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NOTE

PENETRATING SEX AND MARRIAGE: THE PROGRESSIVE POTENTIAL OF ADDRESSING BISEXUALITY IN QUEER THEORY

KARLA C. ROBERTSON*

INTRODUCTION

Two pure souls fused into one by an impassioned love—friends, counselors—a mutual support and inspiration to each other amid life's struggles, must know the highest human happiness;—this is marriage; and this is the only cornerstone of an enduring home.¹

Elizabeth Cady Stanton's century-old feminist vision of marriage as grounded in companionship remains deeply imbedded in our social consciousness. Society's vision of marriage focuses on love, companionship, commitment, and romance. People also commonly view marriage as the legal union of men and women, presumably heterosexuals. Although this vision of marriage as heterosexual companionship is deeply rooted within our social consciousness, law does not recognize the love and companionship model of marriage.² Neither case law nor statutes requires marriage to be a union of companions, lovers, friends, partners or even heterosexuals.³ This disconnect between legal and social understandings of marriage reveals the heterosexual, companionship model of marriage as idyllic social myth.

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¹ 1 HISTORY OF WOMAN SUFFRAGE 22 (Elizabeth Cady Stanton et al. eds., 1881).
² This Note will demonstrate that in fact love and commitment fail to occupy a determinative place in formal marriage law. Despite this fact, lawmakers also contribute to the mythology that legal marriage is about heterosexual love. For example, in the recent debates about the "marriage penalty," Republican lawmakers referred to the tax as "a tax on love." See Aaron Zitner, GOP RIDES HERD ON "LOVE TAX," ROCKY MTN. NEWS, May 3, 1998, at 2A. Despite this characterization by lawmakers, the institution of marriage does not contain such a requirement.
³ This Note focuses on ceremonial or formal marriage. See infra Part I. In many states, couples may also form the marital union through common law marriage. See generally Cynthia Grant Bowman, A Feminist Proposal to Bring Back Common Law Marriage, 75 OR. L. REV. 709 (1996) (discussing the evolution of common law marriage and its current status and desirability for women).
Instead of constructing marriage laws around companionship or identity, family law doctrine constructs marriage around sex. Specifi-
cally, the act of penis-vagina penetration (PVP) is the essential element of a valid formal marriage. This Note reviews case law and statutes to reveal that the central criterion for the validation, creation, and recognition of legal marriage is not love, not companionship, nor heterosexual identity, but instead the potential to engage in PVP. This Note exposes this pattern by exploring how the law responds to bisexuality in marriage. Examining bisexuality in marriage exposes the construction of legal marriage as fundamentally sexual, and also reveals the progressive potential of focusing on bisexuality to undercut legal regulations which subordi-
nate women and gay people.

Part I presents and analyzes three doctrinal areas that treat PVP as the determinative factor in legitimizing legal marriage: (1) case law concerning transgender marriage, (2) the Uniform Marriage and Dissolution Act (UMDA) and corresponding case law, and (3) the Defense of Mar-
riage Act (DOMA). The transgender marriage cases most explicitly make spouses' potential for PVP the essential criteria for legal marriage. The UMDA and DOMA more subtly treat PVP as the cornerstone of marriage. Viewing marriage through a bisexual lens exposes the centrality of the PVP requirement in these contexts. To set the stage for this analysis, Part I explores multiple permutations of bisexual identity, thus setting the groundwork for an exploration of how bisexuality offers an under-
utilized tool for progressive analysis of marriage doctrine. Part II ad-

dresses an additional area of legal regulation—immigration—that com-

plicates the questions regarding marriage regulation. Part III argues that notwithstanding marriage’s conduct-based (PVP) nature, state courts and Congress present marriage as status-based, specifically heterosexual status. Part IV suggests that PVP is an illegitimate and unprincipled basis for defining legal marriage because it has little to do with the benefits that flow from marriage. Additionally, the PVP criterion perpetuates the subordination of women. This Note concludes by arguing that in today’s debate over same-sex marriage, in which moral arguments are used to convince citizens that only heterosexual companionship is deserving of society’s sanctions, exposing the fact that formal marriage is based on

4. Family law also encompasses divorce regulation; this Note, however, primarily focuses on the creation of a formal marital union.

5. It has also been similarly argued that marriage is for sex. See Sally F. Goldfarb, Family Law, Marriage, and Heterosexuality: Questioning the Assumptions, 7 TEMP. POL. & CIV. RTS. L. REV. 285 (1998) (stating that marriage is for “heterosexual genital intercourse” and arguing for redefining the meaning of marriage in order to open marriage to same-sex couples).

6. This Note limits its analysis to American law. Other countries recognize same-sex marriage and may define the hallmark of marriage by factors other than PVP. For an exploration of marriage regulation outside the United States, see Barbara E. Graham-Siegenthaler, Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe, 32 CREIGHTON L. REV. 121, 129 (1998).
PVP, a sexual act, should help pave the way for a re-examination of legal marriage and lifting the ban on same-sex marriage.

I. LEGAL MARRIAGE DEPENDS ON PENIS-VAGINA PENETRATION

An analysis of pertinent doctrine reveals that legal marriage turns on the ability to engage in one particular sex act: penis-vagina penetration. Courts explicitly state this, requiring that men possess the "necessary apparatus" in order to be married. Men need this particular apparatus—the penis—in order to "function as a husband." In order to be legally married, couples must possess the capacity to "engage in normal sexual relations," normal being defined as PVP. Legally married couples find trouble when the partners cannot continue to sexually fulfill the "marriage contract." This language, extraordinarily explicit, designates PVP as the essential characteristic of marriage. Courts and legislators rely on this requirement to determine which unions to recognize, overlooking and even dismissing ideals of love, companionship, commitment, and heterosexual orientation, which received wisdom tells us are central to marriage.

A. Transgender Marriage

State courts' treatment of transgender marriage illustrates that the determinative criteria for granting legal recognition of marriage is the spouses' potential to engage in PVP. The most striking example of this fact is the New Jersey Superior Court decision in M.T. v. J.T. In this action for spousal support and maintenance, M.T., the plaintiff, was a male to female transsexual. M.T. was born with male sexual organs but transitioned to a female identity, completing the transition by surgery which removed her male genitalia and constructed a vagina. Prior to this

8. See id.
9. See id. at 713.
10. See generally Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500-01 (Sup. Ct. 1971). The marriage contract includes the expectation of sexual relations. See RESTATEMENT OF CONTRACTS § 587 (1977). This expectation also illustrates that marriage depends on PVP.
11. There is much debate and some consensus regarding the terms transgender and transsexual. A common definition of the term transsexual is a person who has undergone sex reassignment surgery (SRS) to change his or her biological sex. See MARTINE ROTHLIBLATT, THE APARTEID OF SEX 17 (1995). The term transgender most commonly describes all those who are differently gendered, including transsexuals, cross-dressers, and drag queens. See GORDENE OLGA MACKENZIE, TRANSGENDER NATION 2 (1994). Some scholars and activists prefer not to use the term transsexual, arguing that it places too much emphasis on genitalia as the defining characteristic of gender identity. See, e.g., Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. PA. L. REV. 1, 32 n.130 (1995). This Note discusses cases including individuals who have undergone SRS, and uses transgender and transsexual interchangeably.
14. Id.
transition, M.T. met J.T., and informed him of her sexual and gender identities as they became romantically involved. One year after the surgery, M.T. and J.T. were married in a ceremonial marriage.\textsuperscript{15} Following this marriage, they lived together and had sexual intercourse.\textsuperscript{16}

As a defense to M.T.'s claim for support, J.T. asserted that his marriage to M.T. was void because she was not female but male.\textsuperscript{17} The Juvenile and Domestic Relations Court disagreed, finding that M.T. was legally female and ordered J.T. to pay spousal support.\textsuperscript{18} J.T. appealed, arguing once again that M.T. was male.\textsuperscript{19}

In resolving the maintenance dispute, the New Jersey Superior Court framed the central issue as whether the marriage between J.T. (a biological male) and M.T., a postoperative male to female transsexual, qualified as a legal marriage between a man and woman.\textsuperscript{20} The court found M.T. to be legally female and therefore eligible to be married to J.T. Most importantly, the court decided that in determining the sex of a person, "the anatomical test, the genitalia of an individual, is unquestionably significant and probably in most instances indispensable."\textsuperscript{21} This factor was most significant for the court because "it is the sexual capacity of the individual which must be scrutinized."\textsuperscript{22} An individual must be able to "engage in sexual intercourse either as a male or female."\textsuperscript{23} In other words, an individual must be able to penetrate or be penetrated. In this

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 208.
\textsuperscript{21} Id. But see Corbett v. Corbett, 2 W.L.R. 1306 (P.D.A. 1970). The court in Corbett determined that a person's sex is decided and fixed at birth. Id. at 1323. The legal validity of a union for marital purposes, then, depends on a person's chromosomes. Under this view of sex, the sex change process becomes invisible, invalid, and/or ineffective for purposes of marriage benefits. This essentialist understanding of sex directly contradicts the thesis of this Note in that it focuses on chromosomes rather than PVP to define marriage. But Corbett can be distinguished; the British courts decided the Corbett case. This Note deals with policy and case law from the United States. Furthermore, the court's reasoning in Corbett mirrors my arguments about why the legal recognition of marriage is based upon penis-vagina penetration. See infra Parts III–IV. For example, the court stated that sex must necessarily be decided based upon biology because a male to female transsexual, for example, "cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage." Id. at 1324–25 (emphasis added). Apparently, the court believed this role to be child-bearing as a consequence of being on the receiving end of PVP. The court treated "biology as destiny" approach, reducing "the essential role of a woman in marriage" to becoming pregnant through PVP. The Corbett court's reasoning would fail to explain why sterile women can get married, or why a woman who had a hysterectomy can receive alimony. For another interpretation of the Corbett case, see Mary Coombs, Transgenderism and Sexual Orientation: More than a Marriage of Convenience, 3 NAT'L J. SEXUAL ORIENTATION L. 1 (1997).
\textsuperscript{22} M.T., 355 A.2d at 209.
\textsuperscript{23} Id.
case, M.T. acquired a vagina which allowed for such penetration, so the court recognized the marriage and ordered J.T. to pay spousal support.\textsuperscript{24}

The emphasis on male to female penetration as the consummate requirement for marriage can also be seen in \textit{Anonymous v. Anonymous}.\textsuperscript{25} The plaintiff, a man, married a person whom he thought was a woman.\textsuperscript{26} The plaintiff and defendant did not have sexual intercourse before the marriage, and the day after the marriage ceremony, the plaintiff discovered his spouse possessed male genitalia.\textsuperscript{27} Notwithstanding this discovery, the parties remained married for some time. Eventually, however, the plaintiff filed an action requesting the court to annul the marriage.\textsuperscript{28}

The court found for the plaintiff, holding that "the so-called marriage ceremony . . . did not in fact or in law create a marriage contract."\textsuperscript{29} The court reasoned that the defendant was not female at the time of marriage, and a valid marriage requires the union of a male and a female.\textsuperscript{30} Furthermore, the court noted that the parties never had a sexual relationship.\textsuperscript{31} Apparently the court used the term "union" as a euphemism for PVP. Even though the defendant underwent a sex change operation after the marriage, but before the annulment action, the initial union did not constitute a valid marriage. The court granted the annulment not on the basis of fraud or incapacity, but on the basis that the two were not qualified to be married.\textsuperscript{32}

One of the \textit{Anonymous} court's most revealing statements regarding the PVP requirement is that "the mere removal of the male organs would not, in and of itself, change a person into a \textit{true} female."\textsuperscript{33} Apparently the court saw genetic composition as determinative in deciding whether a person is male or female. Later in the opinion, however, the court recounted another court's statement that "the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage."\textsuperscript{34} This statement indicates that in determining a person's sex, and therefore the ability to marry, PVP is the key factor.

\begin{itemize}
\item \textsuperscript{24} \textit{Id.} at 211. The court also stated that the decision to recognize a male to female transsexual who could sexually function as female "no way disserv[ed] any societal interest, principle of public order or precept of morality." \textit{Id.} This statement underscores the operative principle argued in this Note: When a man is able to penetrate a person with a vagina, legal and moral recognition follow.
\item \textsuperscript{25} 325 N.Y.S.2d 499 (Sup. Ct. 1971).
\item \textsuperscript{26} \textit{Anonymous}, 325 N.Y.S.2d at 499.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} at 499-500.
\item \textsuperscript{29} \textit{Id.} at 501.
\item \textsuperscript{30} \textit{Id.} at 500.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.} at 501.
\item \textsuperscript{33} \textit{Id.} at 500 (emphasis added).
\item \textsuperscript{34} \textit{Id.} (quoting \textit{Mirizio v. Mirizio}, 150 N.E. 605 (N.Y. 1926)). The \textit{Mirizio} court continued on to say that a marriage relationship should exist with the result and the capacity for the "purpose of begetting offspring." \textit{Mirizio}, 150 N.E. at 607. This emphasis on procreation was cited as a policy reason for the requirements of marriage. For a discussion of this empty justification, see Part I.B.2.b.
A third case which focused on the importance of penis-vagina penetration is *Frances B. v. Mark B.* 35 The plaintiff wife married the defendant husband, believing the defendant to be a man. The wife sought an annulment when she discovered the husband did not have a penis, asserting that the defendant "was unable to have normal sexual intercourse." 36 The defendant was a female to male transsexual who had successfully obtained a legal name change recognizing his transition. 37 Despite the husband's successful social transition, the court granted the annulment, based upon the defendant's purportedly deficient genitalia. While the court recognized that the defendant might pass as a man in society, he could not "function as a husband." 38 The court recognized the transsexual identity, but stated that "[a]ssuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage." 39 The court explained that "hormone treatments and surgery have not succeeded in supplying the necessary apparatus to enable defendant to function as a man for purposes of procreation." 40

The court in *Frances B.* emphasized two things: the importance of possessing a penis and of using it for procreative purposes. The holding, therefore, appears to suggest that the ability to procreate is the basis of a valid marriage. However, the procreative use of the penis follows only after the acquisition of the penis, something that the plaintiff alleged, and the court found, the defendant did not possess. Additionally, the wife's key argument was that the defendant could not have "normal" sexual relations. The court recognized the validity of this claim by focusing on the insufficiency of Mark's male "apparatus." The penis as a tool for penetration, not procreation, occupied the central place in the court's analysis. Although the defendant could be recognized as a man in society, the marriage could not be legally recognized because the court found Mark did not possess a penis, which was essential for performing his marital function of penetrating Frances, with the possibility of procreation. The court found that Mark's deficient penis prevented him from engaging in procreative sex. What the court did not say, however, is as revealing as what it did say. Specifically, the court did not say that the

36. *Mark B.*, 355 N.Y.S.2d at 713 (emphasis added). The wife also sought an annulment based upon the fact that the defendant did not possess sexual organs. *Id.*
37. *Id.* at 714. The court granted a name change from Marsha to Mark after the defendant filed a petition explaining his emotional and physical condition as not female, but male. See *id.* Changing the sex on a birth certificate is also a pressing issue for many transgendered people, and courts sometimes refer to birth certificates to verify sex when deciding whether to grant a marriage license. See *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987).
39. *Id.* at 717 (emphasis added).
40. *Id.* (emphasis added).
central requirement for marriage was the ability to procreate and since Mark could not procreate, the marriage was invalid. Instead, the court focussed on possessing the proper genitalia and then using this genitalia. After meeting these two preconditions, procreation could follow.

This summary of transgender marriage cases illustrates courts’ emphasis on PVP as the central element in determining the validity of marriage. While some of these cases have discussed the ability to procreate as a necessary component of the marital relationship, this component is discussed within the context of penis-vagina sexual intercourse. In other words, it is not procreation itself that concerns the courts, but rather that procreation happens through penis-vagina sexual penetration. Thus, PVP functions as a necessary precondition for the method of procreation discussed and advocated by the courts. Nowhere do these cases discuss whether the parties loved each other, were committed to one another, or were companions at the time of marriage, or sufficiently possessed a “heterosexual” orientation. In fact, discussions regarding sexual orientation are conspicuously absent from the cases, and instead the courts’ decisions regarding marriage validity rest on conduct.

41. One United States case, in addition to the British case previously discussed, see supra note 21, dismisses the relevance of penis-vagina penetration as a criteria of determining a valid marriage and instead relies on the chromosomal make-up of the parties. See In re Ladrach, 513 N.E.2d 828 (Ohio Prob. Ct. 1987). In Ladrach, a post-operative male to female (mtf) transsexual attempted to marry a male. The court held that the two individuals could not marry each other because they were of the same sex. Ladrach, 513 N.E.2d at 832. In finding that the parties were of the same sex, the court relied on the likely chromosomal make-up of the mtf transsexual. According to a doctor’s testimony, the mtf transsexual would most likely not possess the chromosomes of a female. Id. at 830. Also, the court noted that the mtf transsexual’s birth certificate reflected a male sex. Id. at 831–32. This fact, along with the likelihood of the chromosomal composition, provided the court with support for its holding. Moreover, when describing the case, the court dismissed the fact that the mtf transsexual possessed a vagina and, therefore, could engage in penis-vagina penetrative sex. Id. at 830–32. This case does not support this Note’s PVP conclusion. However, of the handful of cases that have been decided on this issue, Ladrach exists as an outlier and minority view.

42. The importance of PVP has also been discussed by the United States Supreme Court. See Turner v. Safley, 482 U.S. 78 (1987). In Turner, the Court addressed whether the fundamental right of marriage can be burdened to a greater degree for prisoners than for non-prisoners. The regulation at issue in Turner allowed a prisoner to marry only with the approval of the prison superintendent. Turner, 482 U.S. at 82. The Court held the regulation to be unconstitutional. Id. at 97. In so doing, the Court discussed the “essential attributes” of marriage and the ability of these attributes to be preserved in the prison context. The Court stated that “[m]any important attributes of marriage remain, however, after taking into account the limitations imposed by prison life.” Id. at 95. These elements included: (1) expressions of support and commitment, (2) an exercise of spirituality or religion, and (3) the expectation that most marriages will be “fully consummated” upon the inmates’ release. Id. at 95–96. Emphasizing the expectation for consummation, the Court focused on the act of PVP. While it is unclear how the Court prioritized these elements (especially in light of the Court’s statement of “most” instead of “all” in the consummation context), the Court assumed that marriage, in general, is granted with the expectation that there will be penetration. If an inmate was never able to consummate a marriage, because he or she was on death row for example, it is unlikely the Court would affirm such a union.
B. PVP Through the Lens of Bisexuality

Like the transgender marriage cases, the UMDA and cases interpreted directly under the act, and DOMA, also treat PVP as the determinative element of a legal marriage. Unlike the transgender cases, however, in the UMDA and DOMA marriage is not constructed as explicitly dependent on PVP. But a careful analysis revealed through the lens of bisexuality shows that PVP is the determining factor for judges and lawmakers in these contexts as well, even if more subtly than in the transgender marriage cases.

1. Understanding Bisexuality

At the most basic level, bisexuals can be described as having the potential to sexually desire both men and women. More specifically, bisexuals refuse or fail to choose a specific gender or sex as the object of their desire. Their sexual desire refuses the binary sexual construction of desire.

Bisexual identity can exist in many permutations. This Note focuses on legally married bisexuals, but there are numerous other permutations including single bisexual people and bisexual men and women in same-sex relationships. The many permutations complicate an understanding of bisexuality. Since few legal scholars have undertaken the

43. Attempting to define or unpack the label “bisexual” is tricky business. Many components comprise identity, including legal status, desire, behavior, and perception. See generally John H. Gagnon, Gender Preferences in Erotic Relations: The Kinsey Scale and Sexual Scripts, in HOMOSEXUALITY/HETEROSEXUALITY 177 (David P. McWhirter et al. eds., 1990) (discussing aspects of identity and the Kinsey scale which measured identity based upon conduct and fantasies).

44. For a poststructural account of identity in general, see AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielsen & Karen Engle eds., 1995). Queer theory has persuasively demonstrated the dangers of relying on identity and theorizing around its constructions. See, e.g., Lisa Duggan, Making It Perfectly Queer, in SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 155 (Lisa Duggan & Nan D. Hunter eds., 1995) (arguing against a political or legal movement based on an idea that sexual identity is “unitary” or “essential”). But see Suzanna Danuta Walters, From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?), in SIGNS, Summer 1996, at 830, 837 (arguing that the politics of feminism and lesbian-feminism are at risk of being lost with the “deconstruction of the cohesion of identity”). This Note does not directly enter into this debate, but does strategically depend upon the existence (whether “real” or not) of a discreet and identifiable bisexual identity at some level to make the larger point about legal marriage. By using bisexual identity in this way, this Note engages in what has been called “strategic essentialism.” See Gayatri Chakravorty Spivak, Subaltern Studies: Deconstructing Historiography, in SELECTED SUBALTERN STUDIES 3, 13-15 (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988).

45. The term bisexual implies a desire based upon a person’s sex. This term simplifies the components of desire. For example, the number of bi-categories increases dramatically when a transgendered person has a bi-identity or a non-transgendered person desires a same-gender, transgendered person. In the case of transgender bi-desire, bisexual fails to capture such an experience. Bi-gender or bi-gender identity may be more applicable. A discussion of transgender identity and politics is beyond the scope of this paper. For an excellent article discussing transgender
project of deconstructing the complex nature of bisexual identity, the following section attempts to fill this gap by presenting some of the permutations of bisexual identity to illustrate that marriage is based on PVP.

For purposes of this Note, the term “identity bisexual” refers to a person who has refused to choose a gay or straight sexual orientation, and thus the term refers to a person’s orientation and potential desire for both men and women, not the many ways a bisexual may choose to live his or her sexual life. The term “opposite-sexed bisexual” describes a person who has a bisexual orientation but is currently partnered with an opposite sex person. In the same vein, the term “same-sexed bisexual” describes a person who has a bisexual orientation but is currently partnered with a person of the same sex.

identity issues, see Hasan Shafiqullah, Note, Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals, 8 HASTINGS WOMEN’S L.J. 195 (1997).

46. See infra note 55 and accompanying text.

47. When I refer to opposite-sex and same-sex identities and relationships throughout this paper, I am relying on the traditional and conventional acceptance and understanding that there are only two sexes. I realize, however, that this is not biologically correct. See Anne Fausto-Sterling, The Five Sexes: Why Male and Female Are Not Enough, in THE MEANING OF DIFFERENCE 68 (Karen E. Rosenblum et al. eds., 1996) (presenting empirical evidence that at least five sexes comprise the human race). This Note reveals that the entire body of family law marriage doctrine depends on the two-sex supposition. For this reason, Fausto-Sterling’s work is monumental in showing that not only is the requirement of opposite sexed unions unprincipled because of the PVP requirement, the requirement is based upon an incorrect and flawed supposition. Fausto-Sterling states: “Western culture is deeply committed to the idea that there are only two sexes . . . . [T]oday it means being . . . subject to a number of laws governing marriage, the family, and human intimacy.” Id. at 68. If this reality were to be acknowledged, the entire basis for legal regulation of human relationships would change. “Imagine that the sexes have multiplied beyond currently imaginable limits . . . . It would have to be a world of shared powers . . . . [M]ale and female, heterosexual and homosexual—all those oppositions and others would have to be dissolved as sources of division.” Id. at 72. This Note uses such terms not to reify their mistaken meanings but instead to operate with common understandings of sex and relationships.

This Note will also refer to heterosexual orientation and heterosexuality. Such terms assume a lifetime of primary and/or exclusive opposite sex partnership or desire. In reality, even a person who exclusively partnered with the opposite sex may desire both women and men. Yet for the purposes of simplicity, this Note assumes this person has a heterosexual orientation. Additional terms could apply in other situations as well. “Functional heterosexual” could refer to a person who may sexually desire both sexes but has spent the majority of his or her recent life partnered with an opposite-sex person. “Social heterosexual” could refer to a person who, regardless of sexual orientation, moves through the world assumed to be heterosexual, because they often do not come out as gay, lesbian, or bisexual. All of these terms illustrate the fluid and dynamic nature of sexual orientation identities. Viewing sexual orientation, specifically bisexuality, as multidimensional and multifaceted can serve a broader liberational goal. What these terms do not show, however, is the legal construction of sexual orientation, specifically in the marriage context.

Finally, the term “legally unionized” could describe a person who has received state sanction for his or her partnership. In other words, a “legally unionized” person is a legally married person. This term does not establish any meaning particular to the sexual orientation of the spouses. Instead the term refers to the legal status given to a person and a couple by the state. The term “legally unionized” is more precise than marriage because marriage is constructed as and conflated with heterosexual orientation, which I later show and deconstruct. See infra Part III. Despite the efficacy of the term “legally unionized,” I will continue to refer to marriage as marriage in order to deconstruct the term.
Bisexuals are essential and unique players in analyzing and understanding legal marriage. Despite this unique role, the diametrical opposition between gay and straight has been, according to Eve Kosofsky Sedgwick, a crucial element of modern Western culture.\textsuperscript{48} According to Sedgwick, twentieth-century thought cannot be understood without understanding the relationship between homosexual and heterosexual.\textsuperscript{49} "[A] whole cluster of the most crucial sites for the contestation of meaning in twentieth-century Western culture are consequentially and quite indelibly marked with the historical specificity of homosexual/homosexual definition . . . ."\textsuperscript{50} This duality of homosexual and heterosexual lies at the heart of our "modern cultural organization."\textsuperscript{51} Identity bisexuals, however, do not fall on either end of this diametric opposition. This organizing principle, nevertheless, serves as one of the bases for labeling bisexuals as either gay or straight, depending on the sex of their partners or the purpose of the classification. Although identity bisexuals have refused to choose, they have been forced into one of the only two options, heterosexual or homosexual. This coercive classification is not surprising since, based on Sedgwick’s analysis, bisexuality challenges the very nature of our cultural organization. Accepting a bisexual orientation forces an expansion of dualistic thinking\textsuperscript{52} and exposes the permeability of traditionally recognized identity boundaries. If Sedgwick is right, bisexuality also undermines fundamental classifications that inform Western thought. Since the stakes of maintaining the homo/hetero duality are so high, an analysis of how bisexual identity is treated has much to offer queer theory.

Identity bisexuals have come out and challenged the omnipresent nature of bipolar social construction.\textsuperscript{53} The bisexual challenges to binary thinking about sexuality have met with considerable success, at least to the extent that bisexuals are lumped into the “gay” side of the social/sexual ledger. Most gay pride parade banners and many gay community centers recognize bisexuality. Sexual orientation anti-

\textsuperscript{48} Eve Kosofsky Sedgwick, Epistemology of the Closet, in THE LESBIAN AND GAY STUDIES READER 45 (Henry Abelove et al. eds., 1993).
\textsuperscript{49} \textit{Id.} at 48.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{53} For comments on bisexual identity, see id.
discrimination laws protect bisexuals. Queer scholarship is also beginning to include work about bisexuality. Yet, ironically, queer scholarship provides one of the starkest examples of bisexuality invisibility. Bisexuals continue to be misunderstood because of the traditional dualistic social construction of sexual orientation identity itself.

One social construction of bisexuals is that they are heterosexual. Identity bisexuals are most often constructed in such a way when an identity bisexual legally marries a person of the opposite sex (thereby becoming an “opposite-sexed,” “legally unionized” bisexual according to this Note’s classification terms) and receives the state-generated privileges and benefits reserved for opposite-sex married couples. In this case, however, a bisexual person does not change his or her orientation. Upon marriage, this person could identify and be viewed as “legally unionized” (the beneficiary of governmental benefits) rather than heterosexual. An opposite-sexed, legally-unionized bisexual would be assumed to be heterosexual until and unless s/he publicly came out as bisexual. In other words, a default rule presumes that being married means that the spouses are heterosexual. This default rule both mischaracterizes bisexuality and perpetuates the exclusivity of the marriage institution.

The diverse terms capable of describing various permutations of bisexuality illustrate the fluidity of bisexuality but also of sexual orientation in general (including heterosexuality). When one considers that identity bisexuals can and do freely enter and exit a legal union, the mythology that marriage is exclusively by and for heterosexuals gets destabilized. Such destabilization “is an important goal that can be partly accomplished by an emphasis on acts.” Applying this idea here (i.e.,

54. See, e.g., MINN. STAT. §§ 363.02–03 (West 1997).
55. See, e.g., Ruth Colker, A Bisexual Jurisprudence, 3 LAW & SEXUALITY 127 (1993); Naomi Mezey, Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts, 10 BERKELEY WOMEN’S L.J. 98 (1995).
56. See generally Darren Lenard Hutchinson, Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse, 29 CONN. L. REV. 561 (1997) (failing to include bisexuals as meaningful participants in the creation of legal theory and to substantively distinguish how they might be the same or different in perpetuating the racism criticized).
57. See supra note 47, see also infra Part I.B.2.b. The Defense of Marriage Act (DOMA) assumes that those who marry are heterosexual. Labeling bisexuals as heterosexual, specifically when married, does not accurately reflect the position of bisexuals in society generally because bisexuals continue to be at risk of discrimination based on their orientation, not marital status. See infra note 107. In fact, bisexuals are often singled out for biased treatment, notwithstanding marital status. In the spring of 1994, the mayor of St. Paul, Minnesota, refused to sign a “gay rights” proclamation because of the inclusion of bisexuals and transgendered persons. See Anthony Lonetree, Coleman Won’t Sign Gay Month Proclamation, MINNEAPOLIS-ST. PAUL STAR-TRIB., May 4, 1994, at 1B. The mayor stated that he would have signed the measure if it included only gays and lesbians because their identity was a “sexual orientation” deserving of “protected class” status. Id. Bisexuality, according to the mayor, was instead a “lifestyle issue” which does not deserve legal protection. Id. The mayor further stated that including bisexuals under the rubric of “gay and lesbian” represented the ultimate of “political correctness.” Id.
adopting a number of terms for bisexuals depending on the acts of partnering) can destabilize marriage by showing the institution depends upon acts, rather than a particular sexual orientation. Revealing that identity bisexuals legally marry opposite sex partners disrupts the myth that marriage is a union based on heterosexual status.

2. Legal Marriage Under the UMDA and DOMA Depends Upon PVP

States traditionally regulate the confines of legal marriage. In two instances, however, legal marriage has occupied national and federal attention. First, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Marriage and Divorce Act (UMDA), which serves as the model for state marriage laws. Second, Congress passed the Defense of Marriage Act (DOMA), which supplanted traditional state jurisdiction over marriage and family regulation by defining marriage as an opposite-sex union for federal purposes and supporting states that ban same-sex marriage. Under both DOMA and judicial interpretations of the UMDA, the dispositive criteria used to determine the legitimacy of a legal marriage is the potential for or actual vaginal penetration by a penis. Opposite-sexed bisexuals best reveal this point because they frequently receive the benefits and privileges of legal marriage without fitting the social description of eligible individuals (i.e., heterosexuals). When they enter the marriage institution as bisexuals, they show that sexual orientation is immaterial to the defining characteristics of marriage. Bisexuals illustrate that PVP, rather than sexual orientation, is the key element of a legal marriage, necessitating a careful


60. The UMDA was originally ratified by a national body entitled the National Conference of Commissioners on Uniform State Laws in 1970 and then amended twice by the same national body. At least eight states have adopted, at least in part, the UMDA including Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. See UNIF. MARRIAGE AND DIVORCE ACT, 9A pt. II U.L.A. 1 (1998) (providing table of jurisdictions adopting the act).


62. This ability is not limited to bisexuals. Gays and lesbians also could freely enter the institution if they wished to do so with an opposite sex partner. Bisexuals are best situated, however, to play this subversive role because they are genuine participants in the mythology of marriage as romantic, love and commitment based. The main point here is that marriage laws do not consider, or even reject, sexual orientation on its face.
review of marriage doctrine. This exploration reveals that love and companionship fail to occupy a central, significant, or even minimal place in legal marriage.

a. The Uniform Marriage and Divorce Act

The UMDA outlines regulations for marriage and divorce. The UMDA purports to “strengthen and preserve the integrity of marriage and safeguard family relationships” and defines marriage as a “personal relationship between a man and a woman.” Evidence of a valid marriage under the act can take the form of reputation, cohabitation, or the acknowledgment of the parties. The UMDA does not explicitly prohibit same-sex marriage. Many courts, however, reason that the generally accepted definition of marriage as opposite-sex as defined by the UMDA precludes legal recognition of same-sex relationships. Opposite-sexed bisexuals, however, can and do legally marry under the UMDA.

Facially, the UMDA does not require that the parties to a marriage love or even like each other. Instead, the UMDA allows legal recognition of a formal relationship between two opposite-sex people simply based upon fact that the parties are opposite sexes. Two people could do nothing more than acknowledge their commitment to one another by registering as a couple after solemnization and thereby become lawfully married. The UMDA assumes that the parties are able to consummate the union simply by the couples’ opposite sex composition. Based upon the language of the UMDA, a bisexual could, therefore, have no sexual desire for, and never cohabit or share finances with, her opposite sex partner but legally marry anyway. The partners could, moreover, despise one another. A bisexual person could announce at the wedding her sexual

64. Id. § 102, at 171.
65. Id. § 201, at 175. To obtain a license in the registration process, the parties must present an application with their sex noted. This statement will be used to verify that the parties are opposite sex, or one man and one woman. If there is a question about the sex of a party, the birth certificate of an individual is often consulted. See In re Ladrach, 513 N.E.2d 828, 829 (Ohio Prob. Ct. 1987). This is why it is crucial for many transgender individuals to change their sex on their birth certificate.
67. UMDA § 207, 9A pt. I U.L.A. 1183 (1998) (providing a list of what types of marriages are prohibited including: (1) marriages between uncles and nieces and between aunts and nephews except as permitted by “established customs of aboriginal cultures,” (3) marriages between brothers and sisters, (4) marriages between ancestors and descendants, and (5) marriages entered into prior to the dissolution of a previous marriage).
69. This requirement incorrectly presupposes that there are, in fact, only two sexes. See Fausto-Sterling, supra note 47.
71. Cf. UMDA § 208(a)(2), 9A pt. I U.L.A. 186 (1998) (holding a marriage to be invalid if a party lacks the physical capacity to consummate the marriage by sexual intercourse and the other party was unaware of the incapacity at the time of solemnization).
orientation and intent to remain identified and active as such but still enjoy the legal recognition of her opposite sex relationship. Therefore, this recognition is based solely on the sex (i.e., genitalia) of the partners, and their potential to engage in PVP using that genitalia.

Thus, marriage under the UMDA is based upon the genitalia of the parties. Facially, however, the UMDA does not provide any insight into the purpose for the opposite sex/genitalia requirement. The criteria used by courts deciding cases under the UMDA for declaring an attempted marriage invalid more explicitly articulate that PVP is the precondition to legal marriage. The UMDA outlines several reasons for invalidating a marriage. A marriage can be declared invalid if a party was induced into a marriage based on fraudulent grounds that relate to the essential elements of the marriage relationship, or if a party lacks the physical capacity to consummate the union.

The UMDA does not state what constitutes adequate grounds for alleging fraud. Cases interpreting this provision of the UMDA provide insight. In Woy v. Woy, a husband sought an annulment, alleging that his wife failed to disclose her same-sex relationship history prior to their marriage. At trial the wife denied she was a lesbian, but admitted she had sexual relations with a woman before and during her marriage to her husband. Her husband identified his wife as bisexual. The husband and the wife had sexual relations during their ten-year relationship.

The Woy court held that the wife’s same-sex activities “had nothing to do with” the essential part of the marriage. The court reasoned that because the marriage was sufficiently consummated, the wife’s “lesbian activities” did not interfere with her ability to engage in “normal” and “usual” sexual relations with her husband. The court stated

72. UMDA § 208(a)(1), 9A pt. I U.L.A. 186 (1998). Courts shall also declare a union invalid if a party lacked the ability to consent, the marriage was prohibited, or a party was not of the appropriate age of consent. See id. § 208(a).
73. UMDA § 208(a)(2), 9A pt. I U.L.A. 1186 (1998). Consummate is defined as “to complete [the] marital union by the first act of sexual intercourse after marriage.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1986). The UMDA section governing marriage invalidity was intended to replace the traditional common law of annulments. In fact, this section purported to completely abolish the traditional grounds used to determine marriage fraud. UMDA § 208, 9A pt. I U.L.A. 186 (presenting the purpose for this section in the Comment following the specific provision of the act).
74. 737 S.W.2d 769 (Mo. Ct. App. 1987).
75. Woy, 737 S.W.2d at 770.
76. Id. at 771.
77. Id. (stating that when he spoke with his wife about her relationship with another woman he “realized that [his] wife was bisexual”).
78. Id. at 773.
79. Id. at 774.
that "the . . . lesbian activities had nothing to do with the essential part thereof of sexual intercourse." 80

The court further determined that the wife did not have an affirmative duty to disclose her same-sex sexual relationships prior to the marriage. 81 This determination was based upon the fact that the wife did not misrepresent her "lesbian" past, and mere non-disclosure did not rise to the level of fraud entitling the husband to an annulment. 82 The court likened same-sex activities prior to marriage to unchastity, which a party need not disclose to another party prior to marriage. 83 In contrast, a party must disclose pregnancy, venereal disease, sterility, and similar matters. 84 Notably, some of the things that must be disclosed (particularly venereal disease or impotence) could affect the capacity for and desirability of engaging in PVP. The court concluded that "annulment of marriage is the exception and not the rule, and must be granted only upon extraordinary circumstances." 85

Woy demonstrates the centrality of PVP in defining a legal marriage under the UMDA. First, the court in Woy disregarded the sexual orientation of the parties to marriage. While married, Ms. Woy engaged in bisexual conduct by having sex with both men and women. The court morally condemned the wife’s bisexuality (or bisexual conduct), stating that "lesbian activities are reprehensible conduct not in accordance with the normal mores of society," 86 but for legal purposes it decided that the sole dispositive condition for the marriage was the existence of PVP.

The Woy decision further illustrates the dubious nature of the articulated justifications for marriage laws that fence out gays and lesbians. The UMDA purports to "strengthen the family" and "protect the institution of marriage." Yet the Woy court recognized that a woman can be sexually active with women before and during her marriage, condemned such behavior, but still upheld the marriage as valid, thus protecting the union of opposite sexual genitals. The court overlooked adultery and "homosexual" conduct because the necessary and dispositive element of legal marriage—PVP—was present. Conservative groups, including the Christian Coalition and Focus on the Family, however, would arguably assert that the Woy court weakened the family unit. 87

80. Id. at 773.
81. Id. at 774.
82. Id.
83. Id.
84. Id.
85. Id.
86. Id.
87. See Al Knight, Primary System Distorts Christian Coalition Views, DENV. POST, Feb. 25, 1996, at D1 (detailing the ideals of the Christian Coalition, an organization that was founded by Republican Pat Robertson, that includes right-wing issues such as anti-choice, prayer in schools, and anti same-sex marriage efforts); Michelle Mahoney, Focus on the Family Sets Compass by Bible, DENV. POST, Nov. 28, 1995, at E1 (explaining the conservative, Colorado Springs based group and
An additional insight offered by Woy relates to Ms. Woy's admission of engaging in sexual acts with both men and women while married. Had Ms. Woy been in the military, her conduct and admission could have justified her discharge. Had Ms. Woy been a recent immigrant to this country and admitted such conduct in a petition for permanent residency, the INS could have denied her petition. The same conduct, however, did not preclude legal recognition of marriage because the only relevant conduct was PVP.

Additional court decisions under the UMDA illustrate that marriage is based upon the potential for PVP much more than any companionship ideal. Courts uphold marriages when entered into solely for the purposes of financial gain or under false pretenses of love and affection. In Henderson v. Ressor, for example, the court validated an ostensibly heterosexual marriage despite the fact that the sole reason for the union was to inherit property at the spouse's death. In Nebbitt v. Nebbitt, the court held that a woman's failure to disclose her lack of love and affection for her husband did not give rise to a fraud suit in tort. Neither Henderson nor Nebbitt required any showing of companionship between the spouses. Parties can marry for financial gain or without love, commitment, or affection as long as the parties are able to engage in PVP.

One additional case provides further support for the premise that PVP is central to legal marriage. In Freitag v. Freitag, the court dismissed an annulment action filed by the wife who claimed that the husband had concealed his "homosexual tendencies." Three weeks after the marriage, the husband became impotent. Two to three weeks following the onset of impotence, the husband confessed his history of homosexuality prior to the marriage.

Despite both the husband's history of homosexuality and the onset of impotence, the court refused to annul the marriage. In reaching its decision, the court noted that prior to the marriage, the couple had been "intimate." Additionally, the couple cohabitated upon their return from

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88. *See infra* note 108.
89. *See infra* Part II.
90. 126 S.W. 203 (Mo. 1910).
91. The *Henderson* case continues to be cited as good law. *See* Charley v. Fant, 892 S.W.2d 811, 813 (Mo. Ct. App. 1995) (citing the *Henderson* case as an example of a legitimate marriage).
92. 589 S.W.2d 297 (Mo. 1979).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* The court, however, did not define "intimate."
a honeymoon.\textsuperscript{99} Because of this cohabitation, the court implicitly assumed that the couple consummated the marriage (i.e., the husband penetrated the wife) when it stated that the husband was "incapable of further fulfilling his marital contract."\textsuperscript{100} Thus it was not cohabitation (or companionship) itself which mattered, but cohabitation as indirect proof of prerequisite PVP.

The \textit{Freitag} court dismissed the action for two related reasons. First, the case did not present a "true case of homosexuality."\textsuperscript{101} Second, the court did not believe that "the condition of the defendant [was] incurable."\textsuperscript{102} These statements illustrate the preeminence of PVP in evaluating the validity of marriage. The husband clearly acknowledged his previous homosexuality, but the court took pains to overlook this declaration. In doing so, the court ignored the sexual orientation of one spouse, focusing instead on the sexual component of the relationship and the future potential for PVP in the marriage.

As with the other marriage cases, the basis for granting state sanction of a marriage relationship does not turn on love or companionship, or even sexual orientation. Instead, courts labor to overlook and dismiss evidence of non-heterosexual orientation and its impact, leaving PVP as the most important factor in distinguishing valid from invalid marriages. In short, courts focus more on sexual behavior (i.e., consummation through PVP) than sexual orientation or love and commitment in deciding whether to legally recognize marriages.

\textbf{b. The Defense of Marriage Act}

Congress passed DOMA in 1996 to counteract the possibility that states might legally recognize same-sex marriage.\textsuperscript{103} Congress offered five main goals and rationales for DOMA: (1) encouraging heterosexuality; (2) preserving government resources; (3) defending traditional notions of morality; (4) defending and nurturing the institution of traditional, heterosexual marriage; and (5) reserving the institution of marriage for procreation.\textsuperscript{104} Despite precluding federal recognition of same-sex marriage, DOMA allows bisexuals to be legally married. Applying
each of the congressional rationales to a legal marriage with at least one bisexual spouse reveals the disingenuousness and ineffectiveness of DOMA and its rationales, and the fact that it is based on PVP. The application of the DOMA rationales to an opposite-sexed bisexual in a legal marriage reveals that the sole determinative criteria for granting legal recognition of marriage is not heterosexuality, but rather the potential for PVP.

The first rationale supporting DOMA (encouraging heterosexual orientation) can be easily discarded as illegitimate. The fact that opposite-sexed bisexuals become legally unionized does not change their sexual orientation. Therefore, DOMA fails to encourage heterosexual orientation by allowing bisexuals to be recognized as legal partners in legal unions. If anything, DOMA encourages what might be called heterosexual conduct, which might be distinguished from what the congressional record seems to treat as heterosexual status. Just as the UMDA cases disregarded one spouse's non-heterosexuality, DOMA does not require bisexuals to forsake their orientation to be legally married. Thus, it does not provide any incentive for heterosexuality. While limiting the institution of marriage to opposite-sex couples may provide an incentive for an identity bisexual to partner with the opposite sex, the law focuses on sexual conduct, not sexual orientation. The second rationale for DOMA is similarly problematic. If protecting scarce governmental resources were a legitimate concern, bisexuals would also be fenced out of the institution in an attempt to preserve the institution's benefits for the truly deserving (read heterosexual). Thus bisexuality exposes the incoherence of DOMA's rationales.

105. While illegitimate, this rationale is not lacking in coercive power. See Adrienne Rich, Compulsory Heterosexuality and Lesbian Existence, in THE LESBIAN AND GAY STUDIES READER 227 (Henry Abelove et al. eds., 1993). Rich argues that there are many forces at work to coerce women to partner with men. See id. at 227, 232-33. To the satisfaction of Congress, DOMA would qualify as one of these forces. Rich, however, does not further argue that these forces convert women into heterosexuals. Instead, she argues that women live on a continuum of lesbian identities and that when women enter or live in a heterosexual union, it is not based upon their true or natural “orientation” per se, but instead on the benefits of the union. See generally id. “A woman seeking to escape such casual violations along with economic disadvantage may well turn to marriage as a form of hope-for protection.” Id. at 235.

106. Furthermore, current legally unionized couples with a bisexual member should face a decrease or elimination of the financial benefits accorded by the government. There are many ways to limit increased governmental spending on marriage without invidiously fencing out a group. The justification of protecting governmental resources is clearly the only attainable, albeit circumspect, goal. According to the GAO, marital status affects more than 1000 federal laws. See Letter from Barry R. Bedrick, Associate General Counsel, General Accounting Office, to Henry J. Hyde, Chair of the Committee on the Judiciary, House of Representatives, (Jan. 31, 1997) (on file with the United States General Accounting Office, available at <http://www.access.gpo.gov/su_docs/aces/acesJ60.shtml>, Report No. OGC–97–16). The GAO claims that conclusions cannot be drawn about DOMA's overall affects on these laws because any particular law may disadvantage or advantage married or single persons. See id. However, the summary of categories of laws affecting marital status illustrates that marital status imparts far more financial benefits than disadvantages to married
The third rationale for DOMA (defending traditional notions of morality) also proves illusory when analyzed through the lens of bisexuality. The view of bisexuality as aligned with gay, and therefore morally repugnant, permeates our society. Many members of Congress express this view. Therefore, by allowing bisexuals entry into legal marriage, the institution becomes “morally contaminated.” Yet DOMA fails to exclude bisexuals from marriage. If those in Congress who supported DOMA intended to uphold traditional morality, these members should have required a sexual orientation litmus test upon application for a marriage license. But this practice, just like requiring a test to determine procreative ability and desire, may well be unconstitutional.

Congress attempted to distinguish between moral and immoral unions in DOMA’s legislative history by distinguishing heterosexuality from homosexuality. To do so, Congress juxtaposed heterosexuals with homosexuals. For example, the legislation states that: “Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality couples. See id. Because all of the other justifications are unfounded and unattainable, protecting heterosexual wealth remains as the only feasible justification. Preserving heterosexual economic superiority exposes the intent to fence out a particular group simply because it threatens another’s economic situation. Also, this argument inaccurately assumes that the government would be unable to extend resources. See generally John D’Emilio, Capitalism and Gay Identity, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 100 (Ann Snitow et al. eds., 1983) (arguing the development of capitalism provided the framework for the emergence of gay individuals and communities).

107. See, e.g., Rowland v. Mad River Sch. Dist., 730 F.2d 444 (6th Cir. 1984) (holding that the termination of a bisexual school teacher was constitutional), cert. denied, 470 U.S. 1009, 1017 (1995) (Brennan, J., dissenting) (stating that “[n]othing in [Supreme Court] precedents requires that result”); Timothy M. Tymkovich et al., A Tale of Three Theories: Reason and Prejudice in the Battle over Amendment 2, 68 U. COLO. L. REV. 287 (1997). Tymkovich represented the state of Colorado in defending the anti-gay Amendment 2 before the U.S. Supreme Court in Romer v. Evans, 517 U.S. 620 (1996). Amendment 2 fenced out gays, lesbians, and bisexuals from the political process. See COLO. CONST. art. II, § 30b (held unconstitutional in Evans, 517 U.S. at 635). The Tymkovich article, mirroring the majority of Colorado voters, made no distinction between bisexuals and “homosexuals” when discussing the validity of Amendment 2.

108. See, e.g., 10 U.S.C. § 654 (1994) (outlining the congressional Don’t Ask, Don’t Tell policy). This policy equates bisexuality with homosexuality in stating: “A member of the armed forces shall be separated from the armed forces if . . . . . bisexual . . . .” Id. § 654(b)(2).

109. A sexual orientation litmus test would likely be unconstitutional under two theories. First, if opposite-sexed bisexual marriage applicants were required to assert a heterosexual identity, and refused legal recognition if they did not, they could allege their fundamental right to marriage was violated. See Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding the right to marry as fundamental). In this case, an opposite-sexed bisexual would argue that any restriction of this right must be supported by a narrowly-tailored, compelling state interest, a standard nearly impossible for the state to meet. The second approach for challenging such a test is based on the First Amendment. A bisexual, gay, or lesbian person could allege that basing marital benefits on an assertion or statement of sexual orientation is a content-based law that violates the First Amendment. See generally Nan D. Hunter, Identity, Speech, and Equality, 79 VA. L. REV. 1695 (1993) (arguing that an announcement of homosexuality communicates an idea, not only a status or conduct).
better comports with traditional (especially Judeo-Christian) morality.”

Bisexuals are conspicuously absent from this discussion. One may think that it is not surprising for Congress to omit bisexuals, however, because they are uniquely situated to fit the description of “heterosexual” by choosing to marry a person of the opposite sex. While bisexuals may choose to marry someone of the opposite sex, they, like gays and lesbians, are not legally allowed to not marry a partner of the same sex. As previously discussed, the choice of partners is not determinative of bisexual orientation." In other words, when an opposite-sexed bisexual becomes legally married, his or her sexual orientation does not change. Identity bisexuals by definition retain their non-heterosexual sexual orientation identity. Therefore, the institution is not exclusively “heterosexual,” calling into question Congress’s traditional notions of morality. By failing to require heterosexual orientation under DOMA, Congress failed to meet its goal of preserving traditional notions of morality.

Bisexuality similarly reveals the bankruptcy of the fourth rationale for DOMA. Congress and the President intended to defend “traditional, heterosexual” marriage with DOMA. But if bisexuals can marry an opposite sex partner, the only tradition being protected is two people of the opposite sex forming a legal union. The partnership at that point need not be comprised of two heterosexuals and is not, therefore, a “heterosexual” union in the sexuality sense." Instead, the spouses would be legally unionized and if they remained married, functional heterosexuals. Congress and the President, however, apparently assume an opposite sex union constitutes a “heterosexual” union (in the sexuality sense). To illustrate, Congress stated that “society has made the eminently sensible judgment to permit heterosexuals to marry.” Additionally, Congress stated: “Civil laws that permit only heterosexual marriage reflect and honor a


111. See supra notes 43-47 and accompanying text.

112. An argument can be made that when members of Congress use the term heterosexual, they mean to invoke only notions of opposite sex pairings and never sexual orientation. One definition of the term heterosexual is: “[O]f or relating to different sexes [heterosexual] twins.” Webster’s Third New International Dictionary 1063 (1986). This definition supports the argument that Congress meant only opposite sex couples. However, Webster’s definition of heterosexual lists the above definition last. The first definition listed under the term heterosexual is: “[O]f or relating to or characterized by heterosexuality [sexual relationships between individuals of opposite sexes are heterosexual].” Id. Heterosexuality is defined as: “[T]he manifestation of sexual desire toward a member of the opposite sex.” Id. Finally, one last definition for heterosexual is: “[A] heterosexual individual.” Id. These definitions, the ones implicating notions of sexual desire, occupy a more central place in the dictionary. Therefore, it is likely that Congress did not divorce notions of sexual orientation from the use of “heterosexual.” Also, when ideas of opposite sex are implicated, they are associated with non-sexual partners, such as twins. Furthermore, by allowing only “heterosexuals” to marry, Congress implicates the definition of heterosexual, which is “a heterosexual individual” which in turn necessarily implicates sexual desire and sexual orientation.

collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."

The fact that bisexuals can marry their opposite sex partners shows that DOMA fails to protect a "heterosexual" institution. Furthermore, the fact that bisexuals legally can avail themselves of protected status and financial benefits begs the question about what "traditional" union Congress hoped to protect. What does it mean that despite congressional attempts to reserve marriage for heterosexuals, bisexuals can and do marry? This means, in part, that the ideal fails to achieve the desired reality. The congressional ideal of only allowing state recognition of those with a heterosexual orientation fails to play out in practice.

The fifth and final of DOMA's rationales, that DOMA reserves the institution of marriage for procreation, is inherently empty. Congress stated: "[Society] has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children." This goal is illusory in that fertility is not a prerequisite for legal marriage. Congressional response to this fact is as empty as the ideal itself. "Surely no one would propose requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce, or to sign a pledge indicating that they intend to do so." Congress would likely assert the same response to those who point out that bisexuals can marry, thereby rendering the traditional and heterosexual ideals as illusory and false. The appearance of tradition apparently matters to Congress, not the reality that being partnered with a member of the opposite sex is not necessarily synonymous with heterosexual status or identity.

Revealing bisexuals' ability to marry provides a trenchant critique of DOMA. If all of the goals forwarded by Congress are incoherent, there must be some unarticulated, additional reason for DOMA. This unarticulated goal is certainly not to legally recognize love and companionship. Congress even specifically states that "it is not the mere presence of love that explains marriage." But not only is love insignificant, it is nonexistent in DOMA and our marriage doctrine. Congress can point to no provision in DOMA that codifies a "love" requirement. Congressional analysis of marriage in DOMA shows that the real reason for DOMA is to affirm PVP as a prerequisite for legal unions. First, Con-

117. Id. at 13, reprinted in 1996 U.S.C.C.A.N. at 2917. The legislative history contains many quotes about the lack of significance of love in the legal marriage relationship. One example is: "The question of what is suitable for marriage is quite separate from the matter of love . . . ." Id. (quoting Professor Hadley Arkes, Amherst College).
gress uses "heterosexual" synonymously and interchangeably with "opposite-sex." For example, Congress defined marriage as the partnership between one man and one woman,\textsuperscript{118} and further set out its regulatory purpose as "defend[ing] the institution of traditional heterosexual marriage."\textsuperscript{119} Congress also contends that "the uniform and unbroken rule has been that only opposite-sex couples can marry."\textsuperscript{120} If opposite-sex pairings neither guarantee nor represent procreative ability, an alternative reason for the requirement must exist. As in UMDA case law, the opposite-sex criterion must then be a euphemism for PVP. Logically, this conduct-based understanding of opposite-sex pairings, then, is the potential for or actual occurrence of PVP.

Under DOMA and the UMDA, bisexuals enjoy state sanction of their opposite sex relationships. Courts and legislators bestow such privilege upon them simply because of their opposite-sex unions. Justifications for DOMA rest upon tradition and encouraging moral families. Bisexuality, however, does not fit within commonly accepted societal notions of "moral" or "traditional," as evidenced by societal discrimination against bisexuals. Bisexuals, nonetheless, are free to marry under the UMDA, indicating that the only necessary criterion for marriage is genitalia deemed necessary to engage in PVP.

II. COMPANIONSHIP AND SEXUAL ORIENTATION MATTER IN IMMIGRATION LAW

Although the general family law rule for granting legal recognition to couples turns on the capacity for PVP, a different rule may apply in other doctrinal areas.\textsuperscript{121} Congress generally relies on the union of a man and woman, or more accurately a penis and a vagina, as a basis to protect the institution of marriage. Under DOMA and the UMDA, simply being "opposite-sex" entitles a couple to marital benefits. Congress, however, does not apply this conduct-based standard in all cases. Specifically, this approach does not apply to immigrants who either marry upon arriving in this country or who hope to join their spouses in the United States.\textsuperscript{122} The Immigration Marriage Fraud Amendments\textsuperscript{123} (IMFA) prevent an immigrant from attaining immediate permanent legal status in the United

\textsuperscript{120} Id. at 3, reprinted in 1996 U.S.C.C.A.N. at 2907.
\textsuperscript{121} The rule could be described as a "marriage-plus" situation. A "marriage-plus" situation exists when litigants present a court with not only a marital, family law issue, but an additional issue legislated by Congress or interpreted by the courts.
\textsuperscript{122} The treatment of marriage in the immigration context best illustrates this "marriage-plus" situation. The marriage plus situation at issue here is marriage plus immigration.
States, even if s/he is married to a United States citizen. Instead, an immigrant married to a U.S. citizen is only granted permanent residency on a two-year conditional basis.

In order to obtain permanent legal status, the immigrant must demonstrate that the marriage was not entered into for the purpose of "procuring an alien's entry as an immigrant." The immigrant and her or his citizen spouse are required to demonstrate a good faith marriage by filing a petition detailing that the marriage was: (1) entered into in accordance with state law, (2) valid at the time of petition, and (3) not entered into for the purpose of gaining legal status for the immigrant. The immigrant and her or his citizen spouse also must meet personally with a representative from the Immigration and Naturalization Service (INS) so the representative can determine whether the couple entered into the marriage in good faith. The statute further requires individuals to prove the legitimacy of their relationship. Evidence of this legitimacy includes pledges of commitment, cohabitation, and a disavowal of the purpose of attaining legal status from the union. The interviews are quite invasive. INS officials question the man and woman separately to determine whether they each know the details about the other's daily lives. In determining the legitimacy of the marriage, courts consider "evidence relating to the degree of commitment by both parties to the marital relationship" which includes considering all "relevant evidence." Courts have interpreted the requirements of the "good faith" requirement to mean, in part, that the parties intended to "establish a life together" at the time of their marriage. Thus, the IMFA, as interpreted, requires proof of a genuine companionship.

125. Id. § 1186a(a)(1).
126. Id. § 1186a(b)(1)(A)(i). The immigrant must also remain married from the time of entry through the time of receiving his or her permanent status. Id. § 1186a(b)(1)(A)(ii).
127. Id. § 1186a(d)(1)(A)(i). The petition must also include the address of each party since the immigrant obtained permanent residence on a conditional basis. Id. § 1186a(d)(1)(B)(i). This requirement implies that it is essential for the immigrant and spouse to live together in order for the immigrant spouse to attain permanent residence.
128. Id. § 1186a(c)(1)(B), (d)(3). The Attorney General, or designee, may waive the requirement of an interview if s/he feels it is appropriate to do so. Even before the Amendments were enacted, the INS met with immigrant spouses to determine the validity of the marriage. See James A. Jones, Comment, The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?, 24 FLA. ST. U. L. REV. 679, 681 (1997).
130. Chand v. INS, No. 96-70901, 1997 WL 415348, at *1 (9th Cir. July 24, 1997).
131. Id.; see also 8 C.F.R. § 216.5(e)(2) (1998).
132. See, e.g., Chand, 1997 WL 415348, at *1 (quoting Bu Roe v. INS, 771 F.2d 1328, 1331 (9th Cir. 1985)).
In 1986, Congress enacted the Immigration Marriage Fraud Amendments to curtail "fraudulent marriages." At that time the INS asserted that close to 30 percent of petitions for immigrant visas involved "suspect marriages." Since 1986, the INS disclaimed this statistic and admitted that the number of people attempting to obtain legal status through marriage was and is much lower. Despite this acknowledgment, the Amendments remain in force.

One example of the companionship requirement under immigration law is found in *Chand v. INS.* Deciding that the marriage at issue was not entered into in good faith, the court relied on the fact that the couple did not see each other for eleven months after the wedding. Similarly, in *Gamboa-Garibay v. INS,* the court found a marriage to be fraudulent, in part, because a spouse could not provide any documents of shared residence. In *Gamboa-Garibay,* the court also considered the fact that a witness who often visited the couple could not give specific details about what the couple did together during the these visits. The court reached its conclusion by disregarding the testimony of numerous witnesses who testified on the petitioner's behalf as lacking credibility.

Juxtaposing the INS amendments with DOMA illustrates the different and contradictory federal approaches to marriage. DOMA accepts without question the marriage of a man and a woman (both presumed to be heterosexual) as a basis for social and legal entitlements. A couple need do nothing more than present their opposite sex composition to a court of law to obtain legal recognition as a valid marriage. Even that

133. H.R. REP. NO. 99–906, at 1, 6 (1986), reprinted in 1986 U.S.C.C.A.N. 5978, 5978. Congress hoped to curtail such fraud while also supporting and encouraging the policy of family unification. Immigrant spouses are given special consideration under our immigration laws in order to achieve such a policy. This special policy, according to Congress, led to abuse and fraud when used by immigrants who married solely to obtain United States citizenship or residency. Id. at 6, reprinted in 1986 U.S.C.C.A.N. 5978, 5978.
134. Id. Congress adopted this statistic as one basis for enacting the Amendments.
135. See Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants,* 102 YALE L.J. 1401, 1411 n.60 (1993) (stating that one of the highest rates of "marriage fraud," according to the INS, is approximately 15 percent in the Los Angeles area but that the INS estimates an average percentage closer to 8 percent). The Amendments primarily burden female immigrants and have been amended to include waivers for battered women. See generally id. (examining the effect of the INS amendments and subsequent regulations on immigrant women).
140. Id.
141. Id. In another case, *Chungong v. INS,* the court mentioned as noteworthy that although a party could supply a legal marriage certificate, the party could not produce any photographs or invitations of the event. No. 96–2103, 1997 WL 295628, at *2 (4th Cir. June 4, 1997).
142. Presuming of course that the union was appropriately solemnized and registered.
143. An annulment, however, is always an option for a party to a marriage who has evidence the marriage was not a valid one. See discussion supra Part I.B.2.a.
declaration is not necessary in most circumstances since opposite-sex couples usually just claim their marital status on hospital, tax, estate, or other forms. In contrast, due to congressional concerns about marriage fraud, immigration laws require much more than mere opposite sex unions to form valid marriages. INS representatives are allowed to ask applicants about their companionship, and even their sexual orientation to determine the validity of a marriage.\footnote{See, e.g., \textcite{Garcia-Jaramillo v. INS, 604 F.2d 1236, 1239 (9th Cir. 1979) (holding that testimony offered at a deportation about an immigrant's homosexuality in an attempt to determine the legitimacy of his marriage was not prejudicial).}

For purposes of federal law, different regulations of marriage apply. Under DOMA, when two opposite sex persons unite, there is not contemplation of fraud. A man and a woman who are legal residents or citizens in this country could arrive at the justice of the peace, declare that they do not love one another and their sole intention is to get financial perks, and still receive approval from the state.\footnote{See Henderson v. Ressor, 126 S.W. 203, 208–09 (Mo. 1910). \textit{But see} \textcite{Patricia A. Cain, \textit{Same-Sex Couples and the Federal Tax Laws, \textit{1 LAW \& SEXUALITY: A REVIEW OF LESBIAN \& GAY ISSUES} 97, 98 (1991) (finding that legally married couples do not always enjoy financial benefits, specifically they have faced some tax burdens such as the "marriage penalty").}} A bisexual could similarly arrive at the courthouse with an opposite sex spouse, denounce heterosexuality, pledge to live in an open manner as a bisexual, but nonetheless receive legal recognition and financial benefits based solely on the genital match at the altar.\footnote{See \textsuperscript{147} supra Part I.B.2.}

Why then does federal law codify this inconsistency? One possibility is xenophobia. The disparate treatment of immigrants manifests not only in the marriage context but also in welfare laws\footnote{See \textcite{8 U.S.C.A. § 1613 (West Supp. 1998) (prohibiting legal immigrants, with few exceptions, from receiving means-tested public benefits for five years after their entry into the United States). Congress also stated that legal immigrants should "not depend on public resources to meet their needs." \textit{Id.} § 1601(2)(A).}} and educational systems.\footnote{See generally Alaine Patti-Jelsvik, \textit{Note \& Comment, Re-educating the Court: Proposition 187 and the Deprivation of Education to Undocumented Immigrants, \textit{18 WHITTIER L. REV.} 701 (1997) (discussing the components of Proposition 187, one of which denied undocumented immigrant children elementary and secondary public education access).} A second possible explanation for the different approaches to marriage is that heightened romantic or companionship requirements for immigrants provide assurance that the immigrant also has a source of financial support, and is, therefore, at a lower risk for burdening the government, or becoming a "public charge." However, this argument could actually work in the converse; once individuals marry, even if their marriage lacks commitment or romance, they are entitled to a wide range of economic support from their spouse, including fair property division, support, and maintenance. This fact might encourage, rather than discourage, a lower threshold for legitimacy, so as to guarantee a source of support. A third possible explanation is that the IMFA grants immigrants...
a benefit, rather than punishes them. This argument rests on the fact that immigrants usually do not receive any type of conditional residency or expedited review, except in the marriage context. While this argument frames the treatment accorded to immigrants as positive or privileged because their petitions receive expedited review if they are married, the reality still exists that compared to legal residents and citizens, immigrants must fulfill heightened and additional requirements in order for their unions to be recognized as legally valid and deserving of financial and societal privilege.

The divergent congressional approaches to regulating marriage complicate the questions regarding marriage regulation and merit further discussion. The IMFA focus on companionship in marriage, however, does not invalidate this Note’s conclusion about PVP in marriage due to the unique nature of the immigration context.149

III. THE MISCHARACTERIZATION OF THE PVP NATURE OF MARRIAGE

The previous discussion illustrates that legal marriage depends upon actual or potential penis-vagina penetration. As the UMDA and transgender cases show, neither sexual orientation nor love nor companionship matters for most marriage regulation. The Woy court, for example, treated a bisexual as heterosexual as long as she engaged in PVP. Under that court’s approach, as long as a person is willing to engage in PVP, the PVP relationship (marriage) will be recognized, notwithstanding the spouse’s non-heterosexual sexual orientation. Woy, then, could be interpreted as furthering heterosexist principles by treating opposite-sexed bisexuals more favorably than gays or lesbians. More fundamentally, the court overlooked sexual orientation altogether. The court based its decision not on the sexual orientation of the parties, but on their capacity for PVP.

The transgender cases similarly illustrate that legal marriage depends on conduct (PVP) rather than heterosexual status. The transgender individuals in these cases were never questioned about their sexual orientation. Instead, their ability to marry rested on their physical ability to perform one particular sex-act: PVP. Finally, Congress articulated the opposite sex requirement for marriage in DOMA, which fronts for the ability to consummate a union, i.e., engage in PVP.

Notwithstanding the doctrine that dictates that legal marriage depends on sexual conduct—PVP—the courts and Congress attempt to characterize marriage as status-based. The following discussion explores two reasons for the mischaracterization of marriage as status-based. First, the mischaracterization serves to reify and elevate heterosexual identity.

149. The unique nature is one of a “marriage-plus” situation. See supra notes 121–22.
Second, the mischaracterization perpetuates the exclusivity of the institution of marriage.

A. How Courts and Congress Mischaracterize Marriage as Status-Based

Congress mischaracterizes marriage as status-based by equating the opposite sex requirement—shown earlier to be the PVP requirement—with heterosexual status, stating "society has made the eminently sensible judgment to permit heterosexuals to marry." The institution of marriage also gets characterized as status-based when the participation of bisexuals in the institution is ignored and dismissed. In other words, marriage can only be characterized as heterosexual by dismissing the reality that bisexuals legally marry.

In a related context, Janet Halley states: "Not knowing what sodomy is, not naming it at all, not describing it accurately, not acknowledging its presence, are all important parts of its historical profile. Obscurity is part of what sodomy is, a means by which it attains its social effects." The same can be said about bisexuality in the context of legal marriage. Bisexual invisibility perpetuates the myth that marriage is exclusively heterosexual and based on status rather than sexual conduct.

By not acknowledging bisexuality, legal marriage can be constructed as purely heterosexual. A nuanced understanding of the bisexual identity, therefore, exposes the institution of legal marriage as one that includes various sexual orientations. In essence, acknowledging that identity bisexuals remain bisexual notwithstanding their participation in a legal marriage reveals that legal marriage includes multiple sexual orientations.

Failing to acknowledge bisexuals as active participants in legal marriage also perpetuates the myth and conservative ideal that legal marriage consists of two heterosexual partners. DOMA's legislative history reveals not only a lack of acknowledgment, but a labored attempt to construct and present legal marriage as an exclusive union of two heterosexuals. For example, Congress presents DOMA as a "heterosexual-only marriage law." This "heterosexual" myth excludes gays and lesbians from the institution. By being constructed as exclusively heterosexual, the institution self-perpetuates as exclusively heterosexual. For example,

151. Just as Sedgwick argues the open secret of the closet has been central to the definition of modern Western thought, the open secret of bisexuality has been central to the construction of legal marriage. See Sedgwick, supra note 48, at 48-49. The open secret is this: bisexuals exist and exist in both heterosexual and homosexual communities (as well as bisexual communities). The participation of bisexuals in heterosexual communities, while known, remains unnamed and unanalyzed.
152. Halley, supra note 58, at 1757.
the law constructs marriage to be about heterosexuals. Because it is about heterosexuals, it is thereby only for heterosexuals. Halley explains how sodomy similarly conflates status and conduct: “[H]omosexual sodomy has become homosexuals as sodomy.” Under the legal institution of marriage, “heterosexual marriage” has, similarly, become “marriage as heterosexuals.” When one considers that bisexuals enter the institution, however, it becomes apparent that the current institution of marriage is not only about heterosexuals but also about bisexuals. The institution instead turns on the present or future acts of PVP, not the sexual orientation status of the spouses.

Admittedly status and conduct cannot be cleanly separated as if distinct aspects of a person. Status can implicate conduct and vice versa: the two are co-constitutive. A wealth of rich scholarship explores the complexities of the relationship between status and conduct. Most relevant for the purposes of this Note is why the institution of marriage is socially and legally constructed as status-based, specifically as heterosexual.

B. Why Marriage Is Mischaracterized As Status-Based

Strategically characterizing legal marriage as based on heterosexual status serves a purpose. As Janet Halley argues, deconstructing like characterizations “exposes the political nature of that equivocation.” In other words, Congress and courts further a political purpose by erroneously equating PVP conduct with heterosexual orientation. First, the characterization perpetuates the myth that marriage is inherently or traditionally for heterosexuals—not gays and lesbians. This equation is intimately tied to both sexism and heterosexism:

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155. This is the definitional approach used to fence out gays and lesbians from marriage. See Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (using definitional approach to uphold denial of marriage license to two males). Singer defines marriage as the union between a man and a woman. Singer, 522 P.2d at 1191–92. Thus, because the union is only about men and women it can only be for men and women. William Eskridge found that this is the most common articulated approach for the defense of opposite-sex marriage. See William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419, 1427–28 (1993).

156. Halley, supra note 58, at 1734.


159. The point I am arguing here is not that classification based upon acts is bad, undesirable, or harmful per se. In fact, classifying based upon acts promises to offer opportunities for liberation and equality. See Halley, supra note 58; Mezey, supra note 55. What this Note argues is that the type of conduct—PVP—that marriage depends upon is unprincipled and illegitimate.

160. Halley, supra note 58, at 1733.

161. William Eskridge found that “[t]he main argument against same-sex marriage is definitional: marriage is necessarily different-sex, and therefore cannot include same-sex couples.” See Eskridge, supra note 155, at 1427. Congress uses this definitional argument to further argue that
For efficient subordination, what’s wanted is that the structure not appear to be a cultural artifact kept in place by human decision or custom, but that it appear natural—that it appear to be a quite direct consequence of facts about the beast which are beyond the scope of human manipulation or revision. It must seem natural that individuals of the one category are dominated by individuals of the other and that as groups, the one dominates the other.\textsuperscript{162}

Since marriage is constructed as crucial to social ordering, it is essential for equivocation to occur. This equivocation legitimizes the social privileges afforded to heterosexuals in other contexts. For example, sexual regulations harken back to traditional notions of morality and appropriate intimacy,\textsuperscript{163} the very notions that create and perpetuate the current institution of marriage. Thus, without such equivocation, the privileged nature of the heterosexual orientation in other contexts may be called into question.\textsuperscript{164} In essence, if courts and Congress were clear that sexual orientation fails to matter in marriage, then it could be argued that orientation should not form the basis for discrimination in other contexts.

In addition, equating heterosexual identity with sex acts illustrates the permeability and fluidity of the heterosexual status. Instead of constituting a coherent status with essential attributes and characteristics that justify the granting of legal subjectivity, heterosexuality depends upon the union of opposite sets of genitalia, and nothing more. In recognizing legal unions, the law does not care about who each partner had partnered with, who they will partner with, or how they will order their intimate relationship and how this constructs or impacts identity.\textsuperscript{165} All the law marriage is exclusively for heterosexuals by equating opposite-sex with heterosexual. See H.R. REP. No. 104–664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

\textsuperscript{162} Marilyn Frye, The Politics of Reality: Essays in Feminist Theory 34 (1983) (citing Paulo Freire’s writings as the genesis for such a theory).


\textsuperscript{164} One obvious context is the military, wherein pronounced heterosexuals receive preferential treatment. See 10 U.S.C. § 654 (1994). Even though the “Don’t Ask, Don’t Tell” policy does not per se exclude gays, lesbians, and bisexuals from the military (instead it prohibits “homosexual conduct”), those thought to be non-heterosexual must prove that they do not possess the propensity to engage in homosexual acts. Heterosexuals obviously receive preferential treatment in almost every other societal context as well, except where there are laws prohibiting against anti-gay discrimination. See, e.g., Minn. Stat. §§ 363.02–03 (West Supp. 1997) (prohibiting discrimination against gays, lesbians, bisexuals, and transgendersed individuals).

\textsuperscript{165} This is not to say that the law does not involve itself with the marriage institution once it is formed. In fact, most states, for example, impose a duty of support on spouses. See generally Amy C. Christian, Joint and Several Liability and the Joint Return: Its Implications for Women, 66 U. Cin. L. Rev. 535, 617 n.75 (1998) (discussing the varied obligations of spouses regarding property and support). Also, states regulate divorce which necessarily involves a state determination as to the continued legal viability of a union. An in-depth discussion of divorce law is beyond the scope of this Note. Moreover, this Note seeks, instead, to investigate the legal rationales and rules for allowing certain unions to access the marital privilege.
cares about is "what" one can do with specific genitalia. This reveals that there is nothing particularly elevated or sacred or socially beneficial about heterosexual marriage, unless one says that PVP is essential to social organization.

Constructing marriage as a purely heterosexual (status based) institution instead of based upon a particular type of sexual conduct (PVP) legitimizes privileges afforded to those just because they assert the status heterosexual. In essence, the construction of legal marriage as an institution based on heterosexual status serves not to describe the institution but instead to prescribe privileged treatment for those who claim the identity in society. This analysis shows the incoherence of fencing out gays and lesbians based upon a status based ideal because, as shown, marriage is not status-based. Instead, the institution is based upon the capacity for PVP which is curious, and, as shown next, illegitimate.

IV. PVP IS AN ILLEGITIMATE BASIS FOR CONFERRING MARRIAGE BENEFITS

Determining legal marriage benefits on the capacity for PVP is an illegitimate basis for providing state marital benefits. The PVP requirement perpetuates heteropatriarchy and subordinates both women and sexual minorities. The PVP requirement subordinates women because it reifies and encourages traditional gender roles (as symbolized through the PVP sex act). One traditional gender role being reified and encouraged is that it is appropriate (or natural) for men and women to have sex with the opposite sex but not the same sex. If a woman or man is not able or willing to perform this act then they are not a proper (or true) woman or man. Requiring PVP for legal marriage encourages and assures that traditional sex and gender roles will be continued. The first and most fundamental of these roles is either penetrating or being penetrated by the opposite sex. Thus, a proper woman for the purposes of marriage is a person who can be penetrated by a penis. A proper man is the person who can penetrate the vagina.

Andrew Koppelman has argued that laws which discriminate against gays and lesbians reinforce male hierarchy, thereby oppressing women. Koppelman argued, as have many writers and scholars, that

166. Congress appears to implicitly agree that determining national policy on the basis of the sexual act of PVP was illegitimate by the omission of any mention of such a requirement. Although the omission also serves the purpose of legitimating the status of heterosexual, see supra notes 153–57 and accompanying text, it also is a clear indictment of the illegitimacy of such a position. This is further proven true because Congress relied on three rationales relating to sexual orientation and marriage for DOMA, none of which were rational, true, or logical. See discussion supra Part I.B.2.b.


the taboo against homosexuality is virtually synonymous with the taboo against "sex-inappropriateness." The taboo against homosexuality, thus, re-enforces traditional sex roles. This taboo, explains Koppelman, "assumes the hierarchical significance of sexual intercourse and the polluted status of the penetrated person." Koppelman arrived at this conclusion based upon the similarities between the taboo against miscegenation and the taboo against homosexuality. Koppelman has shown that the miscegenation taboo presumed that penetration possessed hierarchical significance, with whites dominating blacks and men dominating women. Penetration signifies power; thus, being penetrated signifies powerlessness. Disallowing mixed race marriage protected whites from being penetrated by those who threatened the power structure. The ban on same sex marriage, then, protects men from being penetrated by other men. This legal scheme prevents men from inhabiting the place of the polluted and protects men's status as the penetrator and powerful. In essence, based on the homosexuality taboo, many segments of society refuse to tolerate sodomy because the penetration of a man reduces "men" or "maleness" to the same polluted status as woman or female. Koppelman further states:

Implicit in [the] taboo are the premises— incompatible with equal concern and respect for all citizens—that sexual penetration is a nasty degrading violation of the self, and that there are some people (in the case of the homosexuality taboo, women) to whom, because of their inferior social status it is acceptable to do it . . .

In the marriage relationship, women necessarily occupy the polluted position of the penetrated. This is so because legal marriage requires PVP. Men then occupy an elevated position and women occupy a subordinate position. Being penetrated also means any number of subordinating consequences. These consequences have been documented in case law, journal articles, and social science materials. Some of these consequences include the unequal division of labor in the home, the degree to which men are not held accountable for domestic violence and

171. Id.
172. Id. at 224.
173. Id. at 236.
174. See, e.g., Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment that restricted Medicaid funds for medically necessary abortions).
175. See, e.g., Koppelman, supra note 168, 224.
176. See, e.g., JOHN STOLTENBERG, REFUSING TO BE A MAN 91–100 (1989) (discussing and documenting, as far back as the early eighties, the numerosity and consequences for women of unplanned or unwanted pregnancies including financial hardship, lack of choice for abortions, and lack of support from male partners for electing an abortion).
177. See Marion Crain, Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech, 82 GEO. L.J. 1903, 1915 n.61 (1994) (citing numerous findings that women perform a disproportionate share of the household work).
marital rape,\textsuperscript{178} and the financial ruin many women face upon the dissolution of the union.\textsuperscript{179}

Adrienne Rich also discusses the institution of heteropatriarchy and urges that heterosexuality be recognized as a "political institution."\textsuperscript{180} According to Rich, heterosexuality is such an institution because of the many forces which discourage women from associating with other women (both socially and erotically) and possessing women-identified values.\textsuperscript{181} Thus, if not for the overwhelming number of forces that either punish women for being without a man or make it difficult or near impossible for women to be without a man, women would more fully realize their connection to or desire for other women.

While Rich's theory can be criticized on many fronts, particularly for essentializing women in general and more specifically lesbians,\textsuperscript{182} it provides a helpful context within which the PVP requirement can be understood. Allowing only opposite sexed couples to marry by itself works as a force to encourage male and female coupling.\textsuperscript{183} Rich states that a "woman seeking to escape disadvantage may well turn to marriage as a form of hoped for protection."\textsuperscript{184} However, the PVP requirement does even more; it perpetuates heteropatriarchy by providing financial incentives to women to be penetrated by men. As discussed above, this state sponsored penetration invokes and perpetuates the subordination of women.\textsuperscript{185}

\begin{footnotesize}
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\item \textsuperscript{178} See Katharine K. Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law, 110 Harv. L. Rev. 563, 574 (1997) (finding that marital rape is still legal in one state and treated less seriously than stranger assault); Deborah L. Rhode, Feminism and the State, 107 Harv. L. Rev. 1181, 1193 (1994) (discussing the role and limitations of the state in assisting women, including women who are victims of domestic violence).
\item \textsuperscript{180} Rich, supra note 105, at 232 (emphasis omitted).
\item \textsuperscript{181} Id. at 232–34. Some of the forces which discourage women's identification with other women but that support male power include: sexual terrorism (including rape and sexual harassment), domestic violence, abortion and contraception laws, lack of compensation for work in the home, and non and substandard education of women. Id. at 233.
\item \textsuperscript{182} Rich could be said to essentialize lesbians or lesbian desire as political. "[W]e may first begin to perceive [lesbian existence] as a form of naysaying to patriarchy, an act of resistance." Id. at 239.
\item \textsuperscript{183} Congress agrees, although as previously discussed mistakenly focuses on the sexual orientation instead of genitalia. See supra discussion Part I.B.2.b.
\item \textsuperscript{184} Rich, supra note 105, at 235.
\item \textsuperscript{185} I am not attempting to argue here that PVP is inherently oppressive for women. I could not in good faith argue this position for this would minimize the pleasurable sexual aspect of such an act for women, both heterosexual and opposite-sexed bisexual. I am not attempting to align myself with writers like Andrea Dworkin who have argued that penetration of any kind is inherently oppressive. See Andrea Dworkin, Intercourse 63–67, 122–23 (1987). Instead, I am calling into question the governmental practice and custom of focusing on this act as a basis for recognizing legal unions. For despite the sex positive outlooks on PVP, it carries with it a history and social significance in the law. Thus, I call into question the central place PVP occupies in marriage law.
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Additionally, PVP is an illegitimate basis to determine governmental benefits because it is based on certain sexual activity. The PVP-based marriage requirement reduces the marriage participants to sexual actors and objects. Men and women receive recognition and benefits for what they can do in bed, rather than what they actually do with the rest of their lives in their relationship. For performing the requisite sex act, PVP, the government confers numerous and abundant financial benefits. Spouses also receive social benefits. Because legal marriage has nothing to do with companionship and love, none of these benefits has anything to do with love or companionship. Instead, these benefits reward those who can engage in PVP.

An irony lurks here. Marriage law elevates, reveres, and encourages one type of sexual conduct (PVP) while characterizing the institution to be comprised of exclusively those with a heterosexual sexual orientation. Thus, marriage law contributes to the construction of the heterosexual identity as equivalent to PVP. Unlike heterosexuals, however, marginalized groups must devote a considerable amount of time debunking the myth that they are hypersexual. Without such defense, these groups are at risk for perpetual vilification and misunderstanding. This objectification significantly impacts marginalized groups in the law by creating bias and prejudice. For example, the myth that gay male identity is defined by sex informed the Justices who decided the anti-gay case of Bowers v. Hardwick.

On the one hand, then, heterosexuals’ benefits depend on PVP while courts simultaneously refuse protections or privileges for gays and lesbians due to the characterization, albeit inaccurate and unfounded, that gays and lesbians are all about sexual conduct. Thus, marriage law creates a double standard for gays and lesbians. This double standard is an illegitimate basis to fence out gays and lesbians from marriage. The judiciary and government cannot justify basing an entire legal scheme of financial benefits and burdens, and societal rights and responsibilities, on sexual conduct, penis-vagina penetration, which implicates an entire history and future of the subordination of so many, while simultane-

186. See supra note 106.
187. Admittedly, marriage is not the only societal force that defines the heterosexual identity. See Susan Sterrett, Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s-1920s, 75 DENV. U. L. REV. 1181 (1998) (arguing that pension benefits given to widows were instrumental in creating the heterosexual identity).
188. See generally Halley, supra note 58 (deconstructing the equivocation of gay and sodomy); Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419, 1437–45 (1991) (explaining that one prevalent image of slave women, perpetuated today, is of the Jezebel, or “a woman governed by her sexual desires”).
189. 478 U.S. 186, 192 (1986) (“It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.”); see Halley, supra note 58.
190. By exposing the unprincipled nature of the PVP requirement, this Note risks prompting reform that takes an even more punitive and discriminatory position against gays, lesbians,
transgendered individuals, opposite-sexed bisexuals, and women. This is always a risk, however, when advocating for change. The goal of this Note is to expose the true illegitimate nature of present marriage law with the hopes that future scholarship will continue to propose legitimate and inclusive alternatives.