule of Civil Procedure 8 to include (1) actual pecuniary losses, (2) loss of society and companionship, and (3) mental anguish and suffering of the proper beneficiaries as proper elements in determining damages for the wrongful death of a minor.

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[46] Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632 (Iowa 1969); *see also* DeMoss v. Walker, 242 Iowa 911, 48 N.W.2d 811 (1951).

[47] Skoglund v. Minneapolis St. Ry., 45 Minn. 330, 47 N.W. 1071 (1891).

[48] Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959).

[49] Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538, 541 (1955).

[50] Fussner v. Andert, 261 Minn. 347, 352, 113 N.W.2d 355, 360 (1961).

[51] Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538, 548 (1955).

[52] Decof, *Damages in Child Wrongful Death Cases*, 7 TRIAL 33, 38 (1971).

Domestic Relations—MINNESOTA MARRIAGE STATUTE DOES NOT PERMIT MARRIAGE BETWEEN TWO PERSONS OF THE SAME SEX AND DOES NOT VIOLATE CONSTITUTIONALLY PROTECTED RIGHTS.—*Baker v. Nelson* (Minn. 1971).

Appellants, applicants for a marriage license, were denied their request that a marriage license be issued to them on the sole ground that they were of the same sex (male). The district court, Hennepin County, Minnesota, ruled that the clerk of the county district court was not required to issue a marriage license to applicants of the same sex and specifically directed that a license not be issued to appellants. *Held*, affirmed, that the Minnesota statute governing marriage[1] does not authorize marriage between two persons of the same sex and the marriage of two persons of the same sex is prohibited. The court also held that the statute does not offend the first, eighth, ninth, or fourteenth amendments to the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

The Minnesota supreme court made two distinct holdings concerning marriage between persons of the same sex. First, even though no specific prohibition can be found, the court held "that Minn. St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited."[2] Second, in holding that "same-sex" marriage is prohibited by the statute, the court held "that Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution."[3]

Examining the applicable statute, it appears that the Minnesota court correctly interpreted the legislative intent as prohibiting marriage between two persons of the same sex. As the court stated, in defining marriage, "the term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as 'husband and wife' and 'bride and groom'."[4] In

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[1] MINN. STAT. ch. 517 (1969). The section dealing with the validity of a marriage reads as follows:

> 517.01 MARRIAGE A CIVIL CONTRACT. Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

[2] Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971). MINN. STAT. ch. 517.03 (1969) reads as follows:

> MARRIAGES PROHIBITED. No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; excepting re-intermarriage between such parties; nor within six months after either was a party to a marriage which has been adjudged a nullity, excepting intermarriage between such parties; nor between parties who are nearer than second cousins; . . . nor between persons either one of whom is imbecile, feeble-minded, or insane; nor between persons one of whom is a male person under 18 years of age or one of whom is a female person under the age 16 years. . . .

[3] 191 N.W.2d 185, 187 (Minn. 1971).

[4] *Id.* at 186. *See* MINN. STAT. §§ 517.03, 517.08 (1969).

further support of the court's holding, the Minnesota marriage statute specifies that the marriage license is to be obtained in the county in which the *woman* resides.[5] An objective view of the Minnesota marriage statute would thus necessitate a holding that the legislature intended to authorize only marriages between a man and a woman.

The paramount issue, then, is whether or not a statute which prohibits marriage between two people of the same sex is a violation of constitutionally protected rights. In its short opinion, the Minnesota supreme court summarily dismissed this possibility.

Appellants contended that the prohibition of a "same-sex" marriage denies them a fundamental right guaranteed by the ninth amendment to the United States Constitution, made applicable to the states by the fourteenth amendment. Also, they contended that they were "deprived of liberty and property without due process and . . . [were] denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment."[6] Basically, their allegation was that because marriage is a basic civil right, it is irrational and discriminatory to restrict marriage to people of the opposite sex.

There are no other reported cases in the area of homosexual marriage, but the United States Supreme Court has rendered an opinion on the right of marriage and the right of freedom in selecting a marriage partner in a racial discrimination case where miscegenation statutes were held unconstitutional.[7] The guidelines laid down in that case provide a reasonable, rational basis for restricting the freedom of marriage and the freedom to marry the person of one's choice.

The Minnesota court, relying on a statement from *Skinner v. Oklahoma*[8] that "[m]arriage and procreation are fundamental to the very existence and survival of the race",[9] held that "[t]his historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend."[10] It should be noted, however, that the United States Supreme Court has upheld the position that the due process clauses of state and federal constitutions do not prevent a state government from adapting to the continuous changes in social and economic conditions.[11] In accordance with this viewpoint, the court could have reasonably reached its conclusion by considering changing moral conditions rather than basing it on a "deeply founded historic institution." There have, in fact, been continuous social changes concerning homosexuality in the United States. For example, did the court take into consideration that "[h]omosexuality exists in all classes

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5 MINN. STAT. § 517.07 (1969).
6 191 N.W.2d at 186.
7 Loving v. Virginia, 388 U.S. 1 (1967).
8 316 U.S. 535 (1942).
9 191 N.W.2d at 186 *citing* 316 U.S. 535, 541 (1942).
10 191 N.W.2d at 186.
11 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934).

of American society, among every race and nationality, and every age group,"[12] or that homosexuality is practiced more openly today than at any other time in history?[13]

The court commented briefly on two cases, *Griswold v. Connecticut*[14] and *Loving v. Virginia*,[15] which are landmark cases in the areas of marital freedoms and civil rights, and which "may support . . . [the] thesis that traditional state control of the marital status has to give way to current notions of individual liberty and the right of privacy."[16] They are particularly important since, together, their holdings and implications may compel restriction of state regulation of marriage.[17]

In *Griswold*, a law forbidding the dissemination of birth control information, allegedly justifiable by virtue of the state's concern over marital relations, was held to be unconstitutional because bedroom privacy is so fundamental that it need not be mentioned in the Bill of Rights. The unanimous ruling in *Loving* declared sixteen states' marriage statutes which prohibited marriage between persons of different races unconstitutional, "stating in effect that *any* statutory restrictions on the freedom of choice regarding a partner in marriage must, in order to withstand the scrutiny of the Constitution, rest on a reasonable medical or moral ground and fall clearly within the state's competence to regulate the formation of the marriage contract."[18]

Prior to the decisions in *Griswold* and *Loving*, which will be analyzed herein, the California supreme court delivered a most consistent and relevant opinion in *Perez v. Lippold*,[19] where it held a California miscegenation statute unconstitutional. The majority opinion in that case held that the statute violated both the equal protection and due process clauses of the fourteenth amendment. The court conceded that the state could properly regulate marriage,[20] but stated that statutes intended to avoid a social evil must employ reasonable means to prevent it and that discriminatory and irrational laws are unconstitutional.[21] According to *Perez*, the permissible area of regulation involves those matters which are of legitimate concern to the state; specifically, the court noted health concerns.[22] The opinion stated that marriage is the

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12 R. MITCHELL, THE HOMOSEXUAL AND THE LAW 5 (1969).
13 *Id.*
14 381 U.S. 479 (1965).
15 388 U.S. 1 (1967).
16 Foster, *Marriage: A "Basic Civil Right of Man"*, 37 FORDHAM L. REV. 51 (1968).
17 *Id.*
18 Drinan, *The Loving Decision and The Freedom to Marry*, 29 OHIO ST. L.J. 358 (1968).
19 32 Cal. App. 2d 711, 198 P.2d 17 (1948).
20 *Id.* at 714, 198 P.2d at 18.
21 *Id.*
22 *Id.* at 718, 198 P.2d at 21. Justice Traynor cited an example where health reasons such as the transmission of communicable diseases justified denial of a marriage license, but said that even then, legislation must be based on tests of the individual rather than arbitrary classification.

right of the individual, and not the right of any racial group.[23] Thus, the right to marry means freedom to join in marriage with the person of one's choice, and the segregation statute impaired the right to marry.[24]

Marriage is a basic civil right.[25] As such, it is a constitutionally protected right and states cannot have complete control over the laws governing marriage. States' statutes are subject to federal re-examination and evaluation.[26] In defining marriage, the United States Supreme Court stated in *Griswold*: "Marriage is a coming together for better or for worse, hopefully enduring. . . . It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."[27] This is certainly not the standard definition of marriage found in Webster's Dictionary[28] or Black's Law Dictionary.[29] It is rather, an indication that the Supreme Court looks at marriage "as a civil contract, status or relationship."[30]

In *Loving*, the United States Supreme Court turned its attention directly to the question of freedom to marry and freedom of choice in choosing a partner:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. (cites omitted). To deny this fundamental freedom on so unsupportable a basis as the racial classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.[31]

The United States Supreme Court has thus reinforced the *Perez* decision with the statement quoted above. According to the *Loving* decision, marriage stat-

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[23] *Id.* at 715, 198 P.2d at 19.
[24] *Id.*
[25] Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[26] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).
[27] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
[28] WEBSTER'S NEW COLLEGIATE DICTIONARY 515 (2d ed. 1960) defines marriage as:
> State of being married; also, the mutual relation of husband and wife; wedlock; abstractly the social institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family. . . .

[29] BLACK'S LAW DICTIONARY 1123 (4th ed. 1968) defines marriage as:
> the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.

[30] Drinan, *supra* note 18, at 363.
[31] Loving v. Virginia, 388 U.S. 1, 12 (1967).

utes which restrict the choice of a marital partner will be held unconstitutional unless they are based on reasonable medical or moral evidence.[32] Whether or not such a basis exists is a question that must be answered. Although the *Loving* decision specifically stated that statutes prohibiting marriage solely on the ground of race are unconstitutional,[33] it carries a strong implication that the freedom to marry necessitates the right to a marital partner of one's choice unless some strong medical or moral reason can be shown. However, the Minnesota court merely stated that there is a clear difference between marital restrictions based on race and those based on sex.[34] But, is the prohibition of "same-sex" marriages based on some reasonable medical or moral evidence? In light of *Loving*, this question requires an answer, even if the court considered it obvious.

Concededly, marriage is a social relation which is, and traditionally has been, subject to the control of the state legislatures.[35] But, as stated previously, this control cannot be autonomous. Although it may be difficult to precisely establish limits, the exercise of a state's police power must be subject to constitutional limitations.[36] So even though marriage is subject to the police power of the state, the decisions in *Griswold* and *Loving* are subjecting it to more strenuous tests of constitutionality. In arriving at a determination of whether or not statutes arbitrarily classify or deprive someone of an individual liberty, both history and the possible consequence of the decision are important to the judge when reaching a conclusion.[37] "Except where there is impermissible classification on the basis of race, the problem essentially is one of weighing and balancing conflicting claims and making a reasonable and workable adjustment between individual, social, and public interests, all of which must be both recognized and delimited in some degree."[38] Although the Minnesota court was asked to rule on the specific question of whether or not "same-sex" marriages are authorized by the Minnesota statutes, the court was put in a position where in order for it to fully litigate that question, it must have considered such individual, social and public interests. In reaching its decision, the court must have recognized society's standing on homosexuality and also the public interest (through statutory provisions). But, no mention was made of these considerations. The point is that the protected interests must be recognized, and in doing so, the reasons for denying what has been defined to be a basic civil right will become more apparent.

Although the subject of freedom of marriage to the person of one's choice was surprisingly late in appearing before the Supreme Court,[39] that Court has

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32 Drinan, *supra* note 18, at 358.
33 Loving v. Virginia, 388 U.S. 1, 12 (1967).
34 191 N.W.2d at 187.
35 Maynard v. Hill, 125 U.S. 190, 205 (1888).
36 Foster, *supra* note 16, at 52.
37 *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).
38 Foster, *supra* note 16, at 55.
39 *Loving v. Virginia*, 388 U.S. 1 (1967) is the first case in which the Supreme Court addresses itself directly to the question of freedom to choose a marital partner.

established the boundaries within which a state may restrict this right.[40] When a basic civil right is allegedly violated, the victims should be entitled to a complete explanation and legal documentation as to why the state has the power to restrict that right.

The decision of the Minnesota court may have been in line with legislative intent, but in reaching such a decision it could have considered the reasons why such a restriction is not a violation of constitutionally protected rights, according to the requirements established by the United States Supreme Court in the *Griswold* and *Loving* decisions.[41] Sounder principles could have been relied on by the court than that of one idea being more "deeply founded" than another, or simply that there is a distinction between racial differences and sexual differences.[42] Probably the strongest reasons for prohibiting "same-sex" marriage are laws against homosexuality and society's disapproval of homosexual relationships. "Each of the jurisdictions in the United States has enacted a complex set of statutes in an attempt to regulate the sexual behavior of its citizens. A number of these statutory provisions affect the homosexual and his sexual expressions."[43] Nearly every state has a statute forbidding the act of sodomy. "Sodomy" has been used broadly to mean any sexual acts other than heterosexual genital to genital relations between human beings.[44] It has also been used to designate homosexual or heterosexual anal intercourse between humans and sexual relations between man and beast.[45] Minnesota's sodomy statute defines sodomy as knowing any person by the anus or with the mouth.[46] Even though acclamation of homosexuality has become increasingly liberated, it is still held in distaste among the general public. One main reason is society's concern that homosexuality is the cause of many adult-child relations.[47] Another reason for public concern over homosexuality is the belief that homosexuals indulge in "offensive displays of deviant behavior and preference."[48] Thirdly, society as a whole links homosexuality with force and violence.[49] Whatever the reasons, the American society, in general, disapproves of homosexual relations, and as long as laws exist which prohibit such activity, there would seem to be adequate justification for prohibiting homosexual marriage, by applying the standards set out in the *Loving* decision.

In a society with changing moral attitudes, the question of whether two

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40 Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

41 In the United States, the practice generally prevails that the decisions of the highest court are deemed to be binding on all lower courts which is descriptive of the rule of stare decisis. *See* E. POLLACK, FUNDAMENTALS OF LEGAL RESEARCH 7 (3d ed. 1967).

42 191 N.W.2d at 187.

43 R. MITCHELL, *supra* note 12, at 17.

44 *Id.*

45 *Id.*

46 Minn. Stat. 609.293 (1969).

47 R. MITCHELL, *supra* note 12, at 11.

48 *Id.*

49 *Id.* at 12.

persons of the same sex may legally marry will probably be raised again. The Minnesota court had an opportunity to examine the problem and had it used the tools provided in *Loving* and *Griswold* could have more fully discussed and possibly settled the question. But, although the court did cite those cases,[50] and briefly mentioned their holdings, the decision reached did not provide the answer to the question raised in *Loving*—whether there is sufficient moral or medical reason to restrict the right to marry the person of one's choice in a "same-sex" situation.

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[50] 191 N.W.2d at 186.