Love or Confusion? Common Law Marriage, Homosexuality and the Montana Supreme Court in Snetsinger v. Montana University System

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NOTE

LOVE OR CONFUSION?
COMMON LAW MARRIAGE, HOMOSEXUALITY
AND THE MONTANA SUPREME COURT IN
SNETSINGER V. MONTANA UNIVERSITY SYSTEM

Cassie Coleman*

I. INTRODUCTION

Disregarding already-enacted statutory provisions\(^1\) and risking redundancy, on November 2, 2004, the majority of Montana voters unnecessarily amended the Montana Constitution to define marriage, limiting it to unions between one man and one woman.\(^2\)

Disregarding the requests of the litigants before it, on December 30, 2004, the Montana Supreme Court issued its decision in *Snetsinger v. Montana University System*,\(^3\) unnecessarily confusing the definition of "marriage" in Montana. Barred from attaining any type of marriage in Montana, the Petitioners in *Snetsinger* requested that the court determine

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2. MONT. CONST. art. XIII, § 7.
their status as a class without altering Montana's marriage definitions. Instead, the court confused the definition of common-law marriage in Montana, which does not pertain to the Petitioners, and failed to determine the litigants’ status as a class.

Although the majority's decision in *Snetsinger* is a small victory for advocates of equal rights, the decision disserves all parties to the litigation and the citizens of Montana as a whole. First, the decision does not clarify the Petitioners' rights, which they asked the court to do. Second, the decision confuses the legal status of common-law marriage, especially for state, federal and private entities, as well as individuals who rely upon common-law marriage. The court would have better served the litigants and Montana as a whole if it had determined the class status of the Petitioners without handing down an opinion that needlessly confuses the issue of common-law marriage—a relationship the Petitioners are not even permitted to establish in this state.

This case note first summarizes the multiple opinions in *Snetsinger*, including the majority's holding, Justice Nelson's concurrence, and the two dissenting opinions, one written by Justice Rice and joined by Justice Warner, and the other authored by Chief Justice Gray. This note then discusses why the court should have established the Petitioners' class status, as well as determined that classifications based on sexual orientation should be analyzed under strict scrutiny. Next, this note explains the problems and potential ramifications of the majority's holding in *Snetsinger*, particularly for state, federal and private entities that rely upon Affidavits of Common-Law Marriage in making benefit determinations. Finally, this case note suggests directions for legislation and litigation aimed at establishing equal treatment of homosexuals.

**II. THE FACTS AND OPINIONS**

**A. The Facts**

Carol Snetsinger and Nancy Siegel, and Carla Grayson and Adrianne Neff, employees of the Montana University System and their same-sex partners, together with PRIDE, Inc., a non-profit corporation (the Petitioners), brought suit against the
Montana University System, the Board of Regents and the Commissioner of Higher Education on February 4, 2000. They alleged that the University System's policy of allowing all heterosexual employees to purchase dependent benefits, while denying this same opportunity to all homosexual employees, was unconstitutional as it "treats gay people as second-class citizens, burdens their choices about how to structure their intimate relationships, stigmatizes their families, and devalues them as members of society." The University System's policy permitted employees to purchase insurance for their partners if they were joined in a "solemnized marriage" under section 40-1-301 of the Montana Code, were married using a Declaration of Marriage without solemnization pursuant to section 40-1-311, or had signed an Affidavit of Common-Law Marriage (the Affidavit). The Affidavit stated as follows:

**AFFIDAVIT OF COMMON-LAW MARRIAGE**

We, the undersigned, both being over the age of 18 years, have mutually consented and contracted to become husband and wife; we are now, and have been since (date), living together as husband and wife, and have mutually consented to hold towards each other the relationship of husband and wife, and to assume towards each other all the responsibilities and duties which the law attached to such a relationship.

Signing the Affidavit allowed employees to purchase health insurance benefits through the University System's group plan for whoever signed the Affidavit with the University employee. The University System permitted only heterosexual couples to sign the Affidavit, stating the policy was based on Montana's marriage statutes. The Petitioners argued the policy was unconstitutional in that it permitted unmarried heterosexual couples to obtain health insurance benefits for their partners, while denying this same opportunity to all similarly situated homosexual employees. The Petitioners requested that the court analyze the University System's policy under strict scrutiny either by granting them suspect class status, or by determining classifications based on sexual orientation are, in

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5. Id.
7. Id. ¶ 123 (Rice, J., dissenting).
8. Id. ¶ 6.
9. Id. ¶ 21.
10. Appellants' Opening Brief at 5, Snetsinger (No. 03-238).
all reality, actually based on sex, which is currently a suspect class in Montana.\textsuperscript{11} At the very least, the Petitioners argued the University System's policy of determining dependents for insurance purposes failed to pass even rational basis review, the lowest level of scrutiny.\textsuperscript{12}

In creating its employee benefits plan, the University System could have provided benefits for any dependents or limited the number of eligible dependents based on any number of criteria. "Among these many options, Respondents chose eligibility to marry as the dividing line, defining eligibility for benefits in sex-based terms."\textsuperscript{13} In objecting to the University System's employee benefits plan, the Petitioners never argued that \textit{Snetsinger} was about marriage. Instead, they argued it was "about equality in employment."\textsuperscript{14} Further, the Petitioners expressly stated: "This lawsuit only asks the Court to determine whether Respondents have a compelling reason for using the sex-based definition of marriage to determine eligibility for benefits."\textsuperscript{15} They also argued the University System's policy violated the dignity clause contained in article II, section 4 of the Montana Constitution, in that the policy punished University employees who had same-sex domestic partners because it "devalu[ed] their contributions to society, treat[ed] them as second-class citizens, and underm[ed] their ability to maintain their family relationships, to provide responsibly for their families and to live self-directed lives."\textsuperscript{16}

In response, the University System argued that sexual orientation has not been defined as a suspect class by either the Montana Supreme Court or the U.S. Supreme Court, and that the court should avoid making such a determination in the \textit{Snetsinger} case.\textsuperscript{17} It further argued the Petitioners did not have a fundamental right to health insurance and that the policy was designed to give effect to all recognized forms of marriage in

\begin{itemize}
  \item \textsuperscript{11} Id. at 14-17.
  \item \textsuperscript{12} Id. at 26-33. Where a policy or law implicates a fundamental right, the court must apply strict scrutiny to determine whether classifications discriminating on such a basis are constitutional, and the proponents of such law or policy must establish a compelling state interest for the classification. \textit{See}, \textit{e.g.}, \textit{Wadsworth v. State}, 275 Mont 287, 298-99, 911 P.2d 1165, 1171-72 (1996).
  \item \textsuperscript{13} Appellants' Opening Brief at 11, \textit{Snetsinger} (No. 03-238).
  \item \textsuperscript{14} Id. at 3.
  \item \textsuperscript{15} Id. at 11 n.4.
  \item \textsuperscript{16} Id. at 39.
  \item \textsuperscript{17} Respondents' Brief at 4-6, \textit{Snetsinger v. Mont. Univ. Sys.}, 2004 MT 390, 325 Mont. 148, 104 P.3d 445 (No. 03-238).
\end{itemize}
Montana; in effect, a permissible, reasonable and rational classification.\textsuperscript{18} The University System argued, "[w]hile homosexuals are no doubt the recipients of some degree of discrimination, this is not enough to justify a designation of a suspect class."\textsuperscript{19} Granting suspect class status to homosexuals, the University System alleged, "will have ramifications far beyond this case and will cast doubt upon the constitutionality of numerous statutes that may have a secondary or unintended effect of excluding homosexuals from some benefit or type of protection."\textsuperscript{20}

The University System argued its policy did not discriminate based on sex because both men and women are equally discriminated against and that the homosexual petitioners "are capable of marrying. They just may not marry a person of their own sex."\textsuperscript{21} The University System asserted the policy was based on marriage, in that signing an Affidavit of Common-Law Marriage created a presumption of marriage that Montana recognized.\textsuperscript{22} The University System further reasoned that because the policy discriminated based on marital status, same-sex and different-sex couples were not legally similarly situated because the heterosexual couple signing the Affidavit was validly married, a relationship the legislature has specifically barred homosexual couples from establishing.\textsuperscript{23} The University System argued its reliance "on the state marriage statute [was] inherently rational and [was] consistent with the state's concept of marriage as expressed in state law."\textsuperscript{24} Finally, the Appellants stated the court should not consider the University System's motive because the case presented a public policy question that should be left to the political process.\textsuperscript{25}

The Petitioners disagreed with the University System's public policy argument, stating in their reply brief, "[t]he judiciary's role in protecting constitutional rights becomes all the more crucial when the rights of minorities are involved because it is far more difficult to protect their interests through

\begin{itemize}
\item \textsuperscript{18} Id. at 7, 19.
\item \textsuperscript{19} Id. at 6.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 19
\item \textsuperscript{22} Id. at 27.
\item \textsuperscript{23} Respondents' Brief at 27, Snetsinger (No. 03-238).
\item \textsuperscript{24} Id. at 35.
\item \textsuperscript{25} Id. at 36-40.
\end{itemize}
majoritarian political processes."  

B. The Majority's Holding

In a four to three majority opinion authored by Justice Regnier, the Montana Supreme Court reversed the district court's dismissal of the suit. The court held the Affidavit did not create a marriage for those couples who signed it, and therefore, the University System's benefits policy unconstitutionally discriminated based on sexual orientation, not marital status. The majority held the Affidavit, at most, constituted evidence of a common-law marriage in the event such a union was contested. The court further held its own precedent regarding common-law marriage consistently required extrinsic evidence to prove such a relationship: "[O]ur case law has required more than a signing of a piece of paper to establish a common law marriage."

The majority maintained its decision did not change common-law marriage, but rather, "reiterat[ed] and reaffirm[ed] existing common law marriage jurisprudence." The majority went on to hold in the Petitioners' favor: "[A]ny organization that adopts an administrative procedure in order to provide employment benefits to opposite-sex partners who may not be in a legal marital relationship, must do the same for same-sex couples. To not do so violates equal protection."

The majority reasoned that the University System's affidavit procedure violated equal protection because signing the Affidavit did not constitute a marriage as defined by Montana marriage laws. However, the court also clearly held that its decision did not address same-sex marriage:

Lest there be any doubt, the Appellants clearly stated, both in their brief and in oral argument, that they are not challenging Montana's marriage laws which provide marriage is available only to partners of the opposite sex. . . . Therefore, we have not been

27. Snetsinger, ¶ 27. Justice Cotter, Justice Leaphart and Justice Nelson also concurred in the majority opinion.
28. Id. ¶ 27.
29. Id. ¶ 33.
30. Id. ¶¶ 32-33.
31. Id. ¶¶ 35-36.
32. Id. ¶ 35.
33. Snetsinger, ¶ 27.
asked nor will we address the question of whether Montana’s marriage statutes discriminate against same-sex couples by denying them the right to marry.\textsuperscript{34}

Because the main issue litigated in \textit{Snetsinger} involved the Affidavit used by the University System, the court analyzed whether the Affidavit sufficiently established a valid marriage pursuant to Montana’s marriage laws. The court examined common-law marriage in Montana, finding it to be “an equitable doctrine used to ensure people are treated fairly once a relationship ends.”\textsuperscript{35} Following its own precedent on the issue, the court held three elements must be present to establish a common-law marriage. The couple must show that it: “1) is competent to enter into a marriage, 2) mutually consents and agrees to a common-law marriage, and 3) cohabits and is reputed in the community to be husband and wife.”\textsuperscript{36}

The court stated that it has generally applied the doctrine of common-law marriage upon the termination of a relationship to ensure the parties receive fair treatment, and that such a marriage must be established through the presentation of extrinsic evidence showing all elements of a common-law marriage simultaneously existed during the relationship.\textsuperscript{37} The majority held that where, as with the University System’s policy, the only evidence of a common-law marriage is a signed affidavit, a marriage is not created. The majority further reasoned that a policy allowing unmarried opposite-sex couples to sign an Affidavit of Common-Law Marriage when they may not be able to legally establish such relationships detracts from marriage rather than promotes it.\textsuperscript{38} “Those opposite-sex couples who fill out the Affidavit in order to receive benefits may be shocked to think that they have in fact entered into a marriage that requires court action to dissolve . . . .”\textsuperscript{39} The \textit{Snetsinger} majority’s reasoning is consistent with the court’s 1975 decision in \textit{Matter of Estate of McClelland}, where it declined to find the existence of a valid common-law marriage, even though the couple had signed an Affidavit of Common-Law Marriage, because the totality of the evidence failed to show the existence

\begin{footnotes}
34. \textit{Id.} ¶ 13.
35. \textit{Id.} ¶ 24.
37. \textit{Id.}
38. \textit{Id.}
\end{footnotes}
of a marriage.\textsuperscript{40}

As signing an affidavit does not create a marriage, but merely constitutes evidence of a marriage, the Snetsinger Court found marital status was not the discriminating factor in determining eligibility for benefits. Rather, the discrimination resulted from the University System's disparate treatment of same-sex and opposite-sex couples through its use of the Affidavit. The court reasoned a partner of a heterosexual employee would qualify for benefits by signing the Affidavit, while the partner of a lesbian or gay employee signing the same document would not qualify.\textsuperscript{41} Finally, the court applied the lowest level of scrutiny, the rational basis test, to the policy and found the Affidavit process served no legitimate governmental purpose and, therefore, violated the Equal Protection Clause of the Montana Constitution.\textsuperscript{42} The majority reasoned:

These two groups, although similarly situated in all respects other than sexual orientation, are not treated equally and fairly. The principal purpose of the Equal Protection Clause, Article II, Section 4, of the Montana Constitution, is to ensure citizens are not subject to arbitrary and discriminatory state action. Therefore, we conclude there is no justification for treating the two groups differently, nor is the University System's policyrationally related to a legitimate governmental interest. Once the illusory marital status is removed from the analysis, there is no legitimate governmental interest in treating the two groups differently.\textsuperscript{43}

Ultimately, the court declined to address whether the University System based its policy on sex and failed to clarify the Petitioners' status with regard to equal protection analysis.\textsuperscript{44}

\textbf{D. Dissenting Opinions}

Justice Rice's dissent, joined by Justice Warner, argued the majority "radically alter[ed] common law marriage in Montana, and fail[ed] to honor the reliance that many couples place in the law."\textsuperscript{46} The dissent further argued that the majority's decision included certain procedural errors in the way they handed down the decision.\textsuperscript{46} Disagreeing with the majority's assertion that its decision did not alter common-law marriage in Montana, Justice

\begin{itemize}
\item \textsuperscript{40} Id. \textsuperscript{¶} 25-26.
\item \textsuperscript{41} Id. \textsuperscript{¶} 26.
\item \textsuperscript{42} Id. \textsuperscript{¶} 27.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id. \textsuperscript{¶} 29.
\item \textsuperscript{45} Snetsinger, \textsuperscript{¶} 112 (Rice, J. dissenting).
\item \textsuperscript{46} Id. \textsuperscript{¶¶} 113-161 (Rice, J., dissenting).
\end{itemize}
Rice's dissent recognized the majority's problematic decision as it pertains to state, federal and private entities that rely on Affidavits of Common-Law Marriage.

The Court's error is further demonstrated by the practical realities of proving a common-law marriage. State, federal and private agencies routinely recognize common-law marriages by administrative declaration, and pay financial benefits based upon that administrative action. By law and by contract, these agencies defer to the law of the applicant's domiciliary state in regard to the validity and establishment of a common-law marriage. This is particularly true of federal law governing eligibility for various federal benefits.47

Justice Rice argued the "extrinsic evidence" rule developed by the majority had no basis in Montana law and, "as a practical matter, will interfere with efforts of various agencies, applying Montana law, to make common-law marriage determinations."48 He also argued, as did several amici, that the court should uphold "traditional marriage."49 "Marriage between a man and a woman is based upon thousands of years of cultural experience. Its legal status is founded upon hundreds of years of legal precedent."50 Justice Rice further reasoned that even if the University System's policy discriminates, the newly enacted Marriage Amendment permits such discrimination.51

Chief Justice Gray wrote a separate dissent arguing that reliance on affidavits makes for sound public policy because these documents provide sufficient evidence to presume a marital relationship consistent with Montana's common-law marriage statute.52 In addition, Justice Gray stated "there is nothing 'illusory' about the marital versus non-marital nature of the University System's policy."53 Couples who signed the Affidavit are presumed to be in a valid marriage, Justice Gray argued, even though it excluded same-sex couples, because Montana does not recognize same-sex marriage, common-law or otherwise.54

47. Id. ¶ 133 (Rice, J., dissenting).
48. Id. ¶ 136 (Rice, J., dissenting).
49. Snetsinger, ¶ 150 (Rice, J., dissenting). See also Amicus Curiae Brief of the Montana Catholic Conference, Snetsinger (No. 03-238) and Amicus Curiae Brief of National Legal Foundation, Snetsinger (No. 03-238).
50. Snetsinger, ¶ 150 (Rice, J., dissenting).
51. Id. ¶ 153 (Rice, J., dissenting).
52. Id. ¶ 171 (Gray, C.J., dissenting).
53. Id. ¶ 174 (Gray, C.J., dissenting).
54. Id. ¶¶ 166-78 (Gray, C.J., dissenting).
E. Concurring Opinion

Justice Nelson wrote a concurring opinion joined by no other members of the court in which he asserted that advocates for equal rights should base their arguments on an expanded view of the Montana Constitution's underutilized Equal Protection Clause. Justice Nelson argued laws and policies dependent on gender or sexual orientation violate the Dignity Clause contained in article II, section 4 of the Montana Constitution, and that classifications based on gender or sexual orientation are suspect. As a matter of Montana constitutional law, Justice Nelson asserted that laws and policies based on gender or sexual orientation should be subject to strict scrutiny, requiring the showing of a compelling state interest for such classification. According to Justice Nelson, under this type of analysis, the University System's policy would fail.

Justice Nelson determined homosexuals should be treated as a suspect class because “[i]t is overwhelmingly clear that gays and lesbians have been historically subject to unequal treatment and invidious discrimination,” and that “homosexuals are still among the most stigmatized groups in the nation.” Justice Nelson recognized and dismissed the fact that neither federal nor state court jurisprudence has found sexual orientation as an arbitrary classification or a “suspect class” for equal protection purposes.

This view, however popular, is inherently illogical when one acknowledges that the entire focus of laws directed at gays and lesbians is sex. Majoritarian morality and prevailing political ideology are offended by the fact that people of the same sex have sexual relations with each other. This offense translates into laws and policies that explicitly or implicitly demonize homosexuals and make them a disfavored class. Heterosexuals, on the other hand, are a favored class because their sexual relations are with persons of the opposite sex. Homosexuals are a disfavored class because their sexual relations are with persons of the same sex. Regardless, however, the defining criteria of either class is plainly and simply sex—or, to be more specific, with which sex one is

55. Id. ¶ 66, 70 (Nelson, J., concurring).
56. Snetsinger, ¶¶ 43-110 (Nelson, J., concurring).
57. Id. ¶ 109 (Nelson, J., concurring).
58. Id. ¶ 45 (Nelson, J., concurring).
59. Id. ¶ 50 (Nelson, J., concurring) (quoting Am. Psychiatric Ass'n, Fact Sheet: Gay, Lesbian and Bisexual Issues (Feb. 2000)).
60. Id. ¶ 82 (Nelson, J., concurring).
Justice Nelson further reasoned that no compelling state interest existed for denying the same benefits to employees with same-sex partners who were similarly situated to employees with opposite-sex partners.62

III. THE COURT SHOULD HAVE ADDRESSED THE ISSUES RAISED BY THE LITIGANTS AND DETERMINED HOMOSEXUALS CONSTITUTE A SUSPECT CLASS REQUIRING APPLICATION OF STRICT SCRUTINY ANALYSIS

Although consistent with Montana precedent, the limitations of the Snetsinger decision unnecessarily confuse common-law marriage without defining the Petitioners' class status. The majority's holding that merely signing an Affidavit of Common-Law Marriage does not create a marriage, but constitutes evidence weighing in favor of the finding of a common-law marriage, consistently follows Montana common-law marriage precedent. However, this holding inadequately addresses the issues raised by the litigants. Snetsinger was not a common-law marriage case, as the Petitioners were not married and did not allege to be in common-law marriages.63 Unlike common-law marriage cases, the court was not presented with various facts supporting or detracting from finding such a relationship. Thus, without any facts regarding common-law marriage, the court abolished the constitutional use of Affidavits of Common-Law Marriage.

As the Montana Supreme Court and the federal courts have done in the past, the court applied the lowest level of scrutiny, rational basis review, to the University System's affidavit procedure and concluded that no rational basis permitted heterosexuals to sign the Affidavit and obtain benefits while preventing similarly situated homosexuals from obtaining the same benefits.64 Prior use of this lowest level of scrutiny does not suggest that classifications based on sexual orientation are not subject to a higher level of scrutiny; it merely indicates the policies and laws at issue in prior litigation involving discrimination based on sexual orientation have been so egregious so as not to even pass the lowest level of scrutiny.

61. Id. (Nelson, J., concurring).
63. Appellants' Opening Brief at 4, Snetsinger (No. 03-238).
64. Snetsinger, ¶ 27.
Therefore, courts have found it unnecessary to analyze the policies and laws at a level more stringent than rational basis. The *Snetsinger* court's decision not to apply a higher level of scrutiny resulted in unnecessary confusion of common-law marriage and leaves federal, state and private entities at a loss regarding how to determine the distribution of benefits when faced with a potential common-law marriage. The court created this confusion despite the fact that the litigants clearly stated the case was not about marriage. *Snetsinger* was not a case about marriage because, as the court found, the Affidavit procedure did not create a marriage or constitute enough evidence by itself to create a presumption of marriage. Rather, the case involved illegal discrimination based on sexual orientation. The court should have ruled on the issue presented by the Petitioners and addressed the discrimination at issue in the litigation.

A. The Litigants Requested the Court Address the Class Status of Homosexuals, Not Rule on the Issue of Common-Law Marriage

The major problem with the *Snetsinger* holding is that none of the litigants asked the court to muddy the waters of common-law marriage. In fact, the Petitioners repeatedly stated, as the majority admits, that the case was not about same-sex marriage. As the majority opinion should have reflected, *Snetsinger* dealt with the legal status of same-sex couples in Montana. The Petitioners clearly described this aspect of the case in their reply brief.

[T]he question whether gay people constitute a suspect class deserving of heightened scrutiny must be addressed by applying the established legal test. This court's role, as Respondents emphasize elsewhere in their brief, is not to legislate or to make decisions based solely on policy considerations, but to apply established constitutional law to the facts before it.

Although the court may fashion any appropriate remedy it deems necessary, and in fact litigants as a matter of course

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66. Appellants' Opening Brief at 4, *Snetsinger* (No. 03-238).
68. Appellants' Reply Brief at 14, *Snetsinger* (No. 03-238).
69. Goodover v. Lindey's, Inc., 246 Mont. 80, 82, 802 P.2d 1258, 1260 (1990). "In fashioning the remedy, the court is not bound by the relief requested in the complaint but may order any relief needed to effectuate the judgment."
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expressly plead for "any other relief this Court deems just," courts should decide the case before it. Determination of class status under an equal protection analysis was the issue before the court, and it was the issue the court should have addressed. Montanans should not have their lives drastically altered and the status of their relationships completely changed by litigants who have repeatedly argued their case on other grounds. As Justice Rice stated in his dissent, the court should not have made any decisions regarding common-law marriage. Only Justice Nelson addressed the issue before the court, but did so in a strongly-opinionated concurrence that remains only persuasive precedent.

In the last decade, both the Montana Supreme Court and the U.S. Supreme Court have skirted classifying homosexuals as a suspect class subject to strict scrutiny. The issue is ripe for determination and repeatedly being placed before courts by litigants across the country. Snetsinger presented a perfect opportunity for the court to determine the class status of homosexuals and the applicable level of scrutiny in analyzing laws and policies that classify people based on sexual orientation. As homosexuals meet all the requirements of a suspect class, they should be entitled to its legal classification as such, requiring the application of strict scrutiny analysis to all laws and policies based on such a classification. Even without granting homosexuals suspect class status, strict scrutiny analysis should have been applied because, as with all classifications based on sexual orientation, the University System's policy actually discriminated based on sex, a currently-existing suspect class under Montana law.

B. The Court Should have Granted Homosexuals Suspect Class Status

The test for determining suspect class status is whether the class of people is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to

70. Snetsinger, ¶ 113 (Rice, J., dissenting).
71. Id. ¶¶ 38-111 (Nelson, J., concurring).
73. See, e.g., Bowers, 478 U.S. 186; Lawrence, 539 U.S. 558; Romer, 517 U.S. 620; Gryczan, 283 Mont. 433, 942 P.2d 112.
such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."\(^{74}\) It can hardly be disputed that homosexuals have been "saddled with" societal disabilities, "subjected to purposeful unequal treatment," and "relegated to such a position of political powerlessness."\(^{75}\) The \textit{Snetsinger} litigants did not dispute the extensive history of purposeful discrimination against homosexuals, or that sexual orientation is completely unrelated to employee performance.\(^{76}\)

Opponents of equal rights for homosexuals have often argued that immutability of the distinguishing characteristic is a necessary requirement to obtain suspect class status.\(^{77}\) This characterization is inaccurate because alienage and religious affiliation are not immutable, yet both have triggered strict scrutiny.\(^{78}\) Further, even if the court did require immutability, this element would be satisfied because there is no evidence sexual orientation can be altered.\(^{79}\)

As amici Montana Human Rights Network argued, homosexuals meet all the necessary elements for suspect class status because gays and lesbians have continually been oppressed based on myths that in comparison to heterosexuals, they contribute less and cause detriment to society.\(^{80}\) Like other classes of people who have obtained suspect class status such as women and racial minorities, homosexuals have historically been subjected to such a degree of unequal treatment so as to warrant classification as a suspect class.\(^{81}\) For example, the United States denied admission to homosexual aliens until 1965


\(^{75}\) \textit{In re S.L.M.}, 287 Mont. at 33, 951 P.2d at 1371.

\(^{76}\) \textit{See} appellants' opening brief at 22, \textit{Snetsinger} (No. 03-328) (stating homosexuals "historically have been subjected both to legal disabilities and to discrimination and violence . . . ."); respondents' brief at 6, \textit{Snetsinger} (No. 03-328) (stating "homosexuals are no doubt the recipients of some degree of discrimination . . . .").

\(^{77}\) \textit{See, e.g., Amici Curiae Brief Montana Human Rights Network, et. al. at 4 n.4, Snetsinger} (No. 03-238).

\(^{78}\) \textit{Id.}

\(^{79}\) \textit{Id.} (citing U.S. Surgeon General, \textit{The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior} (July 9, 2001) ("There's no valid scientific evidence that sexual orientation can be changed.")

\(^{80}\) Amici Curiae Brief Montana Human Rights Network, et. al. at 5-7, \textit{Snetsinger} (No. 03-238).

\(^{81}\) \textit{Id.} at 7-11.
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based on their status as "psychopaths." Homosexuals have repeatedly been discriminated against in employment and continue to be discriminated against by the U.S. Department of Defense. Homosexuals are specifically deterred from political activism because "coming out" can detrimentally effect future and continued employment and poses a greater risk of physical violence. In 1973, when the U.S. Supreme Court recognized that gender classifications should warrant heightened scrutiny, fourteen women were serving in the U.S. House of Representatives. In 2002, three homosexuals served in the House. The Senate has never had an openly homosexual member. Montana statutorily defined same-sex sexual relations as criminal acts until only recently. Even today, a statute criminalizing same-sex sexual conduct remains codified in the Montana Code even though it was found unconstitutional by the Montana Supreme Court. The political powerlessness of homosexuals can also be seen in Montana's recently enacted amendment to the state constitution, which reiterates the state's statutory prohibition on same-sex marriage.

The repeated failure of the political process to serve homosexuals can be seen throughout the Montana Code in the sheer number of statutes specifically relating to the marital institution which excludes homosexuals. In its brief supporting the University System's position, the leadership of the 58th Montana Legislature wrote: "Overall, 539 provisions of the Montana Code contain the words 'marriage,' 'spouse,' 'husband,' or 'wife.'"

In addition, the political process continues to fail homosexuals, depriving them of protection as well as civil rights

82. Id. at 8. This law was enacted at 8 U.S.C. § 1182(a)(4).
84. Amici Curiae Brief Montana Human Rights Network, et. al. at 8-9, Snetsinger (No. 03-328).
85. Id. at 12.
86. Id.
87. Id.
91. Amici Curiae Brief The Honorable Roy Brown, et. al. at 5, Snetsinger (No. 03-328).
as demonstrated by the 2005 Montana legislative session.\textsuperscript{92} Despite the numerous instances of violence directed at homosexuals, the legislature declined to extend Montana's hate crimes statute to include offenses against homosexuals.\textsuperscript{93} In his concurrence, Justice Nelson cited the following assertions from the American Psychiatric Association:

[W]hen compared to other social groups, homosexuals are still among the most stigmatized groups in the nation. Hate crimes are prevalent. Gay men and lesbians are still banned from serving openly in the U.S. military service. Child custody decisions still frequently view gay and lesbian people as unfit parents. Gay and lesbian adolescents are often taunted and humiliated in their school settings. Many professional persons and employees in all occupations are still fearful of identifying as gay or lesbians in their work settings. Gay relationships are not recognized in any legal way.\textsuperscript{94}

There is no way to view this blatantly discriminatory treatment without recognizing that it "saddles" those treated in such a manner with myriad societal disabilities such as fear of violence, losing custody of their children, or losing a job.\textsuperscript{95} Further, such treatment certainly constitutes "a history of purposeful unequal treatment" justifying treatment as a suspect class.\textsuperscript{96} Homosexuals meet all requirements necessary for this classification and courts should apply strict scrutiny when analyzing any laws or policies that discriminate based on sexual orientation.

\textbf{C. Equal Protection Analysis}

The first step in analyzing challenges under the Equal Protection Clause of the Montana Constitution is to determine if the classes involved are similarly situated.\textsuperscript{97} If the classes are in fact similarly situated, the second part of the analysis is to determine whether the law or policy at issue treats the classes

\begin{itemize}
\item \textsuperscript{92} Alison Farrell, \textit{Legislature Kills All Human Rights Bills}, MISSOULIAN, April 18, 2005 at 1.
\item \textsuperscript{93} S.B. 202, 2005 Leg., 59th Sess. (Mont. 2005).
\item \textsuperscript{94} \textit{Snetsinger}, ¶ 50 (Nelson, J., concurring) (quoting Am. Psychiatric Ass'n, Fact Sheet: Gay, Lesbian and Bisexual Issues (Feb. 2000)).
\item \textsuperscript{95} \textit{See generally Amici Curiae Brief Montana Human Rights Network, et al., Snetsinger (No. 03-238).}
\item \textsuperscript{96} \textit{In re S.L.M.}, 287 Mont. 23, 32, 951 P.2d 1365, 1371 (1997).
\item \textsuperscript{97} Henry v. State Comp. Ins. Fund, 1999 MT 126, ¶ 27, 294 Mont. 449, ¶ 27, 982 P.2d 456, ¶ 27.
\end{itemize}
differently. Even if the classification appears neutral as to the treatment of the class, it may be challenged if it is actually "a devise designed to impose different burdens on different classes of persons."  

In Snetsinger, employees with partners eligible for health insurance benefits were similarly situated to employees with partners who were denied those same benefits. As the Petitioners argued:

Unmarried female employees of the University living with female domestic partners are similarly situated in relation to unmarried male employees who live with female domestic partners. Though they are in identical positions, male employees may obtain health benefits for their female partners, to whom they are not married, simply by signing an 'Affidavit of Common-Law Marriage.' The University System does not permit Plaintiffs to do the same. As long as a female employee lives with a female partner she is denied this benefit of her employment while her male co-worker living with his female partner is not.

Once the court determines the two groups receiving unequal treatment are similarly situated, it must then determine whether the class of people discriminated against by the policy or law qualifies as a suspect class. Although the class status of homosexuals has recently been an issue before the Montana and U.S. Supreme Courts, neither has determined the class standing of homosexuals or the level of scrutiny that must be applied when analyzing laws and policies that discriminate based on sexual orientation. In Gryczan v. State and Lawrence v. Texas, the Montana Supreme Court and the U.S. Supreme Court, respectively, determined that statutes criminalizing sexual conduct between people of the same sex violated constitutionally protected rights. The courts in both cases applied rational basis review. Neither court, however, addressed the class status for homosexuals because the laws at issue involved such egregious discrimination that they could not even withstand rational basis review. Rather, the courts determined the laws at issue interfered with the constitutionally

98. Appellants' Opening Brief at 8-9, Snetsinger (No. 03-328).
100. Amicus Curiae Brief Northwest Women's Law Center at 11, Snetsinger (No. 03-328).
102. Lawrence, 539 U.S. 558; Gryzcan, 283 Mont. 433, 942 P.2d 112.
103. Lawrence, 539 U.S. 558; Gryzcan, 283 Mont. 433, 942 P.2d 112.
104. Lawrence, 539 U.S. 558; Gryzcan, 283 Mont. 433, 942 P.2d 112.
protected rights of privacy and liberty.\textsuperscript{105} Despite the fact that both the Montana and U.S. Supreme Courts have held unconstitutional laws discriminating against homosexuals, the courts should nonetheless find homosexuals a suspect class because, as previously discussed, they meet all of the suspect class qualifications.

IV. ALTERNATIVELY, THE COURT SHOULD HAVE HELD THAT SEXUAL ORIENTATION IS REALLY SEX-BASED DISCRIMINATION

Even if the court declined to recognize homosexuals as a suspect class based upon the history of discrimination against them, it should have analyzed the University System’s health insurance benefit policy under strict scrutiny since discrimination based on sexual orientation is in reality based on a person’s sex, a suspect class in Montana.\textsuperscript{106} Montana applies strict scrutiny when analyzing classifications based on sex because freedom from discrimination due to one’s sex is a fundamental right guaranteed by article II, section 4 of the Montana Constitution, which expressly provides: “Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”\textsuperscript{107}

The policy at issue in \textit{Snetsinger} constituted sex discrimination because the sole factor in the University System’s determination of whether to extend health insurance benefits to an employee’s partner was the gender of the employee and that of his or her partner seeking benefits.\textsuperscript{108} As previously noted, “[a]s long as a female employee lives with a female partner she is denied this benefit of her employment while her male co-worker living with his female partner is not.”\textsuperscript{109} The Petitioners further argued:

A policy that conditions access to employment benefits on the sex of an employee and his or her partner is sex discrimination. Respondents offer benefits to a male employee with a female

\textsuperscript{105} \textit{Lawrence}, 539 U. S. at 578-79; \textit{Gryzcan}, 283 Mont. at 447-56, 942 P.2d at 120-26.

\textsuperscript{106} \textit{Wadsworth v. State}, 275 Mont. at 299, 911 P.2d at 1172.

\textsuperscript{107} \textit{MONT. CONST.} art. II, § 4.

\textsuperscript{108} Amici Curiae Brief Montana Human Rights Network, et al. at 1 n.2, \textit{Snetsinger} (No. 03-238).

\textsuperscript{109} Amicus Curiae Brief Northwest Women’s Law Center at 11, \textit{Snetsinger} (No. 03-238); Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989).
partner but not to a female employee with a female partner. The only difference between the first employee and the second is the sex of that employee.\textsuperscript{110}

Montana Human Rights Network asserted a similar argument in its brief. "If a male employee has a male partner, the partner cannot receive benefits. If he has a female partner, benefits can be received merely by signing an Affidavit. Thus, the gender of the employee and of the partner is the sole factor in determining whether benefits are available."\textsuperscript{111}

The University System argued its policy did not involve sex discrimination because it applied equally to men and women.\textsuperscript{112} This same argument failed in \textit{Loving v. Virginia}, where the U.S. Supreme Court held that statutory prohibitions on interracial marriage are unconstitutional.\textsuperscript{113} In that case, the Court did not accept the State's argument that anti-miscegenation laws did not discriminate because they applied to blacks and whites equally.\textsuperscript{114}

\[We\] reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose.\textsuperscript{115}

The University System supplied a similar argument, stating that the policy discriminates equally against both genders because a man cannot marry a man and a woman cannot marry a woman.\textsuperscript{116} As the Petitioners noted, however, "denial of employment benefits to a gay person in a committed relationship with a same-sex partner classifies individuals according to sex."\textsuperscript{117} In \textit{Loving}, the Court found this type of rationale violated the constitutional right to equal protection and held it unnecessary to show two groups are discriminated against differently; it is sufficient to show the statute or policy discriminates based on a protected classification.\textsuperscript{118}

\textsuperscript{110} Appellants' Reply Brief at 2, \textit{Snetsinger} (No. 03-238).
\textsuperscript{111} Amici Curiae Brief Montana Human Rights Network, et al. at 1 n.2, \textit{Snetsinger} (No. 03-238).
\textsuperscript{112} Respondents' Brief at 17-19, \textit{Snetsinger} (No. 03-238).
\textsuperscript{113} 388 U.S. 1 (1967).
\textsuperscript{114} \textit{Id.} at 7-8; \textit{see} McLaughlin v. Fla., 379 U.S. 184 (1964).
\textsuperscript{115} \textit{Loving}, 388 U.S. at 8.
\textsuperscript{116} Respondents' Brief at 17-19, \textit{Snetsinger} (No. 03-238).
\textsuperscript{117} Appellants' Reply Brief at 2, \textit{Snetsinger} (No. 03-238).
\textsuperscript{118} \textit{Loving}, 388 U.S. at 8-9.
Discrimination based on the sex of a person and that of his or her partner creates a sex-based classification for equal protection purposes, just as discrimination based on race created a race-based classification in Loving. Since the University System discriminated by using a classification system based on sex, and freedom from such discrimination is a fundamental right, the court should have applied strict scrutiny analysis to determine the constitutionality of the University System’s policy.

V. THERE IS NO COMPPELLING STATE INTEREST FOR THE DISCRIMINATORY TREATMENT OF HOMOSEXUALS

All statutes and policies that implicate a fundamental right must be analyzed under strict scrutiny and can survive only if the evidence shows the “action is closely tailored” to achieve a compelling state interest “and is the least onerous path that can be taken to achieve the State’s objective.” Once the court determines strict scrutiny analysis applies, the policy or law at issue may still be found constitutional if a compelling state interest exists for such a law or policy.

The University System failed to establish even a rational basis for its dependent benefits policy, and amici supporting the University System’s position only presented the argument that the policy should be upheld because it promotes traditional marriage. As the Petitioners asserted in their opening brief, “it is hard to imagine how denying equal benefits to gay employees and their life partners promotes any state interest at all, much less a legitimate one.” Indeed, the Affidavit procedure, along with the policy of determining health insurance benefits, privileges heterosexuality for its own sake. The court determined the University’s discriminatory policy failed to pass the lowest level of scrutiny because no rational basis existed for the policy’s discriminatory determination of benefit eligibility. Consequently, the court declined to apply strict scrutiny and did

119. MONT. CONST. art. II, § 4.
121. Wadsworth, 275 Mont. at 298-99, 911 P.2d at 1171-72.
122. See, e.g., Amicus Curiae Brief Montana Catholic Conference, Snetsinger (No. 03-238); Amicus Curiae Brief National Legal Foundation, Snetsinger (No. 03-238).
123. Appellants’ Opening Brief at 7, Snetsinger (No. 03-238).
124. Snetsinger, ¶¶ 19, 27.
not address whether a compelling state interest existed. As the policy did not pass rational basis review, it would not have withstood strict scrutiny analysis as no plausible compelling state interest for the University's discriminatory employee benefits policy exists.

Further, promoting heterosexism is not a compelling state interest, contrary to the arguments made by amici supporting the University System's policy. The University System argued its benefits policy was based upon the epitome of heterosexuality—the institution of marriage.

In our culture, maintaining the institution of heterosexual marriage is a crucial component of the preservation both of heterosexual identity and heterosexual privilege, just as separate schools are crucial to white identity and privilege. By reserving the ideal represented by marriage for itself, the heterosexual majority is attempting to define itself by reference to this lodestar: to be married is to be an adult, to accept commitment, to pledge oneself to fidelity and loyalty and devotion. It is to be part of society's most sacred institution and its traditional unit of procreation.

Although use of an Affidavit provides a logical way to determine benefits, the argument that the institution of marriage must remain in its present state ignores the fact that allowing the Affidavit to create a marriage may actually cheapen it by providing the potential for heterosexuals to receive benefits for a person with whom they may have no connection. Justice Rice points out in his dissent that there is no evidence that people lie on the Affidavits. However, numerous problems result from allowing a person to receive benefits by simply signing a document stating he or she is married to a University employee. Heterosexuals, both married and unmarried, should be troubled to learn that signing an Affidavit of Common-Law Marriage could create a marriage with all the related legal obligations and responsibilities. Any child born during a marriage is presumed to be the natural child of the

126. See, e.g., Amicus Curiae Brief Montana Catholic Conference, *Snetsinger* (No. 03-238); Amicus Curiae Brief National Legal Foundation, *Snetsinger* (No. 03-238).
130. See, e.g., *MONT. CODE ANN.* § 45-5-621.
married couple.\textsuperscript{131} This means that a man signing the Affidavit to receive health insurance benefits would be married until death or a formal divorce through the court, and would be the presumed father of any child born during the "marriage."\textsuperscript{132} It is unlikely that couples who sign the Affidavit in order to receive employee dependent benefits recognize they have accepted all the associated responsibilities and obligations of marriage, as well as its privileges.

One such marriage privilege is the ability of one spouse to obtain health insurance for the other. The majority's ruling, however, leaves doubt as to how entities should now determine whether a common-law marriage existed or exists in order to grant this privilege. The decision only clarifies that an employment benefit policy cannot extend benefits to heterosexual couples who, without more, sign an Affidavit of Common-Law Marriage.\textsuperscript{133} Whether agencies can continue to rely upon such an affidavit to determine benefits or legal rights, such as paternity, is unclear.\textsuperscript{134}

Further, the exclusion of homosexuals from the Affidavit procedure does not encourage the claimed state interest of heterosexual marriage.\textsuperscript{135} Even if it did, marriage is not necessarily the institution society should be promoting. Historically, marriage has been detrimental to women who, upon entering it, lost their legal identity and were not permitted to own property.\textsuperscript{136} It was once legal for husbands to beat\textsuperscript{137} and rape their wives.\textsuperscript{138} While opponents of same-sex marriage continue to argue for the maintenance of the status quo of marriage, they fail to acknowledge it as an institution that historically has been very detrimental to those within its confines.

In holding the Affidavits do not create a marriage, the court is seemingly strengthening marriage by holding that the mere signing of a piece of paper does not create a marriage, while

\begin{itemize}
  \item 131. Id. § 40-6-105(1)(a).
  \item 132. Id.
  \item 133. Snetsinger, ¶ 35.
  \item 134. See, e.g., MONT. CODE ANN. § 40-6-105 (1)(a).
  \item 135. Appellants' Reply Brief at 5.
  \item 136. Amicus Curiae Brief Northwest Women's Law Center at 17-18, Snetsinger (No. 03-238) (citing Hemma Hill Kay, Symposium on Law in the Twentieth Century: From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century, 88 CALIF. L. REV. 2017 (2000)).
  \item 137. Bradley v. State, 1 Miss. 156 (1824).
\end{itemize}
simultaneously eroding one form of marriage which has a long history in Montana. States recognizing common-law marriage actually tend to be more stringent with the rules of marriage than those states that do not recognize common-law marriage.139

VI. BY AVOIDING THE ISSUES BEFORE IT, THE COURT PROVIDED CONFUSION FOR STATE, FEDERAL AND PRIVATE ENTITIES

As mentioned previously, the other major problem with the court’s decision in Snetsinger is that it leaves state, federal and private entities with confusion on how to determine benefits based on marital status. Use of affidavits is a common practice among state and federal agencies, particularly in determining the distribution of public benefits.140 Several state and federal agencies rely upon an affidavit procedure, similar to that used by the Montana University System in Snetsinger, where a couple signs an affidavit or other document, stating they are common-law married.141 The Affidavits merely list the three elements necessary to establish a common-law marriage, and the couple signs that all are present in their relationship. The agencies then rely upon the representations made in the Affidavits to determine the couple’s eligibility for benefits based on their marital status. For consistency, these affidavits or other documents where an individual has represented his or her marital status, are sometimes shared between agencies, such as the Temporary Assistance for Needy Families (TANF) office and the Child Support Enforcement Division (CSED), which relies upon the representations made in affidavits or other documents to determine benefit eligibility and legal rights, such as parental rights. For example, when a woman applying for TANF signs an Affidavit of Common-Law Marriage, or otherwise represents she is married, a presumption is created that her common-law spouse is the father of all children born during the marriage.142 It is now unclear whether this type of third-party or fourth-party reliance is permissible due to the Snetsinger court’s reasoning that such an Affidavit does not create a marriage. If these affidavits do not create a marriage, it is unclear whether there is

140. Snetsinger, ¶ 133 (Rice, J., dissenting).
141. Id.
142. MONT. CODE ANN. § 40-6-105(1)(a).
any presumption of paternity.

The University System stated: "Surely the University cannot be faulted for acting in a manner consistent with this statutory presumption."\textsuperscript{143} As the legislature statutorily recognizes common-law marriage,\textsuperscript{144} it would be inappropriate for agencies to refuse to recognize such marriages. The majority's reasoning, however, suggests such a result by noting that those who wish to seek benefits based on marital status should obtain either a solemnized marriage or file a declaration of marriage.\textsuperscript{145}

The \textit{Snetsinger} majority held "[c]ommon-law marriage in Montana is an equitable doctrine used to ensure people are treated fairly once a relationship ends."\textsuperscript{146} The court further noted that it has applied the doctrine of common-law marriage only at the end of relationships, either by death or dissolution.\textsuperscript{147} Justice Rice's dissent, however, cited cases where the court applied the doctrine in instances where parties tried to avail themselves of the privileges associated with marriage prior to the end of the relationship.\textsuperscript{148}

Following the course the majority suggests eliminates the doctrine of common-law marriage as it exists within the life of such a marriage, since there is no way for the couple to establish such a relationship prior to its end. However, all elements of a common-law marriage must exist simultaneously. Therefore, it hardly makes sense that a couple can only establish the existence of a common-law marriage \textit{after} its termination and not \textit{before}. If a couple can prove they were common-law married upon the death of one of the partners, surely they should be able to establish this relationship one week prior, if not earlier.

\textit{Snetsinger} consistently follows Montana common-law marriage case law—but \textit{Snetsinger} was not a common-law

\textsuperscript{143} Respondents' Brief at 27, \textit{Snetsinger} (No. 03-238).
\textsuperscript{144} \textit{MONT. CODE ANN.} § 40-1-403.
\textsuperscript{145} \textit{Snetsinger}, ¶¶ 34-35.
\textsuperscript{146} \textit{Id.} ¶ 24.
\textsuperscript{147} \textit{Id.}
marriage case. Rather, as the University System argued, *Snetsinger* was a case of a state entity attempting to include all "spouses" as defined by Montana's various marriage laws. This is particularly difficult now because the definition of marriage is the subject of state and national controversy, as evidenced by the debate surrounding the recent amendment to the Montana Constitution, to "define marriage," the national debates concerning the Defense of Marriage Act, and the numerous court decisions and state legislation involving the issue of same-sex marriage.

*Snetsinger* exemplifies a state entity attempting to recognize all the various forms of marriage, albeit only all heterosexual forms, and the court refusing to uphold this attempt. It is unclear to what extent, if any, other agencies and entities may continue to rely upon the use of Affidavits of Common-Law Marriage. It would be impracticable, if not impossible, for state, federal and private agencies, which handle an enormous volume of cases, to perform a balancing test of extrinsic evidence for every couple or individual who alleges they are, or were, in a common-law marriage before determining benefit eligibility.

VII. WHAT TO DO IN THE AFTERMATH OF *SNETSINGER*

A. Redefine "Family" to Accurately Reflect Today's Families

*Snetsinger* began the erosion of heterosexual privilege by granting homosexual employees the same health benefit rights as those enjoyed by heterosexual employees. In response to *Snetsinger*, the Board of Regents unanimously voted to extend dependent coverage under its health insurance plan to cover one adult of an employee's choosing. Under the new policy, approved on March 18, 2005, "group health coverage can be extended to one adult dependent of a university system

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149. *Snetsinger*, ¶ 13; Appellants' Opening Brief at 3, *Snetsinger* (No. 03-238).
151. See MONT. CONST. art. XIII, § 7.
employee at an additional premium of about $160 per month."155 The University System's revised policy now permits each employee to include one adult as a dependent, irrespective of whether this person is the employee's legal spouse, parent, roommate, domestic partner, girlfriend, boyfriend, or sibling.156 Permitting same-sex partners to obtain benefits likely will not cost the University System any more money than what it currently pays for health insurance. "Nearly two decades of consistent actuarial studies . . . [show] that domestic partners routinely cost less than spouses to insure, due principally to same-sex couples' lower obstetric and pediatric costs."157

The University System's new policy marks the beginning of redefining "family" in Montana, at a time when defining relationships seems to be a popular activity. The U.S. Supreme Court has held the right to define family to be a fundamental right, prohibiting the state from "forcing all to live in certain narrowly defined family patterns."158 Redefining family, as the University System's new policy will allow and will likely yield consistency in benefit plans. Under the University System's former policy, a heterosexual couple could simply sign an Affidavit and receive benefits,159 regardless of whether the spouses shared a residence or maintained a common household. Therefore, by remaining married, an employee could insure a spouse who may live out-of-state, maintaining a separate household. The married couple may in fact have had only minimal contact for years, yet the University extended the benefit of health insurance to this "spouse." The University System's new policy should eliminate such inconsistencies while extending benefits to those adults for whom its employees most need to provide.

Redefining the family needs to extend beyond the health insurance policy of the Montana University System. The denial of marriage to an entire class of people by Constitutional Initiative 96 does not mean homosexuals and same-sex domestic partners have ceased to exist. Society needs to recognize the existence of such relationships and understand that the obligations and commitments between same-sex partners are

155. Id.
156. Id.
157. Brief of Amicus Curie MEA/MFT at 3, Snetsinger (No. 03-238) (emphasis in original).
159. Snetsinger, ¶ 33.
the same as those between opposite-sex partners.

While statutory and constitutional provisions prevent homosexuals from accessing the institution of marriage, redefining the family will allow homosexuals to attain the same benefits as are currently provided to heterosexuals. Redefining the family, through the adoption of policies such as the University System's new benefits policy, will allow institutions to look at the make-up of individual families, rather than the marital status, a classification which necessarily discriminates against homosexuals. Redefining "family" will also more accurately reflect all families of today. For example, the new benefit plan will allow adult children to provide insurance for their dependent parents, just as parents are eligible to provide insurance for their dependent children. The "nuclear family" consisting of a married man and woman with children no longer pervades our society as it once did.

Federal, state and private entities should also begin to redefine family to more accurately depict families of today, which may actually strengthen families. Using the child support system as an example, where a marriage, either formal or common-law, has not been formally terminated, all children born during the marriage are presumed the natural children of the two parties to the marriage. Although this is often an accurate presumption, there are many instances when the couple has been separated for years before the birth of a child and the parties have had no contact, intimate or otherwise, with each other during these years. The presumption of paternity remains that the mother's husband is the father of all children born while the couple is legally married, although basic high school sex education would indicate otherwise. Even in cases where the married couple continues to share a common residence and perhaps intimate relations throughout the gestation period of a child, the mother may sign child support documents stating there is no way her husband fathered the child. Again, sometimes common sense and a simple high school genetics course show the husband could not father the child. Under present Montana law, the husband remains the presumptive father and child support is due from him. How these policies and definitions of "family" strengthen marriage or

160. MONT. CONST. art. XIII, § 7; MONT. CODE ANN. § 40-1-103.
161. MONT. CODE ANN. § 40-6-105(1)(a).
162. Id.
families is unclear.

Although the public policy behind child support is to ensure that every child has two parents to provide care and support, this is often an ill-fated goal that does not consider the needs of the parents or the child. Where there is domestic violence, collection of child support may not be in the best interest of the either the child or the custodial parent who is the victim of the violence. Where domestic violence is coupled with poverty, it may be impossible to collect child support and may endanger the health of the child and custodial parent. Applying a more accurate definition of “family” in these cases would be beneficial. In those instances, a “family” would only include one parent, and the other parent would not be considered as part of the “family” in any event. The abusing parent would not be sought out for payment of arrears, and neither parent would be considered part of the other parent’s “family” for benefit determinations.

Perpetuating the benefits bestowed upon those who say “I do,” not only reinforces heterosexual privilege to the detriment of homosexuals, it also traps domestic violence victims in abusive relationships. Continuing to lobby for defense of marriage laws and similar legislation perpetuates the myth that marriage is always a healthy relationship beneficial to society, when that is not always the truth. This myth should not be perpetuated.

“I submit that those championing the preservation-of-marriage argument accord a good deal more to the sanctity of the institution than do a substantial percentage of Montanans and other Americans as evidenced by their actual conduct.”

B. Future Litigation

The issue of legal class status based on sexual orientation and the level of scrutiny to be applied to such classifications is now ripe for decision. “The issue before the [Snetsinger] Court is probably one of the most divisive in American society today.”

Prior to Lawrence, litigators were forced to ignore homosexual conduct (sexual relations between members of the same sex) while arguing for equal protection. However, since Lawrence and Gryczan, this conduct has now been judicially sanctioned,

164. Respondents’ Brief at 3, Snetsinger (No. 03-238).
and the decisions support the extension of equal protection to homosexuals as a class.

To begin the process of eradicating heterosexual privilege, litigation and proposed legislation should focus on defining homosexuals as a suspect class, requiring strict scrutiny analysis for all legislation and policies based on sexual orientation. Bills need to be drafted defining sexual orientation as an immutable characteristic requiring strict scrutiny analysis to be applied to policies and laws discriminating based on sexual orientation. Proponents of equal rights need to continue to lobby for the removal of the unconstitutional statute criminalizing same-sex sexual contact from the Montana Code. Until society recognizes the immutability of sexual orientation, litigation should focus on the fact that discrimination based on sexual orientation is really based on sex, and therefore subject to strict scrutiny analysis.

Justice Nelson's concurrence also suggests the Equal Rights Clause and the dignity provision of the Montana Constitution have not been fully utilized. By applying the human dignity clause, which provides "the right to human dignity is inviolable," laws and policies that classify people based on sexual orientation would be unconstitutional due to their interference with the fundamental right of human dignity. This provision of the Montana Constitution should be used to advocate for extending suspect class status to homosexuals and to require that strict scrutiny be applied to laws and policies that discriminate based on sexual orientation.

VIII. CONCLUSION

Although Snetsinger may be a small victory in the overall scheme of civil rights, it could have gone further, while remaining true to the issues defined by the litigants, if it had determined the University System's policy illegally discriminated based on sex. Doing so would have kept the court from muddying the waters of common-law marriage. The Snetsinger Petitioners expressly requested that the court grant suspect class status to homosexuals and apply strict scrutiny

166. See MONT. CODE ANN. § 45-5-505; see also Gryzcan, 283 Mont. 433, 942 P.2d 112.
when analyzing laws and policies that discriminate based on sexual orientation, as the University System's policy at issue did. Because homosexuals satisfy all elements necessary for suspect class status, the court should have granted them such status. At the very least, the court should have determined that classifications based on sexual orientation are actually sex-based classifications and, as such, subject to strict scrutiny. Through continued litigation and proposed legislation, homosexuals may eventually be granted suspect class status and recognized as deserving of all the rights and freedoms already bestowed upon heterosexuals.

The University System's revised health insurance policy, which allows for employees to purchase health insurance for one other adult, is the beginning of redefining "family" to more accurately reflect the make-up of today's families. They do not consist of one woman, one man, one boy, one girl, a white picket fence, two cars and one dog. As such, public policy should not be based on such an erroneous model. The "traditional," nuclear family is not the "family" that many people live in today. Through the court system and legislatures, laws should be changed to reflect the current notion of family, and allow people the privacy and freedom to honestly choose the family they wish to create.