

## Divorcing Marriage from Sex: Radically Rethinking the Role of Sex in Marriage Law in the United States

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### Abstract

In 2015, the U.S. Supreme Court required all states to permit same-sex couples to marry. Many people assume that marriage equality for gay, lesbian, bisexual and transgender people has been achieved simply by eliminating the requirement that two individuals entering a marriage must be of different sexes. However, family law in the United States has traditionally required not only that married people are of different sexes, but also that they perform heterosexual intercourse. This focus on heterosexual performance threatens to undermine the legal marriages of gay, lesbian, bisexual and transgender people. It also threatens the dignity, privacy, and legal validity of some heterosexual couples' marriages. Contrary to current practice, the law should make no assumptions about the existence or type of sexual behavior between spouses that is necessary to create and sustain a marriage.

### Key words

Same-sex marriage; transgender; heterosexuality; family law; annulment

### Resumen

En 2015, la Corte Suprema de los Estados Unidos obligó a todos los estados a permitir que las parejas del mismo sexo se casaran. Muchas personas asumen que se ha logrado la igualdad de matrimonio para personas gays, lesbianas, bisexuales y transexuales simplemente eliminando el requisito de que dos personas que contraen matrimonio deben ser de diferente sexo. Sin embargo, el derecho de familia en los Estados Unidos tradicionalmente ha requerido no sólo que las personas casadas sean de sexo diferente, sino también que mantengan relaciones sexuales heterosexuales. Este enfoque en el comportamiento heterosexual amenaza con minar los matrimonios legales de personas gays, lesbianas, bisexuales y transexuales. También amenaza la dignidad, privacidad y validez legal de los matrimonios de algunas parejas heterosexuales. Contrariamente a la práctica actual, el derecho no debe hacer suposiciones sobre la existencia o el tipo de

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comportamiento sexual entre los cónyuges que es necesario para crear y mantener un matrimonio.

**Palabras clave**

Matrimonio de personas del mismo sexo; heterosexualidad; derecho de familia; nulidad

**Table of contents**

1. Introduction .....	1279
2. The centrality of heterosexual intercourse to the law of marriage.....	1280
3. The historical evolution of marriage law's emphasis on heterosexual intercourse .....	1284
4. Case studies: transgender marriage .....	1286
5. A critique of marriage law's focus on heterosexual intercourse.....	1291
6. Conclusion .....	1297
References.....	1297
Cases.....	1299
Legislation .....	1301

## 1. Introduction

Marriage law in the United States of America has undergone rapid change in recent years.<sup>1</sup> In 2004, Massachusetts became the first state to offer marriage licenses to same-sex couples (*Goodridge v. Department of Public Health* 2003). As a growing number of states joined the trend, the United States Supreme Court ruled in 2013 that the U.S. Constitution requires the federal government to grant legal recognition to same-sex marriages that are valid under state law (*U.S. v. Windsor* 2013). In 2015, culminating decades of political and legal advocacy, the Supreme Court decided that the Constitution guarantees same-sex couples the right to marry (*Obergefell v. Hodges* 2015). Family law in the United States finds itself at the beginning of a new era in which same-sex couples are free to marry in all states.

It would be a mistake to conclude that as a result of these developments, marriage law in the U.S. is now sex-neutral. In discussions of same-sex marriage, many people have assumed that marriage equality for lesbian, gay, bisexual and transgender people would be achieved simply by eliminating the requirement that two people entering a marriage must be of different sexes. According to this view, the law of marriage has traditionally prescribed heterosexuality, but only with respect to the rules determining which couples could marry. This reasoning suggests that now that same-sex couples are able to get married, marriage will no longer serve as a vehicle for promoting heteronormativity, and lesbian, gay, bisexual and transgender people will be free to transform the institution by breaking down familiar gender stereotypes (Hunter 1991, Eskridge 1996, pp. 116-118, Graff 1999, pp. 224-225, Kim 2011, p. 55, Stoddard 2014, p. 799).

It is true that whether one is male or female, and whether one's intended spouse is male or female, is no longer a basis on which access to marriage may be denied. Nevertheless, it is important to remember that the word "sex" has more than one meaning. In addition to referring to a person's sex (as in, male or female), the term can also refer to having sex (as in, performing sexual intercourse). In the second sense of the word, sex remains very relevant to marriage law.

It is common knowledge that in the U.S., as in most places, the law has traditionally required that married couples consist of one man and one woman. What is less well known is that marriage law in the U.S. has also traditionally required that married couples perform heterosexual genital intercourse.<sup>2</sup> A host of family law doctrines define heterosexual intercourse as fundamental to the marital relationship. This focus on heterosexual performance will not automatically disappear just because same-sex couples are permitted to marry (Brook 2014, p. 62). Instead, these doctrines have the potential to survive and cause continuing harm unless they are challenged and eliminated. What is needed is a fundamental rethinking of the role of sex in the legal conception of marriage.

In recent decades, marriage has been subjected to a barrage of criticism. Some critics have advocated eliminating marriage or at least reducing its influence; others have argued that marriage should be reformed or reconstructed (Fineman 1995, Polikoff 2008, Kim 2011, Barker 2012, Ettelbrick 2014, Macedo 2015). The goal of this article is not to enter into this debate, which has been aired elsewhere. Instead, assuming that marriage (including same-sex marriage) endures, this article aims to consider the role of sexual intercourse in the legal regulation of

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<sup>1</sup> The phrase "marriage law," as used in this article, includes legal rules controlling who may get married as well as rules concerning divorce, annulment, and other issues related to marital status. As Barker (2012, p. 22) recognized, these types of rules constitute marriage's legal structure.

<sup>2</sup> This article uses the words "required" and "requirement" to refer to the role of heterosexual intercourse in marriage law, even though heterosexual intercourse is technically not a prerequisite for all marriages. As discussed below, heterosexual intercourse is a prerequisite for some marriages (specifically, common law marriages in certain states). Furthermore, when a marriage is subject to a legal challenge, several legal doctrines make the presence or absence of heterosexual intercourse determinative of the outcome. See Section 2 below. Thus, marriage law creates a regulatory scheme in which the performance of heterosexual intercourse is necessary to safeguard the legal integrity of marriages.

marriage. The article will argue that contrary to current practice, the law should make no assumptions about the existence or type of sexual behavior between spouses that is necessary to create and sustain a marriage.

## 2. The centrality of heterosexual intercourse to the law of marriage

What is the essence of marriage? That question underlies the controversy about same-sex marriage, as well as the controversy about the institution of marriage itself. As the following discussion will show, numerous legal doctrines express the principle that an essential element of marriage is the performance of heterosexual genital intercourse.

Consummation, which refers to the first act of sexual intercourse after marriage, remains legally significant, despite scholarly criticism (Clark 1988, pp. 39, 112, Cossman 2007, pp. 74-75, 79).<sup>3</sup> In a case interpreting the constitutional right to marry, the Supreme Court described sexual consummation as one of the most "important attributes" of marriage (*Turner v. Safley* 1987, pp. 95-96). Heather Brook (2015) describes the effect of consummation as follows:

[I]n the same way that saying "I do" is a performative *speech* act, consummation is a performative *sex* act. In saying "I do," one is wedded; when a marriage is consummated, it is confirmed or finalized. The sex act does not merely describe or communicate consummation, but *produces* it. In this way, consummation can be understood as performative sex. Consummation is not the only sexual performative associated with marriage; is it merely the first and most obvious one. (Brook 2015, p. 57).

Although consummation is not necessary to begin a formal marriage (that is, a marriage that adheres to statutory requirements like licensing and registration), the absence of consummation may be relevant or even decisive in an action to annul the marriage later (Clark 1988, pp. 34-39, 111-112, *Patel v. Patel* 2014). With respect to common law marriages (which are informal marriages that take place without a license), the significance of consummation is even greater. Entry into a common law marriage requires cohabitation (Clark 1988, p. 48, Abrams 2012, p. 26), and some courts have held that sexual intercourse is necessary to establish cohabitation (*Dean v. District of Columbia* 1991, p. 776).<sup>4</sup> Thus, sexual consummation remains a legal prerequisite for some marriages.

Sexual intercourse is often said to be a "basic obligation[] arising from the marriage contract" (*BM v. MM* 2009, p. 852). Several cases assert that "[t]he refusal of husband or wife without any adequate excuse to have ordinary marriage relations with the other party to the contract strikes at the basic obligations springing from the marriage contract, when viewed from the standpoint of the state and of society at large" (*Kronenberg v. Kronenberg* 1960, p. 221). A married couple's sexual interaction is more legally significant than their social interaction; the former, but not the latter, is central to the marriage contract (*Davis v. Davis* 2009, p. 618). Because sexual intercourse is an "essential incident[] of marriage," a contract to forgo or limit sexual intercourse in marriage has long been considered unenforceable (*Graham v. Graham* 1940, p. 938, *Favrot v. Barnes* 1976, p. 875). Twenty-first century courts remain unwilling to allow married couples to contract about sexual matters (*Diosdado v. Diosdado* 2002, *In re Marriage of Cooper* 2009).

Given the centrality of sex to the legal definition of marriage, it is not surprising that sex plays an important role in divorce. Unlike other countries that have moved

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<sup>3</sup> This article focuses on marriage law in the United States, which differs in important respects from marriage law in other countries, including other common law countries. For example, consummation is irrelevant to civil marriage law in Australia and New Zealand (Sharpe 2002, p. 92).

<sup>4</sup> Nine states and the District of Columbia permit entry into a common law marriage within their borders (Areen *et al.* 2012, p. 177), and such marriages are recognized in many other states pursuant to conflict of laws rules (Clark 1988, p. 47). Where they are recognized, common law marriages enjoy the same legal validity and consequences as formal marriages (Perry 2003, p. 47).

to a pure no-fault divorce system (Barker 2012, p. 25, Brook 2015, p. 166), the majority of American states recognize both fault and no-fault grounds for divorce (Areen *et al.* 2012, p. 719). The ability to prove that one's spouse committed marital fault can confer a distinct advantage in divorce proceedings. Fault-based divorces may require a shorter waiting period and result in preferential consideration for the innocent spouse on property, spousal support and/or child custody issues (Katz 2015, p. 93).<sup>5</sup> In some states, a spouse's unjustified refusal to have sexual relations can furnish the basis for the other spouse to obtain a divorce on fault grounds such as constructive abandonment, cruelty, desertion, or indignities (*Anderson v. Anderson* 2003, p. 1093, *BM v. MM* 2009, Areen *et al.* 2012, p. 703).<sup>6</sup> Adultery and deviant sexual conduct are other examples of divorce grounds based on sexual behavior (Appleton 2008, p. 318-19, *N.J. Stat. Ann.* § 2A:34-2(h) (2015)).<sup>7</sup> Impotence is also a ground for divorce in some states (*Goodridge v. Department of Public Health* 2003, p. 332 n. 22, Appleton 2008, p. 319).

Sex may also affect the availability of no-fault divorce based on separation. In states where divorce is available on the ground that the parties have been separated for a designated period of time, some courts hold that separation does not exist unless the parties are living apart and abstaining from sexual contact (*Bergeris v. Bergeris* 2014). The rationale seems to be that an act of sexual intercourse restores the marital relationship, even if the couple is separated in every other respect. This is consistent with Brook's (2015, p. 57) concept that marital sex acts are "performative" in the sense that they establish, and iteratively reestablish, the marriage itself.

Legal annulment is available in all states. Unlike a divorce, which terminates a valid marriage, an annulment indicates that a marriage was void or voidable from the outset. For that reason, some states limit or deny spousal support and/or property division after annulment (*Woy v. Woy* 1987, p. 774, Gregory *et al.* 2013, pp. 64-65). Hence, an attempt to obtain a legal annulment rather than a divorce is often a strategic ploy by a financially dominant spouse who wants to avoid sharing income and assets. Additionally, some litigants seek annulment in preference to divorce because it avoids the stigma of a "failed" marriage (Wardle 2004, p. 52).

The law of annulment places enormous emphasis on sexual performance. The grounds for annulment in most states include impotence (Borten 2002, p. 1098, *N.J. Stat. Ann.* § 2A:34-1(c) (2015)). Impotence, also known as incapacity, is defined as the inability of either a husband or wife to consummate the marriage by heterosexual intercourse (Perlmutter 1973 & 2015, Gregory *et al.* 2013, p. 57).<sup>8</sup> Impotence may arise from physical or psychological causes (*Manbeck v. Manbeck* 1985, Borten 2002, p. 1098). A number of cases have found a wife to be impotent because she had an unusually small vagina (*Singer v. Singer* 1950, *Donati v. Church* 1951) or because she had vaginismus, a condition in which the muscles around the vagina involuntarily contract and prevent penetration (*T. v. M.* 1968). In some jurisdictions, impotence may be inferred if a marriage has not been consummated after three years (*Manbeck v. Manbeck* 1985, Borten 2002, p. 1099,

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<sup>5</sup> With the advent of no-fault divorce grounds such as irreconcilable differences, irretrievable breakdown of the marriage, and separation, relatively few cases are litigated on fault grounds. However, fault grounds can shape the outcome of negotiated settlements in no-fault divorce cases by affecting the parties' bargaining endowments (Mnookin and Kornhauser 1979).

<sup>6</sup> Because sexual relations, unlike social relations, are central to the marriage contract, the court in *Davis v. Davis* (2009, p. 618) recognized sexual abandonment, but not social abandonment, as a valid basis for a divorce on the ground of constructive abandonment.

<sup>7</sup> In addition to serving as a fault ground for divorce, adultery remains a crime in many states; arrests and prosecutions continue to occur, although they are rare (Nicolas 2011, Sweeny 2014). Criminal law consequences of adultery are beyond the scope of this article.

<sup>8</sup> To support a successful annulment action, impotence must be incurable and must have been unknown to the moving party at the time of the marriage (*Manbeck v. Manbeck* 1985, Borten 2002, p. 1098).

Gregory *et al.* 2013, p. 57). In addition, non-consummation itself is sometimes recognized as a ground for annulment (Borten 2002, p. 1105, *Patel v. Patel* 2014).

The law's emphasis on sexual intercourse is also evident in cases concerning annulment for fraud. In most jurisdictions, annulment is available if a spouse has committed a fraud going to the "essentials" of the marriage (*V.J.S. v. M.J.B.* 1991, *Ur-Rehman v. Qamar* 2012, Gregory *et al.* 2013, p. 58). Traditionally, the only types of fraud that were considered sufficiently serious to meet this standard were those involving "the sexual obligations of marriage" (Clark 1988, p. 110), such as the willingness or ability to engage in sex or have children (Abrams 2012, pp. 8-9, 14). A leading family law treatise pointed out that this rule "suggests that sex is the only really essential feature of marriage" and described this emphasis on sex as "odd" (Clark 1988, p. 110), but as the present discussion indicates, it is entirely in keeping with many other legal doctrines. As one court stated, "[A] sexual relationship is implicit in marriage vows and ... an unstated intent, held at the time of the marriage ceremony, to utterly refuse to engage in a sexual relationship with the other party is a fraud that alters the very essence of the marriage" (*Janda v. Janda* 2007, p. 438).

In recent years, courts have expanded the types of misrepresentations that can warrant nullifying a marriage on the ground of fraud (Gregory *et al.* 2013, p. 58). However, the sexual focus remains. Many courts explicitly require a stronger showing of fraud to entitle a party to an annulment if the marriage has been sexually consummated than if it has not (*In re Marriage of Liu* 1987, Borten 2002, pp. 1106-1107).<sup>9</sup>

Some scholars have suggested that the role of sex in annulment law has little impact because annulments are difficult to obtain and because annulment of a voidable marriage may generally be sought only by one of the spouses, not by the government or another third party (Green 2011, p. 17-18). While annulments are less common than divorces, they remain a viable method of terminating marriages and are granted quite liberally by some judges. For example, *Easton v. Mercer* (2015) applied the doctrine of "equitable fraud" to grant an annulment to a husband whose wife had refused to have sex with him or live with him during their four-year marriage, despite the fact that no actual fraud was proven. States differ in how receptive they are to annulment actions brought by third parties; some allow third parties to bring annulment actions based on fraud (*In re Estate of Gardiner* 2001, p. 1110), even though fraud was traditionally considered a ground that was available only to the spouses themselves (Abrams 2012, pp. 7, 11, 48). A case in point is *In re Estate of Santolino* (2005), where a decedent's sister, who was seeking to annul her brother's marriage after his death, was permitted to plead specific facts in support of her claim that the decedent's marriage was the product of a fraud as to the essentials of the marriage (*In re Estate of Santolino* 2005, p. 515). In any event, the fact that an annulment action is brought by one's spouse rather than by a third party is scant consolation to someone who does not want the marriage to be annulled. According to Heather Brook (2014), the lingering significance of consummation in annulment law animates marriage as a privileged institution and affirms its heterosexual character at a time when traditional marriage is losing its vitality and, at least in some places, is blending into other

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<sup>9</sup> Certain grounds for annulment are waived if one spouse continues to cohabit with the other under circumstances that are deemed to forgive or cure the defect in the marriage. For example, if a spouse was under the age of consent at the time of marriage, the opportunity to annul the marriage on this ground is lost if the marriage is "confirmed" by cohabitation after the age of consent has been reached (Clark 1988, pp. 95-96, *N.J. Stat. Ann.* § 2A:34-1(e) (2015)). Similarly, an annulment action based on fraud will be unsuccessful if the defendant can show that the plaintiff "ratified" the marriage by continuing to cohabit with the defendant after learning the truth (Clark 1988, p. 114, *N.J. Stat. Ann.* § 2A:34-1(d) (2015)). As noted earlier, some courts view sexual intercourse as a necessary component of cohabitation (*Dean v. District of Columbia* 1991), so these rules about cohabitation are really rules about sex.

statuses like cohabitation (Brook 2014, p. 62). In short, the legal rules linking sexual performance to annulment remain a relevant part of marriage law.

Throughout the cases and statutes discussed in this section, the references to sexual activity do not contemplate a broad range of sex acts. On the contrary, it is clear that the law attaches unique significance to complete penile-vaginal penetration (Robertson 1998, Cossman 2007, p. 75, Brook 2014, p. 59).<sup>10</sup> Sexual activity that takes other forms does not count.<sup>11</sup> The case reports are replete with descriptions of incomplete erections (*S.B. v. J.B.* 1996), structural malformations and diseases of the genital organs (*Godfrey v. Shatwell* 1955, Perlmutter 1973 & 2015), ejaculation outside the vagina (*T. v. M.* 1968), and other circumstances associated with “imperfect” or “unnatural” intercourse (*Kshaiboon v. Kshaiboon* 1983, Clark 1988, pp. 100-101). Judges have repeatedly indicated that such behavior is inadequate to meet the legal definition of sex within marriage.

In cases involving a marriage of a man and a woman, courts have treated the performance of heterosexual genital intercourse as determinative, regardless of the parties’ sexual orientation. For instance, in *Woy v. Woy* (1987), a husband sought annulment on the ground that his wife failed to disclose her lesbian affairs. The marriage was consummated and the parties engaged in “normal sexual relations” (*Woy v. Woy* 1987, p. 773). The presiding judge held that “the fact that [the wife] ... engaged in lesbian activities had nothing to do with consummation of the marriage or with the essential part thereof of sexual intercourse” (*Woy v. Woy* 1987, p. 773) and denied the annulment. A dissenting judge argued that “homosexual behavior ... can and should be a definite basis for voiding the marital relationship or contract” (*Woy v. Woy* 1987, p. 780), but his view did not prevail.

Similarly, in *Freitag v. Freitag* (1963), a wife requested annulment on the basis of her husband’s fraudulent concealment of his “homosexual tendencies” (*Freitag v. Freitag* 1963, p. 643). The court pointed out that the couple “admittedly were intimate before the marriage, apparently had a not unhappy honeymoon and an uneventful three weeks of cohabitation upon their return” (*Freitag v. Freitag* 1963, p. 643). Thereafter, the husband became “impotent and incapable of further fulfilling his marital contract” (*Freitag v. Freitag* 1963, p. 643). Although the husband acknowledged his history of homosexuality, the court denied the annulment, because the couple had engaged in heterosexual intercourse and the wife had not proven that the husband’s impotence was incurable.

In contrast to the *Woy* and *Freitag* cases, courts have been willing to annul marriages when one spouse’s alleged homosexuality prevented consummation and that spouse fraudulently concealed his or her unwillingness to have intercourse (*Santos v. Santos* 1952, *Sophian v. Von Linde* 1964, *Kshaiboon v. Kshaiboon* 1983). Thus, these annulment cases hinge on the performance of heterosexual intercourse, not on sexual orientation.<sup>12</sup>

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<sup>10</sup> Unless indicated otherwise, all references to sexual intercourse in this article refer to traditional penile-vaginal penetration.

<sup>11</sup> One exception is the emerging trend in some states toward recognizing acts other than penile-vaginal penetration as adultery (Nicolas 2011, Areen *et al.* 2012, pp. 699-700). However, there is no parallel trend toward broadening the definition of sex within a marriage.

<sup>12</sup> Leslie Green (2011, pp. 1, 3, 18, 21) was correct that sexual orientation does not play a decisive role in traditional marriage law, but his assertion that traditional marriage law does not place much importance on sexual activity within marriage is not true, at least with respect to the United States. In contrast to Green (2011), Twila Perry (2003, p. 31) accurately observed that “the law considered sexual relations between spouses to be extremely important.” Perry (2003, p. 31) then qualified that statement by cautioning that “there is some ambiguity about the question of the extent to which the presence or absence of sex affected the legal status of a marriage”; this caveat serves as a helpful reminder that marriages lacking sexual intercourse are not necessarily invalid for that reason. Nevertheless, as explained throughout this section, if such a marriage were challenged by means of various legal doctrines concerning marriage, divorce, and annulment, the performance of sexual intercourse or lack thereof would be a crucial element of the legal analysis.

The legal doctrines described above continue to be invoked in recent cases and statutes (*In re Estate of Santolino* 2005, *BM v. MM* 2009, *Patel v. Patel* 2014), and many older cases applying them have not been overruled and are still cited as precedent. As Brenda Cossman (2007, p. 70) has insightfully observed, laws concerning sex in marriage are less likely to be vigorously enforced than in previous eras and have been largely supplanted by “sexual self-governance”. Nevertheless, these laws have enduring power, both because they help to shape the exercise of self-governance and because they remain available to legal actors who choose to deploy them. Courts’ willingness to police sexual behavior in marriage varies according to context. Kerry Abrams (2012) has pointed out that modern courts are more likely to scrutinize marriages for fraud when there is a perceived potential for harm to the public, as in cases involving immigration. But the effects of these laws extend beyond the individual cases in which they are applied and enforced. They help to shape the social construction of marriage and are internalized by individual spouses, bringing the government’s views and priorities into the supposedly private sphere of the family (Brook 2015, pp. 23-25). The way marriage is legally structured – including doctrines placing heterosexual intercourse at the center of marriage – affects the way we see marriage and other relationships (Brook 2015, p. 175). “Marriage can thus be conceived as a zone in which governmental interest in (heterosexual) sex acts is processed” (Brook 2015, p. 172).

### **3. The historical evolution of marriage law’s emphasis on heterosexual intercourse**

The body of law governing marriage, divorce, and annulment places extraordinary importance on heterosexual intercourse. This is not an accident. The law of marriage evolved to regulate and channel sexual behavior into a prescribed institution in keeping with prevailing religious and social norms (Schneider 1992, Appleton 2008, pp. 276-283). This process has deep historical roots.

The origins of marriage doctrines in the United States, including the centrality of heterosexual intercourse, can be traced back for millennia. Current American attitudes toward marriage grew out of patterns established in Ancient Israel, Greece, Rome, and the pre-Christian Germanic tribes (Becker 2001). With the emergence of Christianity came new restrictions on marriage and sex, the impact of which continues to be felt today (Becker 2001, Hamilton 2006). Paul, Augustine, Thomas Aquinas and other Christian authorities emphasized the negative attributes of sex, confinement of sex to marriage, and limitations on the types and circumstances of permissible sexual behavior (Friedman 1992, Becker 2001). By the thirteenth century, Roman Catholic canon law required consummation for a valid marriage and prohibited all sexual activity except procreative marital sex (Becker 2001). Canon law provided a foundation for the development of English matrimonial law, which in turn influenced legal developments in the American colonies and later the United States (Clark 1988, pp. 21-25, 99-100, Becker 2001). Despite the historical connections between marriage law and religion, both the U.S. Constitution and sound public policy dictate that religious precepts are not a legitimate justification for secular laws (Becker 2001, *Perry v. Schwarzenegger* 2010, pp. 930-31, Macedo 2015, pp. 34, 59, 123-125).

The cultures that produced the rules that underlie present-day marriage law were thoroughly patriarchal, and the rules themselves were not directed equally at women and men. Religious, social, and legal concepts that have shaped the institution of marriage are deeply enmeshed with gender hierarchy and male subordination of women (Polikoff 2008, pp. 12-15). To give one example, Christian thinkers promulgated the notion of the “marital debt”: the obligation to perform sexual intercourse in marriage (Becker 2001, pp. 19, 27). The idea that “sexual intercourse is an inherent right of marriage” found its way into American law (*Cox v. Cox* 1973, p. 373) and provided a basis for the common law doctrine that a husband cannot be guilty of raping his wife, which is known as the marital rape

exemption (Becker 2001, pp. 19, 27, 30). The common law model of marriage imposed a duty of support on husbands and a duty of services, including sexual services, on wives (Perry 2003). Gender bias was apparent in the law of adultery since its inception; early formulations typically defined adultery more broadly and punished it more harshly when committed by women rather than men (Becker 2001, pp. 13-14, 16, Cossman 2007, pp. 85-86, Nicolas 2011, pp. 105-115).

Legal doctrines treating heterosexual intercourse as essential to marriage are simultaneously ancient and modern. They have been in place for centuries, but they remain valid today (see Section 2). The gender inequality that long characterized legal rules on sex and marriage has likewise not disappeared (Kim 2011, pp. 42-45). The legacy of the marital rape exemption is evident in state laws that regard rape within marriage more favorably than other rapes (Becker 2001, p. 30, Katz 2015, p. 78). The Supreme Court has invalidated overt gender distinctions in family law because they violate the Constitution's Equal Protection Clause (*Stanton v. Stanton* 1975, *Orr v. Orr* 1979), but laws that are gender-neutral on their face continue to be applied in ways that systematically disadvantage women. For example, women's adultery is more likely to trigger a fault-based divorce than men's, and some statutes make adultery a bar to receiving alimony but impose no reciprocal penalty for adultery committed by alimony payors (most of whom are male) (Appleton 2008, pp. 318-319, *Mick-Skaggs v. Skaggs* 2014).

Although marriage law's archaic origins continue to influence many current legal doctrines, the role of procreation in marriage law has changed dramatically in the past fifty years. Historically, marital sex and procreation were closely linked issues (*Goodridge v. Department of Public Health* 2003, p. 961 n. 23). Confinement of sexual activity to marriage was designed in large part to guarantee paternity, clarify lines of kinship and inheritance, and prevent illegitimacy (Becker 2001, p. 17, Borten 2002, Nicolas 2011, p. 107). Thus, it is not surprising that until the middle of the twentieth century, courts often held that an essential element of marriage was not merely heterosexual intercourse, but heterosexual intercourse without contraception (*Gerwitz v. Gerwitz* 1945, p. 329). Annulments and divorces were granted due to failure to perform heterosexual intercourse without contraceptives (*Kreyling v. Kreyling* 1942, *Ehrlich v. Ehrlich* 1952). Following the Supreme Court's landmark decision that married couples have a constitutional right to use contraception (*Griswold v. Connecticut* 1965), procreation can no longer be considered a legal purpose of marriage (*Goodridge v. Department of Public Health* 2003, p. 961). In the words of one court, "Unlike marital sexual relations, which are, per se, part of the essential structure of marriage, the parties are free to decide when and if and how often they will have children" (*Zagarow v. Zagarow* 1980, p. 250).

Indeed, even before married couples' use of contraceptives received constitutional protection, the law regarded impotence as potentially fatal to a marriage but never treated infertility or sterility as a basis for annulment, divorce, or denial of a marriage license (*Goodridge v. Department of Public Health* 2003, pp. 961-962, Katz 2015, p. 55). Conversely, in the absence of penile-vaginal penetration, the fact that a wife became pregnant by her husband's sperm was found insufficient to save a marriage from annulment based on impotence (*T. v. M.* 1968). In other words, sexual intercourse without procreation was enough to ensure the legal survival of a marriage, but procreation without sexual intercourse was not. Thus, despite the strong connection between marital sex and procreation, the law always recognized a distinction between them.

The distinction between marital sex and marital procreation has taken on added significance in the legal battle over same-sex marriage. In same-sex marriage cases, judges on both sides of the issue have occasionally lapsed into confusion about this crucial distinction. For example, Justice Alito, in an opinion opposing same-sex marriage, described procreation as "the one thing that only an opposite-

sex couple can do" (*Obergefell v. Hodges* 2015, p. 2641). In a similar vein, Chief Justice Marshall, author of the ground-breaking Massachusetts Supreme Judicial Court decision supporting same-sex marriage, referred to procreation as "the one unbridgeable difference between same-sex and opposite-sex couples" (*Goodridge v. Department of Public Health* 2003, pp. 962). These judges ignored the fact that there is something else that "only an opposite-sex couple can do" – namely, perform heterosexual intercourse.

Opponents of same-sex marriage have relied on the historical connection between marriage and procreation as a rationale for denying same-sex couples the right to marry. In his dissenting opinion in the 2013 Supreme Court case that required the federal government to recognize same-sex marriages authorized by state law, Justice Alito waxed nostalgic:

While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship (*U.S. v. Windsor* 2013, p. 2718).

More recently, in the Supreme Court decision requiring all states to permit same-sex marriage (*Obergefell v. Hodges* 2015), the dissenting opinions by Chief Justice Roberts and Justice Alito emphasized the link between marriage and procreation, but the majority opinion correctly observed that "[a]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State" (p. 2601).

Apparently recognizing that neither fertility nor procreation is necessary for a marriage to be legally valid, some same-sex marriage opponents contrived an argument that the government is justified in limiting marriage to different-sex couples because only different-sex couples can accidentally conceive a child as a result of having sex (Abrams and Brooks 2009). The accidental procreation argument – the idea that marriage functions as a safety net for heterosexuals who might otherwise carelessly create a child out of wedlock – was accepted by some judges and rejected by others (*Hernandez v. Robles* 2006, *In re Marriage Cases* 2008). Judge Posner disposed of this argument with withering sarcasm: "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure." (*Baskin v. Bogan* 2014, p. 662).

Despite attempts by same-sex marriage opponents to restore procreation to a prominent position in legal rules about marriage, it is clear that the law in the United States today regards heterosexual intercourse, but not reproduction, as fundamental to the marital relationship.

#### 4. Case studies: transgender marriage

A unique perspective on the centrality of heterosexual intercourse to the law of marriage is provided by cases involving transgender people<sup>13</sup> who have married or sought to marry.<sup>14</sup>

<sup>13</sup> As used in this article, "transgender" is a general term that includes people whose appearance, behavior or other personal characteristics do not conform to traditional gender norms (Currah *et al.* 2006, pp. xiv, 4, 159 n. 1). Within the broad transgender category, certain individuals (sometimes called transsexuals) have a self-defined gender identification that differs from the biological sex that was assigned to them at birth. Some of these people undergo or wish to undergo medical intervention such as hormone therapy and/or surgery in order to align their bodies with their gender identities; others do not. In recent years, transgender people have become increasingly visible in popular culture in the United States, including Laverne Cox and Caitlyn Jenner (Sontag 2105).

<sup>14</sup> Cases in the United States involving transgender people and marriage include *Anonymous v. Anonymous* (1971), *B. v. B.* (1974), *M.T. v. J.T.* (1976), *In re Ladrach* (1987), *Vecchione v. Vecchione*

The case of *M.T. v. J.T.* (1976) arose when M.T. filed an action for financial support against her husband, who had abandoned her after two years of marriage. M.T. had been designated male at birth but testified that “throughout her life she had always felt that she was a female” (*M.T. v. J.T.* 1976, p. 205). M.T.’s husband responded to her complaint by claiming that the marriage was void because the plaintiff was actually a male. At the time the case was decided, no state or country permitted same-sex couples to marry.

After finding that the marriage had been consummated, the trial judge ruled in M.T.’s favor. The New Jersey Superior Court Appellate Division affirmed. The appellate court determined that the plaintiff was a female and the marriage was valid, relying in large part on medical evidence showing that the plaintiff had surgery prior to the marriage which removed the male sex organs and replaced them with a vagina and labia which were “adequate for ... traditional penile/vaginal intercourse” (*M.T. v. J.T.* 1976, p. 206).

The appellate court rejected the reasoning of earlier cases holding that sexual identity is fixed at birth. Instead, the court held that surgical alteration of the plaintiff’s genital anatomy to comport with her subjective gender identity made her eligible to be considered a female. The basis of the court’s conclusion was clear: Plaintiff was able to contract a valid marriage as a woman because plaintiff could and did have “traditional” intercourse as a woman with her husband. The expert testimony included a detailed description of the size, angle, and other characteristics of her “artificial vagina,” which had a “good cosmetic appearance” and was “the same as a normal female vagina after a hysterectomy” (*M.T. v. J.T.* 1976, p. 206).<sup>15</sup> According to the court,

[F]or purposes of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinized. Sexual capacity ... in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female (*M.T. v. J.T.* 1976, p. 209).

A striking feature of the court’s reasoning is that it treated the question of a person’s sex (i.e., is the plaintiff male or female), and the question of whether a person is having sex (i.e., did the plaintiff and defendant have “traditional penile/vaginal intercourse”), as essentially the same question. A woman is a person who performs the female role in heterosexual intercourse, and a person who performs the female role in heterosexual intercourse is a woman. Thus, the two meanings of the word “sex” – sex as an identity and sex as an act (Sharpe 2002, p. 7) – are not as distinct as they might initially appear. Rather, according to this case, a determination of biological sex, and a determination of whether someone is having sex (specifically heterosexual intercourse), are mutually constitutive and reinforcing.

In some respects, the decision in *M.T. v. J.T.* is remarkably progressive, especially considering that it was written in 1976. Both the trial and appellate courts were willing to recognize the plaintiff as female. By contrast, a number of cases before and since have taken the position that the assignment of biological sex at birth is permanent. For example, in *Littleton v. Prange* (1999), the Texas Court of Appeals affirmed the dismissal of a wrongful death case filed by Christie Littleton against the doctor whose malpractice had allegedly caused the death of the plaintiff’s husband. The Texas court posed the legal question as follows: “[C]an a physician

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(1997), *Littleton v. Prange* (1999), *In re Estate of Gardiner* (2001, 2002), *In re Nash* (2003), *Kantaras v. Kantaras* (2003, 2004), *In re Oren* (2004, 2006), *In re Marriage of Simmons* (2005), *In re Lovo-Lara* (2005), *Radtke v. Miscellaneous Drivers & Helpers Union* (2012), *Burnett v. Burnett* (2013), *Davis v. Summers* (2013), *In re Estate of Araguz* (2014), *Miller v. Angel* (2014), and *Beatie v. Beatie* (2014).

<sup>15</sup> As Sharpe (2002) indicated, the court was concerned not only with the function of M.T.’s vagina but also with its aesthetic appearance, demonstrating “a concern to ‘naturalise’ her vagina” in order to ensure that M.T. was truly female and that the couple’s sexual activity was therefore free of the taint of homosexuality (Sharpe 2002, p. 122).

change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?" (*Littleton v. Prange* 1999, p. 223). As the phrasing of the question suggests, the opinion staunchly endorsed the latter answer. Even though Christie Littleton had amended her birth certificate to show that she was female, and even though she had undergone surgery that gave her "the capacity to function sexually as a female" (*Littleton v. Prange* 1999, p. 225) and had been having "normal sexual relations" with her husband during their seven-year marriage (*Littleton v. Prange* 1999, p. 227),<sup>16</sup> the court held that the marriage was invalid because Christie Littleton was designated male at birth, and Texas law at the time prohibited a marriage of two men.<sup>17</sup> "In short, once a man, always a man" (*Littleton v. Prange* 1999, p. 227).<sup>18</sup>

Similar issues were raised by the case *In re Estate of Gardiner* (2001, 2002). When Marshall Gardiner died without a will, J'Noel Gardiner, who had married Marshall a year earlier, sought to be recognized as Marshall's surviving spouse and heir. Marshall's estranged adult son challenged J'Noel's status as a surviving spouse by arguing that J'Noel was male, so her marriage to the decedent was void under the applicable law. J'Noel had been designated male at birth. Before her marriage to Marshall, she went through numerous medical procedures, including "sex reassignment surgery," and obtained a new birth certificate and other legal documents that identified her as female (*In re Estate of Gardiner* 2001, pp. 1091-1092). After the trial court decided that both J'Noel and Marshall were male and their marriage was void, the Kansas Court of Appeals reversed and ordered that the case be remanded for a full hearing. The Court of Appeals found that J'Noel had a "fully functioning vagina," the couple was "sexually intimate," and their marriage was consummated (*In re Estate of Gardiner* 2001, pp. 1091, 1110). However, on a subsequent appeal, the Kansas Supreme Court reversed again and reinstated the trial court's judgment. According to the Kansas Supreme Court, "A male-to-female post-operative transsexual does not fit the definition of a female" as intended by the Kansas legislature (*In re Estate of Gardiner* 2002, p. 135). Therefore, J'Noel's marriage to Marshall was void, and Marshall's son was the sole heir.

*Littleton v. Prange* (1999) and *In re Estate of Gardiner* (2002) are among the cases in the United States that have relied on the reasoning of *Corbett v. Corbett* (1970), an English case that nullified the marriage of Arthur and April Corbett on the basis that April was born male.<sup>19</sup> According to the *Corbett* decision, "the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed" (*Corbett v. Corbett* 1970, p. 47). The fact that April Corbett was living as a woman, and that she had undergone "very skillful surgery" that left her with what the official medical report called a "remarkably good ... artificial vagina," was considered irrelevant to her "true sex" (*Corbett v. Corbett* 1970, pp. 41, 47). The judge emphasized that "natural heterosexual intercourse is an essential element" of marriage and that April Corbett was not "naturally capable of performing the essential role of a woman in marriage" (*Corbett v. Corbett* 1970, p. 48). Although there was conflicting evidence about the parties' sexual interactions, the judge concluded that April Corbett "was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity

<sup>16</sup> Apparently wanting to avoid any ambiguity, Christie Littleton's legal brief specifically asserted that the couple had "engaged in private, intimate, heterosexual vaginal-penile sexual intercourse" (Frye and Meiselman 2001, p. 1033 n. 11).

<sup>17</sup> Ironically, the *Littleton v. Prange* (1999) holding that sex at birth is immutable had the effect of enabling lesbian and gay couples to circumvent Texas's ban on same-sex marriage if one of the spouses was transgender; since the two people's designated sexes at birth were different, they were able to marry (Frye and Meiselman 2001).

<sup>18</sup> A subsequent Texas case held that *Littleton v. Prange* (1999) had been legislatively overruled by a statutory amendment permitting a court order showing a "sex change" to be used as proof of identity for a marriage license application (*In re Estate of Araguz* 2014).

<sup>19</sup> *Corbett v. Corbett* (1970) was legislatively overruled in 2004 by the Gender Recognition Act and is no longer valid law in its country of origin (Brook 2015, p. 47).

constructed by [the surgeon], can possibly be described ... as 'ordinary and complete intercourse' or as 'vera copula – of the natural sort of coitus'" (*Corbett v. Corbett* 1970, p. 49).<sup>20</sup>

The New Jersey court in *M.T. v. J.T.* (1976) explicitly refused to follow the reasoning of the *Corbett* case (*M.T. v. J.T.* 1976, p. 208-209) and instead concluded that since M.T. was "fully capable of sexual activity" as a female, she "should be considered a member of the female sex for marital purposes" (*M.T. v. J.T.* 1976, p. 211). Apart from this successful outcome for the plaintiff, the *M.T. v. J.T.* (1976) decision has a number of troubling aspects. First, the court strenuously rejected the possibility that two people of the same sex could marry and instead suggested that such an outcome "cannot be fathomed" (*M.T. v. J.T.* 1976, p. 208). Second, the court's emphasis on M.T.'s ability to perform heterosexual intercourse reaffirms marriage as a heterosexual institution and seems designed to "insulate the institution of marriage from 'unnatural' homosexual practices" (Sharpe 2002, p. 122). In addition, *M.T. v. J.T.* (1976) presupposes a clear distinction between male and female, as well as the ability to determine on which side of the dividing line each individual falls. The court quoted with approval the following language from a prior case: "It has been suggested that there is some middle ground between the sexes, a 'no-man's land' for those individuals who are neither truly 'male' nor truly 'female.' Yet the standard is much too fixed for such far-out theories" (*M.T. v. J.T.* 1976, p. 210). The categories of male and female are actually far more contingent than this description would suggest. As Heather Brook (2015, p. 53) has written, "Marriage laws do not mirror a simple and clear-cut division of all human beings into male and female but sustain the fiction of an obvious and natural sexual order". Designations of biological sex, and the framework of sexual binarism on which they rest, are socially constructed and reflect normative assumptions about gender roles (Franke 1995). Contrary to the view that there is no "middle ground" between the two sexes, transgender identity can be, and often is, variable and fluid (Currah *et al.* 2006). In addition, people who are intersex, a term that refers to those who possess ambiguous or incongruent sexual features that do not accord with either the standard male or female anatomy, challenge the notion that each person is "truly" male or female (Currah *et al.* 2006, pp. xv, 51).

A related flaw in the *M.T. v. J.T.* decision is its highly medicalized perspective on the question of sexual identity. This perspective is an inevitable consequence of the court's focus on the performance of heterosexual intercourse. Although the court acknowledged that "a person's sex or sexuality embraces ... one's self-image, the deep psychological or emotional sense of sexual identity and character" (*M.T. v. J.T.* 1976, p. 209), it concentrated primarily on the fact that M.T. had had surgery to remove her male sex organs and replace them with genitalia that enabled her to perform the female role in heterosexual intercourse. Pursuant to the court's logic, if M.T. had not had genital surgery, she would not have been able to perform heterosexual intercourse as a woman, so her marriage would not have been valid, regardless of her female "self-image." The *M.T. v. J.T.* decision underscored this point by citing and distinguishing two earlier cases, each of which had annulled a marriage involving a transgender person (*M.T. v. J.T.* 1976, p. 209). *Anonymous v. Anonymous* (1971, p. 499) concerned the marriage of a man to a person "who appeared to be a female"; in that case, "there was no medical evidence" that the "putative transsexual" "had had an operation to remove his male organs" and "the two persons had never had sexual intercourse" (*M.T. v. J.T.* 1976, p. 209). Similarly, in *B. v. B.* (1974), a "female transsexual had had a hysterectomy and

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<sup>20</sup> The judge continued, "When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres" (*Corbett v. Corbett* 1970, p. 49). The analogy is significant because both anal intercourse and intracrural intercourse (a term that refers to sexual contact between one partner's penis and the other partner's thighs) fail to meet the traditional definition of consummation, which requires "normal sexual intercourse" (*Corbett v. Corbett* 1970, p. 50).

mastectomy but had not received any male organs and was incapable of performing sexually as a male" (*M.T. v. J.T.* 1976, p. 209). Because M.T. had undergone genital surgery and performed the female role in heterosexual intercourse with her husband, her situation was fundamentally different from that of the transgender parties in the two earlier cases.

Thus, *M.T. v. J.T.* made genital surgery a *sine qua non* for recognizing the preferred sex of a transgender person for marital purposes. However, many transgender people do not have genital surgery for various reasons, including its high cost and risks of medical complications and diminished sexual sensation (Flynn 2006, p. 39, Tobin 2006/2007, pp. 399-402). Operations to convert female genitalia to male are more medically complex, more expensive, less likely to create satisfactory results, and less common than operations to do the opposite (Tobin 2006/2007, p. 401, Sontag 2015, p. 28).<sup>21</sup> Therefore, requiring genital surgery has a disparate negative impact on female-to-male transsexuals as a group, in comparison to their male-to-female counterparts (Flynn 2006, p. 39). The case *In re Marriage of Simmons* (2005) illustrates the harsh consequences of mandating that a female-to-male transsexual must complete genital surgery in order to have his preferred sex legally recognized. That case found that although Sterling Robert Simmons "ha[d] undergone surgeries to remove his internal female organs, he still possess[e] all of his external female genitalia," and therefore he was considered a female, with the result that his marriage to a woman was invalid (*In re Marriage of Simmons* 2005, p. 309). Because genital surgery is not universal among transgender people, the *M.T. v. J.T.* decision, although favorable to the plaintiff in that case, poses a potential obstacle to many other transgender individuals seeking legal recognition of their preferred sex.

In *Kantaras v. Kantaras* (2003), a Florida trial court issued a decision that did not require genital surgery in order to recognize the preferred sex of a married transgender person. Yet the court still relied on medical evidence to establish capacity for heterosexual intercourse. Instead of focusing on genital surgery, this decision looked to the effects of hormone treatment on genital anatomy. The trial judge ruled that Michael Kantaras, who had been designated female at birth, was male and therefore validly married to a woman, even though he had not had phalloplasty (that is, a surgically created penis). The trial court's opinion spanned over 800 pages, much of it devoted to expert medical testimony, articles from medical journals, and Michael's medical history (which included a hysterectomy and double mastectomy, but no surgery on his external genital organs). The opinion also contains detailed descriptions of the couple's sexual practices. The court determined that as a result of hormone treatment, Michael's clitoris had been transformed into a "small penis," such that Michael could and did perform heterosexual intercourse as a male (*Kantaras v. Kantaras* 2003, pp. 281, 750, 760). This finding was essential to the trial court's conclusion that the marriage was valid.<sup>22</sup>

As these cases show, some courts have considered designations of biological sex at birth to be unalterable, while some others have been willing to recognize a transgender person's sex for marital purposes based on the person's ability to perform heterosexual intercourse as a male or a female.<sup>23</sup> Although the latter

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<sup>21</sup> According to an "appalling" but often-quoted adage attributed to a prominent surgeon, "It is easier to dig a hole than build a pole." (Holmes 2008, p. 148). The description of a vagina as "a mere cavity, absence or lack" reflects a phallocentric viewpoint that places a higher value on the penis than the vagina and that regards the vagina primarily as the natural site of heterosexual male pleasure (Sharpe 2002, pp. 6, 122).

<sup>22</sup> On appeal, the appellate court reversed the trial court's decision and held that Michael was female because sex is an "immutable trait[] determined at birth" (*Kantaras v. Kantaras* 2005, p. 161).

<sup>23</sup> In addition to the factors discussed in the text, some decisions concerning marriages of transgender people have relied on an amended birth certificate or court order designating a party's preferred sex (*In re Lovo-Lara* 2005, *Radtke v. Miscellaneous Drivers & Helpers Union* 2012, *In re Estate of Araguz* 2014, *Miller v. Angel* 2014).

approach has the advantage of allowing certain transgender people to marry in accordance with their preferred sex, it invites a medicalized inquiry that is at best intrusive and at worst a dehumanizing freak show. When courts force transgender people to undergo medical procedures in order to gain legal recognition of their preferred sex, they reinforce the power of medical professionals as gatekeepers. "Many gender nonconforming people resist the medical regulation of transgender bodies." (Romeo 2005, p. 732). Transgender activists have criticized the medical profession for imposing a narrow and conformist view of gender, undermining the autonomy of transgender people, and offering services that are out of reach for people who cannot afford them (Spade 2003). Judicial reliance on medical evidence means that transgender litigants who cannot or choose not to undergo the requisite medical treatments will lose their legal claims.

Now that the U.S. Supreme Court has struck down laws prohibiting same-sex marriage, legal disputes concerning marriages of transgender people will presumably no longer focus on whether a marriage is invalid because the spouses are of the same sex. However, the need to determine the sex of the parties will not automatically disappear. Notwithstanding the legalization of same-sex marriage, the sex of the spouses remains legally relevant. Most states have parentage laws that grant parental rights to "husbands" whose "wives" give birth to a child. These laws generally take two forms: a presumption that a husband is the legal parent of a child born to his wife, and a rule that a husband who consents to his wife's insemination with donor sperm is the legal parent of the resulting child (Joslin 2014, p. 497). Some courts are not willing to apply these types of laws to a married couple unless they fit into the sex-specific categories of "husband" and "wife" (Carbone and Cahn 2016). At the administrative level, marriage license applications typically ask whether each party is male or female; the applicants are required to swear or affirm, under penalty of perjury, that the information they provide is true. Furthermore, some jurisdictions offer an alternative legal status such as civil union that is available only to same-sex couples and that purports to offer the same legal rights and responsibilities as marriage (*N.J. Stat. Ann. § 37:1-30* (2015)). For all these reasons, questions about the sex of a transgender person are likely to continue to arise in marriage-related cases. Because of the law's pervasive emphasis on heterosexual intercourse as a central feature of marriage, there is a strong possibility that courts will persist in using heterosexual capacity and performance as the standard to determine a person's sex.

## 5. A critique of marriage law's focus on heterosexual intercourse

The cases and statutes discussed above reveal the law's obsession with penile-vaginal penetration as a defining element of marriage. The reliance on heterosexual intercourse as a litmus test is deeply troubling for many reasons.

Heterosexuality depends conceptually on a distinction between male and female (Sandland 2005, p. 59). The requirement of heterosexual intercourse in marriage is inextricably linked to gender binarism and gender hierarchy (Brook 2015, pp. 163-164). The heterosexual intercourse requirement, with its inevitable emphasis on "the essential role of a woman in marriage" (*Corbett v. Corbett* 1970, p. 48) and the "male duties and obligations inherent in ... marriage" (*B. v. B.* 1974, p. 717), shares a lineage with other legal doctrines that presuppose distinct roles in marriage for women and men. For example, the rule of coverture, which endured for hundreds of years, dictated that when a woman married, her legal identity was subsumed into that of her husband and she could not independently own property, enter a binding contract, or file a lawsuit (*Perry v. Schwarzenegger* 2010, pp. 958-959). Although modern equal protection jurisprudence has done away with coverture and similar laws that overtly enforce gender-specific roles for spouses, consummation can be viewed as a physical enactment of coverture by making the husband and wife into one conjugal body (Brook 2015, pp. 73-74, 172).

As long as marriage law doctrines privilege heterosexuality, they necessarily perpetuate a gender-based vision of marriage (Perry 2003, p. 32). Moreover, it is not an egalitarian vision. By making penile-vaginal penetration the only legally recognized form of sexual expression, marriage law normalizes a system of male access to women's bodies (Barker 2012, pp. 134-136). Indeed, the act of heterosexual intercourse, including when it begins and ends, is customarily defined in terms that privilege men's sexual arousal and satisfaction over women's. As Susan Frelich Appleton (2008, p. 285-286) pointed out, "family law's almost exclusive concern with penile-vaginal penetration ... necessarily relies on a male norm.... [T]he preoccupation with penile-vaginal penetration – not the usual the route to orgasm for women – communicates the irrelevance of female sexual pleasure...."

Predictably, marriage law's focus on heterosexual intercourse provided ammunition for those fighting to block same-sex couples from marrying. For example, a key witness in the closely-watched California same-sex marriage litigation testified at trial that the "rule of sex" in marriage is universal and mandates that only a man and a woman may marry (*Perry v. Schwarzenegger* 2010, pp. 947-948). A similar argument was adopted by the trial court in an earlier case, *Dean v. District of Columbia* (1991). The trial judge in that case upheld the denial of a marriage license to two men, relying in part on the District of Columbia's annulment statute, which permits a marriage to be annulled in the event of "matrimonial incapacity" (*Dean v. District of Columbia* 1991, pp. 774-775). The judge defined "matrimonial incapacity" as an "inability to consummate the marriage by engaging in sexual intercourse" (*Dean v. District of Columbia* 1991, p. 775). The court went on to explain that the term "intercourse" could not include oral or anal sex, because the legislature would not have intended that a couple could consummate a marriage by committing sodomy, which at that time was a crime (*Dean v. District of Columbia* 1991, p. 775).<sup>24</sup> Therefore, the court concluded that since same-sex couples cannot have heterosexual intercourse, they cannot marry. Scholars and political commentators have advanced similar claims that inability to perform heterosexual intercourse disqualifies same-sex couples for marriage (Macedo 2015, pp. 38-59).

In the aftermath of the Supreme Court's decision in *Obergefell v. Hodges* (2015), arguments that only different-sex couples may marry are legally irrelevant. Nevertheless, the requirement of heterosexual intercourse poses a continuing risk of harm to lesbian, gay, bisexual and transgender people. The centrality of heterosexual intercourse to the law of marriage reflects and perpetuates a dominant cultural role for heterosexuality generally. When the institution that many people regard as the bedrock of society is defined by reference to heterosexual intercourse, this conveys a powerful message that constructs heterosexuality as normal and marginalizes other sexual orientations – a message that continues to resonate even after same-sex couples are permitted to marry. The homophobia of law, which has been manifested in resistance to same-sex marriage and judicial anxiety over transgender marriage (Sharpe 2002, pp. 89-134), lives on in rules requiring heterosexual intercourse in marriage.

On a practical level, it is difficult to see how legal rules that are contingent on heterosexual intercourse can be applied to same-sex married couples without leading to destructive results. If penile-vaginal intercourse remains central to legal doctrines concerning consummation, divorce, and annulment, all same-sex marriages will be vulnerable to legal attack. This is an example of formal equality leading to substantive inequality; by applying the same rule to different-sex and same-sex marriages, the latter will inevitably be disadvantaged.

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<sup>24</sup> Subsequently, the U.S. Supreme Court held that criminal laws prohibiting sodomy are unconstitutional (*Lawrence v. Texas* 2003).

Another possible approach would be to treat different-sex and same-sex marriages differently by retaining the requirement of sexual intercourse for different-sex couples but exempting same-sex couples from the requirement. This would obviously be a denial of formal equality and therefore would invite a constitutional challenge.<sup>25</sup> This two-tier approach would also devalue lesbian and gay sexuality by selectively rendering it invisible. The selective erasure of lesbian and gay sexuality is already evident in some laws governing same-sex relationships. When the state of New Jersey enacted legislation to create civil unions for same-sex couples, the grounds for dissolution of civil unions mostly mirrored the existing statute listing the grounds for divorce from marriage (which at the time was limited to different-sex couples), except that “deviant sexual conduct voluntarily performed by the defendant without the consent of the plaintiff” was included as a ground for divorce but omitted from the grounds for dissolution of civil unions (*N.J. Stat. Ann.* §§ 2A:34-2(h), 2A:34-2.1 (2015)). The reason for this omission is not clear. Could it be an assumption that lesbian and gay sexual practices are intrinsically “deviant,” or that lesbian and gay spouses do not deserve legal protection of their sexual autonomy? Such invidious assumptions have no legitimate place in a legal scheme that purports to grant equal rights to same-sex and different-sex couples.<sup>26</sup>

A potential solution to this conundrum would be to consider lesbian and gay marital sex as analogous to heterosexual marital sex and to treat all three types of sex the same for legal purposes. In theory, this approach appears to offer both formal equality and substantive equality. However, this framework is problematic because it would require each court or legislature to decide exactly which lesbian or gay sex acts are sufficiently fundamental to qualify for the analogy to “traditional” heterosexual intercourse.<sup>27</sup> Different courts might arrive at different conclusions about what constitutes “traditional” lesbian and gay intercourse, leading to disparate results in cases presenting similar facts. This type of inconsistency is a reason why some courts have refused to consider anything other than penile-vaginal penetration as adultery. As one such court explained, expanding the definition of adultery to cover “extramarital intimate sexual activity with another” “would permit a hundred different judges and masters to decide just what individual acts are so sexually intimate as to meet the definition” (*In re Blanchflower* 2003, p. 1012).<sup>28</sup>

<sup>25</sup> Although a full consideration of the constitutional issue is beyond the scope of this article, *Obergefell v. Hodges* (2015) provides ample support for the argument that different-sex and same-sex marriages must be subject to equivalent requirements.

<sup>26</sup> A comparable discrepancy exists in the United Kingdom, where inability or willful refusal to consummate is a ground for annulment of a different-sex marriage (*Matrimonial Causes Act 1973* s.12), but there is no analogous ground for terminating a same-sex marriage (*Marriage (Same Sex Couples) Act 2013* Sch. 4, Part 4) or a civil partnership, which is limited to same-sex couples (*Civil Partnership Act 2004* ss. 44, 49, 50). Furthermore, for both different-sex and same-sex marriages, the adultery ground for divorce applies only to sexual infidelity with a member of the “opposite sex” (*Marriage (Same Sex Couples) Act 2013* Sch. 4, Part 3), and the adultery ground does not apply at all to civil partnerships (*Civil Partnership Act 2004* ss. 44, 49, 50). I am grateful to Rosemary Auchmuty for bringing this to my attention.

With regard to the Civil Partnership Act 2004, Nicola Barker observed that the omission of consummation and adultery provisions can be read in two contradictory ways: as “a denial of lesbian and gay sexuality” that carries the implication that “the ‘real’ sex act ... remains a heterosexual, penetrative one,” or as an opportunity to transgress the marriage model by gaining legal recognition for relationships that are non-sexual or non-monogamous (Barker 2012, pp. 166, 185-186).

<sup>27</sup> Constructing a “one-size-fits-all” definition of sexual intercourse that is general enough to encompass heterosexual, lesbian, and gay couples would be a marked departure from the law’s current treatment of heterosexual intercourse, which is narrowly defined to apply only to penile-vaginal penetration; in any event, lawmakers seem disinclined to adopt such a broad redefinition of marital intercourse (Brook 2014, p. 59).

<sup>28</sup> In an apparent effort to avoid confusion about the definition of adultery in the context of a same-sex relationship, the New Jersey statute that sets out the grounds for dissolution of a civil union uses the phrase “voluntary sexual intercourse between a person who is in a civil union and an individual other than the person’s partner in a civil union couple” (*N.J. Stat. Ann.* §2A:34-2.1(a) (2015)), instead of the word “adultery” which appears in the corresponding section of the divorce statute (*N.J. Stat. Ann.* §

Even if it were possible to identify a single lesbian or gay sex act that deserves official legal recognition alongside heterosexual intercourse, this would not be a satisfactory solution. Any legal scheme that differentiates among marriages of heterosexual, lesbian, and gay couples would depend upon identifying the sex of each party, thus reinstating marriage's reliance on a foundation of biological dimorphism that is ultimately unstable (Brook 2015, p. 47). Furthermore, designating a single officially-recognized sex act for each type of marriage is tantamount to government-imposed sexual orthodoxy.<sup>29</sup> Such a reductive and confining approach to sexual behavior is in direct opposition to the call by many scholars and activists for greater sexual pluralism and non-conformity and for freedom from governmental regulation of sex (Beyond Marriage 2014). By domesticating specific types of lesbian and gay sex within marriage, such a rule would further stigmatize other types of lesbian and gay sexual expression inside and outside of marriage, enshrining categories of favored and disfavored lesbian and gay sex (Barker 2012, pp. 166, 173-182, Ettelbrick 2014). As Nicola Barker has pointed out, the historical exclusion of same-sex couples from marriage opened space for the development of alternative forms of relationships, living arrangements, and sexual practices (Barker 2012, pp. 173-82). The quest for and availability of same-sex marriage increased the pressure to conform to narrow models of behavior; legal rules defining a single lesbian or gay sexual act as central to same-sex marriage would intensify that effect.

Aside from the problems it creates for lesbian and gay couples, the law's preoccupation with heterosexual intercourse in marriage also excludes those who are in relationships that do not involve sexual intimacy. In recent years, scholars, advocates, and others have drawn attention to the importance of non-conjugal relationships characterized by interdependence, mutual support, and/or caregiving (Law Commission of Canada 2001, Rosenbury 2007, Polikoff 2008, Barker 2012, pp. 201-204). Many forms of government recognition and benefits are currently limited to those adult couples who participate, or who are presumed to participate, in a sexual relationship. This limitation disadvantages countless others, like the thirty-six-year-old twin sisters who wrote to the Law Commission of Canada (2001, p. 119):

[W]e have co-habited continuously..., rely on each other for emotional support, and are entirely dependent on each other financially.... Yet, because we are sisters, rather than husband and wife, ... we are denied tax benefits, "family" health coverage, and a multitude of other advantages.... We find this situation incredibly frustrating. It seems to us that we are being penalized for not marrying or living with men – or even with women in a presumably sexual relationship. Should the possibility of sexual relations..., whether heterosexual or homosexual, really be the yardstick by which the government, the law, and the corporation measure a citizen's entitlement to social and economic rights? This notion is completely absurd, and yet our entire social structure is premised upon it.

Along similar lines, a commentator in the *New York Times* (Bello 2013) posed the following questions:

Can my primary partner be my sister or child or best friend, or does it have to be someone I am having sex with? I have two friends who are sisters who have lived together for 15 years and raised a daughter. Are they not partners because they don't have sex? And many married couples I know haven't had sex for years. Are they any less partners?

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2A:34-2(a) (2015)). However, this begs the question of what constitutes "intercourse" between a lesbian or gay couple.

<sup>29</sup> As Justice Blackmun wrote in his dissenting opinion in *Bowers v. Hardwick* (1986). "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds" (*Bowers v. Hardwick* 1986, p. 205).

Public policy that privileges conjugal relationships – whether they take the form of traditional marriage or other arrangements that follow the “marriage model” – falls short of meeting the needs of diverse individuals and relationships (Barker 2012). The growing recognition of asexuality (defined as the absence of feelings of sexual attraction) provides additional support for the view that requiring people to have sex in order to benefit from the advantages that flow to married couples is unjustified and discriminatory (Emens 2014).

Heterosexual couples are not immune to the harms inflicted by the law’s preoccupation with sex in marriage. As the *New York Times* commentator quoted above suggested, many married different-sex couples are not sexually active; many others engage in sexual activity that does not include penile-vaginal intercourse. Should their marriages really be subject to dissolution by assigning fault on that basis, as divorce doctrines like “constructive abandonment” currently allow? Moreover, many married heterosexual couples who do engage in sexual intercourse would no doubt find it demeaning to single out that fact as the source of their relationship’s legal validity (*Lawrence v. Texas* 2003, p. 567). In the eyes of most people – married and unmarried alike – the core elements of marriage include love, commitment, and mutual support. In her testimony in the California same-sex marriage case, historian Nancy Cott observed that marriage is “a couple’s choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life” (*Perry v. Schwarzenegger* 2010, pp. 933, 947). Marriage is also a social and legal institution that provides “an orderly framework in which people can ... receive public recognition and support, and voluntarily assume a range of legal rights and obligations” (Law Commission of Canada 2001, p. 130). In comparison to these factors, many observers would assign much less importance to the specific sexual acts performed by a married couple. This is particularly true today, in contrast to earlier eras when marriage was the only setting in which sexual intercourse was legally permitted to take place (*Zablocki v. Redhail* 1978, p. 386).

Legal rules predicated on sexual behavior during marriage threaten the dignity and privacy of married couples. As the cases discussed in Section 2 indicate, different-sex couples have long been subjected to bizarre and invasive legal inquiries in cases concerning consummation, divorce, and annulment. The level of clinical detail provided in these cases about the parties’ genitalia and sexual functioning makes the case reports read more like chapters from a gynecology or urology textbook than judicial opinions. Transgender people have been the subject of probing examinations (literally and figuratively) to determine the validity of their marriages, as described in Section 4. For instance, the trial court opinion in *Kantaras v. Kantaras* (2003) devoted hundreds of pages to the determination that Michael Kantaras had a “‘small penis’ which was his former clitoris” (*Kantaras v. Kantaras* 2003, p. 750) and an elaborate analysis of that organ, including its length, capacity for penetration, and ability to achieve orgasm.<sup>30</sup> Legally-authorized same-sex marriage in the United States is such a new phenomenon that, to the best of my knowledge, it has not yet produced any reported decisions examining the legal sufficiency of the parties’ sexual conduct, but such inquiries are inevitable if the law retains its emphasis on sexual performance. As long as sex is central to the legal definition of marriage, the state may be called upon to police the borders of legitimate and illegitimate marital sex (Cossman 2007, pp. 23-25).

Given the historical link between marriage and procreation, some authorities have felt obliged to explain why marriage law requires the capacity to engage in sexual intercourse but not the capacity to reproduce. A typical answer is that requiring a showing of fertility “would lead to offensive and demoralizing inquiries in the

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<sup>30</sup> The voyeuristic impact of the *Kantaras* case was compounded by the fact that the three-week trial was broadcast on Court TV (Flynn 2006, p. 38).

courts" (*Smith v. Smith* 1921, p. 399, *Hernandez v. Robles* 2006, p. 365). As we have seen, marriage law is rife with "offensive and demoralizing inquiries" into the sexual capacity and performance of spouses and potential spouses. Court-ordered medical examinations, prurient descriptions of the parties' genitalia, and lurid accounts of the couple's sexual interactions are common in these cases. This type of judicial scrutiny of a married couple's sexual relationship violates the spirit, if not the letter, of U.S. Supreme Court decisions safeguarding the privacy of sexual conduct and shielding the "sacred precincts of marital bedrooms" from government intrusion (*Griswold v. Connecticut* 1965, p. 485, *Lawrence v. Texas* 2003).<sup>31</sup> The concepts of marital and sexual privacy are problematic (Goldfarb 2000, Franke 2004, Appleton 2008), but they provide a useful corrective to the callous prying that characterizes cases involving sexual capacity and performance in marriage. The adequacy of consensual sexual activity within marriage should be a matter of concern to the couple, not the courts (Perry 2003, pp. 32, 38).

It is important to remember the contexts in which these issues arise. One category of cases involves a spouse seeking a strategic advantage in a contested matrimonial action (*M.T. v. J.T.* 1976, *Woy v. Woy* 1987, *Kantaras v. Kantaras* 2003). A second group of cases involves the government trying to prevent or deny recognition of a marriage, for example by refusing a marriage license or visa (*In re Ladrach* 1987, *In re Lovo-Lara* 2005). A third class of cases is brought by third parties challenging the validity of a marriage for their own benefit, against the wishes of one or both of the spouses themselves (*Littleton v. Prange* 1999, *In re Estate of Gardiner* 2002, *Radtke v. Miscellaneous Drivers & Helpers Union* 2012). All of these are adversarial proceedings.

By making information about sexual capacity and performance not merely relevant but potentially determinative, the law places a weapon in the hands of hostile parties in contested cases. Third-party challenges to the validity of a marriage are particularly troubling, since they undermine both spouses' control over their relationship. Although an action to annul a marriage on the basis of impotence must be brought by one of the spouses (*K.A.L. v. R.P.* 2012), annulment claims resting on issues of sexual capacity and performance may be available to third parties on a variety of other theories, including fraud and the court's general equity powers (*In re Estate of Gardiner* 2001, *In re Estate of Santolino* 2005). Thus, current legal rules enable outsiders, as well as the spouses themselves, to challenge a marriage based on evidence of intimate sexual matters.

A sexual relationship is no doubt an important component of marriage for many married couples, regardless of their sexual orientation. It is understandable that one or both spouses might decide to end a marriage because of dissatisfaction with the sexual aspect of the relationship. However, in most cases, they should be permitted to do so only on no-fault grounds. Every state has at least one no-fault ground for divorce, such as irreconcilable differences, irretrievable breakdown of the marriage, or separation (Areen *et al.* 2012, p. 719). No-fault grounds do not require proof of specific marital misconduct and should be interpreted in such a way as to spare the parties from the damaging and intrusive fact-finding generated by legal rules that make sexual intercourse central to the definition of marriage. The presence or absence of consensual sexual behavior by a married couple should not be the basis for a fault-based divorce or contested legal annulment, and especially should not provide third parties with a justification for attacking the validity of a marriage. If a state offers fault-based matrimonial remedies, they should be available only for wrongful conduct, such as coercive or exploitive sexual activity (including marital rape and child sexual abuse). But the performance of sexual intercourse should not, in itself, play a role in the law of marriage.

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<sup>31</sup> A full analysis of constitutional privacy doctrine and its application to this issue lies outside the scope of this article.

## 6. Conclusion

Family law should be purged of rules that make penile-vaginal penetration an essential element of marriage. Any requirement of sexual activity between spouses is problematic. Privacy, diversity, and autonomy cannot be served by a legal definition of marriage that prescribes specified forms of sexual expression. The law of marriage should be agnostic as to the existence and type of consensual sexual activity between spouses. Such a sex-neutral approach would be a further step toward equality in marriage and beyond.

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