Hybrid

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In a 1981 decision, the South Dakota Supreme Court thought it reasonable to ask Sandra Jacobson to forego a sexual relationship with a person of the same sex. "Concerned parents," the Court wrote, "in many, many instances have made sacrifices of varying degrees for their children." The law of sexual orientation routinely gives bisexuals the "choice" of avoiding the negative consequences of the legal system (i.e., loss of custody of children, discharge from the military, imprisonment for sexual conduct) if they will disavow their attraction to people of the same sex and flaunt their attraction to people of the opposite sex. But as one Ninth Circuit judge asked: "Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?" Because bisexuals find some people of both biological sexes attractive, society considers it especially appropriate to visit upon them coercion that would be unthinkable for heterosexuals.

The blatantly coercive history of sexual-orientation policies
should make us wary of developing any sexual-orientation categories under the law. Yet, some categories are necessary to develop ameliorative policies. Should the definitions that are used for ameliorative purposes parallel the definitions that have been used for subordinating purposes? Is it possible for society to create privileges and benefits for the gay, lesbian and bisexual communities without perpetuating negative stereotypes about these communities? We need to consider carefully which policies we are trying to promote as we construct these new categories in order to avoid importing destructive values and policies into the gay, lesbian, and bisexual communities.

I. Homosexual Policies That Cause Harm

A. Cincinnati: "Homosexuals Are Not Identifiable"

Many grass-roots attempts to restrict the rights of gay and lesbian people through voter referenda have occurred in the last decade. Oregon and Colorado received considerable national publicity overshadowing a lesser-known attempt in Cincinnati, Ohio, which has produced the most peculiar case law relating to the definition of "homosexual."

In November 1992, the city of Cincinnati passed a Human Rights Ordinance prohibiting discrimination based on race, gender, age, color, religion, disability status, sexual orientation, marital status, or ethnic, national, or Appalachian regional origin in employment, housing, and public accommodations. The passage of this ordinance caused an immediate backlash. An organization called Equal Rights Not Special Rights (ERNSR) was formed to eliminate special legal protection that was accorded to individuals because they were gay men, lesbian, or bisexual.
ERNSR’s strategy was to get the voters to pass a ballot initiative which would invalidate the Human Rights Ordinance as it applied to individuals who are “homosexual, lesbian, or bisexual.” (Presumably, it did not invalidate the Human Rights Ordinance insofar as it protected *heterosexuals* from sexual-orientation nondiscrimination.) The initiative passed by a popular vote of approximately 62 percent in favor and 38 percent opposed and became Amendment XII to the Cincinnati City Charter.

Six days later, a lawsuit was filed challenging the implementation of the initiative. Plaintiffs prevailed in the trial court and the case was appealed to the Court of Appeals. The lower court found that the initiative penalized gay, lesbian, and bisexual people based on their status as persons oriented toward a particular sexual attraction or lifestyle. In reaching this conclusion, the trial court noted that having the *status* of being gay, lesbian, or bisexual does not require an individual to engage in any particular *conduct*. (One can be, after all, a celibate homosexual.) Instead, homosexual status requires an individual to have an “innate and involuntary state of being and set of drives.” This conduct/status distinction was needed to distinguish the initiative from the sodomy statute unsuccessfully challenged in *Bowers v. Hardwick*. In *Bowers*, the U.S. Supreme Court had ruled that states could constitutionally proscribe homosexual sexual *conduct*. In order to conclude that the Cincinnati initiative was unconstitutional, the trial court had to be able to conclude that the initiative regulated *status* rather than *conduct*.

The Court of Appeals rejected the trial court’s analysis that the initiative regulated status rather than conduct. It concluded that the initiative could not be discriminating on the basis of status because we have no way to identify gay, lesbian, or bisexual people except by their conduct:
The reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class. Many homosexuals successfully conceal their orientation. Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual tendencies), they cannot constitute a suspect class.

Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their conduct which identifies them as homosexual, bisexual, or heterosexual. . . . for purposes of these proceedings, it is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct.8

The Sixth Circuit's logic is difficult to comprehend. It suggests that all individuals who are affected by the Cincinnati initiative are currently engaging in sexual conduct with people of the same biological sex. Because Bowers allows a state to regulate such conduct, it concludes that the Cincinnati initiative must be constitutional.

The Cincinnati initiative, however, never mentions sexual conduct so the court makes a big leap from the initiative language to its conduct conclusion. It makes that leap by broadly defining the word "conduct" and then ignoring its own definition. In the paragraph quoted above, the court concludes that we cannot identify homosexuals except by their conduct. Conduct, however, is broadly defined to include both "public displays of homosexual affection" and "self-proclamation of homosexual tendencies." The latter aspect of conduct acknowledg-
edges the existence of a celibate homosexual who publicly pro-
claims his or her sexual feelings or desires. By the end of the
quoted passage, however, the court has forgotten this part of
the conduct definition because it concludes that one cannot
distinguish between individuals who are predisposed toward
homosexual conduct and those who engage in such conduct.
But, if "conduct" included self-proclamations by individuals
not currently engaged in relationships, then, of course, one
could readily distinguish between the two categories. The Bow-
ers conduct rule, which only related to homosexual activity,
would then be inapposite to the Cincinnati initiative which
regulated homosexuals irrespective of their current sexual
activity.

Many problematic assumptions underlie the Court of Ap-
peals’ decision in the Cincinnati case. First, the court assumes
that definitional problems are unique to the area of sexual
orientation. Identification problems make gay, lesbian, and bi-
sexual people ineligible for suspect class treatment but some-
how do not cause problems for racial or religious minorities.
But, racial identification can be equally difficult. As Judy Scales-
Trent so vividly demonstrates in her book, Notes of a White
Black Woman, one can be black but look white.9 Yet, it is
unthinkable that a court would deny suspect class treatment to
blacks because we cannot correctly identify all blacks through
visual observation. The court assumes that most gay, lesbian,
and bisexual people choose to be invisible or closeted. It is only
a small minority through public displays of affection (that could
and should be curtailed) that become identifiable as gay or
lesbian.

Second, the court assumes that bisexuals do not exist. Al-
though the initiative specifically mentions "bisexuals" as does
the Human Rights Ordinance, the court never considers the
application of the initiative to bisexuals. Instead, it limits its
discussion to “homosexuals” who are found to exist only
through their conduct and not through their identity. Such
reasoning causes monogamous bisexuals to be labeled as heter-
ero sexual or homosexual, depending on the sex of their current
partner. Under the court’s reasoning, it would not be possible
for a woman, like myself, who is married to a man (thereby
meeting the “public display of heterosexual affection” test) to
hold myself out as a bisexual. The court assumes that public
displays of affection and self-proclamations will be consistent
along the bipolar categories of heterosexual and homosexual.
Thus, although the court rejects the ease with which we can
define people’s sexual orientation, the court adopts a very bipo-
lar notion—one is homosexual if one engages in public displays
of affection with someone of the same sex and one is heterosex-
ual if one engages in public displays of affection with someone
of the opposite sex. Bisexuals do not exist.

Given the court’s perverse logic, the political and legal impli-
cations of the Cincinnati decision are amusing to consider. Let
us assume, for example, that an organization in Cincinnati
decides to allow individuals to join if they will sign a piece of
paper saying that they are predisposed to find people of the
same sex sexually attractive. (One can join even if one also finds
individuals of the opposite sex to be sexually attractive.) If you
sign the paper, you became an official member of the “H” club.
Could the city of Cincinnati then pass an ordinance protecting
members of the “H” club from being discriminated against? If
so, could the voters of Cincinnati pass a referendum prohibiting
the city from granting special protection to members of “H”
club? In such a case, the members of “H” club would be discrete
and identifiable. They would be definable without reference to
their conduct. Of course, members of the gay, lesbian, and
bisexual communities are currently members of the “H” club but the Sixth Circuit Court of Appeals mistakenly believes that most gay, lesbian, and bisexual people are in the “closet” when they are not engaged in public displays of affection. And, unfortunately, such decisions as the Cincinnati case drive gay, lesbian, and bisexual people into the “closet” because such cases take away their newly granted nondiscrimination protections. As we will see below, courts and legislatures consistently encourage gay, lesbian, and bisexual people to remain closeted. Self-deprecating gay, lesbian, and bisexual people, who attempt to hide and criticize their own sexual orientation, are rarely targeted by anti-gay policy measures. The message from the Sixth Circuit is that gay, lesbian, and bisexual individuals do not need or deserve nondiscrimination protection because they have the choice of remaining closeted or, in the case of bisexuals, heterosexual.

B. The State of New Hampshire: Conduct-Based Definition of Homosexuality

The Sixth Circuit limited the definition of homosexuals to individuals who engage in same-sex conduct in order to facilitate an initiative aimed at hurting gay men, lesbians, and bisexuals. The New Hampshire Supreme Court, by contrast, narrowed the definition of homosexuals so as not to include all individuals who have engaged in same-sex conduct. An individual could thus move from Cincinnati to New Hampshire and be reclassified from a homosexual to a heterosexual. (Neither court, of course, would consider labeling an individual who had engaged in both same-sex and opposite-sex conduct as a bisexual.)

In 1987, the state of New Hampshire passed a bill barring “homosexuals” from adopting children, being foster parents, or
working in day care centers. This was its definition of "homosexual":

a homosexual is defined as any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender.¹⁰

This definition divided people into two stark categories: heterosexual or homosexual. Any act of same-sex sexual activity made a person homosexual. Presumably, most bisexuals would be labeled as homosexuals under this definition. Moreover, homosexuality was defined exclusively on the basis of sexual experience. Sexual orientation was equated with sexual experience rather than sexual desire or identity. Thus, a bisexual or homosexual who had not yet experienced sexual relations with individuals of the same sex would be labeled a heterosexual.

Because of the blatantly coercive aspects of this bill against individuals classified as homosexuals, the New Hampshire House of Representatives was concerned about its constitutionality. Pursuant to the New Hampshire Constitution’s rules regarding advisory opinions, it sought an opinion from the New Hampshire Supreme Court concerning its constitutionality.

The New Hampshire Supreme Court (including now-U.S. Supreme Court Justice David Souter) advised the state legislature that this bill would be constitutional in the adoption and foster care setting but not in the day-care setting. In determining the constitutionality of the bill, the court, however, was troubled by the definition of homosexuality. It stated: "This very narrow definition of homosexual behavior contains no requirement that the acts or submission thereto be uncoerced, nor does there appear to be any temporal limitation regarding when the acts are to have occurred."¹¹ Because the court believed that the statute was too broad in defining homosexuality, it decided
to assume that the homosexual acts had to be voluntary and knowing. Moreover, the court created this temporal rule:

we interpret the definition’s present tense usage to mean that the acts bringing an individual within the definition’s ambit must be or have been committed or submitted to on a current basis reasonably close in time to the filing of an adoption. This interpretation thus excludes from the definition of homosexual those persons who, for example, had one homosexual experience during adolescents, but who now engage in exclusively heterosexual behavior.\textsuperscript{12}

This commentary by the state Supreme Court was an attempt to narrow the New Hampshire definition to include only individuals who were currently engaging in same-sex sexual activity. A person who engaged in same-sex sexual activity only at a young age could be excluded from the definition based on the combination of the coercion and timing exceptions. Because the event had occurred in the distant past, one did not have to consider this event to be indicative of the individual’s current identification. The fact that the event had not recurred even might be evidence that the individual was repulsed by such activity. Moreover, if the individual could allege coercion then the label “homosexual” would not apply at all. This definition had the effect of excluding bisexuals from its definition if the bisexual was currently engaged in opposite-sex sexual activity.

After the state Supreme Court issued its advisory opinion, the state legislature enacted a statute prohibiting homosexuals to adopt or to be foster parents. (Based on the court’s legal advice, it dropped the ban on homosexuals working as day-care workers.) It used the following definition of homosexuality: “any person who knowingly and voluntarily performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender.”\textsuperscript{13} The legislature explicitly imposed the requirement that
the sexual behavior be knowing and voluntary but it did not explicitly impose a temporal requirement. It retained the present tense usage but left open the question of how recently one would have had to engage in a homosexual act to be deemed a homosexual. Would the act have had to occur in the previous day, the previous week, the previous year, or the previous decade? These interpretations are awkward because they require a past-tense interpretation of the statute. Certainly, the legislature did not mean to require that the person engage in a homosexual sexual act while being interviewed about his or her suitability as a parent! Nonetheless, it did construct a conduct-based definition of homosexuality.

Although the legislature was alerted to the ambiguity with respect to timing, it did nothing to solve the problem. It continued to believe that it could neatly divide the world into the homosexual and heterosexual to achieve its purpose. Although the legislature was subtly alerted to the fact that bisexuals exist, it chose to continue to ignore their existence. Therefore, it is hard to know whether it intended to exclude bisexuals, who were currently sexually involved with individuals of the opposite sex, from its definition.

In sum, the state of New Hampshire initially created a legal disability for homosexuals without considering how hard it might be to define the “homosexual.” When confronted with definitional difficulties by a state Supreme Court that seemed to recognize the ambiguity that was created for some bisexuals, the legislature did not budge much. It maintained bisexual invisibility in the face of criticism by the state Supreme Court.

In the state of New Hampshire, therefore, the “homosexual” who was excluded from being an adoptive parent was the individual who had engaged in same-sex sexual activity and would not express regret concerning those experiences by claiming
that they were coercive. The state of New Hampshire did not intend to exclude all individuals who had same-sex sexual experiences from being adoptive or foster parents. It only intended to exclude those individuals who felt positively about their same-sex sexual experiences. A closeted, self-deprecating homosexual or a bisexual who was currently engaging in opposite-sex sexual activity and was willing to disavow same-sex sexual experiences was considered to be a more appropriate parent than an open, proud homosexual or bisexual who was engaging in same-sex sexual activity.

Oddly, however, the state does not even appear to have considered another category of homosexual or bisexual—an individual who is open about his or her identity but is not currently engaged in same-sex sexual conduct. For example, both an open bisexual who is married to a person of the opposite sex and an open homosexual who is currently not in a sexual relationship would seem to qualify as adoptive parents under the state’s definition. One would not expect that the state of New Hampshire wants open homosexuals or bisexuals to adopt children since they might inculcate gay-positive values to their children. The failure to mention such individuals reflects the state’s stereotypes and ignorance. Like the Sixth Circuit, it does not believe such people exist because they have the “option” of being closeted. The federal government, however, has become well aware of such individuals as it has tried to write policies to govern the military.

C. Federal Government: Keeping Homosexuals out of the Military and in the Closet

Like the State of New Hampshire, the federal government has distinguished between conduct and status so as not to sweep
too broadly in limiting the rights of gay, lesbian, and bisexual people in the military.\textsuperscript{15} While the state of New Hampshire’s definitional story is relatively straightforward, the military’s is far from simple. The military has had a long-standing problem trying to define “homosexual” and has adjusted its definition many times in order to better achieve its intended social policies as well as to avoid constitutional difficulties. Its definition-making has been so unsuccessful and problematic that it has recently developed a definition that is radically more encompassing, and less bipolar, than prior definitions. The military currently excludes nearly all gay men, lesbians, and bisexuals from military service based on both conduct or status. It finally has realized that it cannot fully perpetuate the subordination of all nonheterosexuals unless it opens up its rigidly bipolar definition of sexual orientation.

**First Definition: A Sweeping Rule**

The first definition used by the military to exclude homosexuals provided for the mandatory discharge of individuals who engaged in “homosexual acts.” “Homosexuality” was defined as including “the expressed desire, tendency, or proclivity toward [homosexual] acts whether or not such acts are committed.” Unlike the definition used by the Sixth Circuit in the Cincinnati case, this definition recognized that there could be a “celibate homosexual”—that conduct and orientation can be distinct. The definition, however, was silent on whether it covered bisexuals.

The definition soon led to problems because it resulted in broader exclusion than desired by the military, as exemplified by *Beller v. Midendorf*.\textsuperscript{16} This case challenged the discharge of three individuals because they allegedly engaged in activity prohibited by Navy regulations. These three individuals pre-
presented three different categories of individuals who might be covered by the military’s exclusion policy: (1) an avowed homosexual, (2) an avowed bisexual who admittedly engaged in same-sex activity, and (3) an avowed heterosexual who admittedly had engaged in same-sex sexual activity.

1. The Avowed Homosexual. Mary Saal, a Navy air traffic controller, signed a statement in 1973 admitting that she had homosexual relations with another member of the Navy. At her disciplinary hearing, she admitted to having had homosexual relations since she signed that statement and indicated that she intended to continue her homosexual relationship. She easily fit the Navy’s definition of homosexual since she acknowledged engaging in homosexual conduct.

2. The Avowed Bisexual. Dennis Beller, an enlisted member of the Navy, admitted during an investigation that he had current contacts with homosexual groups. Subsequently, Beller acknowledged that he had sexual activities with men for the first time after enlisting in the Navy, and that he considered himself to be bisexual. The initial evidence suggested that Beller fit the Navy’s definition somewhat less perfectly than Saal, because it only included information about his associational activities. He did not appear to engage in public acknowledgment of his homosexuality. Moreover, he was not known to have engaged in homosexual activities. His subsequent disclosure, however, soon brought him under the Navy’s “expressed desires” definition. Nonetheless, Beller insisted on labeling himself a “bisexual,” by which he presumably meant that he had opposite-sex as well as same-sex sexual desires. That expression, however, did not remove him from the category of “homosexual.” Bisexuals were an unacknowledged, but apparently covered, category.
3. The Avowed Heterosexual. James Miller, a Yeoman Second Class, admitted during an investigation that he had participated recently in homosexual acts with two civilian men. A medical officer who examined Miller concluded that “he did not appear to be ‘a homosexual,’ and that he found no evidence of psychosis or neurosis.” According to the court, Miller “at various times denied being homosexual and expressed regret or repugnance at his acts.” Miller fit the Navy’s definition of a homosexual because he was found to have engaged in homosexual activity. His expressed repugnance at his homosexual conduct did not exempt him from discharge.

The homosexual acts clause therefore allowed the Navy to discharge Saal and Miller, and the “expressed desire” clause allowed them to discharge Beller. Although the military claimed it had the discretion to retain a “known homosexual” during this discharge process, it did not exercise that option.

Second Definition: “It Only Happened Once, and I Regret It”

Miller’s case apparently troubled the Navy because of the rules’ inflexibility. Although the Navy made no effort to retain Miller, and denied his request to reenlist, it did modify its regulations after he was discharged. Under the new regulations, the Navy could decide to retain a “known homosexual” if the following conditions were met:

A member who has solicited, attempted, or engaged in a homosexual act on a single occasion and who does not profess or demonstrate proclivity to repeat such an act may be considered for retention in the light of all relevant circumstances.

This was a modest modification of the regulations because the modification required the existence of two separate conditions: the homosexual act occurred only once and the person
expressed disdain for such activity. Although Miller might have been able to meet the second requirement, he could not meet the first requirement since he acknowledged having engaged in more than one homosexual act.

Nonetheless, the modification shows that the Navy was troubled by a perceived conflict between its understanding of who are “true homosexuals” and who it was discharging. Moreover, the modification demonstrates the Navy’s attempt to get military employees to conform their statements and actions to the categories of “true homosexual” and “normal heterosexual." Subsequent to the modification, the Navy gave individuals who were found to have engaged in homosexual activity the opportunity to stay in the military if they said that the event was their sole homosexual experience and that they did not intend to commit such acts again in the future. The Navy could then operate under the confirmed illusion that people typically experiment exactly once in homosexual activity, discover they do not enjoy the experience, and therefore fit the category of normal heterosexual. The illusion could persist so long as people tailored their statements about their sexual activity to fit within the modified regulation.

Not everyone who engaged in exactly one incident of same-sex sexual behavior, however, could meet the Navy’s new exception. An unsuccessful attempt to tailor one’s statements to the new regulations occurred in Dronenburg v. Zech. James Dronenburg had been a petty officer with the Navy for nine years. In August 1980, a seaman recruit gave sworn statements to the Navy alleging that he had engaged in repeated homosexual acts with Dronenburg. Dronenburg’s first response was to deny those allegations. Later, he acknowledged their accuracy.

Since the only evidence of Dronenburg’s conduct were his
actions with one sexual partner, he could have tried to come under the "one act" exception. Dronenburg's problem, however, was that he fit the court's and society's stereotype of a "true homosexual." According to the Court of Appeals:

This very case illustrates dangers of the sort the Navy is entitled to consider: a 27-year-old petty officer [Dronenburg] had repeated sexual relations with a 19-year-old seaman recruit. The latter then chose to break off the relationship.\textsuperscript{25}

The court (in an opinion written by Judge Robert Bork and joined by Judge Antonin Scalia) criticized Dronenburg's actions at great length, because they demonstrated the "powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction."\textsuperscript{26} In other words, like the state of New Hampshire, the D.C. Circuit was particularly horrified because of what it perceived to be a coercive homosexual sexual act between an older man and a young man. Those are the acts of a stereotypical "true homosexual" even if they could technically fall within the "one act" exception. The military and the court therefore made no attempt to allow Dronenburg to fit into the "one act" exception for those who have only had one sexual partner.

By putting Dronenburg in the stereotypical "true homosexual" category, the court and the military could also make the seaman recruit blameless. The younger recruit could argue that the sexual activity was limited and not reflective of his sexual orientation—that he was repulsed by the actions and therefore sought to end the relationship. In the language of the New Hampshire statute, he could argue that he did not\textit{ knowingly} and\textit{ willingly} engage in homosexual acts, but that he was subject to coercion by an older officer. This version of the story allows the court to believe that homosexual conduct is deviant,
only performed when one person is acting in a coercive way. Like the version accepted by the New Hampshire legislature, this version does not require the military to recognize homosexual acts as frequent consensual activities. It also allows the military to ignore bisexuality by allowing people to be labeled heterosexual if they predominantly engage in opposite-sex sexual activity.

The "one time" exception clause, however, was not the only problem facing the military in enforcing its regulations. It was also having difficulty with its broad definition of homosexuality which included "the expressed desire, tendency, or proclivity toward [homosexual] acts whether or not such acts are committed." That definition was written to encompass the "true homosexual" whose homosexuality was known on the basis of identity rather than action. The problem with this regulation, however, was that it allowed the military to penalize someone solely on the basis of speech, seemingly in violation of the First Amendment.

That problem soon emerged in the first round of benShalom v. Secretary of Army. Miriam benShalom, a member of the U.S. Army Reserves, had publicly acknowledged her homosexuality during conversations with fellow reservists, in an interview with a reporter for her division newspaper, and in class, while teaching drill sergeant candidates. She was then informed by letter that she was being considered for discharge from the Reserves.

The district court concluded that the regulation which dictated her discharge violated the First Amendment because it "directly infringes on any soldier's right at any time to meet with homosexuals and discuss current problems or advocate changes in the status quo, even though no unlawful conduct would be involved." Moreover, the court concluded that the
regulation infringed on a soldier's right to receive information and ideas about homosexuality. In other words, the regulation went further then allowing the Army to discharge the "true homosexual." It also permitted the Army to discharge people who simply associated with homosexuals or received information about homosexuals. (Such people, of course, are dangerous because they undermine the view that homosexuals are immoral and deviant.) Because of such constitutional problems, the military was forced to abandon its attempt to reach individuals purely on the basis of status. It needed to link that status to conduct. Hence, the next round of definitions.

Third Definition: A Broader Disavowal Exception

In response to benShalom and Dronenburg, the military issued new regulations which stated that:

a member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

1. That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

   (A) such conduct is a departure from the member's usual and customary behavior;
   (B) such conduct, under all the circumstances, is unlikely to recur;
   (C) such conduct was not accomplished by use of force, coercion, or intimidation;
   (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
   (E) the member does not have a propensity or intent to engage in homosexual acts.
These regulations constituted a much more complicated attempt to distinguish between the “true homosexual” and the “true heterosexual.” Unlike the previous exception for individuals who engage in one homosexual act, these regulations allowed exceptions for individuals who have engaged in many homosexual acts as long as they expressed disapproval of such acts. Miller, as well as the seaman recruit in the Dronenburg case, could probably have fit under this broader exception. In addition, Beller, the “avowed bisexual” discharged under the first definition of homosexual could probably have fit under the exception.

These regulations no longer permitted the military to discharge an individual entirely on the basis of his or her association with homosexuals, or his or her receipt of information about homosexuals. There would have to be a positive statement of identity through public acknowledgment of homosexuality or marrying someone of the same sex. These public statements would put the individual into the category of a “true homosexual.”

These regulations, however, did not end the military’s legal troubles, because they continued to treat someone adversely based on status rather than conduct. The attempt to criminalize the status of an individual’s sexual orientation poses grave constitutional problems. The government, however, did not want to limit itself to cases in which there was known homosexual conduct because it was threatened by individuals, such as ben-Shalom, who were willing to publicly state their status as homosexuals. Those individuals were apparently more threatening to the military than individuals who engaged in homosexual conduct but expressed disdain at such conduct. Thus, the military created fewer status exceptions than conduct exceptions.

The new regulations continued to give the military First
Amendment problems in the "status" cases where there was
evidence of identification but no evidence of homosexual con-
duct. Three cases raised that problem. In *Woodward v. United
States*,\(^{34}\) *Watkins v. United States Army*,\(^{35}\) and the second
round of *benShalom v. Marsh*,\(^{36}\) individuals were discharged
from the military because of their sexual status rather than
sexual conduct. In each of these cases, there was no proof that
the individual had engaged in homosexual acts. The only proof
was that he or she identified as a homosexual. James Woodward
acknowledged that he was sexually attracted to members
of his own sex and sought the company of gay officers, but there
was no finding that he had engaged in homosexual conduct.\(^{37}\)
Miriam benShalom publicly acknowledged she was a lesbian
but there was no finding that she had engaged in homosexual
acts.\(^{38}\) Finally, Perry Watkins had always acknowledged that he
was a homosexual but there was no finding that he had engaged
in homosexual conduct.\(^{39}\) The military wanted to discharge
these individuals because they belonged to the ranks of the
"true homosexual" but there was no evidence of homosexual
conduct.

In Woodward’s case, the military achieved its desired end
by discharging him for reasons other than his homosexuality.
Disciplinary proceedings were brought against Woodward be-
cause he visited an officer’s club in the company of an enlisted
man who was awaiting discharge from the Navy because of
homosexuality.\(^{40}\) Woodward never acknowledged engaging in
homosexual acts but did acknowledge that he identified as a
homosexual.\(^{41}\)

On the basis of those statements, Woodward was recom-
mended for discharge. The discharge, however, was not pro-
cessed and, instead, Woodward was made available for reas-
ignment or release from active duty. His file was then reviewed
by a personnel officer. As a result of this review (which would not have taken place but for the allegation of homosexuality), the Navy determined that Woodward’s record placed him below the cutoff point for retaining a reservist. These “nonhomosexual” reasons were used to release him from reserve status. The Navy therefore did not have to defend its right to discharge him solely on the basis of his homosexual status by finding another explanation for his discharge.

In the case of Sergeant Perry Watkins, the military did not resolve the status problem as successfully. It had known of Sergeant Watkin’s homosexuality for more than a decade, had no current evidence of homosexual conduct, and had no reason to discharge him other than his homosexuality. Nonetheless, his public acknowledgment of his homosexuality made him a “true homosexual” whom the military wanted to discharge. This case was very difficult for the courts because Watkins fit the category of a “true homosexual” yet the military had tolerated his homosexuality. Moreover, the only indication that Watkins had engaged in homosexual activity was quite old. In 1968, Watkins admitted engaging in homosexual acts with two other soldiers, actions that occurred fourteen years before the Army tried to discharge him. Thus, he would seem to have met the New Hampshire Supreme Court’s “temporal exception” but for his refusal to repudiate his homosexuality. His unwillingness to repudiate his homosexuality, coupled with the military’s lack of knowledge of recent homosexual acts, made his case one that squarely challenged the military’s power to create penalties solely on the basis of status.

When the Ninth Circuit heard this case for the first time, it viewed the case as one requiring it to determine whether the military could constitutionally penalize someone entirely on the basis of his status. Proceeding from that assumption, the
Ninth Circuit concluded that such action violated the constitutional ideal of equal protection of the laws:

we conclude that allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.\footnote{45}

The court disallowed the military to discharge an individual such as Watkins whose homosexuality was known solely on the basis of statements rather than conduct.

The Ninth Circuit’s original decision, however, was not as pathbreaking as it might first appear, because it proceeded on the dominant assumption that homosexuality is immutable and bipolar. In other words, we are either fixed as homosexual or heterosexual:

Scientific proof aside [about the immutability of sexual orientation], it seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex? It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment. \ldots But the possibility of such a difficult and traumatic change does not make sexual orientation “mutable” for equal protection purposes.\footnote{46}

This passage was strikingly bipolar because the court assumed that individuals have either exclusive heterosexual or exclusive homosexual innate sexual feelings. In the court’s words, shock treatment is the only way to get people to move outside these bipolar categories. Bisexuals, therefore, do not exist. If the court were to recognize the existence of bisexuals, its reasoning might falter because it then would have to ask
whether it is reasonable or constitutional for the government to try to affect the conduct of people who do not have an exclusive preference. The court’s argument relied on the presumption of immutability and bipolarity. Thus, it had its own understanding of the “true homosexual” which rendered bisexuals invisible. Its understanding of the true homosexual simply differed from that of the military.

The Ninth Circuit’s modest attempt to redefine the “true homosexual” was ultimately unsuccessful, as its reasoning was overturned by the entire panel of the Ninth Circuit when it sat to reconsider the case. The Ninth Circuit decided the case on estoppel grounds (i.e., not applying a rule on grounds of equity) rather than on equality grounds. It refused to permit the Army to discharge Watkins in the 1980s on an estoppel theory because the military had “affirmatively misrepresented in its official records throughout Watkins’ fourteen-year military career that he was qualified for reenlistment.”47 Because of this affirmative misrepresentation, the Army was estopped from refusing to reenlist Watkins on the basis of his homosexuality.48

The Watkins decision sent out a clear message to the military: discharge a soldier as soon as he or she acknowledges his homosexuality. Do not tolerate the “true homosexual” at all if you want to maintain the integrity of your own regulations. Rather than creating more protection for individuals who may identify as homosexuals or engage in homosexual conduct, the Ninth Circuit’s decision served as a reprimand to the Army for failing to comply with its own regulations to weed out “true homosexuals.” Watkins was a homosexual whom the military and the court found had a “nonwaivable disqualification for reenlistment.”49 By treating that disqualification as discretionary rather than mandatory, the military took the risk of undermining its ability to weed out the “true homosexual.” Wat-
kins was therefore the exceptional "true homosexual" who was allowed to stay in the military only because of repeated attempts by the Army not to strictly enforce its own rules. The military's definition of the "true homosexual" was left unchanged.

Because of the Army's fourteen-year history of failing to enforce its own regulations against Watkins, the Ninth Circuit did not have to resolve the issue of whether the military could seek to discharge someone solely on the basis of status. That issue ultimately arose in the second round of *benShalom v. Marsh.* As discussed above, a district court had ruled in 1980 that benShalom's discharge under the second set of regulations violated the First Amendment. The Army did not appeal that order and eventually reinstated benShalom for the eleven-month balance of her original enlistment. Meanwhile, the Army modified its regulation. While serving the final period of her initial enlistment, benShalom sought to reenlist for another full six-year term under the old rules. The army notified benShalom that she was barred from reenlistment because of her acknowledgment that she was a lesbian. In 1988, a new district court judge ruled that the Army was continuing to discriminate unconstitutionally against benShalom in violation of the First Amendment, because it was her statements about her sexual orientation that were precluding her from being reenlisted in the Army. The court granted benShalom's request for a preliminary injunction.

That decision was overturned on appeal. The Seventh Circuit Court of Appeals concluded that the military had eliminated the problematic passage when it deleted the "desires or interest" language from the prior regulation. The court saw no difficulty with the remaining language because it concluded that benShalom's admission that she was a homosexual implied, "at
the very least, a 'desire' to commit homosexual acts." Using that interpretation of the regulation, the court was able to avoid the status/conduct issue that had been raised by the first Ninth Circuit panel to hear the Watkins case. It was able to resolve the constitutional dilemma that had plagued the Ninth Circuit by allowing the military to discharge or refuse to reenlist the "true homosexual" who was defined solely on the basis of status, not conduct. This finding that conduct and desire are synonymous (so that there is no such thing as a celibate homosexual) was similar to the Sixth Circuit's conclusion in the Cincinnati case that one cannot identify a homosexual other than on the basis of conduct. The court conflated status and conduct to uphold the military's regulation.

Fourth Definition: Don't Ask, Don't Tell, and Disavow

The third definition, which conflates status and conduct, however, did not end the military's attempts to define the "true homosexual" it wanted to exclude from military service. In a highly publicized dispute with President Clinton, who wanted to end discrimination against gay men, lesbians, and bisexuals in the military, Congress decided to codify its own version of who should be excluded from military service based on homosexuality.

Under the new rules, which for the first time were codified by statute, a member of the armed forces shall be separated if:

- the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that (A) such conduct is a departure from the member's usual and customary behavior; (B) such conduct, under all the circumstances, is unlikely to recur; (C) such conduct was not accomplished by use of force, coercion, or
intimidation; (D) under the particular circumstances of the case, the
member's continued presence in the armed forces is consistent with
the interests of the armed forces in proper discipline, good order, and
morale; and (E) the member does not have a propensity or intent to
engage in homosexual acts.

(2) the member has stated that he or she is a homosexual or
bisexual, or words to that effect, unless there is a further finding, made
and approved in accordance with procedures set forth in regulations,
that the member has demonstrated that he or she is not a person who
engages in, attempts to engage in, has a propensity to engage in, or
intends to engage in homosexual acts.

(3) the member has married or attempted to marry a person known
to be of the same biological sex.\textsuperscript{57}

Although this rule received publicity as an attempt to moderate
the military's treatment of gay, lesbian, and bisexual people, it actually empowers the military to discharge homosexuals
more easily. The first part of the rule allows individuals to be
excluded based on conduct alone. As with previous rules, it
permits exceptions where the conduct is allegedly inconsistent
with an individual's orientation. As such, it retains the exception
for the individual who is willing to disavow his or her
same-sex sexual feelings or actions.

The second part of the rule is broader than past rules, because it allows for the exclusion of individuals based on speech,
irrespective of a finding of any sexual activity. Under the old
rules, the military had to presume a connection between speech
and action (as in the \textit{benShalom} case). Under the new rules, no
such presumption is required. The mere statement that one is
homosexual or bisexual apparently conflicts with military mo-
rale and is a ground for discharge. In addition, the second part
of the rule provides explicitly for the exclusion of bisexuals.
One does not have to label bisexuals as "homosexuals" in order
to exclude them.
The third part of the definition also expands the scope of the military’s exclusion policy by clarifying that off-base activity can cause one to be excluded from military service. An individual who marries someone of the same sex in an off-base ceremony but who intends to be celibate while serving on-duty, can be excluded. The military no longer confines itself to conduct or statements. Coupled with the second part of the definition, it is clear that newspaper interviews as well as private marriage ceremonies can form the basis for exclusion.

This new rule is described as “don’t ask, don’t tell,” but it could be more properly described as “don’t act, don’t tell, and disavow your homosexual or bisexual conduct.” As with earlier rules, it gives individuals an incentive to disavow their prior same-sex sexual activity. Unlike prior rules, it also makes it clear that being open about one’s sexual orientation, if it is homosexual or bisexual, can be very dangerous to one’s military career. No longer can such individuals as Perry Watkins be open about their homosexuality, while refraining from being “caught” in homosexual acts, and expect to be retained in the military.

The broad reach of the existing rules has caused a district court to declare them invalid. In Able v. United States of America, the federal district court entered a preliminary injunction, and ultimately a permanent injunction, to prevent the military from enforcing these rules to discharge six individuals from the military. In concluding that the free speech provision of the First Amendment had been violated, the court observed that: “The Act and Regulations restrict their speech not only while they are in uniform and on duty, or on base, but in every conceivable aspect of their lives, including the prosecution of this lawsuit. . . . This court holds that there is a serious question as to whether a regulation goes beyond what is reason-
ably necessary to protect any possible government interest when it inhibits six service members from continuing to speak in court to make a constitutional challenge."  

The sweeping nature of these regulations reflects that the government is moving in a new direction in its attempt to define the “true homosexual” who should be excluded from military service. Unlike the state of New Hampshire, which apparently wanted to limit the scope of its anti-gay rules to individuals who engage in certain kinds of same-sex sexual conduct, the federal government wants to reach as broadly as possible to exclude any individual who has a homosexual identity or who has engaged in same-sex sexual conduct. The fact that many good soldiers will be discharged, who had been able to be retained under the old versions of the rules and represent an enormous financial investment for the military, seems not to be of concern. At this time, the private sensibilities of heterosexuals in the military, who do not want to shower or bunk with individuals who find some members of the same sex attractive, seem to be paramount through the exclusion of all open homosexuals and bisexuals. Good discipline and morale supposedly cannot be retained through the presence of any “out” homosexuals or bisexuals. A bipolar model has been retained of “good” soldiers and “bad” soldiers; for the first time, bisexuals clearly have been placed in the “bad” soldier category along with celibate homosexuals. The bipolar model now seems to have shifted to “heterosexuals” and “others,” with “others” including a much broader category for exclusion than in the past.

In sum, the military has had a tortured history of trying to decide whom exactly to exclude from service based on homosexuality. It started with a pure identity definition, moved to a pure conduct definition, and now has a broad definition that
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includes both conduct and identity. To the military's credit, one might say that its current definition best achieves its apparent purpose of excluding as many gay, lesbian, and bisexual people from military service as possible. In terms of human rights, however, the current definition is extremely troubling because of the ways it forces gay, lesbian, and bisexual people to curtail same-sex sexual conduct as well as open same-sex sexual identity in order to serve in the military.

D. State Sodomy Law: An Attempt to Target Bisexuals

One final example shows that social policies do not always target the "pure homosexual" for mistreatment; sometimes, bisexuals can be the central target. Ironically, in their search for a "middle ground" in the gay rights debate, Professors Arthur Murphy and John Ellington have proposed blatant discrimination against bisexuals. They suggest that existing sodomy laws be modified to make it illegal to engage in sexual intercourse by mouth or anus with another person of the same sex unless the accused can prove by a preponderance of the evidence that the individual with whom they had sex was "reasonably believed by the accused to be a true homosexual." A "true homosexual" is defined as an individual whose "sexual orientation is predominantly towards persons of the same sex as himself or herself." They justify this rule by arguing that it is permissible to direct the bisexual to "make a choice":

The only people whom the statute inevitably frustrates are those (rare?) bisexuals who are powerfully, equally attracted to both men and women—the truly "double gaited" in Damon Runyon's phrase.
But as the majority of the justices recognized in *Bowers*, a state may define and proscribe deviant behavior in its pursuit of secular morality. A state may frustrate a bisexual’s desire for homosexual intercourse just as it may frustrate any adult’s libidinal hankering for a fifteen year old Lolita, a close adult relative, a prostitute or a willing animal.64

Murphy and Ellington’s proposal openly condemns bisexuals (and tolerates the “true homosexual”) thereby turning the New Hampshire perspective on its head. While the legislature in New Hampshire was determined to find the “true homosexual” for legal sanction, Murphy and Ellington are determined to provide limited protection to the “true homosexual” while proscribing the same-sex conduct of the “true bisexual.” Clearly, to some people, bisexuals are the most threatening category whereas, to other people, “true homosexuals” are the most threatening. In either case, social policy is created to conform human behavior to a set of arbitrary norms.

In sum, social policies act coercively to construct individuals’ sexuality. These classifications substantially affect people’s lives. Children are languishing in foster care who could be adopted by loving and committed homosexual parents in New Hampshire and elsewhere. The quality of our military is eroded through open acceptance of homophobia. Gay and lesbian people are routinely denied family rights and other benefits because of their “illegal lifestyle.” These definitions are not simply irrational attempts to classify human behavior and identity but are powerful mechanisms to perpetuate the subordination of gay, lesbian, and bisexual people in society. Unfortunately, instead of consistently arguing for the elimination of these debilitating categories, some argue for the creation of new, more debilitating categories.65
II. Positive Categorization

In the prior examples, courts, legislatures, and academics have proposed categorization schemes for the purpose of harming the gay, lesbian, and bisexual communities. Is categorization for constructive purposes also possible?

A. Marriage versus Domestic Partnership

The gay and lesbian community has pursued two separate, but related, strategies with respect to the law of marriage. First, it has sought to extend the right to marry to same-sex partners. Because the marriage strategy has been generally unsuccessful, it has also sought to create a new legal category—domestic partnership—which can be used to provide same-sex partners with the option of obtaining some benefits that are normally limited to married couples. The attempt to obtain domestic partnership registration has been extremely successful with many cities and corporations providing same-sex couples the opportunity to register and obtain benefits otherwise only accorded to married couples.

Both strategies, however, have their problems. The marriage approach is arguably flawed because it strengthens the patriarchal institution of marriage by extending it to a new group. We should be seeking to weaken or destroy the institution of marriage rather than extend it to a new category of people. The domestic partnership approach is arguably flawed because it gives same-sex couples an unacceptable second-class status. We should be seeking formal equality rather than separate and unequal benefits. But are these flaws fatal?

My bisexual perspective gives me a special insight into the
marriage and domestic partnership movement because I have been in a long-term (but legally unrecognized) relationship with a woman and in a long-term (but legally recognized) relationship with a man. On an emotional and symbolic level, I understand how much easier it is to sustain a married relationship with someone of the opposite sex than an unmarried relationship with someone of the same sex. Familial and societal support can strengthen opposite-sex married relationships. On an instrumental level, I also appreciate the material benefits that become available through the institution of marriage. My husband was able to immigrate easily to the United States because I was able to sponsor him through the “first-preference” that is accorded spouses under immigration law; I have also been able to obtain inexpensive health insurance for him through my employer. Without the legal and emotional benefits of marriage, we would probably not even be living in the same country at this time. The law of marriage as well as the emotional support of marriage therefore have profound influences in people’s lives.*

For that reason, I fully endorse attempts to extend the benefits of marriage to same-sex couples although I question why these benefits must be marriage-dependent. For example, as a university employee, why can I only offer my tuition benefits to my spouse and child? Why can’t I offer them to a poor child in my city? It seems peculiar that the spouses of highly compensated employees get tuition waivers. The community would probably benefit more from a poor child receiving a tuition waiver to attend my university than my husband receiv-

*My friends who have entered into interracial or interreligious marriages have suggested to me that their relationships, while receiving formal legal recognition, did not receive the familial support usually accorded to marriages. It is therefore hard to predict whether same-sex couples would attain familial support if they were allowed to legally marry. Nonetheless, they would receive numerous legal benefits.
ing a tuition waiver, since my husband could otherwise afford to go to the university.

Marriage-related benefits are unlikely ever to disappear, but we could and should take conscious steps in that direction. In Canada, for example, health insurance is provided universally irrespective of marital or employment status. Similarly, all tax returns are filed in Canada by individuals rather than jointly by couples. Even in the United States, argues Martha Fineman, we often define family without respect to the public law of marriage by encouraging, for example, antenuptial agreements and separation agreements.68

The elimination of some marital-based rules, however, does not necessarily foreshadow equality for same-sex couples. For example, the Canadian system offers numerous benefits on the basis of marital status such as immigration privileges, social assistance, family emergencies, tax benefits, pensions, custody, property division, spousal support upon divorce, and intestacy benefits.69 Canada has a Human Rights Code in six Canadian jurisdictions that protects against sexual orientation discrimination,70 and constitutional law that recognizes that gay men and lesbians constitute a “suspect class,”71 yet a recent Canadian Supreme Court decision, Egan v. Canada, suggests that many marital-based privileges will remain unavailable to same-sex couples.72 The Court justified the unavailability of federal pension benefits to same-sex partners based on the stereotype that “It is the [heterosexual] social unit that uniquely has the capacity to procreate children and generally cares for their upbringing.”73 Oddly, the Court overlooked that poor same-sex couples like the petitioners who had lived together for nearly fifty years especially needed federal assistance because they did not have children to help support them in their advanced years. The Court, of course, also overlooked the lesbian babyboom, made
possible by the oldest of reproductive technologies—artificial insemination. It seemed to accept a commonplace stereotype—that lesbians are inherently infertile.*

Unfortunately, the lesson from Canada is that mere recitation that same-sex couples should constitute a suspect class does not mean that the Court has overcome stereotypes about homosexuals in our society. Not all gay men are wealthy and thereby undeserving of pension benefits; not all lesbians are infertile.

Although marriage could provide important benefits to same-sex partners, domestic partnership constitutes an unacceptable second-class citizenship that has so little value that it is not worth the price of extending a bipolar model of relationships. The purpose of domestic partnership registration is to allow the gay and lesbian community to obtain benefits that are currently only available to married couples. This movement has two problems. First, the gay and lesbian community has accepted very problematic definitions of domestic partnership in order to qualify for benefits. Second, and more importantly, the gay and lesbian community has helped perpetuate a bipolar model of family relationships through its endorsement of domestic partnership registration in exchange for very few benefits.

Problematic Definitions of Domestic Partnership

The definitions of domestic partnership are consistently more rigorous than the definitions of marriage. Nearly all entities require evidence of shared finances and a waiting period of at least six months since the last domestic partnership. At the University of Pittsburgh, for example, couples need to specify

*When I was contemplating having a child, a colleague reportedly said to a friend of mine, “But Ruth can’t have a child, she’s a lesbian!” That same individual expressed no surprise or shock when I bore a child as part of a heterosexual partnership. My perceived reproductive ability fluctuated depending upon the gender of my partner.
that they are responsible for their "common welfare" and that at least two years have passed since a statement of termination of a prior domestic partnership agreement. The City of San Francisco requires that individuals "live together," "agree to be responsible for each other's basic living expenses," and have not had a different domestic partner in the last six months. Similarly, the City of Berkeley requires that individuals "reside together and share the common necessities of life," and have filed a statement of termination of a prior domestic partnership at least six months before. Finally, the City of Boston requires individuals to specify that they "share basic living expenses," and "assume responsibility for each other's welfare and for the welfare of any dependents."

These definitions are far more rigorous than existing definitions of marriage. Many people, of course, remarry within days of finalizing a divorce. In addition, many married individuals live in separate cities or choose not to commingle assets or finances. In fact, feminists often encourage women not to commingle financial assets so that they will have independent credit and finances in the event of divorce. Domestic partnership rules reflect a heightened patriarchal definition of marriage—financial and emotional dependence coupled with a prior period of apparent chastity. "A checklist of features used to determine who is 'in' and who is 'out' of family normalizes the dominant conceptions of family, and reinforces the notion that difference is deviance. Resort to such a test preserves the exclusionary function of family, albeit with slightly adjusted boundaries." On close examination, these definitions are filled with more burdens than benefits. Individuals who register under a domestic partnership system are not guaranteed any meaningful benefits such as health insurance for their partner. At the University of Pittsburgh, for example, individuals who register under this
system get library privileges and modest tuition reduction but no health insurance benefits for their partner. In return for these quite limited privileges, the individuals in the domestic partnership agree to be responsible for each other’s financial welfare. Since catastrophic illness is one of the most common ways that an individual can incur substantial financial debt, one wonders whether it makes sense to sign up for a domestic partnership without any guarantee of health insurance benefits for one’s partner. Registration is particularly problematic due to the open discrimination that same-sex couples experience in our society. Holding themselves out as a couple by sharing a residence or using a joint bank account may allow a couple to register but it also may expose them to victimization because of their sexual orientation and family status. In making same-sex couples conform their behavior to the domestic partnership registration checklist, we may be heightening their exposure to discrimination while according them few benefits.

One cynical way to understand domestic partnership is that mainstream society has capitalized on gay and lesbian people’s desires for symbolic manifestations of their relationships by offering them a domestic partnership registration system. In registering, however, domestic partners largely agree to accept social welfare responsibilities that would otherwise be borne by the state. They achieve few gains except at the symbolic level, and even that symbolism is tainted by the second class status of domestic partnership as compared to marriage.

The response to these arguments is that domestic partnership registration is a step toward official legal recognition of same-sex marriage. As society becomes more comfortable extending some benefits and recognition to same-sex partners, it becomes more comfortable with extending the privilege of marriage. This is a plausible argument but only if domestic partnership
registration is sufficiently analogous to marriage that such long-term steps might occur. Highly restrictive definitions of domestic partnership and limited allocations of benefits do not help us attain that long-term strategy. In fact, the effect of these programs may be exactly the opposite of their intended affect, giving society the false sense that same-sex couples who can register as domestic partners do not need marriage because they already have domestic partnership.

When I give public speeches about same-sex marriage, I am usually confronted with a member of the audience who is positive that same-sex couples can marry in California. It is true that hundreds of same-sex couples have registered as domestic partners in San Francisco and Berkeley while receiving few benefits and many potential liabilities for such registration. But same-sex marriage bills have repeatedly stalled in the California assembly and have virtually no chance for passage in the immediate future. If domestic partnership were not so commonplace, members of the public would not be so misinformed about the status of marriage in the gay and lesbian community.

My university has a highly restrictive registration system for domestic partners with limited benefits that do not include the highly important benefit of health insurance. A strong backlash has arisen over even these limited privileges, forcing, in part, the resignation of the university president. It is thus clear that no extension of these benefits will happen in the short-term or even near long-term. Yet, there is also broad misinformation about the existing available scope of benefits. I routinely hear from well-informed individuals that same-sex couples do have access to family-based health insurance benefits although that information is entirely wrong. The larger community therefore falsely believes that same-sex couples have been extended extensive benefits while the reality is that same-sex couples have an
onerous registration system with few benefits. Politically, it might be more useful for the larger community to believe that same-sex couples have no benefits whatsoever than to be deduced into believing that same-sex couples have extensive benefits. The existence of minimal benefits has stalled political work without creating meaningful reform.

The solution to these problems is not to oppose all moves toward domestic partnership, but we should be aware of the problematic nature of domestic partnership and seek to eliminate its problems. We should push for definitions of domestic partnership that parallel state marriage law. If state marriage law has no waiting period, then we should insist that domestic partnership also has no waiting period. Moreover, we should be vigilant in trying to make domestic partnership a registration for benefits rather than a registration for obligations. Admittedly, gay, lesbian and bisexual people also should take on their share of social obligations but those obligations must be borne proportionately. At the current time, same-sex couples help finance many of the benefits available to married couples by paying higher insurance premiums, higher income taxes, and higher inheritance taxes, and by receiving fewer tax deductions. If domestic partnership simply becomes a method of increasing the liabilities of same-sex couples, then we should be loud in our criticism of that result. The gay, lesbian, and bisexual community should not be asked to bear a disproportionate set of obligations in our society in the name of domestic partnership.

Unfortunately, moving domestic partnership in this more progressive direction has proven quite difficult. In Ontario, Canada, for example, the New Democratic Party (when it controlled the provincial legislature) introduced Bill 167 to provide for the equal treatment of same-sex partners who are in spousal
relationships.\textsuperscript{77} Although the bill had the support of the governing party, and passed first reading by a close margin, it never became law. Unlike the domestic partnership ordinances that have been passed in the United States, this bill would have provided equality on the provincial level between common law opposite-sex and same-sex couples.\textsuperscript{78} (Marriage is codified in Canada at the federal law, so the Ontario government could not modify the definition of marriage.) Equality, however, proved to be politically unacceptable. The bill faltered at its second reading and was defeated. The failed Ontario attempt, however, reveals that the public only accepts domestic partnership registration if it is truly a second-class citizenship. When it becomes the functional equivalent of common law marriage, it becomes unacceptable.

**Bipolar Model of Family Relationships**

More fundamentally, however, these definitions are flawed because they perpetuate a bipolar model of family relationships. In *The Neutered Mother, the Sexual Family*,\textsuperscript{79} Martha Fineman argues that we should abolish marriage as a legal category and with it any privilege based on sexual affiliation:

Instead of seeking to eliminate [the stigma of nonmarital relationships] by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual relationships equal with each other and all relationships equal with the sexual?\textsuperscript{80}

The problems that Fineman identifies can be seen in the domestic partnership examples cited above. Individuals signing up for domestic partnership registration must state that they have only one domestic partner. A family unit can only consist
of two unrelated adults. The assumption of two adults derives from the heterosexual model of one male and one female parent in a family unit.

Some of these definitions, such as the San Francisco program, also requires individuals to indicate that they have an “intimate, committed relationship of mutual caring.” The defeated Ontario domestic partnership bill required the individuals to be in a “conjugal relationship.” But why must families be built on intimate relationships? Why cannot groups of people choose to live together as a domestic partnership even if they do not share a sexual relationship? As Fineman argues, there is no reason to privilege sexual affiliations above other kinds of affiliations.

The bipolar model reflected in the law of domestic partnership is reflective of the bipolar model generally found in family law. Based on our heterosexual model of parenthood, the law generally only acknowledges two parents of the opposite sex. Most recently, the law has moved toward recognizing two parents of the same sex, but only when the original opposite-sex parent relinquished his rights to parenthood. Because the law has been formulated under the heterosexual model, people rarely question the two-person limitation which, as I showed above, is replicated in the domestic partner registration system.

Many contemporary family law situations cry out for recognition of more than two parents. For example, in Thomas S. v. Robin Y., the court was faced with the difficult question of who should be the legally recognized parents when two women, Robin and Sandra, raised a child together jointly. The child was biologically related to Robin as well as a male friend, Thomas. Thomas became somewhat involved in the child’s life at the age of five when the child began to be interested in her biological origins. After five years of periodic interaction with the child, Thomas sought to be legally recognized as a parent due to a
dispute with the child's female parents over visitation. Due to the limitations of family law, only one of the women was legally recognized as a parent. The legal issue in the case was whether Thomas should also be recognized as a parent. The court found for Thomas so that the legally recognized parents became the biological mother, Robin, and Thomas. Sandra was a legal nonentity. If Robin were to die, Thomas not Sandra would become the child's sole parent.

The court's resolution of the case is not surprising under existing bipolar family law, because the legal system searches for one male and one female parent. If rights to children, however, were defined with regard to relationships rather than heterosexualized biology, Sandra would be a legally recognized parent. Moreover, if our model were not rigidly bipolar based on our heterosexual premises, this child would have three parents. Our system of bipolar injustice, however, gives preferential rights to married couples often ignoring same-sex couples and always ignoring threesomes, foursomes, and so forth. Rather than seeing a child as potentially blessed because she has three individuals who desire to be her parents (with parenthood's many responsibilities), our legal system tries to find the biologically appropriate opposite-sex partners to parent irrespective of their emotional relationship to the child. (In this case, Sandra had a much stronger connection to the child than Thomas yet she was legally unrecognized.)

Unraveling the bipolar assumptions that form the basis of family law is a formidable task. Some modest movement in this direction, however, has occurred. For example, the law increasingly recognizes the rights of stepparents to visitation. Stepparents' rights are a dramatic departure from the two-parent model because they reflect rights to nonbiological emotional parents in addition to the rights of legally recognized
parents. At a minimum, stepparent statutes should be extended to accord rights to same-sex partners who help raise children but who are not related to their partner through marriage. Thus, women like Sandra could be ensured of maintaining a relationship with a child in the event of the dissolution of her relationship with Robin. Current law does not properly weigh the best interest of the child when it perpetuates the two-parent, heterosexual model.

**B. Affirmative Action**

Generally, the gay rights movement is silent about affirmative action out of fear that the Christian Right will use such talk as an excuse to undermine efforts to achieve more basic nondiscrimination. Nonetheless, some authors have begun to tentatively speak about affirmative action for the gay and lesbian community, and some institutions have even begun to implement affirmative action programs on the basis of sexual orientation.

Because of the complications and controversies involved in implementing affirmative action on the basis of sexual orientation, it is very important that we have a sound argument for how and why to implement such a program. A good place to begin is to determine why we consider an affirmative action policy to be appropriate. I would like to consider two rationales which I will explore more fully in later chapters. First, affirmative action might benefit people who have suffered prior economic or social disadvantage because of their group-based status. Second, it might provide “role models,” particularly in settings where high status employment is involved.

Jeffrey Byrne and Bruce Deming justify affirmative action under the first rationale—societal disadvantage. Nonetheless,
as they acknowledge, there is no monolithic treatment on the basis of sexual orientation:

For gay and lesbian people qua gays and lesbians, nondiscrimination may more effectively deliver the promise of substantive equality. We are raised as presumptively heterosexual members of families belonging to every race, religion, and socioeconomic class, and as Representative Barney Frank explains, “have not on the whole in this country suffered the kind of systematic discrimination in the allocation of educational resources that have affected other groups.” Neither are our economic opportunities and social mobility as a group as systematically circumscribed as are those of African Americans and other groups.85

It may be the case that some gay, lesbian, or bisexual people have been largely shielded from the effects of prejudice. On the other hand, it may be the case that an individual gay, lesbian, or bisexual individual has faced dramatic discrimination that has disadvantaged her in an educational institution or workplace. Individualized storytelling of disadvantage may therefore be an appropriate requirement before affirmative action is implemented on an individual basis.

Storytelling may reveal many different life experiences that could be relevant to affirmative action in employment or higher education. For example, many gay, lesbian, and bisexual people are cut off from their families when they “come out.” These events can be emotionally and financially traumatic. Others are subjected to beatings or blatant harassment because of their perceived homosexuality. Yet others are suspended, or even expelled from school for violating rules against homosexuality. By contrast, some people, like myself, were “out” to very supportive families and faced few experiences that interfered with academic performance. Individualized storytelling may be especially appropriate in the context of sexual orientation, because
Sexual Orientation

gay, lesbian, and bisexual people rarely live in communities defined by sexual orientation and economic disadvantage at a young age. Nonetheless, because of blatant discrimination often visited upon gay, lesbian, and bisexual people as teenagers or adults, the disadvantage rationale is often but not always appropriate in this context.

The second justification—the role model theory—would arrive at different conclusions based on group-based status and necessitates less individualized storytelling. Under a role model theory, I would have been entitled to affirmative action as a law school applicant as an “out” lesbian because I hoped to serve as a role model for other lesbians and generally serve that community. Under that justification, it would not matter whether I had suffered disadvantage due to my lesbian status. What would matter would be my commitment to the community. Others who have faced disadvantage, but have little or no interest in serving as a role model, might not be deserving under that rationale.

To further complicate the problem of categorization, we have to consider the situation of bisexuals. Should bisexuals be included under the social disadvantage or role model theories? Little attention has been given to how to define the beneficiary group in the sexual orientation context. One law firm has defined it as “self-identified gay men and lesbians” whereas another institution has defined it as “declared gay men, lesbians, and bisexuals.” Jeffrey Byrne, the only author who discusses how we should define the beneficiary group, argues that we should include bisexuals along with lesbians and gay men:

Bisexual persons have suffered oppression and invisibility such that the justifications articulated for affirmative action for lesbians and gay men warrant inclusion of bisexual persons in the beneficiary group. In particular, bisexual women and men face the same widespread societal and employment discrimination faced by lesbians and gay men.
Byrne makes his argument for the purpose of extending protection of gay men and lesbians to bisexuals under the disadvantage justification but I believe his argument actually helps demonstrate the flaws with his basic categorization scheme. Bisexual individuals vary widely in terms of what that category means to them. Individual F, who has had exclusive relationships with someone of the same sex, may consider herself to be bisexual along with individual G, who is married to someone of the opposite sex and has never been sexually involved with someone of the same sex. Individual H may have recently had relationships with individuals of both sexes. For those three categories of people, the meaning of their sexual orientation might be entirely different in their lives. Individual F may have suffered extensive discrimination by individuals who considered her to be a "lesbian" rather than bisexual. Individual G may have suffered virtually no discrimination because few people recognize that he considers himself to be bisexual. Individual H may be being treated as an outcast by both members of the heterosexual and homosexual communities because she does not seem to "fit in."

A particular bisexual individual may be any one of those three characters during his or her lifetime. (In fact, I have taken these stories from my own life experiences as a bisexual individual.) We therefore need to recognize the fluidity of our sexual orientation in creating rules about the meaning of our sexual orientation in our lives. Before deciding that these bisexual individuals are deserving of affirmative action, I would want to hear their histories. How has their sexual orientation disadvantaged them such that affirmative action makes sense?

The role model theory might be a more appropriate justification for bisexuals although it also has some problems. Although I am currently an "out" bisexual in that I openly acknowledge my sexual feelings and history, my sexual orientation is also
largely hidden through my wearing of a traditional wedding ring. I may be a positive “bisexual” role model but only to those individuals who are sufficiently perceptive to recognize my bisexuality. By contrast, when I was involved with a woman (but still considered myself to be a bisexual), I was generally perceived as a lesbian because I did not have the false signifier of a well-known marriage to a man. In fact, when I broke up with a woman and got involved with a man, I was told that it was too bad that I was dating a man because I had been such a good lesbian role model! It never occurred to the speaker that I had just become an excellent bisexual role model by openly changing the gender of my partner. It can be difficult to serve as a bisexual role model, although I have found it to be true that students who identify as bisexual (or who are considering such identification) often seek me out for conversation. I may therefore serve as a role model for some students seeking to come to terms with their bisexual identity.

The problem of applying the role model theory to bisexuals reflects the problem previously noted by the Sixth Circuit—gay, lesbian, and bisexual people are not always readily identifiable. Racial minorities, however, also are not always visually identifiable. The role model theory only works as a justification for people who choose to be identifiable. An institution should therefore only apply the role model theory to individuals who it reasonably believes will make themselves identifiable and available as role models. Closeted gay men, lesbians, or bisexuals do not serve as positive role models; neither do identifiable racial minorities who prefer to have little contact with minority students or colleagues. Unlike the Sixth Circuit, however, I would suggest that gay men, lesbians, and bisexuals are often quite identifiable by their words, deeds, or conduct. In an educational institution, especially, I find that my reputation quickly becomes
the source of considerable gossip although I have certainly never engaged in sexual activity on campus. The Sixth Circuit lives in a highly sheltered environment if it does not recognize the visibility that is often accorded to gay men, lesbians, and bisexuals in the community. Therefore, unlike the Sixth Circuit, I would not presume homosexual invisibility anymore than I would presume racial minority invisibility.

Because few institutions have adopted affirmative action plans on the basis of sexual orientation, we have an opportunity to develop those rules with a fresh start. Rather than mimic the rules that we have used in the race and gender areas, it makes sense to ask broad questions about the nature of these rules. We need to have a mechanism to determine who is deserving of affirmative treatment as well as a rationale for our affirmative action policy. If, instead of probing into "status," we probed into an individual's experience of disadvantage and willingness to serve as a role model, then I believe we would have a fair method of determining who is entitled to affirmative action with little or no fraud problem. We do not need to repeat the "status" categorization problem that has been historically used against gay, lesbian, and bisexual people in order to structure appropriate affirmative action.

Because affirmative action for gay, lesbian, and bisexual people is likely to be firmly resisted, it is especially important that we develop strategies that will be effective. Deming and Byrne, in writing the first articles on this subject, already recognize the wide variation in treatment about gay, lesbian, and bisexual people. As a first step, let us build on that recognition rather than repeat the shortcomings of our racial experience. Let us use affirmative action programs as an opportunity to share experiences of disadvantage and stories of positive role modeling to target appropriate beneficiaries as well as to educate us
about the scope of mistreatment suffered by gay, lesbian, and bisexual people.

It is fashionable in postmodern circles to say that society constructs sexuality. Usually, however, these comments are made at a broad, theoretical level, asking us to consider the social policies that create “compulsory heterosexuality.” In this chapter, we have seen that this construction also occurs at the definitional level. Legislatures and courts have consciously created awkward definitions of “homosexuality” to achieve social policies. These definitions are not universal; instead, they vary depending upon the context in which they are applied. Thus, an individual may not be a homosexual under military regulations but might be a homosexual under state adoption law. There is no one definition of a “true homosexual.” Instead, there are definitions which conveniently exclude certain people from privileges and opportunities based on their sexual practices or identity. It takes a lot of double-speak for society to attack the “true homosexual” while leaving safe the normal heterosexual who happens to engage in sexual activity with someone of the same sex but who repudiates that conduct. The bisexual must remain invisible for this legal system to survive.

Nonetheless, we should not simply get rid of all uses of the word homosexual, heterosexual, or bisexual because we may sometimes need to use those terms to develop ameliorative categories to overcome a history of subordinating treatment. Categories can be useful, but only when their ends are ameliorative. As we create new categories, we should be very mindful of whether these new categories are ameliorative or, instead, are themselves perpetuating bipolar injustice.