



## To-Get-Her For*Ever*: A Man Hater’s Right to Same-Sex Marriage<sup>1</sup>

Carmen M. Cusack, J.D., Ph.D.c.

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<sup>1</sup> Eve was the first man-hater. See Genesis 3:16 (King James). “Unto the woman [God] said, in sorrow thou shalt bring forth children, and thy desire shall be to thy husband, and he shall rule over thee.” *Id.* “The harmonious relationship between the man and the woman was broken; it would end in subjection of Eve to her husband (3:16).” Michael D. Guinan, Adam, Eve and Original Sin, American Catholic Update (May 2007), <http://www.americancatholic.org/Newsletters/CU/ac0507.asp> (citing Genesis 3:16). Heterosexual union becomes a curse for Eve that brings her sorrow. See Genesis 3:16 (King James). She is heterosexual because she “desires” Adam, but she cannot enjoy heterosexual marriage in which she lives sorrowfully. *Id.* She was the first woman ever to have been ushered into, and required to be in, a binary union. See Genesis 3:20 (King James). Her name refers to procreation and motherhood. See *Id.* When Adam and Eve sinned, Elohim cursed Eve and Adam to hate each other. See Genesis 3:15 (King James). “I will put enmity between you and the woman, and between your seed and her seed.” *Id.* See generally Jose Gabilondo, Irrational Exuberance About Babies: The Taste For Heterosexuality And Its Conspicuous Reproduction, 28 B.C. THIRD WORLD L.J. 1, 7, 31, 32, 36, 51, 55, 57 (2006); Toni Lester, Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?, 14 AM. U. J. GENDER SOC. POL’Y & L. 253, 296 (2006).

## 1. INTRODUCTION

Not all same-sex partners are born homosexual.<sup>2</sup> Many people in same-sex relationships are born homosexual,<sup>3</sup> but some choose same-sex relationships.<sup>4</sup> Biologically heterosexual women can choose to live in same-sex relationships with other women: lesbians, bisexuals, transsexuals, or heterosexuals.<sup>5</sup> There are many reasons why a woman might want to marry another woman.<sup>6</sup> A heterosexual person may choose a same-sex relationship because her life partner is her platonic best friend, or because her options for binary coupling are subpar.<sup>7</sup> A woman may use a same-sex relationship as a tool to make a political statement about patriarchy.<sup>8</sup> A woman may become

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<sup>2</sup> See generally Sunish Gulati, *The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177 (2003).

<sup>3</sup> See *Ali v. Gonzales*, 160 Fed. App. 485, 486 (7th Cir. 2005).

<sup>4</sup> Jane Yager, *Why Some Women Become Lesbians Later in Life: They Meet the Right Woman, Fall in Love, Then Feel Sexual Desire*, NEWSER (Aug. 9, 2010), <http://www.newser.com/story/97596/why-some-women-become-lesbians-later-in-life.html> (citing *'Late-Life Lesbians' Reveal Fluidity Of Sexuality*, National Public Radio, NPR (Aug. 7, 2010), <http://www.npr.org/templates/story/story.php?storyId=129050832>).

<sup>5</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 942 (N.D. Cal. 2010); Yager, *supra* note 4.

<sup>6</sup> Lisa M. Diamond, *A Dynamical Systems Approach to the Development and Expression of Female Same-Sex Sexuality*, 2 PERSP. ON PSYCHOL. SCI. 142, 144 (2007).

<sup>7</sup> See generally Estelle B. Freedman, *The Prison Lesbian: Race, Class, and the Construction of the Aggressive Female Homosexual, 1915-1965*, 22 FEMINIST STUD. 397 (1996).

<sup>8</sup> See generally Lyndall MacCowan, *Review of "The 'New Gay' Lesbians" by Lillian Faderman*, 14 J. HOMOSEXUALITY 173 (1987).

The 'New Gay' Lesbians" argued that Minton and McDonald's theory of homosexual identity formation as a developmental process that begins in early childhood does not apply to most lesbians. Faderman made a case for lesbianism as a political identity that arises after a woman has reached the "universalistic" adult stage, one which results from her rebellion against a sexist society. Her argument was based on the lesbian-feminist assumption that all lesbians are feminists, and that homosexuality itself is an artificial category that over-emphasizes sexual behavior.

involved in a same-sex relationship as a result of psychological trauma.<sup>9</sup> Biologically heterosexual women may use same-sex

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When this argument is applied to the identity of new gay lesbians, the same lesbians who developed lesbian-feminist theory out of their experience, it is convincing and well-documented. When applied to old gay lesbians, it lacks proof. The assumptions of lesbian-feminism avoid the social and historical contexts of both lesbian-feminist and old gay lesbian identity development, and side-steps the identities of non-feminist lesbians and lesbians for whom sexual preference is not primarily a political stance. As an explication of lesbian identity development in previously heterosexual women, Faderman's article was important and raised questions about malleable behavior and identity.

*Id.* at 178.

<sup>9</sup> Jill C. Humphrey, *Researching Disability Politics, or, Some Problems with the Social Model in Practice*, 15 *DISABILITY & SOC'Y* 63 (2000).

The social model arose as a reaction against the medical model of disability, which reduced disability to impairment so that disability was located within the body or mind of the individual, whilst the power to define, control and treat disabled people was located within the medical and paramedical professions (Oliver, 1996). Under the bio-medical regime, material deprivation and political disenfranchisement continued unabated, whilst institutional discrimination and social stigmatisation were exacerbated by segregation (Barnes 1991). In this context, the social model harbours a number of virtues in redefining disability in terms of a disabling environment, repositioning disabled people as citizens with rights, and reconfiguring the responsibilities for creating, sustaining and overcoming disablism.

*Id.* at 63. As society continues to accept sexuality as a continuum, theoretical understandings have evolved. "[E]go dystonic homosexuality" is no longer a recognized medical condition, but it once described a person whose sexuality was at odds with his own self-perception. This leads to anxiety. It is almost the exact opposite of how lesbianism becomes a coping mechanism in PTSD. See Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 *TUL. J.L. & SEXUALITY* 1, 24 n.116 (2003); e.g., Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 *TUL. J.L. & SEXUALITY* 123, 148-49 (2001).

[T]he deck appears to be stacked against transsexual people. Despite the psychiatric view of transsexuality as a mental disorder, transsexual people are not protected under federal laws that prohibit discrimination on the basis of handicap or disability. While gender identity disorder is considered a psychiatric disorder in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders [DSM IV], nevertheless both the Rehabilitation Act of 1973 and the Americans with Disabilities Act explicitly exclude transsexuality and gender identity disorders not resulting from 'physical impairments' from protection under either Act. Several states which prohibit

discrimination against people with disabilities exclude transsexuality, either explicitly in legislation or by judicial decision. Transsexual people are protected under neither Title VII's prohibition of sex discrimination nor state and local sex discrimination laws, on the ground that "sex" does not include transsexuality. Eight states and the District of Columbia prohibit employment discrimination on the basis of sexual orientation, but implicitly exclude transsexual people.

*Id.* American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV (4th ed. 2000). World Health Organization, ICD-10: INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS (10th ed. 2008). Compare Dean Byrd & Stony Olsen, Homosexuality: Innate and Immutable?, 14 REGENT U. L. REV. 383 (2002), with Franklin H. Romeo, Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law, 36 COLUM. HUM. RTS. L. REV. 713, 724-26 (2005).

[T]he medical model of gender has emerged over the past two decades as one alternative to the strict biological model previously employed by courts. The medical model explains gender nonconformity through the psychiatric diagnosis of Gender Identity Disorder (GID) and relies upon medical evidence - both in the form of psychological diagnoses and physical treatments such as hormone therapy and gender-related surgeries - in order to establish gender transgressions as legitimate and therefore worthy of recognition and protection under the law. Like the biological model, the medical model assumes that two genders exist and enforces the norms typically associated with these genders. However, the medical model is based upon the belief that some people suffer from a psychological condition (GID) that causes them to experience great discomfort regarding their assigned gender. The diagnostic criteria for GID generally include an on-going desire since early childhood to be the "opposite" gender, a desire to physically modify one's body, and heterosexual desire in the gender with which one identifies. Under this model, gender nonconforming people who meet these criteria are eligible to transition from living as their birth gender to living as the gender with which they identify. This process is facilitated by a combination of psychological and physical care that both enables and requires transgender people to then conform to the expected norms of their lived gender. The medical model of gender nonconformity has proven to be one of the few ways in which gender nonconforming people have been able to garner respect and recognition of rights in legal settings. While the biological model of gender has resulted in the blanket denial of legal protections to transgender litigants, courts have looked to the medical model as a way of legitimizing certain gender nonconformity. Increasingly, as the medical regulation of gender transitions has become more uniform and visible, courts have been willing to grant at least rudimentary legal protections to transgender litigants who are able to provide documentation of a GID diagnosis and related medical treatment. This has resulted in the expansion of transgender rights on two fronts: the ability of some transgender litigants to be legally recognized as the gender with which they identify, and the ability of some transgender litigants to access rights based upon a medical diagnosis of GID.

*Id.*

relationships to satisfy their desires to couple in a stable environment; as a statement about women, family, and society;<sup>10</sup> or as a coping mechanism to heal the abuse suffered during a previous heterosexual relationship.<sup>11</sup>

This article will argue that case law should be applied in a novel, yet just, manner that finds that heterosexual women's fundamental right to marry includes marriage to other heterosexual women under substantive due process.<sup>12</sup> It will argue that heterosexual women have the right to freely express a political statement against patriarchy by entering into same-sex marriages,<sup>13</sup> and that psychologically disabled people who choose same-sex coping strategies must be treated equally to mentally healthy heterosexuals or psychologically disabled

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<sup>10</sup> *Contra* Momin Rahman & Stevi Jackson, *Liberty, Equality and Sexuality: Essentialism and the Discourse of Rights*, 6 J. GENDER STUD. 117 (1997). See generally Angela M. L. Pattatucci, Book Review, 25 ARCHIVES OF SEXUAL BEHAV. 221 (1996) (reviewing HETEROSEXUALITY: A FEMINISM & PSYCHOLOGY READER (Celia Kitzinger & Sue Wilkinson eds., 1993)).

<sup>11</sup> Lenore E. A. Walker, Professor, Online Class at Nova Southeastern University (Sep. 21, 2011). Dr. Lenore Walker coined the term Battered Woman Syndrome. LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (Springer Publishing, 3d ed. 2009). During an online Criminal Justice Ph.D. class chat she mentioned that women who have been battered sometimes turn to each other in lesbian relationships. This was a minor point that she raised. It had no connection to biologically gay women. In the greater context of her work, this fact was mentioned to supply students with an idea of how traumatized women can be by abusive, heteronormative relationships. Though the point was brief, it offered invaluable and tremendous insight into the sexual spectrum, female psychology, the cycle of gendered abuse, and Post Traumatic Stress Disorder.

<sup>12</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967); U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>13</sup> U.S. CONST. amend. I. Women have not always had equal rights in family law. Legally, women suffered many disabilities and badges of political oppression. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 1017, 2048-49, 2062-64, 2088, 2090, 2093 (2000), reprinted in DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, *CONTEMPORARY FAMILY LAW* 181 (Thomson Reuters, 2d ed. 2006); e.g., George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEX. REV. L. & POL. 359 (2011).

heteronormative individuals under the equal protection clause.<sup>14</sup> Before arriving at the brass tacks of the above arguments in Sections III, IV, and V respectively, this article will first explain its purpose in endeavoring to attack binary marriage in support of same-sex marriage.

## A. FOR WHAT IT'S WORTH

The purpose of this article is to advocate for same-sex marriage by shaking-out and resetting the black letter law in order to suit an array of people living in alternative lifestyles who have been led to believe that they cannot rely on the current case law to support their unions.<sup>15</sup> Though this article may not persuade you of an existent heterosexual right to same-sex marriage, it is enough to confront majoritarian marital jurisprudence in a unique way. Marriage laws hardly suit modern understanding of family and love, and they should be subject to challenge.<sup>16</sup> Because loving unions cannot be regulated, current marriage laws rest on legal fiction.<sup>17</sup> They are mainly a set of property laws that subsidize binary reproduction.<sup>18</sup>

The legal fiction of marriage goes to its core. In order to marry, bisexuals have to wed binary partners,<sup>19</sup> while

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<sup>14</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985); U.S. CONST. amend. XIV, § 1.

<sup>15</sup> *Lawrence v. Texas*, 539 U.S. 558, 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986); *Loving*, 388 U.S. at 1; U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>16</sup> See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding a New York village's definition of family by "defining the word 'family' to mean one or more persons related by blood, adoption, or marriage").

<sup>17</sup> See James White, *Is This Why We Send Them to University? Outrage as Gay Man and Straight Woman Get Married... for Degree Art Project*, DAILY MAIL (Jan. 14, 2011), <http://www.dailymail.co.uk/news/article-1347084/Gay-man-straight-woman-married-University-Worcester-degree-art-project.html#ixzz1nveUdE86>.

<sup>18</sup> See generally Gabilondo, *supra* note 1, at 7, 31, 32, 36, 51, 55, 57.

<sup>19</sup> See, e.g., LAVENDER VISIONS, <http://lavendervisions.com/index.php> (last visited Nov. 11, 2012).

biologically multisexed people, who are assigned a gender role at birth, have to choose a binary sexed/legally binary gendered partner regardless of how their hormones develop.<sup>20</sup> Some closeted individuals will choose binary partners simply because they want to be married.<sup>21</sup> Some heterosexual people, like the women identified by this paper, have complex and valid reasons for wanting to be recognized as married heterosexuals but have no desire to be married to a man.<sup>22</sup>

In no way does the argument offered on behalf of the small group of people identified by this paper intend to dissuade advocates from arguing on behalf of same-sex homosexual marriage or opposite-sex heterosexual marriage. To the contrary, this paper argues against restricting heterosexual women to binary marriages. In that sense, this argument is ultimately a queer, pro-heterosexual and anti-patriarchal argument on behalf of same-sex marriage.<sup>23</sup> Any argumentation in this article that distinguishes the rights of homosexuals and heterosexuals is strictly an intellectual endeavor meant to align this argument with an established right and reduce its compartmentalization with a less frequently recognized right. This article exists to tear down a wall that does not keep two actual sides separate but instead creates an East and West that do not organically exist without the wall.<sup>24</sup> Homosexual and heterosexual binary marriage advocates would ask, “why would this article argue for a more encompassing right to marriage if the intention is to dismantle marriage?” The intention is not to

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<sup>20</sup> See, e.g., Chris Parsons, *Woman Lived As a Man for 41 Years Because Parents Didn't Tell Her She Was Born a Hermaphrodite*, DAILY MAIL (Feb. 27, 2012), <http://www.dailymail.co.uk/health/article-2107085/Caroline-Kinsey-lived-man-41-years-parents-didnt-tell-shes-hermaphrodite.html>.

<sup>21</sup> See LAVENDER VISIONS, *supra* note 19.

<sup>22</sup> See *infra* Sections III, IV, & V.

<sup>23</sup> See Gabilondo, *supra* note 1, at 4.

<sup>24</sup> *The Berlin Wall: 20 Years Later*, THE N.Y. TIMES (Nov. 6, 2009) <http://www.nytimes.com/interactive/2009/11/09/world/europe/20091109-berlinwallthenow.html>.

dismantle marriage, but to disprove the idea that existing law is necessary, important, or even rational.<sup>25</sup>

Though the heterosexual women described by this paper would engage in the same type of sexless marriage engaged in by millions of binary heterosexual couples,<sup>26</sup> the discussion about the difference between marriage and partnership or cohabitation and unions have been nitpicked *ad nauseam*, so to put a pebble on the mountain top, this paper will briefly discuss it here.<sup>27</sup> Without sex, the law could be used to distinguish between a valid marriage and an invalid marriage.<sup>28</sup> Marriages that have not been consummated might be voidable.<sup>29</sup> This means that a party would have to request that the court void the

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<sup>25</sup> *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1996)).

<sup>26</sup> Donovan Mauer, *The Big No: The Truth About Sexless Marriage*, MSNBC (Sept. 8, 2009), [http://today.msnbc.msn.com/id/32735936/ns/today-relationships/t/big-no-truth-about-sexless-marriage/#.T1BKI\\_GmjzQ](http://today.msnbc.msn.com/id/32735936/ns/today-relationships/t/big-no-truth-about-sexless-marriage/#.T1BKI_GmjzQ). “Some experts call marriages that average 10 rolls in the hay per year or less ‘sexless.’” *Id.*

<sup>27</sup> See, e.g., *O’Darling v. O’Darling*, 188 P.3d 137 (Okla. 2008). *Contra* C.M. v. C.C., 867 N.Y.S.2d 884, 885-88 (N.Y. Sup. Ct. 2008). Legal scholars have analyzed the meaning of marriage and partnership rights in the context of civil unions, cohabitation, and marriage as a bundle of rights. See e.g. William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001).

Liberal premises do not require the state to recognize any two people's marriages, nor to attach legal obligations and benefits to such interpersonal commitments, but once the state has made a policy decision to recognize and even encourage marriages, the state may not arbitrarily deny that recognition and bundle of regulations.

*Id.* at 855. Unions, partnerships, and marriages offer different, but overlapping bundles that serve to differentiate the various contexts. *Id.*

<sup>28</sup> See *In re Estate of Santolino*, 895 A.2d 506, 512 (N.J. Super. Ct. Ch. Div. 2005) (holding that impotence is grounds for voidability); see also *In re Marriage of Glatfelter*, No. Co45651, 2005 WL 950472, at \*3-4 (Cal. Ct. App. Apr. 26, 2005); *Dodrill v. Dodrill*, No. 03CA578, 2004 WL 93846, at \*3 (Ohio Ct. App. Apr. 28, 2004).

<sup>29</sup> See *Santolino*, 895 A.2d at 512; see also *Glatfelter*, 2005 WL 950472, at \*3-4; *Dodrill*, 2004 WL 93846, at \*3-4.



marriage.<sup>30</sup> On the one hand, such a procedure, socially and emotionally would be similar to a simplified dissolution.<sup>31</sup> Heterosexual women in same-sex, sexless marriages could ask the court to void their marriages under this hypothetical.<sup>32</sup> The ramifications on property would be no different than if the women had separated after being roommates or partners in a civil union, or had their binary marriages annulled.<sup>33</sup> With respect to their property rights, the court would most likely treat them as cohabitants or perhaps partners.<sup>34</sup> Truly, the absence of sex and its potentiality for making the marriage voidable does not have a great enough effect to raise public concern to the level of a total ban on same-sex marriage. On the other hand, the absence of sex does not change the benefit of the additional rights, such as medical decision-making or evidentiary privileges, which could be of great use to many heterosexual women.<sup>35</sup> Though the arguments below touch on the benefits of marriage, they focus mainly on recharacterizing the black letter law to include a heterosexual right to marry the same-sex.<sup>36</sup>

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<sup>30</sup> See *Santolino*, 895 A.2d at 512; see also *Glatfelter*, 2005 WL 950472, at \*3-4; *Dodrill*, 2004 WL 93846, at \*3-4.

<sup>31</sup> See *Santolino*, 895 A.2d at 512; see also *Glatfelter*, 2005 WL 950472, at \*3-4; *Dodrill*, 2004 WL 93846, at \*3-4; *O'Darling*, 188 P.3d at 139-41.

<sup>32</sup> See *Santolino*, 895 A.2d at 512; see also *Glatfelter*, 2005 WL 950472, at \*3-4; *C.M. v. C.C.*, 867 N.Y.S.2d at 888-89; *Dodrill*, 2004 WL 93846, at \*3-4.

<sup>33</sup> See, e.g., VT. STAT. ANN. tit. 15, § 1201 (2008); Am. Bar Ass'n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 348 (2004).

<sup>34</sup> *Garcia v. Garcia*, 2002 UT App 381, 60 P.3d 1174; see *Devaney v. L'Esperance*, 949 A.2d 743, 751-52 (N.J. 2008) (granting "palimony"). *But see Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir. 2001).

<sup>35</sup> VT. STAT. ANN. tit. 15, § 1201 (2008).

<sup>36</sup> *Lawrence v. Texas*, 539 U.S. 558, 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); U.S. CONST. amend. V, XIV § 1.

## B. CAUGHT IN A RAD BROMANCE:<sup>37</sup> A FUNDAMENTAL RIGHT TO MARRY

People value platonic love.<sup>38</sup> Bromances, which are nonsexual relationships between men, have become increasingly popular.<sup>39</sup> “Men in a bromance are sometimes said to be ‘bromosexual,’ and they may be accused of having ‘man crushes,’ even though their relationship is not, in fact, sexual in nature.”<sup>40</sup> Bromances often include physical affection and playful contact, but not sex.<sup>41</sup> In bromances, men are usually single because they cannot marry each other.<sup>42</sup> There is a deep level of intimacy and care between the bros.<sup>43</sup> “Often, the men become close with each other’s families, spending time with them and considering themselves to be almost like members of the family. It is also common to see men in a bromance living together, taking advantage of their close friendship to ‘save money on the rent’”(quotations added).<sup>44</sup> The less popularly described

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<sup>37</sup> *RAD BROMANCE - Lady Gaga parody of BAD ROMANCE*, YOUTUBE (Nov. 27, 2009), [http://www.youtube.com/watch?v=O\\_P1OhKUw6I](http://www.youtube.com/watch?v=O_P1OhKUw6I).

<sup>38</sup> Platonic same-sex love does not require hatred of the opposite sex, but often there is a bond that is formed between platonic lovers that is premised in part upon their mutual rejection of or hatred for members of the opposite sex or the entire opposite sex as a class of people. See e.g., MIGUEL CARRASQUEIRA, *LEARNING TO BE A PROPER MAN: THE ROLE OF MALE BONDING IN AMERICAN MODERNIST FICTION* (2006). “[W]omen are the most frequent undesirables that male bonding is designed to keep at bay. Male bonding, then, is intrinsically intertwined with prejudice against women, a form of misogyny reflected in the way men...treat women.” *Id.* at 21; MICHAEL KIMMEL & AMY ARONSON, *MEN & MASCULINITIES: A SOCIAL, CULTURAL, AND HISTORICAL ENCYCLOPEDIA* (2004). “[B]uddy narratives offer male movie-going audiences escapist fantasies of men rejecting women, marriage, and domesticity for the independence, adventure, and rewards of male bonding.” *Id.* at 114.

<sup>39</sup> *What is a Bromance?*, WISEGEEK, <http://www.wisegeek.com/what-is-a-bromance.htm> (last visited Apr. 19, 2012).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

platonic female correlate to the bromance has been termed by bloggers as a womance or a hoemance.<sup>45</sup> If heterosexuals in platonic love want to give their platonic lover further access and intimacy, and entrust them with legal responsibility, then why is it necessary for the state to prevent their marriage?

The Court has held that the 5<sup>th</sup> Amendment's due process clause, through the 14<sup>th</sup> Amendment, creates a substantive and implicit fundamental right to privacy for all citizens of the United States.<sup>46</sup> This right to privacy includes a fundamental right to marriage.<sup>47</sup> Currently, the Court only recognizes the fundamental right for heterosexuals in binary marriages.<sup>48</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Hoemance*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=hoemance> (last visited Nov. 11, 2012); *Womance*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=Womance>, (last visited Nov. 11, 2012).

<sup>46</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

<sup>47</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>48</sup> The U.S. Supreme Court does not recognize the right of same-sex couples to marry. Obviously, lower courts in a number of states have recognized the right for all homosexual partners, including "natural-born gay" people to marry. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010). The Obama administration enforced the *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1996)). *But see*, *Cid Standifer, VA Will Not Defend DOMA in Benefits Cases*, ARMY TIMES (May 10, 2012) <http://www.armytimes.com/news/2012/05/military-veterans-affairs-defense-of-marriage-act-051012w/>. "[D]isability benefits from VA...denied under DOMA, which says same-sex couples do not qualify for federal benefits, regardless of the state laws where they live." *Id.* Many states have amendments to their constitutions that ban gay marriage, such as Florida's Amendment 2 and California's infamous Proposition 8 that put Section 7 in the California Constitution, and led to an overturn and stay in *Schwarzenegger*. *Schwarzenegger*, 704 F. Supp. 2d 921; FLA. CONST. art. 1, § 27; Eskridge, *supra* note 27. In general, this paper refers to those states, DOMA, the federal courts, and the state courts that segregate opposite and same-sex couples. *See* Christopher J. Keller, *Divining the Priest: A Case Comment on Baehr v. Lewin*, 12 LAW & INEQ. 483, 502 (1994).

In *Loving v. Virginia*, the Court found an antimiscegenation statute constitutionally infirm for both its invidious race discrimination and its infringement of the right to marry, which had "long been recognized as one of

There is no nationally recognized fundamental right for same-sex marriage.<sup>49</sup>

Some heterosexual women who prefer a womance, or who have been unable to participate in satisfactory marriages with men, will seek to exercise their fundamental right to marry other women.<sup>50</sup> These women's rights will be violated in most jurisdictions under provisions that are meant to exclude homosexuals from the institution of marriage.<sup>51</sup> This is because

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the vital personal rights essential to the orderly pursuit of happiness by free men." The long "tradition" of homoracial marriage in Virginia was no reason in the Court's eyes to bar heteroracial individuals from exercising their freedom to enter into a familial relationship. A long-standing tradition of prejudice, in the Court's opinion, was no basis for determining individual liberty interests. The *Baehr* Court failed to distinguish the impermissibility of grounding a liberty interest in tradition in *Loving*, from the permissibility of grounding the denial of the liberty interest of marriage to homosexuals based on the "traditions and collective conscience" of our people.

*Id.* The *Baehr* Court, in reasoning similar to the Virginia District Court, held that homosexual unions should be excluded as a fundamental right because heterosexual marriage was the only marriage considered legitimate at the time the U.S. Supreme Court decided *Skinner* and *Zablocki*. *Id.* at 520.

<sup>49</sup> Though there may be a court ordered right to gay marriage in the future, or Congress may repeal DOMA, this argument addresses the current law, not what might be or the author's opinion.

<sup>50</sup> See Benjamin L. Weiss, *Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare "Reform"*, 15 LAW & INEQ. 215, 229-30 (1997).

This power derived from "the relation between individual and State . . . upon which our institutions rest." Pierce simply followed Meyer to hold that the Due Process Clause granted parents the "liberty . . . to direct the upbringing and education of children under their control." Meyer and Pierce have served as the basis for a wide range of privacy rights under the Constitution, including the fundamental right to heterosexual marriage. . . .

*Id.* See Weiss at 240 n.108 ("Heterosexual marriage is a fundamental constitutional right, and although government has the right under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), to use its power to influence personal choices, the choice to marry still requires that a partner be available.").

<sup>51</sup> Eskridge, *supra* note 27.

these women's rights have been defended using a "right to gay marriage" argument.<sup>52</sup>

After examining a dictionary definition of marriage, the court stated that the governing marriage statute defines 'marriage' as 'the state of the union between persons of the opposite sex. It is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense.'<sup>53</sup>

As written, these laws do not prevent homosexuals from marrying opposite-sexed people. Under this definition of marriage, homosexual marriage is legal, as long as the marriage is binary. Therefore, same-sex marriage bans do not exclude homosexual marriage; they exclude same-sex marriage even though heterosexuals have consistently been held to have a longstanding right to marry.

The difference in outcome between *Bowers v. Hardwick* and *Lawrence v. Texas* highlights the importance of framing the issue in matters related to homosexuality.<sup>54</sup> In *Bowers*, the Court found that there is no fundamental, longstanding right to homosexual sex.<sup>55</sup> But, the *Lawrence* Court found that there is a fundamental right to privacy that protects all private, consensual, non-harmful sex acts.<sup>56</sup> Though there may not be a specific right to participate in homosexual activity, under the

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<sup>52</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (standing for the proposition that the right to marriage is fundamental in spite of classifications like race or sex).

<sup>53</sup> Heather Hodges, *Dean v. The District of Columbia: Goin' to the Chapel and We're Gonna Get Married*, 5 AM. U. J. GENDER SOC. POL'Y & L. 93, 100 (1996) (citing *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971)).

<sup>54</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986). See generally Tyler S. Whitty, *Eliminating the Exception? Lawrence v. Texas and the Arguments for Extending the Right to Marry to Same-Sex Couples*, 93 KY. L.J. 813 (2004).

<sup>55</sup> *Bowers*, 478 U.S. at 193.

<sup>56</sup> *Lawrence*, 539 U.S. at 566-67.

larger blanket of the right to privacy, which includes marriage, all people have the right to engage in the same activities as heterosexual, binary couples.<sup>57</sup> The difference in how the questions are framed determined the difference in outcome between *Lawrence* and *Bowers*.<sup>58</sup>

Justice O'Connor reasoned that in addition to the fundamental right to privacy, exclusions of private, same-sex activity violated equal protection.<sup>59</sup> She thought that the Court should have stricken the sodomy laws in *Lawrence*, not to protect the fundamental right to privacy, but to avoid having to reduce heterosexual privacy rights on equal protection grounds.<sup>60</sup> Even though the *Lawrence* Court could have held that the law violated a distinct, longstanding right for homosexuals to engage in private sodomy,<sup>61</sup> O'Connor, who wrote a concurring opinion in *Lawrence*, reasoned that the *Bowers* Court could not protect a fundamental right to privacy for heterosexuals while engaging in discrimination against homosexuals.<sup>62</sup> In other words, the Court could not uphold heterosexuals' fundamental right to have private sex that includes sodomy, while also violating the equal protection<sup>63</sup> of homosexuals' right to privacy.<sup>64</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Lewis v. Harris*, 378 N.J. Super. 168, 208-09 (2005).

<sup>59</sup> *Lawrence*, 539 U.S. at 588 (O'Connor, J., concurring).

<sup>60</sup> *Id.*

<sup>61</sup> *Baehr v. Lewin*, 74 Haw. 530, 563 (1993); *Lawrence v. Texas*, 539 U.S. 558, 579 (2003); *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986). Heather Hodges, Dean v. The District of Columbia: *Goin' To The Chapel And We're Gonna Get Married*, 5 AM. U. J. GENDER SOC. POL'Y & L. 93, 95-96 (1996).

<sup>62</sup> *Lawrence*, 539 U.S. 558, 579; *Bowers*, 478 U.S. 186.

<sup>63</sup> For an argument as to why the equal protection clause is generally insufficient for extending the right to same-sex marriage but the fundamental right to privacy provides a sufficient basis, see Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 391 (1993).

<sup>64</sup> *Id.*

When two things are diacritically defined against each other, each one must be distinct enough from the other to sustain the difference. The same principle--in theory, at least--underlies the state equal protection doctrine analyzed here. Equal protection doctrine offers useful side-by-side comparisons of “heterosexual” and “homosexual” because its function is to test the logical quality of legal classification.<sup>65</sup>

*Loving v. Virginia* has come to stand for the proposition that there is a fundamental right to marry, which cannot be limited by immutable characteristics or contingent on the outcome of the couples’ reproductive potential.<sup>66</sup> In that case, a black woman wanted to marry a white man.<sup>67</sup> The Virginia law prohibited white people from marrying anyone apart from other white people.<sup>68</sup> People of color could also intramarry each other without restriction.<sup>69</sup> The Court struck down that law, finding that restrictions on who a white person could marry violated their fundamental right to marriage.<sup>70</sup> The Court struck at

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<sup>65</sup> Gabilondo, *supra* note 1, at 36.

<sup>66</sup> *Loving v. Virginia*, 388 U.S. 1 (1967). See also Baehr, 74 Haw. 530 (holding in favor of same-sex marriage by analogizing *Loving* to *Baehr*); Jennifer Wriggins, *Maine’s “Act To Protect Traditional Marriage and Prohibit Same-Sex Marriages”*: *Questions Of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345, 368-70, 375 (1998).

<sup>67</sup> *Loving*, 388 U.S. at 2.

<sup>68</sup> Wriggins, *supra* note 66, at 368-70.

<sup>69</sup> *Id.* at 369.

<sup>70</sup> *Loving*, 388 U.S. at 12. See also Maggie Ilene Kaminer, *How Broad is the Fundamental Right To Privacy and Personal Autonomy? - On What Grounds Should the Ban on the Sale of Sexually Stimulating Devices be Considered Unconstitutional?*, 9 AM. U. J. GENDER SOC. POL’Y & L. 395, 402 (2001) (*Lawrence* did not overturn *Bowers* on due process grounds, it extended the right to privacy to all consensual acts on equal protection grounds. The holding in *Bowers*, that there is no longstanding right to homosexual privacy, is still valid, even as it distinguishes the fact that there is still a fundamental right to heterosexual privacy.).

Virginia's antiquated categorizations and legal limitations due to a person's physical appearance.<sup>71</sup> The same could apply in the case at bar.<sup>72</sup> If a fundamental right to privacy prevents the state from regulating private sexual activity, then the sex within a marriage cannot be a reason to regulate the marriage. If the sex is not an issue, then the only remaining difference between same-sex marriage and binary marriage is the physical attributes of the couple. Under *Loving*, the states cannot deny a couple marriage on these grounds.<sup>73</sup>

The State of Hawaii ruled in favor of same-sex marriage in *Baehr v. Lewin*. In that case, the Court cited *Loving*, saying, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]."<sup>74</sup> There, the court reasoned that the state's interest in preserving the tradition of binary marriage did not afford it the requisite weight, a compelling reason for intruding on the right to privacy.<sup>75</sup> The *Baehr* court, held that the state could not discriminate based on sex unless "(a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights."<sup>76</sup>

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<sup>71</sup> See generally *Loving*, 388 U.S. 1. For a modern example of a state attempting to break antiquated categorizations see H.D. 2012 Leg., 438, 430th Sess. (Md. 2012).

<sup>72</sup> See generally Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. CAL. REV. L. & SOC. JUST. 209, 242 (2009) ("Even the well-known double whammy of the *Loving v. Virginia* opinion provided only a brief explanation of the liberty/due process argument for striking the anti-miscegenation statute, which rested on the fundamental right to marriage; the Court focused much more strongly on the law's racial classification/equal protection aspect."). See also Aderson Bellegarde Francois, *To Go Into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. GENDER RACE & JUST. 105 (2009).

<sup>73</sup> *Loving*, 388 U.S. at 11-12.

<sup>74</sup> *Baehr v. Lewin*, 74 Haw. 530 at 563 (1993) (citing *Loving*, 388 U.S. at 12).

<sup>75</sup> *Baehr*, 74 Haw. at 561-71.

<sup>76</sup> *Id.* at 580.



The strongest argument for same-sex marriage - that the government does not have the right to discriminate based on sex,<sup>77</sup> and the strongest argument for traditional marriage - that it is not accessible to homosexuals,<sup>78</sup> both yield to this argument that heterosexual women have the right to marry each other. Both forms of reasoning can be analogized to *Loving*, which involves two heterosexual people whose relationship presented the state with a challenge based on immutable physical traits.<sup>79</sup>

The Supreme Court has held that the Fourteenth Amendment denotes the right of the individual to marry.<sup>80</sup> In *Loving*, the statute was intended to keep white people's bloodline free of non-white blood.<sup>81</sup> Since the statute did not restrict anyone else from marrying each other, the marriage statute was clearly protecting white breeding.<sup>82</sup> Marriage is an individual right that each woman retains regardless of whether any man wants to be married to or can breed with her. Women possess a fundamental right to marry in spite of their potential to breed with male partners.<sup>83</sup> A woman's right is not diminished because there are no suitable partners for breeding; therefore, why would her opportunity to marry be diminished?<sup>84</sup>

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<sup>77</sup> Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at \*6 (Alaska. Sup. Ct. Feb. 27, 1998).

<sup>78</sup> Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding against same-sex marriage as homosexual marriage, and finding no analogous relation between the racial classification in *Loving* and the sexual classification presented by the question of gay marriage).

<sup>79</sup> *Singer*, 522 P.2d at 1196.

<sup>80</sup> Meyer v. Nebraska, 262 U.S. 390, 399 (1923). See also Susan Tall, *Legal and Ethical Implications of Human Procreative Cloning*, 3 J.L. & SOC. CHALLENGES 25, 29 (1999) (the right to privacy includes a person's right to marry).

<sup>81</sup> *Loving v. Virginia*, 388 U.S. 1, 5 (1967) (citing VA. CODE ANN. §§ 20-54, 20-57 (repealed 1960)).

<sup>82</sup> *Loving*, 388 U.S. at 5.

<sup>83</sup> See e.g., Lewis v. Harris, 378 N.J. Super. 168, 189 (2005) (internal citations omitted).

<sup>84</sup> *Id.*

Professor Gabilondo, of Florida International University, writes that heterosexual marriage laws routinely institutionalize and socially subsidize reckless heterosexual coitus, which is an insult to homosexuals.<sup>85</sup> He points out an unconstitutional incongruity in the fact that courts are required to use strict scrutiny on laws that infringe on heterosexuals' marital rights, but only rational review on laws that infringe on homosexual marriages.<sup>86</sup> Gabilondo's argument has been framed by others who advocate for homosexual marriage as a sex discrimination issue, more than a right to marriage issue.<sup>87</sup> Gabilondo describes the artificial premium placed on heterosexual breeding throughout law as an unnatural creation of social conditioning.<sup>88</sup> As in *Loving*, where restrictive laws created an artificial premium<sup>89</sup> on white blood, Gabilondo asserts that heterosexual breeding is virtually subsidized<sup>90</sup> because it is rewarded so heavily.<sup>91</sup> Since courts have denounced procreative rationalizations as a basis for discriminatory marriage laws and *Loving* denounced marital restriction based on genetic differences, then the argument at bar also rests on the fact that same-sex couples do have the right to marry, regardless of the procreative outcome.<sup>92</sup> Here, the right to marry belongs to the individual and cannot be regulated by the government's desired

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<sup>85</sup> Gabilondo, *supra* note 1, at 7, 31, 32, 36, 51, 55, 57.

<sup>86</sup> *Id.* at 27-29.

<sup>87</sup> Susan Frelich Appleton, *Missing in Action?, Searching for Gender Talk in the Same Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 103 (2005).

<sup>88</sup> Gabilondo, *supra* note 1, at 3-4.

<sup>89</sup> *Id.* at 3, 4, 53, 73, 74.

<sup>90</sup> *Id.* at 10, 16, 53, 74.

<sup>91</sup> *Id.* at 41, 44, 54.

<sup>92</sup> *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978); see also Cynthia M. Vansickle, *A Return to the Anti-Feminist Past of Divorce Law: The Implications of the Covenant or Marriage Laws as Applied to Women*, 6 J.L. Soc'y 154, 157 (2005) (focusing on a person's right to marry). See generally John G. Culhane, *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage*, 17 TUL. J.L. & SEXUALITY 7 (2008).

control over reproductive possibilities<sup>93</sup> or fecundability.<sup>94</sup> If a woman cannot mate or abstains from mating with a man, then she still has the right to marry.

If heterosexual women want to marry each other, then states should offer a compelling reason for prohibiting the exercise of their fundamental rights.<sup>95</sup> The state's traditional argument that marriage is between a man and a woman fails in light of holdings that show that marriage is an institution designed to preserve heterosexuality.<sup>96</sup> Through the development of homosexual marriage challenges the Court has considered every angle including the fact that opposite-sex marriage propagates the species, is a healthy environment for children, is a longstanding tradition, and a host of other rationales.<sup>97</sup> All of these arguments have failed to justify the exclusivity of binary marriage.<sup>98</sup> What has consistently emerged is that the right to marry is fundamental regardless of one's immutable traits or the results of one's involvement in breeding with the opposite sex.<sup>99</sup>

Laws that prohibit heterosexuals from marrying one another are strictly scrutinized under a substantive due process challenge and states must explain why the restriction is necessary.<sup>100</sup> States have attempted to imbed the necessity of opposite-sex marriage into their laws by defining marriage as

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<sup>93</sup> *Zablocki*, 434 U.S. at 385; *Loving v. Virginia*, 388 U.S. 1, 5 (1967) (citing VA. CODE ANN. §§ 20-54; 20-57 (repealed 1960)).

<sup>94</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 959 (2003).

<sup>95</sup> *Smith v. State*, 6 S.W.3d 512, 515 (Tenn. Crim. App. 1999) ("When a challenge is made alleging infringement of a fundamental right, 'strict scrutiny' of the legislative classification is only required when the classification interferes with the exercise of a 'fundamental right' or operates to the peculiar disadvantage of a suspect class.") (emphasis added).

<sup>96</sup> *Lewis v. Harris*, 378 N.J. Super. 168, 188-89 (2005).

<sup>97</sup> *Goodridge*, 798 N.E.2d at 961-67.

<sup>98</sup> *Id.*

<sup>99</sup> *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>100</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010).

being between a man and a woman.<sup>101</sup> But this fails in consideration of the fact that this definition permits one lesbian to marry one gay man to achieve permissible but absurd results.<sup>102</sup> The statute does not really keep homosexuals from marrying it is just that they cannot marry *other* homosexuals, or rather they can, but a homosexual must marry another opposite-sexed homosexual.<sup>103</sup> “Because the [court] focuse[s] its analysis predominantly on gender identification,” rather than individual qualities, laws “will continue to ignore the rights of homosexual[s] . . . [t]hus, considering only the rights of [people who] *appear* to be heterosexual.”<sup>104</sup> Just as a binary marriage law cannot prevent gay marriage, restrictions on same-sex marriage cannot preserve heterosexual marriage and limiting heterosexuals to binary marriage violates the longstanding tradition that heterosexuals have the right to marry.<sup>105</sup>

### C. POLITICAL LESBIAN MARRIAGE: FREE SPEECH

Lesbianism is a political statement.<sup>106</sup> Political lesbianism asserts that society, including smaller social institutions like marriage, would be more successful as feminist rather than

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<sup>101</sup> See FLA. CONST. art. 1, § 27, *supra* note 48. See generally Eskridge, *supra* note 27.

<sup>102</sup> See generally James L. Musselman, *What's Love Got to Do With It? A Proposal for Elevating the Status of Marriage by Narrowing its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37 (2009).

<sup>103</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 20 (N.Y. 2006).

<sup>104</sup> Elizabeth C. Barcena, *Kantaras v. Kantaras: How a Victory for one Transsexual May Hinder the Sexual Minority Movement*, 12 BUFF. WOMEN'S L.J. 101, 101 (2003).

<sup>105</sup> *Id.* See also Julie A. Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 843 (2005).

<sup>106</sup> MacCowan, *supra* note 8. See also Beth Firestein, *The Bisexual Challenge: Is the Issue Bisexuality, Or is it Lesbianism?*, 34 J. SEX RES. 107, 108 (1997) (reviewing PAULA C. RUST, *BISEXUALITY AND THE CHALLENGE TO LESIBAN POLITICS: SEX, LOYALTY, AND REVOLUTION*).

patriarchal institutions.<sup>107</sup> Anyone, including lesbians, bisexuals, asexuals, heterosexuals, pansexuals, gays, and trans-people, can be political lesbians.<sup>108</sup> Two heterosexual women can live in a domestic partnership, operate a professional partnership, exchange power of attorney, list one another as life insurance beneficiaries, and mimic every other benefit of marriage between a man and a woman, but without a legal marriage ceremony political lesbians are denied their First Amendment right to utter marriage vows and, therefore, perform the symbolism of marriage.<sup>109</sup>

Marriage is symbolic speech.<sup>110</sup> Symbolic speech will be protected by the First Amendment if the speech act is “imbued

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<sup>107</sup> MacCowan, *supra* note 8.

<sup>108</sup> See *Ali v. Gonzales*, 160 Fed. app 485 (7th Cir. 2005); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *Diamond*, *supra* note 6; *Gulati*, *supra* note 2; *MacCowan*, *supra* note 8; *Yager*, *supra* note 4. See generally VERA WHISMAN, *QUEER BY CHOICE: LESBIANS, GAY MEN, AND THE POLITICS OF IDENTITY* (Routledge 1996).

<sup>109</sup> U.S. CONST. amend. I (“Congress shall make no law...abridging the freedom of speech”). See, e.g., David B. Cruz, “*Just Don't Call It Marriage*”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 937 (2001) (“While some of the literature on same-sex marriage notes marriage’s importance to lesbigay self-conceptions, marriage is obviously very important to many heterosexually identified individuals’ personal identities. In some instances, ‘in our culture, by just being married, a woman gains an identity, an acceptability, a legitimacy that you often don’t get as a single woman.’”) (internal citations omitted).

<sup>110</sup> See James M. Donovan, *Same-Sex Union Announcements: Whether Newspapers Must Publish Them, and Why We Should Care*, 68 BROOK. L. REV. 721, 750-51 (2003).

Society as a whole has certain generally shared expectations about the kind of relationship that married couples typically have (while it lacks any such clear expectations about relationships of other sorts). Once a couple is legally married, society will come to expect that their relationship is of this kind. Critical, then, is this role of public expectation. “It is the public recognition of the status of ‘married’ that constitutes the most important benefit of marriage, and what is most crucially abridged when the State discriminates against gay couples who want to marry.” When society withholds public recognition, that denial fundamentally weakens the relationship that society ignores. Without legal marriage, “it is all too easy for the rest of society to ignore same-sex relationships, and to assume that they are only sexual, or involve no serious long-term commitment or sharing of finances and household responsibilities.”

with the elements of communication,” and has “a particularized message,” such that the “likelihood [is] great that the message would be understood.”<sup>111</sup> One requirement of marriage is that opposite sex, heterosexual couples engage in a ceremony.<sup>112</sup> The words in the vow are unimportant insofar as there is no legal requirement for what must be said.<sup>113</sup> The requirement is that a symbolic act of legal union be made publically.<sup>114</sup> When the Court fails to allow two heterosexual women to symbolically express political lesbianism, the Court has failed to uphold these women’s right to free speech.<sup>115</sup>

Heterosexual women should be permitted to marry so that they can symbolically express political lesbianism.<sup>116</sup> First, these women would have to show that their marriage is a symbolic speech act.<sup>117</sup> Would the likelihood be great that people would understand that two heterosexual women marrying means that they did not want to support the traditional patriarchal institution of opposite sex marriage?<sup>118</sup> If opposite sex marriage is legally required to communicate the legal union between a man and a woman and gay marriages communicate the union

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A relationship is never truly final and settled if it lacks public acknowledgement; rather, it retains a tentative, provisional quality.

*Id.*

<sup>111</sup> *Spence v. Washington*, 418 U.S. 405, 409, 411 (1974). See also, Melissa Rivero, *Melting in the Hands of the Court: M&M’s, Art, and a Prisoner’s Right to Freedom of Expression*, 73 BROOK. L. REV. 811, 814 (2002) (indicating that the First Amendment protects symbolic speech).

<sup>112</sup> See *State v. Holm*, 137 P.3d 726, 737 (Utah 2006).

<sup>113</sup> Gabilondo, *supra* note 1, at 3, 4, 10, 16, 41, 44, 53, 54, 73, 74.

<sup>114</sup> *Id.*

<sup>115</sup> See generally *Spence*, 418 U.S. at 405.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Cf. Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. CAL. REV. L. & SOC. JUST. 209, 296 n.215 (2009).

<sup>118</sup> See generally *Spence*, 418 U.S. at 405.

between homosexual couples in states where it is legal, then heterosexual same-sex marriage is likely to communicate, at the very least, that two heterosexual women would rather marry each other than marry men.<sup>119</sup>

The act of marriage is “imbued with elements of communication,” but the question is whether the message is particularized.<sup>120</sup> It seems so. Many different and possibly political statements, beyond love and sexual attraction, can be inferred from opposite sex marriage, such as the couple became pregnant out-of-wedlock, shacking-up cuts costs, or age-is-just-a-number since the groom appears to be sixty years the bride’s junior. These factors change the particular message that is communicated to the public about the marriage or the ceremony, but they do not make the symbolic expression of the marriage ceremony as a unifying speech act any less communicative.<sup>121</sup> The same would be true for heterosexual women who engage in political lesbian marriage ceremonies. The communication of union would be sufficient to communicate a particular message about the gender exclusive union between heterosexual women.

The Court should ask whether the prohibition against legally sanctioned marriage ceremonies restricts symbolic speech. The answer would be yes. The Court would then have to ask whether the restrictions are content based or content neutral.<sup>122</sup> Does a statute that prevents same-sex marriage, on its face, intend to prevent people from uttering or performing certain speech elements? Perhaps so.

The state regulates marriage ceremonies as well as marriage licenses.<sup>123</sup> State laws forbid people from engaging in ceremonies that give the impression of marriage when that marriage is not sanctioned by the state.<sup>124</sup> For example, a

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 409.

<sup>121</sup> *Id.* See generally *Cohen v. Cal.*, 403 U.S. 15 (1971).

<sup>122</sup> See generally *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994).

<sup>123</sup> See generally *State v. Holm*, 137 P.3d 726 (Utah 2006).

<sup>124</sup> *Id.*

polyandrist who is already married to one man cannot hold a public ceremony to symbolically join with an additional man.<sup>125</sup> “The crux of marriage in our society...is not so much the license as the solemnization, viewed at its broadest terms as the steps, whether ritualistic or not, by which two individuals commit themselves to undertake a marital relationship.”<sup>126</sup> Even though participants of symbolic weddings may not attempt to collect any legal benefits owed to married persons, and even though municipalities many turn a blind-eye to symbolic weddings, states do prohibit them and states do prosecute people who have symbolic weddings.<sup>127</sup>

Since the speech is intentionally prohibited, the statutes must be strictly scrutinized and will likely fail.<sup>128</sup> States would have to show that they have a compelling reason for completely censoring the speech act and that the statute is narrowly tailored to achieve that necessary governmental goal.<sup>129</sup> Here, there is no compelling interest in blocking the symbolic speech created

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<sup>125</sup> *Id.* at 740.

<sup>126</sup> *Id.* at 737 (Holm was convicted of marrying a second woman in a symbolic, polygamous wedding. They testified that in their hearts they believed that they were married, even though they knew that the ceremony would not be legally binding. They did not believe that the wedding ceremony was illegal, they did not purport to be married, and were never intending to engage in civil disobedience or fraud).

<sup>127</sup> *See generally id.* at 726.

<sup>128</sup> *Contra* Shapiro, *supra* note 72, at 370.

“[C]rime speech” - for example, saying “I do” in an otherwise valid marriage ceremony when one is already married), generally does not attain the dignity of being called “categorically excluded” speech. In the sight of the First Amendment, crime speech is incapable of categorical inclusion or exclusion, or of being assigned low (but nonzero) value. In effect, the First Amendment recognition system says it’s not even bad speech.

*Id.* Cf. *Contemporary Family Law*, at 6, 122, 134 (discussing the illegality of symbolic, polygamous marriage ceremonies). *Contra id.* at 135 (citing Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 103 (2005) (describing why fundamental right to marry arguments should differentiate between gay rights and polygamous rights and incestuous unions)).

<sup>129</sup> *See generally* City of Ladue v. Gilleo, 512 U.S. 43 (1994).



through political lesbian marriage.<sup>130</sup> Heterosexual people have the fundamental right to marry and the government does not have a rational, much less compelling, reason to block people from symbolically commenting on the union between a man and a woman versus the union between a woman and a woman.<sup>131</sup> Statutes that were intended to regulate marriage, which would protect citizens from engaging in fraudulent marriages, secret marriages, or the like, could be written differently so that they do not specifically prevent heterosexual women from engaging in political lesbian speech acts through same-sex marriage ceremonies.<sup>132</sup>

If the statutes are content neutral, then this means that the Court believed that even in states where amendments specifically permit only one man and one woman to engage in a marriage (with its requirement for a ceremony) the statutes were not written to prevent same-sex couples from engaging in symbolic speech.<sup>133</sup> The state might suggest that under a content neutral analysis, the state's time, place, and manner restrictions on speech offer alternate means for expressing a political lesbian message.<sup>134</sup> Women can discuss marriage or openly announce

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<sup>130</sup> Shapiro, *supra* note 72, at 295 n.215 (stating that even if some laws of general application did trigger strict scrutiny, prohibiting the social fallout from plural marriage is a compelling interest).

<sup>131</sup> See generally *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>132</sup> See generally *State v. Holm*, 137 P.3d 726 (2006).

<sup>133</sup> See Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 353 (2008) (supporting the state's proposition, but in the context of gay rights).

Moreover, this Article addresses only civil marriage, not religious or sacramental marriage. Even so, "civil marriage, and not just marriage ceremonies or religious marriage, should be understood as expressive." Indeed, the traditionalist demand that long-held understandings about marriage, although typically shaped by religion, should also be reflected in civil marriage is at the heart of the cultural conflict over the symbolic aspects of civil marriage.

*Id.*

<sup>134</sup> See *U.S. v. Eichman*, 496 U.S. 310, 315-19 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-14, 419-20 (1989); *Spence v. Washington*, 418 U.S. 405, 409-12 (1974).

that it is a mock-ceremony, the state would argue, but this argument is specious.<sup>135</sup> The actual marriage, symbolized by the ceremony, defines the symbolic speech act.<sup>136</sup> This is why the state makes it a requirement for opposite sex marriage.<sup>137</sup> If there were an alternate means for communicating the same message, then the state would not *require* that speech act.<sup>138</sup> The requirement in-and-of-itself attests to the narrowness of the speech act and the fact that some states only permit opposite sex, heterosexual couples from making the symbolic speech attests to the violation of the First Amendment.<sup>139</sup>

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<sup>135</sup> See Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 326 (2004).

The expressive component of marriage has much power, and thus importance, for a number of reasons. First, the sheer number of people who marry magnifies the act's communicative effect. Some 90 percent of all Americans will marry during their lifetimes, and more than 70 percent of people who divorce remarry. Second, because the state requires that the commitment be made publicly, the communicative effect is necessarily more significant than it is for non-public forms of conduct. In fact, for many people, their engagement and wedding announcements, wedding invitations, and the actual declaration of marriage vows in the wedding ceremony are among the most public statements they ever make. Both legal requirements and extralegal norms, which are inextricably linked, have historically operated together to make this so.

*Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See Teresa M. Bruce, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back into the Courtroom*, 81 CORNELL L. REV. 1135, 1168-70 (1996). Don't Ask Don't Tell (DADT) has now been held to be an unconstitutional violation of free speech. *Log Cabin Republicans v. United States*, 658 F.3d 1162 (2011). See also, Matthew E. Waranius, *What Up With DADT?: Addressing Confusion From Inside The Military*, 2 J.L. & SOC. DEVIANCE 56 (2011). The following article segment is contextualized by the DADT policy era:

In *Ben-Shalom*, the Seventh Circuit adopted an analysis that denies First Amendment protection to pure speech. Even though the court employed this analysis in the military context and therefore deferred considerably to military judgment, it still endorsed a dangerous and potentially unconstitutional restriction on expressive freedom, a restriction that may well have repercussions

The state might argue that heterosexual women would want to marry each other as a form of civil disobedience; it could be argued that the marriage would be undertaken to break the law

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in the civilian community. A judiciary that can boldly assert that pure speech is the same thing as conduct should have little trouble extending that treatment to symbolic speech. By wrongly characterizing expressive manifestations of personality or belief as conduct, courts can ignore the protection guaranteed by the First Amendment to thoughts, emotions, and personality. In *Pruitt v. Cheney*, for example, the Ninth Circuit expressed an impoverished view of the scope of First Amendment protection for expressive conduct and religious freedom when it upheld an Army regulation mandating the discharge of any soldier who “enters into a homosexual marriage ceremony.” The court accepted the government’s argument that Captain Dusty Pruitt had, by completing a marriage ceremony with another woman, admitted (1) to having previously participated in lesbian erotic activities and (2) to having a continuing desire to participate in such activities in the future. The symbolic expression contained in a religious ceremony, in other words, constituted prohibited conduct. In manipulating the speech/conduct dichotomy in order to produce an outcome favorable to the military, the Ninth Circuit abdicated its responsibility to protect First Amendment rights from unnecessary restrictions. Moreover, the court turned its back on a constitutional principle that has been described by a Wisconsin federal district court as follows: “One’s personality develops and is made manifest by speech [and] expression... It is only when one’s personality, no matter how bizarre or potentially dangerous, actually manifests itself in the form of unlawful conduct, that the government may intercede in an effort to control the personality or restrict its manifestation.” Hardwick does not direct courts to abandon their responsibility to protect the Constitution; contrary to what one may gather from the Ninth Circuit’s holding in *Pruitt*, there exists neither a military nor a homosexual exception to the Bill of Rights. In *Ben-Shalom* and *Pruitt*, the Seventh and Ninth Circuits, respectively, refused to protect expression that some commentators and at least one court have viewed as political speech implicating core First Amendment principles. Professor Karst, for example, believes that when Reverend Pruitt was Captain Pruitt, her straight Army colleagues and superiors knew her as an outstanding officer. Now that she has made her gay identity public, those people are challenged to reconsider their understanding of what it is to be homosexual - to reshape their abstract and threatening idea of “a homosexual” in a way that will make room for this real person whom they know and respect. The likelihood of such a reconsideration, I suggest, is exactly what the political leadership of the Defense Department fears in cases like this one. The California Supreme Court has likewise described coming-out speech as an “aspect of the struggle for equal rights,” finding that statements of homosexual identity constitute political speech protected by that state’s labor code. To openly identify oneself as a lesbian contradicts prevailing social mores by affirming the value of homosexuality in a cultural climate that constantly denigrates it.

*Id.*

and defy heteronormative rules, as opposed to actually expressing a separate message.<sup>140</sup> This is untrue.<sup>141</sup> While it is true that civil disobedience and speech that exists to break the law cannot be protected, political lesbian marriage does not exist to break the law.<sup>142</sup> The message in political lesbianism is that first, traditional social institutions are patriarchal and, second, social fixtures that are exclusively female or feminist are more functional than those that are exclusively male or patriarchal and mixed.<sup>143</sup> This message does not need to break the law to be communicated. If civil disobedience were the aim, then the message would have been sufficiently communicated once the law was broken.<sup>144</sup> Political lesbians could engage in

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<sup>140</sup> U.S. v. O'Brien, 391 U.S. 367, 382-83 (1968). Many commentators have argued that the lawmakers who enacted the relevant parts of the law in *O'Brien* actually did intend to suppress a certain kind of expression; but the Court declined to inquire into the lawmakers' intentions and instead focused on the fact that the law was triggered by the physical act of destroying the draft card rather than by the act's communicative impact. See *id.* at 383. See, e.g., *id.* at 382 (holding that a generally applicable law banning destruction of draft cards should be judged under a relatively forgiving First Amendment standard, rather than strict scrutiny, because it applied to the defendant "for [the] noncommunicative impact of his conduct, and for nothing else"). See also Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 38, 45 (1973) (distinguishing laws that restrict speech because of a government "non-speech interest," which turns on the noncommunicative impact of the speech, from laws that restrict expression because of a government "anti-speech interest," which turns on the harms "caused by the meaning effect of the speech"); Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses Of Conduct, "Situation-Altering Utterances," And The Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286, n.30 (2005).

<sup>141</sup> See Noa Ben-Asher, *Who Says "I Do?": Reviewing Judith Butler & Gayatri Chakravorty Spivak, Who Sings the Nation-State? Language, Politics, Belonging* (2007), 21 YALE J.L. & FEMINISM 245, 246 (2009) (book review) ("[P]erformance of public marriage ceremonies by couples and groups whose marriages are not recognized by current state laws may be understood as performative contradiction and political speech-action.").

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

symbolic weddings and then return to patriarchal lifestyles.<sup>145</sup> Instead, the symbolic speech of marriage announces the beginning of a living manifesto, a political lifestyle, and a new union.<sup>146</sup> The speech does not symbolize civil rebellion rather it symbolizes political reform.<sup>147</sup>

#### D. RATIONAL REVIEW: EQUAL PROTECTION

Social-sexual identity reflects an individual's psychosexual identity.<sup>148</sup> It is common sense, common-knowledge, and well-established science that homosexuality is not a psychiatric illness.<sup>149</sup> Yet, as a reflection of psychosexual identity, lesbianism can be a bi-product of and alleviation for psychiatric illness.<sup>150</sup> Lesbianism can satisfy a woman's need to express love in a way that rejects men or replaces members of the opposite sex.<sup>151</sup> Same-sex relationships formed by women who

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Ben-Asher, *supra* note 141, at 246.

<sup>148</sup> Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 ANN. HEALTH L. 195, 200-01 (2002); Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 841-842 (1995); Parker Thoeni, *Commemorating the Tenth Annual Hispanic Law Conference: Equal Marriage Rights for Transgendered Individuals*, 3 AM U. MOD. AM. 66, 66 n.10 (2007) (citing *In re Heilig*, 372 Md. 698, 698 n.4 (2003)) (citing Jerold Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination*, 13 AM. J.L. & MED. 53, 53-54 (1987)); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 12-14 (1995). See generally Dana R. Shugar, *To(o) Queer Or Not? Queer Theory, Lesbian Community, and the Functions of Sexual Identities*, 3 J. LESBIAN STUD. 11 (1999).

<sup>149</sup> Freedman, *supra* note 7.

<sup>150</sup> Lesbianism can relieve stress that does not rise to the level of illness, too. See generally Freedman, *supra* note 7; Sharon Lamb, *Feminist Ideals for a Healthy Female Adolescent Sexuality: A Critique*, 62 SEX ROLES 294 (2010).

<sup>151</sup> Lesbianism is a very healthy response to traditional, abusive relationships between men and women.

psychosexually reject men may include lesbian sex or may be platonic.<sup>152</sup>

In 1979, Dr. Lenore Walker found that women can experience unique symptoms related to domestic violence and battering.<sup>153</sup> Battered Woman Syndrome (BWS), a subcategory of Post Traumatic Stress Disorder (PTSD) originally researched by Dr. Walker, was common among heterosexual women who had been in cyclically abusive, heterosexual partnerships, usually marriages.<sup>154</sup> These women became traumatized by the abuse, often reliving the violence.<sup>155</sup> Some women who have suffered intimate partner violence (IPV) may cultivate lesbian relationships with other women because of and as a treatment for PTSD.<sup>156</sup> PTSD is an illness that has a psychological, neurological, physical, and social dimension; it can affect the entire psychosexual identity.<sup>157</sup> Depending on the severity, people with PTSD may have a disability.<sup>158</sup> As a means of treating their disability or as a part of their disability, some biologically heterosexual or bisexual women turn away from

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<sup>152</sup> Diamond, *supra* note 6, at 156.

<sup>153</sup> See generally LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

<sup>154</sup> *Id.* at 106. Biologically lesbian women are just as susceptible to cycles of violence within lesbian relationships as heterosexual women are with men or with other heterosexual women. See Py Bateman, *Leaving Abusive Partners*, 9 VIOLENCE AND VICTIMS 85 (1994); Grace A. Telesco, *Sex Role Identity and Jealousy as Correlates of Abusive Behavior in Lesbian Relationships*, 8 J. HUM. BEH. SOC. ENV'T 153, 156 (2003). What I am referring to is some women's coping mechanisms. I am neither supporting nor negating the validity of their personal strategies for ending the cycle of violence.

<sup>155</sup> Walker, *supra* note 11, Online Class at Nova Southeastern University (Sep. 21, 2011).

<sup>156</sup> Walker, *supra* note 11, Online Class at Nova Southeastern University (Sep. 21, 2011). See also Pamela M. Jablow, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1131 (2000).

<sup>157</sup> DSM-IV-TR, *supra* note 9, at § 309.81; ICD-10 § F43.1, *supra* note 9.

<sup>158</sup> DSM-IV-TR, *supra* note 9, at § 309.81; ICD-10 § F43.1, *supra* note 9.

men and toward other women.<sup>159</sup> Their only hope for a private life comes in a relationship with another woman because they are unable to experience physical or emotional intimacy with men.<sup>160</sup>

The equal protection clause “is essentially a direction that all persons similarly situated should be treated alike.”<sup>161</sup> Municipalities that obstruct same-sex marriage violate equal protection by discriminating against survivors of IPV who suffer from PTSD and become lesbians as a result of their disability.<sup>162</sup> Traditionally, marriage has been considered a fundamental right,<sup>163</sup> but not for those who are incompetent.<sup>164</sup> The Court has held that mentally ill heterosexuals have the right to marry.<sup>165</sup>

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<sup>159</sup> DSM-IV-TR, *supra* note 9, at § 309.81; ICD-10 § F43.1, *supra* note 9. One psychiatrist who played a key role in deleting homosexuality from the list of mental disorders argued that for a behavior to be appropriately termed a psychiatric disorder, it had to be regularly accompanied by either subjective distress or some generalized impairment in social functioning. Andrew Koppelman, *Forum: Sexual Morality and the Possibility of “Same-Sex Marriage”: Is Marriage Inherently Heterosexual?* 42 AM. J. JURIS. 51, 84 (1997).

<sup>160</sup> These are not the only reasons that some women cease their private relationships with men and enter into private relationships with women. See Yager, *supra* note 4; DSM-IV-TR, *supra* note 9, at § 309.81; ICD-10 § F43.1, *supra* note 9.

<sup>161</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

<sup>162</sup> *Id.* Mark L. Hatzembuehler, Katie A. McLaughlin, Katherine M. Keyes & Deborah S. Hasin, *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. PUB. HEALTH 452, 455-59 (2010).

<sup>163</sup> See generally Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601 (2006).

<sup>164</sup> See generally Jennifer L. Levi, *A Prescription for Gender: How Medical Professionals Can Help Secure Equality for Transgender People*, 4 GEO. J. GENDER & L. 721 (2003).

<sup>165</sup> See generally *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *K.E.S. v. C.A.T.*, 107 P.3d 779 (Wyo. 2005) (conditioning the mother’s continued custody on her receiving treatment for bipolar disorder); *Contemporary Family Law*, *supra* note 13, at 740 (citing *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (The California Supreme Court reversed an award of custody related to the

This should not be confused with the bevy of statutes that address incompetence.<sup>166</sup> In the context of marriage, incompetence is a defense that can be used to annul a marriage that was entered into without an ability to appreciate the significance of legal union.<sup>167</sup> Incompetent people may have disabilities, but the majority of disabled people are not legally incompetent.<sup>168</sup>

Borrowing from the Americans with Disabilities Act or Department of Veterans Affairs, which define disability by the extent to which a person is impaired by any physical or mental condition, women who enter same-sex relationships as a result of PTSD should be treated as if they are fully disabled by a psychiatric illness that impairs them from engaging in a heterosexual lifestyle.<sup>169</sup> In 2008, between two to ten percent of Americans suffered from serious mental illness, including bipolar disorder, depression, mania, anxiety, attention deficiency and hyperactivity, anorexia, bulimia, schizophrenia, etc.<sup>170</sup> The heterosexuals among them, no doubt a majority, could legally exercise their fundamental right to marry because

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lower court's outdated stereotyping belief that a disabled person could not care for children)); Gabilondo, *supra* note 1.

<sup>166</sup> See *In re Estate of Santolino*, 895 A.2d 506, 580-81 (N.J. Super. Ct. Ch. Div. 2005); *Nave v. Nave*, 173 S.W.3d 766, 774-75 (Tenn. Ct. App. 2005); CONTEMPORARY FAMILY LAW, *supra* note 13, at 147, 151.

<sup>167</sup> *Santolino*, 895 A.2d at 580-81; *Nave*, 173 S.W.3d at 774-75.

<sup>168</sup> See generally Heeb, *supra* note 63.

<sup>169</sup> See *How the VA Evaluates Levels of Disability*, VIETNAM VETERANS OF AMERICA (2004), [http://www.vva.org/ptsd\\_levels.html](http://www.vva.org/ptsd_levels.html) (providing information on how Veterans Affairs evaluates whether each case of PTSD rises to the level of a disability). The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, defines an individual as meeting the definition of disability if she: "(1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment." See also *ADA Homepage*, U.S. DEP'T OF JUSTICE (Nov. 9, 2012), <http://www.ada.gov>.

<sup>170</sup> *Prevalence of Serious Mental Illness Among U.S. Adults by Age, Sex, and Race*, NAT'L INST. OF MENTAL HEALTH, [http://mentalhealth.gov/statistics/SMI\\_AASR.shtml](http://mentalhealth.gov/statistics/SMI_AASR.shtml) (last visited Sept. 25, 2012).



otherwise competent, but mentally ill, heterosexual people cannot be treated differently than other mentally healthy, competent heterosexuals with whom they are similarly situated.<sup>171</sup> With respect to their fundamental right to marry, people with disabilities in same-sex relationships are similarly situated with heterosexual people.<sup>172</sup>

In *Cleburne v. Cleburne*, the Court applied rational review to strike down an unconstitutional law.<sup>173</sup> On an equal protection challenge, the Court found that the City of Cleburne, Texas could not discriminate against the mentally retarded by denying them a zoning permit for a living facility.<sup>174</sup> The Court used rational review because mentally challenged people are not a quasi-suspect class.<sup>175</sup> Using the lowest standard of review, the Court found that the City of Cleburne failed to provide any rational relationship between the law, which discriminated against group housing for the mentally retarded, and any legitimate governmental purpose.<sup>176</sup> When the Court uses this standard of

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<sup>171</sup> Psychiatric illness is akin to an emotional affliction in this context. *Contra* Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 AM. J.L. & MED. 117, 123 n.71 (1999). A Wisconsin statute defined mental illness as "mental disease to such extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community." *Id.* (quoting WIS. STAT. ANN. § 51.75 (West Supp. 1971)). Similarly, Indiana's 1972 general civil commitment law omitted explicit reference to dangerousness, but in practice allowed such consideration. *See* Jackson v. Indiana, 406 U.S. 715, 728 (1972). The statute first considered whether the individual had a "psychiatric disorder which substantially impairs his mental health." *Id.* (quoting IND. CODE § 22-1201(1) (1971)). Psychiatric disorders included mental illness or disease, mental deficiencies, epilepsy, alcoholism or drug addiction. *Id.* (citing IND. § CODE 22-1201(2) (1971)).

<sup>172</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Compare id.*, with Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 231 (1988) ("Courts have wholly abdicated any responsibility to articulate the "important [sic] governmental objectives" served by state policies denying gay and lesbian couples the right to marry.").

<sup>176</sup> *Cleburne*, 473 U.S. at 450.

review, their scrutiny is so low that almost any law is upheld.<sup>177</sup> This form of review struck down this law because the discriminatory, unequal treatment of those who have mental challenges or illnesses is totally irrational.<sup>178</sup>

All persons similarly situated should be treated equally.<sup>179</sup> The current majority opinion is that heterosexual people possess a right to marry.<sup>180</sup> Heterosexual people have the right to marry people who abuse them, remain in abusive heterosexual relationships, or remarry new abusive binary partners an infinite number of times. The fact that some heterosexuals suffer from mental disabilities that require them to stop marrying people of the opposite sex does not mean that they are dissimilarly situated from heterosexuals who can continue to be abused by their husbands.<sup>181</sup> Obviously, for policy reasons alone, there is a more compelling, important, and rational reason for allowing women to marry people who do not abuse them, instead of limiting their options and practically encouraging them to remain in binary abusive or traumatic relationships.

Like the holding in *Cleburne*, treating competent heterosexuals dissimilarly because of mental illness is

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<sup>177</sup> *Id.*; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955).

<sup>178</sup> Discriminatory laws that benefit the disabled are distinguishable from laws that discriminate against the disabled. See Erik K. Ludwig, *Protecting Laws Designed to Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny*, 8 U. PA. J. CONST. L. 513 (2006); see generally Wriggins, *supra* note 66.

<sup>179</sup> *Cleburne*, 473 U.S. at 439. See also Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253, 296 n.285 (2006) (*Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (citing O'Connor, J., concurring) (relying on the Equal Protection Clause to invalidate the Texas statute because it states that "all persons similarly situated should be treated alike . . ."))).

<sup>180</sup> *Cleburne*, 473 U.S. at 463; *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>181</sup> See Kari Balog, *Equal Protection for Homosexuals: Why the Immutability Argument Is Necessary and How it is Met*, 53 CLEV. ST. L. REV. 545, 547 (2005) ("The Supreme Court has been faced with several cases in which the Court could have determined that homosexuality deserved the same heightened protections that race and gender receive. However, the Court has managed to avoid the problem of determining whether or not homosexuals are a suspect class.").

irrational.<sup>182</sup> The Court has rejected the notion that people can be treated unequally because of their mental status or condition.<sup>183</sup> Furthermore, under statutes with binary wording, psychologically disabled heterosexuals may marry other psychologically disabled heterosexuals of the opposite sex. Psychologically disabled or mentally healthy homosexuals, on the other hand, may marry each other or heterosexuals as long as they are paired with people of the opposite sex, so this produces an irrational result that proves the illegitimacy of these

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<sup>182</sup> Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (2003). See also Jeffery J. Ventrella, *Square Circles?! Restoring Rationality to the Same-Sex "Marriage" Debate*, 32 HASTINGS CONST. L.Q. 681, 710 n.114 (2005).

See, e.g., Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (rejecting heightened scrutiny of "don't ask, don't tell" policy); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (applying rational basis review to Texas sodomy statute), overruled on other grounds, Lawrence v. Texas, 539 U.S. 558 (2003); Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997) (holding that the city's charter amendment concerning sexual orientation was subject to review "under the most common and least rigorous equal protection norm (the "rational relationship test")"); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (holding that a "deferential standard of review" was applicable to military regulation regarding homosexuals); Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996), cert. denied sub nom, Richenberg v. Cohen, 522 U.S. 807 (1997) (rejecting that homosexuals are a "suspect classification" requiring strict scrutiny); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1998) (stating that "homosexuals do not constitute a suspect or quasi-suspect class" and the military's "don't ask don't tell" policy is only subject to "rational basis review"); Rich v. Sec'y of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) ("classification based on one's choice of sexual partners is not suspect"); Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (holding that a group defined by homosexual conduct "cannot constitute a suspect class"); Woodward v. U.S., 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) (holding that homosexuals are not in a "class to which heightened scrutiny must be afforded").

*Id.*

<sup>183</sup> OTHER AREAS OF LAW, SUCH AS EMPLOYMENT, VOTING, OR HOLDING PUBLIC OFFICE, ALSO REGULATE INCOMPETENCE AND MENTAL RETARDATION. SEE BUCK V. BELL, 274 U.S. 200, 207-08 (1927); PATRICK W. CORRIGAN, FRED E. MARKWITZ & AMY C. WATSON, *STRUCTURAL LEVELS OF MENTAL ILLNESS STIGMA AND DISCRIMINATION*, 30 SCHIZOPHRENIA BULLETIN 481, 482-83 (2004); MARTHA A. CHURCHILL, *AMICUS BRIEF SUPPORTING RIGHT TO MARRY FOR A WOMAN WITH A DEVELOPMENTAL DISABILITY*, MARTHA A. CHURCHILL, ATTORNEY AT LAW (DEC. 13, 2000), [HTTP://WWW.MARTHACHURCHILL.COM/DDGUARDBRIEF.HTM](http://www.marthachurchill.com/DDGUARDBRIEF.HTM).

laws that discriminate against disabled, same-sex couples.<sup>184</sup> Laws that preclude same-sex marriage deny two disabled people of the same sex their fundamental right to marry and this violates equal protection.<sup>185</sup>

## E. CONCLUSION

Women who choose same-sex relationships in response to their lifestyles or extreme trauma, or as a promotion of political lesbianism, still retain their right to marry. Heterosexuals possess the fundamental right to marry other heterosexuals. Symbolic speech should be protected, even though the content is not heteronormative, because there is no alternative means for publicly expressing political lesbian marriage than a public ceremony. Disabled women deserve equal protection in marriage as those groups with whom they are similarly situated. Courts should strike laws that abridge heterosexual women's right to marry other heterosexual women on substantive due process, free speech, and equal protection grounds.

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<sup>184</sup> See generally *Hoemance*, *supra* note 45; *Womance*, *supra* note 45.

<sup>185</sup> Such as the law upheld in *Singer v. Hara*. *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).