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The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage

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I. Introduction

From the metaphor of the closet[1] to that of the three dollar bill, tropes[2] of fraud, deception, and mimicry seem to trip off the tongue when the subject of a queer sexual orientation arises.[3] Over the last decade, and particularly within the last three years, marriage traditionalists have increasingly relied on a particular rhetoric of deception—counterfeiting—to convey what in their view is a species of public fraud: same-sex marriage and its close approximations, civil unions and domestic partnerships. Indeed, counterfeiting rhetoric has become so common in the legal controversy over same-sex marriage that its sheer pervasiveness nearly renders it invisible.

In May 2003, Marilyn Musgrave, United States Representative and co-sponsor of the original Federal Marriage Amendment (FMA), publicly declared that a federal marriage amendment was necessary because "[t]he traditional values Americans hold are being traded in for counterfeit marital unions."[4]

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1. *See* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 3–4 (1990) (describing the closet as a metaphor applicable to sexual minorities); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1793–1816 (1996) (discussing the closet as a symbol that suggests the political powerlessness of sexual minorities).

2. A trope denotes the "turning" of a word away from its original meaning toward a new meaning that is not immediately obvious. In Part IV this Article discusses the trope of "queer as counterfeit."

3. The category of "queer" is by no means self-defining. This Article will demonstrate that queer at once connotes passing and deception (e.g., queer/counterfeit currency) and a resolute refusal to pass and to deceive (e.g., queer as ostentation). In this sense, queer connotations partake of the same double bind in which the law routinely places sexual minorities—simultaneously passing too much and not enough. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 839–40 (2002) (defining queers as sexual minorities who do not pass and who do not want to pass); ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 1 (1996) (noting that for some queer theorists, the "semantic clout" and "political efficacy" of the very category of queer follow from its "resistance to definition").

4. Cheryl Wetzstein, *Bill to Define Marriage Tried Again in House as Two States Mull Cases*, WASH. TIMES, May 26, 2003, at A8.

Representative Musgrave was not the first person involved in the same-sex marriage debate to coin the analogy between same-sex marriage and counterfeiting. Rather, its vintage in that debate may be traced at least as far back as the mid-90s. In 1995, Robert Knight, Director of the Concerned Women of America's Culture and Family Institute, deployed the counterfeiting trope to describe same-sex marriage;[5] one year later, Gary Bauer, former President of the Family Research Council, testified that same-sex marriage is "a counterfeit that will do great harm to the special status that the genuine institution [of marriage] has earned."[6] Nor is Representative Musgrave the last to link subversive numismatic practices with non-normative sexual and affective relationships. More recently, counterfeiting has become a routine way to describe same-sex marriage and its imitative approximations, civil unions and domestic partnerships, as well as the so-called artificial reproduction that occurs in the context of a same-sex relationship.[7]

Where does this counterfeiting language come from and what does it signify? More importantly, what work is it doing in the legal controversy over the extension of marital rights to same-sex couples? On one level, to compare same-sex marriage to a counterfeit makes sense in light of the fact that sexual minorities and counterfeit articles share a common language. The federal criminal statute that targets counterfeiting, 18 U.S.C. § 472, imposes penalties on those who either "pass," or attempt to "pass," counterfeit currency in the United States.[8] With respect to sexual minorities, Professor Kenji Yoshino has amply documented just how pervasive the language and ideology of passing is for gays and lesbians.[9] This Article will return to this idea that same-sex couples are like counterfeit currency because artificial reproductive technology is increasingly allowing them to pass for straight—part of the reason, this Article submits, why procreation has suddenly become the dominant rationale in same-sex marriage litigation today.

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5. *See* David W. Dunlap, *Some States Trying to Stop Gay Marriages Before They Start*, N.Y. TIMES, Mar. 15, 1995, at A18 (quoting Robert Knight saying, "It [same sex unions] might be called a partnership, but if it's called marriage, it's a counterfeit version. And counterfeit versions drive out the real thing").

6. *Defense of Marriage Act of 1996: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Congress (1996), *available at* 1996 WL 387291 (testimony of Gary L. Bauer in favor of the federal Defense of Marriage Act).

7. *See infra* Part III (discussing generally the application of counterfeiting rhetoric to same-sex marriages and civil unions).

8. 18 U.S.C. § 472 (2000).

9. *See* Yoshino, *supra* note 3, at 814–36 (documenting the cultural and legal contexts in which passing norms occur).

At the same time, to compare same-sex marriage to a counterfeit makes about as much sense as does the claim that same-sex marriage will lead us ineluctably down the slippery slope to incest. In a prior article, this author argued that the slippery slope trope, "from same-sex marriage to incest," does not hold up because incest is definitionally imprecise—just where is it that we are slipping to when we slip into incest?[10]—and because in many ways we have already slipped.[11] Here, the author turns instead to the counterfeiting trope that legal actors, among others, have recently deployed to describe the public fraud that, in their view, same-sex marriage represents. The counterfeiting analogy to same-sex marriage warrants close attention for two reasons. First, and more narrowly, the counterfeiting analogy does not hold up because, quite simply, same-sex marriage is not fooling the public and same-sex couples are not, at least technically, passing for straight when they marry each other. Rather, that relationship is, for many, more akin to the obscene: "I know it when I see it."[12] According to the recent same-sex marriage cases, same-sex couples are not only *different* from cross-sex couples when it comes to the so-called essential attribute of marriage—procreation—they are *better* than cross-sex couples because they can procreate responsibly every time they wish to do so. Second, and more broadly, the counterfeiting analogy, which highlights the negative aspects of passing, runs counter to the passing demands that the law has placed on sexual minorities for decades—from the military,[13] to the family,[14] to the employment context.[15] Whereas sexual minorities are routinely faulted for not passing enough, counterfeiting rhetoric places them in the hopeless position of passing too much. The procreation rationale, this Article will show, does exactly the same—it effectively punishes same-sex couples for not only passing, but for passing too well.

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10. *See* Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1562 (2005) (noting that the definition of incest varies greatly from state to state such that it is unclear where the slippery slope to incest ends).

11. *See id.* at 1566 (discussing constitutional challenges to incest prohibitions and concluding that the recent same-sex marriage and sodomy cases have not taken society any farther down the slippery slope than it already is).

12. Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring).

13. *See, e.g.*, Yoshino, *supra* note 3, at 775 (discussing the debate over outing and the military's "don't ask, don't tell" policy).

14. *See id.* at 858–64 (discussing custody and visitation restrictions on gay parents, including court decisions allowing visitation rights if parents do not expose their gay, lesbian, and/or bisexual relationships to their children or if they hide their sexual orientation).

15. *See id.* at 889–900 (discussing the passing demands that grooming restrictions place on minorities in the employment context).

This Article argues that the counterfeiting analogy to same-sex relations, while on its face illogical, is intimately tied to concerns about sodomy and same-sex procreation—each of which, this Article maintains, is viewed as a fraudulent imitation that not only threatens the currency of marriage but also represents a kind of economic fraud. It will show that the counterfeiting analogy that has emerged in the legal discourse surrounding rights for gays and lesbians not only makes a great deal of sense on its own, but also helps to *make sense of* the current legal treatment of same-sex couples in the marriage context. As with the current casting of same-sex relationships as counterfeit, the counterfeiting analogy was once deployed to signify non-procreative sex (sodomy) and transgressive procreation (miscegenation). Indeed, to accuse someone of being a counterfeiter during the early-modern period was no small business: Counterfeiters were not only implicitly linked to the sodomites, but were, in fact, far worse than the sodomites. A look at that history is useful, and necessary, for two reasons. First, it provides a lens through which to view, and better understand, the bizarre claim that same-sex marriage is a counterfeit, a statement which on its own fails to explain how a relationship that is regularly characterized as a form of flaunting has suddenly become a deception perpetrated on the public. Second, it helps to explain what is behind the highly influential, and hugely successful, procreation rationale for same-sex marriage prohibitions.[16]

Until recently, it had appeared that the procreation rationale—the argument that same-sex couples cannot legally marry because they cannot sexually procreate with each other—was in desuetude, no longer "advanced seriously by states or taken seriously by courts."[17] Even just a brief glance at the state and federal reporters, however, reveals that the procreation rationale is very much alive.[18] The recent resurgence of the procreation rationale has stumped commentators and (some) judges alike, both of whom have dismissed it as absurd and reminiscent of the same animus that the Supreme Court in

16. *See, e.g.*, Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COAST. L. REV. 181, 193 (2005) ("The procreation argument enjoys great currency in academic and legal discussions of gay marriage. Indeed, it is probably *the* most common argument against gay marriage in these circles."); William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 154 (2004) ("The most common state interest discussed in same-sex marriage case law relates to procreation.").

17. Peter Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Governmental Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 151 (1998).

18. *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (upholding the state's same-sex marriage prohibition partly on the basis of procreation); Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006) (same).

Romer v. Evans[19] held was an impermissible basis for laws under even rational basis review. They have queried: What does the procreation rationale mean for cross-sex couples who cannot, or do not want to, sexually reproduce?[20] How does it affect adopted children and their adoptive families?[21] Given its emphasis on biological anatomy, doesn't it "hew[] perilously close" to gender discrimination?[22] This Article argues that these criticisms, while useful, have overlooked the extent to which the procreation rationale reflects a concern over the fraudulent aspects of same-sex relations and same-sex procreation. It proposes that the success of that rationale in recent same-sex marriage litigation is better understood in light of the counterfeiting rhetoric that has also emerged, alongside the procreation rationale, from the recent same-sex marriage debate. While neither the counterfeiting analogy nor the procreation rationale makes much, if any, sense when viewed in isolation, they both begin to make considerably more sense when considered together.

This Article will proceed as follows. The first two Parts analyze the procreation rationale and counterfeiting rhetoric, respectively, in order to set the stage for Part IV and Part V's more substantive analysis of the relationship between them. Part II summarizes the evolution of the procreation rationale that states have offered in support of same-sex marriage prohibitions. In addition, it maintains that pre-existing criticism of that rationale by jurists and commentators fails to consider the extent to which the procreation justification reflects a belief that same-sex marriage, and same-sex procreation, are a species of fraud. Part III then provides an overview of the counterfeiting trope that has been deployed by marriage traditionalists to describe civil unions and same-sex marriage, and exposes the logical inconsistencies of that trope as applied to both.

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19. *See* Romer v. Evans, 571 U.S. 620, 635–36 (1996) (finding that Amendment 2 to the Colorado Constitution was based on animus toward gays and lesbians and therefore violated the equal protection clause of the federal Constitution).

20. *See infra* Part II.B (noting that supporters of the procreation rationale for prohibiting same-sex marriage use rhetoric similar to that found in cases involving fraudulent inducement to marry).

21. *See, e.g.*, Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 307–09 (2006) (arguing that the involvement of the procreation rationale in the same-sex marriage debate has led to favoritism toward marriage in the adoption context and such favoritism is not related to the purposes of marriage or to child welfare).

22. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003); *see also* Kenji Yoshino, *Too Good for Marriage*, N.Y. TIMES, July 14, 2006, at A2 (comparing the procreation rationale for prohibiting same-sex marriage to the supposedly benign reasons for employment discrimination against women in the past).

Parts IV and V contend that while neither the counterfeiting trope nor the procreation rationale makes much sense when considered separately, they both begin to make a great deal of sense when considered in concert. Here, this Article argues that counterfeiting is a single analogy that reflects the two procreative concerns that are currently shoring up same-sex marriage prohibitions: to wit, a fear of fraudulent (non-procreative) sex and fraudulent families that pass for the real thing. In order to better understand the counterfeiting analogy, as well as how sodomy and the families of same-sex partners could possibly be thought of as fraudulent, Part IV explores in greater detail the historical linking of subversive sexual/reproductive relationships (sodomy, miscegenation) and counterfeiting in legal and non-legal sources.

Part V is both narrow and broad in scope. First, and more narrowly, it uses the history surveyed in Part III to explain the role that procreation is playing in the legal controversy over same-sex marriage and to demonstrate the extent to which that rationale reflects a concern about fraud. Second, and more broadly, this Part uses that history to tell a much larger story about sexual fraud. It will show that in some very real sense recent same-sex marriage litigation is repeating the history of sodomy and miscegenation regulation—it's just that the swindler has replaced the sodomite and the miscegenous relationship as the explicit focal point of concern, and disgust for private acts is being rhetorically channeled as outrage over public fraud. It will also suggest that this rhetorical transformation attempts to render discrimination on the basis of sexual orientation legally defensible after *Lawrence v. Texas*.[23]

Part VI, which is more normative in scope, maintains that we might view the counterfeiting analogy as at once restrictive and liberating. On the one hand, the analogy continues to place sexual minorities in the proverbial double bind that has characterized the law's treatment of that class since even before *Bowers v. Hardwick*,[24] where the Supreme Court, as Janet Halley observes, rhetorically duplicates the double bind in a way that ultimately places gays and lesbians *in* a double bind.[25] Whereas the law routinely requires sexual

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23. *See* Lawrence v. Texas, 539 U.S. 558, 571–74 (2003) (noting that morality no longer constitutes even a rational basis for the legal regulation of certain conduct and certain relationships).

24. *See* Bowers v. Hardwick, 478 U.S. 186, 186 (1986) (stating that there is no fundamental right to same-sex sodomy under the Fourteenth Amendment).

25. *See* Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1748 (1993) (pointing out that the *Bowers*' Court placed sexual minorities in a double bind). The *Bowers* Court claimed that criminalization of same-sex sexual conduct was based on a legitimate condemnation of gay and lesbian identity, and yet at the same time, found the statute nondiscriminatory because it only prohibited conduct and therefore did not target a certain identity. *Id.*

minorities to pass, both the counterfeiting analogy and the procreation rationale curiously fault them for passing too much. On the other hand, the counterfeiting analogy provides an opportunity to reassess the central role that the state plays in creating and maintaining the value of cross-sex marriage as an original form, and to explore the productive possibilities of imitative performance more generally. As several notable queer and other postmodern theorists have shown, imitation of an allegedly original form, be it gender or marriage, has the power to throw the ontological primacy of that form into question.[26]

This Article begins by asking a few relatively simple questions. First, why have same-sex couples been accused of committing a fraud when the relationship in question is open, obvious, and so often characterized as a form of flaunting? Second, why have courts upheld same-sex marriage prohibitions on the basis of a rationale as wispy and weightless as procreation? Understanding the history and theory behind the rhetorical linking of sexual relationships and subversive economic practices helps to clarify not only how same-sex marriage is like counterfeiting, but also what is doing some of the work to shore up the procreation rationale for same-sex marriage prohibitions. Simply because the counterfeiting analogy might make sense in theory, however, does not mean that it is immune from criticism. Counterfeiting rhetoric is not only descriptively inaccurate, but also perpetuates the double bind which sexual minorities know all too well. While same-sex marriage proponents might put the analogy to positive use by exploring the productive possibilities of imitation, they should at the same time remain wary of a comparison that perpetuates the same double bind that supports discriminatory treatment under the law.

II. Same-Sex Marriage and the Procreation Rationale: A History and Critique

In 1998, Peter Cicchino remarked that "[t]he argument from procreation, that same-sex relationships will bring about the decline of the nation through underpopulation, no longer seems to be either advanced seriously by states or taken seriously by courts."[27] However, a survey of state and federal cases that

26. *See infra* Part VI.B (comparing the relationship among the procreation rationale, fears of racial miscegenation in the past, and the fear common to opponents of miscegenation and same-sex marriage that these imitative forms of white heterosexual marriage cast doubt on the superiority of that original form).

27. Cicchino, *supra* note 17, at 151.

have recently addressed the constitutionality of same-sex marriage prohibitions reveals that the procreation rationale for those prohibitions is in the ascendant—and, indeed, doing most of the work to insulate them from successful constitutional attack. The ongoing success of the procreation rationale requires a close examination of what is driving that rationale as well as of the fundamental assumptions on which it rests. Section A summarizes the trajectory of the procreation rationale for same-sex marriage prohibitions through its most recent appearance in a series of cases involving state and federal constitutional challenges to those prohibitions. Section B then discusses the major criticisms of that rationale offered by legal commentators and by some courts in order to highlight a point that they have missed and that Parts III and IV will more fully develop, namely, that the procreation justification is inextricably tied to concerns about fraud.

A. The Evolution of the Procreation Rationale: From Sterile Non-Procreators to Superior Procreators

1. Procreation Rationale: "Preservation-Through-Transformation"

The evolution of the procreation rationale for same-sex marriage prohibitions over the last thirty-five years vividly illustrates what Professor Reva Siegel has referred to as a process of "preservation-through-transformation,"[28] that is, the process by which legal actors abandon the "justificatory rhetoric" of an older, contested "status regime"[29] in favor of "new . . . reasons to protect" that regime.[30] According to Siegel, the justificatory rhetoric that traditionally supported status hierarchies based on sex and race has evolved in such a way so as to assume a kinder, gentler face—a rhetorical transformation that has, in turn, allowed for the continuation or preservation of those same status hierarchies.[31] In her seminal piece, Siegel focuses on the evolution of the law's treatment of (marital) domestic violence

28. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

29. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179 (1996).

30. *Id.* at 2119 (1996).

31. *See id.* (noting that civil rights agitation will pressure elites to simultaneously cede some privileges of a status regime and change the rhetoric to preserve much of the same regime).

and on the extent to which that evolution has worked to preserve a gender hierarchy within marriage.[32]

This Section turns instead to the evolution of the procreation rationale for same-sex marriage prohibitions and on the extent to which that evolution has worked to preserve a pre-existing hierarchy based on sexual orientation with respect to who might enter into a marital relationship. The argument that cross-sex procreation is necessary to propagate the species has ceded to more innocuous-sounding procreation rhetoric that ironically casts sexual minorities in a more positive light than their cross-sex counterparts. Nevertheless, and partly because current justificatory rhetoric sounds more complimentary to gays and lesbians than did prior procreationist rhetoric, the pre-existing status hierarchy that excludes same-sex couples from marriage has remained largely in place.

2. Procreation Rationale: Evolution

During the early same-sex marriage litigation in the 1970s, courts routinely adverted to the traditional version of the procreation rationale in sustaining those prohibitions against a range of state and federal constitutional challenges. In most of those cases, the procreation rationale appeared alongside the strict definitional approach to marriage, that is, the circular argument that marriage is by definition a civil contract between a man and a woman.[33] In the process, sexual procreation—that is, both the ability and the capacity to procreate sexually—became the principle feature that distinguished same-sex relations from the cross-sex paradigm of reproduction.

In the first case to uphold the constitutionality of a same-sex marriage prohibition, *Baker v. Nelson*,[34] the Supreme Court of Minnesota cited biblical authority and federal Supreme Court precedent, respectively, when it observed that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within family, is as

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32. *See id.* at 2118–19 (charting the changes in the law's treatment of domestic violence).

33. *See* Adams v. Howerton, 486 F. Supp. 1119, 1123 n.2 (C.D. Cal. 1980) ("The dictionary definition of the term 'spouse' is a husband or wife."), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) ("Black's Law Dictionary furnishes three definitions of marriage, all of which recognize that it is a union or contract between a man and a woman.").

34. *See* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (holding that the state's marriage statute prohibited same-sex marriage and did not violate the federal Constitution).

old as the book of Genesis,"[35] and, quoting *Skinner v. Oklahoma*,[36] that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[37] The *Baker* court's linking of marriage and a certain kind of procreation—presumably that of the sexual variety—through *Skinner* quickly became authority for courts first considering the constitutionality of same-sex marriage prohibitions in the 1970s. Thus, in *Singer v. Hara*,[38] the Washington Court of Appeals reasoned that the state's refusal to grant a marriage license to two males was "not based upon [their] status as males" (and therefore in violation of that state's equal rights amendment) but rather "upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children."[39] The court at once made clear that by "appropriate and desirable forum for procreation" its focus was not so much on the kind of family that a child would be born into but rather on the kind of parents who were having (or who could have) a child in the first place—namely, those who were biologically equipped to reproduce sexually with each other.[40] As the court remarked: "The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race . . . . [I]t is apparent that no same-sex couple offers the possibility of the birth of children by their union."[41]

Courts hearing constitutional challenges to same-sex marriage prohibitions in the 1980s and 1990s continued to support the definitional approach to marriage by relying on the procreation rationale and by using sexual procreation to distinguish same- and cross-sex relationships. For instance, in *Adams v. Howerton*, a federal district court in California looked favorably upon that state's same-sex marriage prohibition in part because "the main

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35. *Id.* at 186.

36. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding that the Fourteenth Amendment to the Constitution protects procreation).

37. *Baker*, 191 N.W.2d at 186 (quoting *Skinner*, 316 U.S. at 541).

38. *See* Singer v. Hara, 522 P.2d 1187, 1189 (Wash. App. 1974) (finding that the denial of a marriage license to same-sex couples is allowed by the laws and constitution of the State and of the United States).

39. *Id.* at 1195.

40. *Id.*

41. *Id.*; *see also* Hatcher v. Hatcher, 580 S.W.2d 475, 483 (Ark. 1979) (citing the dictionary definition of marriage as "a contract between a man (husband) and a woman (wife)" and supporting that definition by observing that "[m]arriage is an important institution that is fundamental to our very existence and survival") (citations omitted); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (citing various dictionary definitions of marriage as a union between a man and a woman).

justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race."[42] In upholding the lower court's ruling—which dealt not with a same-sex marriage prohibition per se but rather with whether a same-sex partner constituted a "spouse" under the Immigration and Nationality Act of 1952—the Ninth Circuit observed that because "homosexual marriages never produce offspring,"[43] same-sex marriage prohibitions were permissible under both the federal and the state constitutions.[44] For this reason, two men could not be considered "spouses" for federal immigration purposes.[45]

Similarly, in *Dean v. District of Columbia*,[46] the Court of Appeals for the District of Columbia relied heavily on sexual procreation when it upheld the District's same-sex marriage prohibition against both a due process and an equal protection challenge. As with *Baker* and its progeny, *Dean* cited *Skinner* for the proposition that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[47] Moreover, the *Dean* court remarked that "in recognizing a fundamental right to marry, the [Supreme] Court has only contemplated marriages between persons of opposite sexes—persons who had the possibility of having children with each other,"[48] as well as that "the aspect of marriage that elevates it to a 'fundamental' right under the due process clause [is] the capacity to have children together."[49]

On one level, the *Dean* court's procreative reasoning placed it directly on the line of cases, starting with *Baker*, which drew a link between marriage and

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42. Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980); *see also* Soos v. Superior Court, 897 P.2d 1356, 1360 (Ariz. Ct. App. 1994) ("Marriage and procreation are fundamental to the very existence and survival of the race.") (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); Baehr v. Lewin, 852 P.2d 44, 73 n.8 (Haw. 1993) (Heen, J., dissenting) (arguing that the purpose of the marriage regulation at issue was to promote procreation); DeSanto v. Barnsley, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (noting that various sources define marriage as being between a man and a woman).

43. Adams v. Howerton, 673 F.2d 1036, 1043 (9th Cir. 1982).

44. *Id.* (upholding the statute denying preferential status to spouses of same-sex marriage).

45. *See id.* (finding that Congress "rationally intended to deny preferential status to the spouses of [homosexual] marriages"); *see also* Constant A. v. Paul C.A., 496 A.2d 1, 18 n.6 (Pa. Super. Ct. 1985) ("If the traditional family relationship (lifestyle) was banned, human society would disappear in little more than one generation . . . . A primary function of government and law is to preserve and perpetuate society . . . .").

46. *See* Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995) (rejecting constitutional challenges to the District of Columbia's same-sex marriage ban).

47. *Id.* at 333 (citations omitted).

48. *Id.*

49. *Id.* at 335.

sexual procreation and which suggested that the right to marry rested upon the biological possibility to procreate sexually. Under this view, sexual procreation constituted the primary axis around which the right to marry revolved and according to which it was defined, and was the central feature that distinguished same- and cross-sex relationships. On another level, however, *Dean*'s justificatory rhetoric in other parts of the opinion foreshadows the different sort of procreative reasoning that has appeared in the more recent same-sex marriage cases. More specifically, although *Dean* suggests that the possibility of sexual procreation is a necessary (albeit not sufficient) attribute of marriage, it also suggests, in another part of the opinion, that the "principal purpose [of marriage is]: To regulate and legitimize the procreation of children."[50] Here, the focus is not so much on sexual procreation and on the propagation of the species that it ostensibly guarantees, but rather on the fact that marriage provides a forum for responsible procreation—as the primary or principal objective of marriage shifts from procreation per se to the legitimization of children who are procreated outside a marital context.

This modified version of the procreation justification that appears alongside the old version in *Dean* has become the predominant procreationist rationale in recent same-sex marriage litigation. To be sure, and contrary to Cicchino's assertion that procreation as "propagation of the species" is "no longer taken seriously by courts,"[51] residues of the former procreationist rhetoric continue to appear in some of the more recent same-sex marriage cases.[52] Increasingly, however, courts are contemplating a more fully developed version of the so-called "private welfare rationale"[53] to which the *Dean* court gave nod, a rationale that reflects an anxiety over the extent to which same-sex relations/reproduction is similar to, rather than different from, cross-sex relations/reproduction. More specifically, most courts have found that procreation constitutes a rational basis for marriage statutes that exclude same-sex partners from their definitional ambit because "[m]arriage's vital purpose is *not* to mandate procreation but to control or ameliorate its

50. *Id.* at 337 (citing Zablocki v. Redhail, 434 U.S. 374, 385–86 (1978); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

51. Cicchino, *supra* note 17, at 151.

52. *See, e.g.*, Smelt v. City of Orange, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005) (stating that "procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest"), *aff'd in part, rev'd in part*, 447 F.3d 673 (9th Cir. 2006).

53. Lewis v. Harris, 875 A.2d 259, 276 (N.J. 2005) (Parrillo, J., concurring) (explaining the term "private welfare rationale"), *aff'd as modified by* 908 A.2d 196 (N.J. 2006).

consequences—the so-called 'private welfare' purpose. To maintain otherwise is to ignore procreation's centrality to marriage."[54]

In a nutshell, the private welfare procreation rationale proceeds as follows: The state's predominant objective in regulating marriage is to provide a forum in which responsible child-bearing and child-rearing may occur and to ensure that children are legitimized. It is not, as the former same-sex marriage cases suggested, to mandate that procreation occur within marriage in the first place. Furthermore, cross-sex reproduction can be, and often is, accidental. Same-sex reproduction, however, can only ever be the product of choice, planning, and forethought. While the state's interest in promoting responsible cross-sex reproduction is significant, its interest in promoting responsible same-sex reproduction is *de minimis* in light of the fact that same-sex couples are already responsible procreators by virtue of the very manner in which they reproduce. Because same-sex marriage bears no relation to the state's interest in creating a forum in which either responsible cross-sex reproduction or the legitimization of non-marital children may occur, statutes that limit marriage to cross-sex individuals are constitutional under the lowest level of judicial scrutiny. Interestingly, although this newer version of the procreation rationale for same-sex marriage prohibitions continues to highlight the differences between natural cross-sex reproduction and artificial same-sex reproduction, it implicitly (and sometimes explicitly) acknowledges a similarity between these two modes of reproduction, namely, the fact that same-sex couples can reproduce and are reproducing.[55]

A more detailed explanation of this so-called private welfare rationale appears in *Morrison v. Sadler*,[56] where the Indiana Court of Appeals upheld that state's same-sex marriage prohibition exclusively on the ground that it advanced the state's legitimate interest in encouraging responsible procreation between cross-sex couples.[57] Its explanation, which is representative of the current version of the procreation rationale and which has been cited favorably by several courts, is worth quoting in full:

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54. *Id.* (emphasis added).

55. *See* Dean v. District of Columbia, 653 A.2d. 307, 336 (D.C. 1995) ("[H]omosexual couples, absent state law or policy impediments, can and do elect parenthood, through adoption, surrogacy, or artificial insemination—the result being that parenthood, and even the benefits of procreation, are not necessarily limited to formally united heterosexual couples."); Baker v. State, 744 A.2d 864, 881 (Vt. 1999) ("[A] significant number of children today are being conceived by [same-sex] parents through a variety of assisted-reproductive techniques.").

56. *See* Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005) (upholding the limitation of marriage to cross-sex couples).

57. *Id.* at 28–29 (finding that the disparate treatment of same- and cross-sex couples was reasonably related to the State's responsible procreation justification).

> Becoming a parent by using "artificial" reproduction methods is frequently costly and time-consuming. Adopting children is much the same. Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. "Natural" procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.
>
> What does the difference between "natural" reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the State of Indiana's clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the "protections" of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.
>
> By contrast, procreation by "natural" reproduction may occur without any thought for the future. The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from "casual" intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, "accidents" do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the "natural" procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a "change in plans."[58]

In other words, procreation is a rational basis for same-sex marriage prohibitions because "recognition of same-sex marriage would not promote the State's interest in marital procreation, particularly unintended procreation from heterosexual intercourse."[59] In Part IV, I will return to the *Morrison* court's framing of same-sex reproduction as a better, more efficient product than its cross-sex counterpart, and I will suggest that this image of same-sex procreation

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58. *Id.* at 24–25 (citations omitted).

59. Hernandez v. Robles, 794 N.Y.S.2d 579, 599 (Sup. Ct. 2005), *rev'd and vacated by* 805 N.Y.S.2d 354 (2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006)

ironically conflicts with the image of same-sex procreation as counterfeit that has emerged from the same-sex marriage debate.

As with *Morrison*, the more recent same-sex marriage cases reflect a similar shift in the courts' procreative reasoning, as the encouraging procreation for the perpetuation of humankind argument has evolved into the managing procreation as the consequence of heterosexual sex argument.[60] Curiously, courts no longer cast same-sex couples seeking marital rights in terms of what they lack—the ability to procreate sexually and thereby to help perpetuate the human race. Rather, the current deployment of the procreation rationale casts same-sex couples who wish to reproduce in terms of what they alone possess—the ability to procreate responsibly every time they wish to do so. Moreover, because same-sex reproduction is allegedly better than its cross-sex counterpart, same-sex couples and their families neither need nor require the state's protection in the form of marriage. While courts continue to emphasize the difference between same- and cross-sex relationships, artificial reproduction has replaced the mere ability to reproduce sexually (and to propagate the species) as the key diacritical feature that distinguishes those relationships and that renders differential treatment of them constitutionally relevant.

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60. *See, e.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) ("DOMA 'encourage[s] the creation of stable relationships that facilitate the rearing of children by both of their biological parents.'" (quoting, in part, the federal government's Memorandum in Support of Motion to Dismiss at 15–16)); *Hernandez*, 805 N.Y.S.2d at 371 ("[R]ecognition of same-sex marriage would *not* promote the State's interest in marital procreation, particularly *unintended* procreation from heterosexual intercourse, nor would it promote the State's interest in dual-gender parenting.") (emphasis added); Shields v. Madigan, 783 N.Y.S.2d 270, 276 (Sup. Ct. 2004) (applying the rational basis test the court noted that "preserving the institution of marriage for opposite sex couples serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman, which, in turn, *uniquely fosters procreation*") (emphasis added); Standhardt v. Superior Court, 77 P.3d 451, 463 (Ariz. App. Div. 2003) ("Because same-sex couples cannot themselves procreate, the State could reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships."). The dissent in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) noted that:

> If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it . . . might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur. In essence, the Legislature could conclude that the consequence of such a policy shift would be a diminution in society's ability to steer the acts of procreation and child rearing into their most optimal setting.

Id. at 1002 (Cordy, J., dissenting).

At the same time, the fact that courts like *Morrison* are acknowledging that same-sex couples can reproduce and are reproducing suggests an implicit recognition of, and discomfort with, the very thing—procreation—that is starting to bridge the gap between same- and cross-sex couples. Although same-sex couples cannot reproduce through sexual means with each other, the fact remains that artificial reproductive technology, which was less common during the early phase of same-sex marriage litigation when the procreation as propagation rationale was at its height, offers them the opportunity to procreate and to generate a product that looks very much like the original model of cross-sex reproduction. As one court recently noted:

> To be precise, same-sex couples can cause procreation. A female capable of producing children can be married to another female and become pregnant through various methods, then produce and raise the child in her same-sex union. Similarly, a same-sex male couple could cause a female to become pregnant, directly or otherwise, and later adopt and raise the child.[61]

This explicit recognition of the ability of same-sex couples to cause procreation signals not only a notable shift from earlier procreationist rhetoric that deployed procreation in order to distinguish same- and cross-sex relationships, but also a growing awareness of the extent to which those relationships are starting to look more, not less, like each other.

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61. Coordination Proceeding, Special Title [Rule 1550(c)] (Marriage Cases), No. 4365, 2005 WL 583129, at *12 n.3 (Cal. Super. Ct. Mar. 14, 2005); *see also Hernandez*, 794 N.Y.S.2d at 599 ("[T]he reality is that significant numbers of couples in New York have formed same-sex families, and numerous couples will continue to do so, whether they are allowed to marry or not."). The dissent in *Lewis v. Harris*, 875 A.2d 259 (N.J. 2005), *aff'd as modified by* 908 A.2d 196 (N.J. 2006) noted that:

> [T]he claim that the promotion of procreation is a vital element of marriage and justifies exclusion of persons of the same gender falls on its face when confronted with reproductive science and technology. The fact is some persons in committed same-sex relationships can and do legally and functionally procreate.

Id. at 255 (Collester, J., dissenting).

For further discussion of this issue, see Castle v. State, No. 04-2-00614-4 (Wash. Super. Ct. Sept. 7, 2004) ("Same-sex couples can and do legally procreate through assisted reproduction and adoption."), *rev'd*, Andersen v. King County, 138 P.3d 963 (Wash. 2006); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 n.24 (Mass. 2003) ("If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means."); Baker v.Vermont, 744 A.2d 864, 881 (Vt. 1999) ("[T]here is no dispute that a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques.").

B. Procreation Rationale: Criticisms

This Section addresses some criticisms of the procreation rationale, both in its past formulation as "marriage encourages the propagation of the species," and in its current formulation as "marriage encourages responsible cross-sex procreation and the legitimization of children." These criticisms neglect to explain why that rationale, notwithstanding its obvious flaws, is doing most of the work to sustain same-sex marriage prohibitions today. More importantly, they fail to recognize how the recent analogy between counterfeiting and same-sex relations provides a clue as to what is behind the courts' procreative logic.

Several commentators, and a few courts, have observed that the procreation rationale is unconvincing and vulnerable to attack. Their criticisms focus on the rationale's tenuous legal grounding, questionable factual grounding, or both, as well as on its inaccurate portrayal of the contemporary family. First, and with respect to the procreation as propagation argument, some critics have relied on cases like *Skinner* and *Turner v. Safley*[62] to rebut the contention that the fundamental right to marry is conditioned on the ability to procreate.[63] Other critics have turned to the law governing the grounds for marital annulments and divorces in order to refute the notion that procreation is a necessary condition of marriage.[64] Relying, in part, on the fraudulent inducement to marry line of cases, they have argued that fraud with respect to a spouse's ability or willingness to procreate, rather than a spouse's innate

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62. *See generally* Turner v. Safley, 482 U.S. 78 (1987) (discussing the prison correspondence regulation in relation to marriage as well as the prisoner regulation that required a warden's permission for an inmate to marry).

63. *See* Jamal Greene, Comment, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1994 (2005) ("Because the *Turner* Court struck down a marriage ban that applied to a population with no legal right to procreate and that provided an exception for pregnancy, the decision undermines any claim that marriage is fundamental because of an inexorable connection to procreation."). The Comment argues that the *Skinner* Court's use of the conjunctive "and" in its celebrated declaration about the importance of procreation to the "survival of the race" suggests "independence, not confluence, between marriage and procreation." *Id.* at 1994. In addition, *Skinner* was not a fundamental right to marry case, but involved the unequal application of a state law that both interfered with procreation as "one of the basic civil rights of man" and violated the equal protection guarantee of the Fourteenth Amendment. *Id.* As such, the Court's "discussion of marriage was incidental to its discussion of the importance of procreation." *Id.* Nowhere in *Skinner* does the Court even remotely suggest that the basic civil right to marry is dependent on the basic civil right to procreate or that the right to marry is only considered to be a fundamental for those who are able to procreate sexually with each other.

64. *See, e.g.*, Lawrence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1092 (2002) (stating that "the State's interest in the sexual component of marriage has traditionally been implicated only by the potential for children to be born outside of it, rather than by a need to encourage or guarantee procreation").

capacity to procreate, is the driving force behind the law's treatment of marital annulments/divorces on the basis of fraud.[65] In *Coordination Proceeding, Special Title [Rule 1550(c)], Marriage Cases*, the California Superior Court also noted this distinction when it looked unfavorably upon that state's use of the fraudulent inducement to marry line of cases in support of the procreation rationale for its same-sex marriage prohibition. As the court remarked, "the cases cited by the [State] do not establish that California courts have recognized that the purpose of marriage in this state is procreation. Instead, these cases establish that annulment is a remedy for the fraudulent inducement to marry."[66] Finally, other critics and courts have responded to the procreation as propagation rationale by simply noting its flagrant over- and under-inclusiveness,[67] its tenuous basis in logic, and its complete lack of empirical support.[68]

Second, and with respect to the encouraging responsible procreation argument, some courts have flatly remarked that "the prevention of same-sex marriages is wholly unconnected to promoting the rearing of children by married, opposite sex-parents."[69] Remarkably, even courts that have upheld same-sex marriage prohibitions have observed that the encouraging responsible procreation rationale is troubling because such reasoning would appear to militate against marital rights for those individuals who either cannot reproduce or do not want to. Concurring in *Morrison*, one judge voiced his misgivings over the majority's conclusion that the same-sex marriage prohibition at issue

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65. *See id.* at 1112 ("In contrast to consummation by sexual intercourse, which courts uniformly describe as virtually synonymous with the marital relationship, procreation has only inconsistently been treated as an implied term, and is often treated as something subject to negotiation between the parties.").

66. Marriage Cases, *supra* note 61, at *8. The dissent in *Lewis* noted that:

> [I]f procreation or the ability to procreate is central to marriage, logic dictates that the inability to procreate would constitute grounds for its termination. However, as opposed to the inability or unwillingness to engage in sexual intercourse, the inability or refusal to procreate is not a legal basis for divorce or annulment.

Lewis v Harris, 875 A.2d 259, 285 (N.J. 2005) (Collester, J., dissenting).

67. *See, e.g.*, Carpenter, *supra* note 16, at 205 (stating that the procreation rationale would appear to "expose a potential political flaw in the procreation argument: by repeatedly emphasizing the importance of procreation in marriage, opponents of gay marriage run the risk of demeaning the many married couples for whom procreation is either unwanted or physically impossible").

68. *See id.* at 194 ("If Western civilization is truly facing a population implosion, as some suggest, that is attributable to many factors other than gay marriage."); Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145, at *7 (Md. Cir. Ct. Jan. 20, 2006) ("This Court, like others, can find no rational connection between the prevention of same-sex marriages and an increase or decrease in the number of heterosexual marriages or of children born to those unions.").

69. *Deane*, 2006 WL 148145, at *7.

in that case was constitutional because it rested on the rational basis of "encourag[ing] responsible procreation, and same-sex couples cannot procreate through sexual intercourse."[70] The judge admitted that he was "somewhat troubled by this reasoning."[71] He continued to explain that:

> Pursuant to this rationale, the State presumably could also prohibit sterile individuals or women past their child-bearing years from marrying. In fact, I would assume the State may place any restrictions on the right to marry that do not negatively impact the State's interest in encouraging fertile, opposite-sex couples to marry.[72]

While useful, these criticisms neglect to consider precisely why procreationist rhetoric has persisted despite its myriad flaws. If the Supreme Court has suggested that the fundamental right to marry is not reserved to those who are able (or who want) to procreate, and if the law governing marital annulments is clear that procreation is not a necessary condition of marriage, then why have courts given, and in some instances continue to give, such weight to the procreation as propagation rationale? Moreover, if the encouraging responsible procreation rationale lacks even a remote connection to same-sex marriage prohibitions, why has it become the main procreation-centered rationale in same-sex marriage litigation today? Put more simply, what is really doing the work to sustain either version of the procreation justification?

This Article maintains that these procreation justifications, which on their face make little sense, are better understood in light of both the counterfeiting rhetoric that has recently emerged in the same-sex marriage debate and the history behind that rhetoric. Specifically, and as the following Parts will show in greater detail, understanding the history and theory behind the deployment of counterfeiting language to describe non-normative sexual and reproductive relationships gets us one step closer to discerning: (1) why same-sex marriage provokes such anxiety among marriage traditionalists today; (2) why procreation remains their overriding concern; and (3) the logic on which both versions of the procreation rationale for same-sex marriage prohibitions rest. At this point, I offer three brief reasons why we *should* be thinking about same-sex marriage prohibitions in the larger context of fraud, of which counterfeiting is a variety.

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70. Morrison v. Sadler, 821 N.E.2d 15, 36 (Ind. Ct. App. 2005) (Friedlander, J., concurring).

71. *Id.* at 37.

72. *Id.* at 36–37.

First, it is not an accident that states like California in the *Marriage Cases* are citing to the fraudulent inducement to marry line of cases in support of the procreation rationale for same-sex marriage prohibitions.[73] While a few commentators (and at least one court) have remarked that those cases do not stand for the proposition that procreation is a necessary condition of marriage,[74] some of the fraudulent inducement cases and their not-so-distant relatives—those cases in which annulments and/or divorces are granted on the basis of impotency—do stand for a very important point that the critical commentary has overlooked: The idea that marriage without sexual procreation is in some sense a sham and a fraud, not a "real" or "true" marriage at all.

For instance, in *Santos v. Santos*,[75] a fraudulent inducement case, the Supreme Court of Rhode Island granted a husband-spouse's petition for divorce on the ground that his wife concealed an intention, allegedly formed prior to the marriage, *not* to engage in "normal sexual intercourse"[76] with him during the marriage and a desire "to engage . . . in unnatural intercourse" with him instead.[77] Although the court did not elaborate specifically on what it meant by "unnatural sexual intercourse," it did suggest that the term was synonymous with non-procreative sex of the sort engaged in between members of the same sex—as the wife left her husband after only three days of marriage "to associate with a girl friend of questionable reputation, for whose love she professed a preference."[78] In keeping with the law governing fraudulent inducements to marry, the court granted the husband's petition on the ground that the wife did not enter into the marriage in good faith.[79] More interesting, however, is the court's suggestion that what was fraudulent about the wife's behavior was not only the concealment of her true intention at the time the marriage was contracted, but also the "unnatural intercourse" in which she allegedly sought to engage with her husband. The court remarked, "the only reasonable inference from the uncontradicted and unexplained evidence of her own conduct . . . is

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73. *See* Marriage Cases, *supra* note 61, at *6–8 (discussing cases in which annulment was granted where marriage had been fraudulently induced).

74. *See id.* at *8 (discussing the line of fraudulent inducement cases); *see also* Borten, *supra* note 64 (discussing the State's interest in the sexual component of marriage).

75. *See* Santos v. Santos, 90 A.2d 771 (R.I. 1952) (holding that a wife's concealment of her intent not to consummate the marriage is grounds for divorce).

76. *Id.* at 772.

77. *See id.* at 774 (stating that the wife's "design to engage only in abnormal conduct . . . was repugnant to and destructive of the basic purpose and terms of the marriage covenant").

78. *Id.*

79. *See id.* (stating that the wife's lack of good faith destroyed any possibility of mutuality and therefore prevented a valid marriage contract from coming into existence).

that from the beginning she had not intended to enter into a *true* marriage."[80] In other words, the marriage was fraudulent not only because the wife withheld information from her husband at the outset of the marriage, but also because she wanted to engage in a certain kind of sex with him, non-procreative sexual intercourse, that rendered their marriage less authentic or true.

Similarly, in *D. v. C.*,[81] a New Jersey court granted a wife's petition for annulment on the ground that she suffered from "vaginismus, 'an emotional or mental disorder'" that rendered her impotent, even though "she was normal organically and anatomically."[82] Because the wife was allegedly ignorant of her condition prior to marriage, *D. v. C.* was not a fraudulent inducement case per se. Rather, what was at issue there was whether the wife, as the impotent spouse, could bring the annulment action or whether such actions were available to potent spouses only.[83] *D. v. C.* is nevertheless interesting because it raises the idea, of particular relevance here, that marriage without penetrative, procreative sex is a sham or an inauthentic marriage—a fraud even in the absence of actual fraudulent conduct. As the court stated in dicta after finding that annulment actions could be brought by either the potent or the impotent party: "The public interest in dissolving a *mock marriage* is the same whichever of the parties is incapable."[84] The fact that the *D. v. C.* court uses language resonant of fraud, "mock marriage," is particularly noteworthy because the court was not dealing with a fraudulent inducement case at all. Indeed, the fact that the wife was acting in good faith with respect to her alleged condition did not render her non-procreative marriage any more true and any less a counterfeit.

The language used by the *Santos* court to describe non-procreative sexual acts and the *D. v. C.* court to describe the incapacity to have procreative sex suggests that a marriage that exists without procreative intercourse is a sham or mock marriage—it is a fraud in and of itself. It could be, then, that lawmakers are relying on the fraudulent inducement to marry line of cases (and on the annulment of marriage/divorce cases more generally) in support of same-sex marriage prohibitions currently because they are at the very least *thinking* about same-sex relationships as fraudulent in the sense that they are non-procreative and therefore a travesty of the true or authentic thing.

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80. *Santos*, 90 A.2d at 774. (emphasis added).

81. D. v. C., 221 A.2d 763, 764 (N.J. Super. Ct. Ch. Div. 1966) (finding that an impotent spouse is entitled to annul a marriage).

82. *Id.*

83. *See id.* (stating that the question of whether the wife, as an impotent spouse, could bring an annulment action was a matter of first impression in that court).

84. *Id.* at 765 (emphasis added).

Second, it makes sense to think about same-sex marriage in terms of fraud because certain legal academics have both implicitly and explicitly conceptualized the state's recognition of that relationship as a kind of fraud. In *Sex and Reason*, Judge Richard Posner contended that "permitting homosexual marriage would place government in a dishonest position of propagating a false picture of the reality of homosexuals' lives."[85] More recently, and indeed more explicitly, Professor Lynn Wardle has remarked that "if same-sex unions do not contribute to the essential social purposes of marriage, a state that confers the legal status of marriage upon same-sex unions *commits fraud* when it presents a false image of same-sex unions as comparable to traditional marriage."[86]

Third, the policy rhetoric surrounding the same-sex marriage debate makes explicit this connection between same-sex marriage and fraud that emerges in the cases and the academic commentary alike. Both before, and even more so after, the Supreme Court's decision in *Lawrence v. Texas*, those who oppose marriage equality for same-sex couples have increasingly turned to a rhetoric of fraud in order to justify legislative and constitutional measures banning same-sex marriage. It is to this rhetoric and its implications that this Article now turns.

III. The Same-Sex Marriage Debate and the Counterfeiting Analogy: A Survey and Critique

Comparisons between same-sex relations and counterfeiting have become so common and so frequent in the rhetoric surrounding the same-sex marriage (and same-sex civil unions) debate that they all but escape our attention. This Part looks at those comparisons in order to place into the foreground a rhetorical trope whose sheer pervasiveness often causes us to forget that it is there in the first place—and, more importantly, to overlook the extent to which that trope does not hold up. Section A will provide an exhaustive survey of the recent analogies that same-sex marriage opponents have made between same-sex relations and counterfeiting. Section B will then demonstrate the ways in which the counterfeiting trope is descriptively inaccurate as applied to both civil unions and same-sex marriage, thus forcing one to ask just why that trope has persisted notwithstanding its imprecision.

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85. RICHARD POSNER, SEX AND REASON 312 (1992).

86. Lynn Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL'Y 771, 775 (2001) (emphasis added).

A. Counterfeiting Rhetoric in Law and Policy Today

Opponents of rights and benefits for same-sex couples in the form of civil unions[87] and domestic partnership recognition[88] routinely conceptualize such marriage approximations or marriage equivalents in the language of counterfeit. For instance, just one month after the terrorist attacks on September 11, 2001, Robert Knight accused "homosexual activists"—that is, the gay and lesbian partners of victims of the 9/11 attacks who sought benefits from the September 11 Victim Compensation Fund and the American Red Cross—of "trying to hijack the moral capital of marriage and apply it to their own relationships," which he characterized as "counterfeit marriage."[89] In just a single stroke, Knight managed to conflate genuine terrorism, LGBT activism, same-sex relationships, and counterfeiting in a way that situated those four varieties of assault on the same symbolic plane and that no doubt resonated with a public intensely fearful of each.[90]

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87. Civil unions are state-sanctioned relationships between two same-sex individuals. Connecticut, New Jersey and Vermont are the only jurisdictions in the United States that recognize civil unions between same-sex partners. *See* CONN. GEN. STAT. ANN. §§ 46b–38bb (West 2005) (stating that only parties of the same sex are eligible for civil unions); N.J. STAT. ANN. § 37:1-1 (WEST 2007) (repealing New Jersey's prohibition of same-sex marriage); VT. STAT. ANN. tit. 15, § 1202 (2005) (stating that parties to a valid civil union must "be of the same sex and therefore excluded from marriage laws").

88. A domestic partnership is a legal relationship recognized by the state and/or jurisdiction in which it is entered; unlike civil unions, domestic partnership recognition does not guarantee the same rights and benefits that the state confers upon cross-sex married couples. California, Hawaii, Maine, and the District of Columbia are the only jurisdictions in the United States that recognize domestic partnerships (but not civil unions) between two same-sex individuals. *See* CAL. FAM. CODE § 297 (Deering 2007) (defining and providing the requirements for establishing a domestic partnership); HAW. REV. STAT. § 572C-1 (2006) (including domestic partners as reciprocal beneficiaries); ME. REV. STAT. ANN. Tit. 18, § 1-201 (2006) (giving inheritance rights to domestic partners); D.C. CODE § 32-701(3) (2006) (defining domestic partner).

89. Press Release, People for the American Way, Religious Right Groups Oppose Relief Assistance for Surviving Same-Sex Partners Following Terrorist Attacks, http:///www.pfaw.org/pfaw/general/default.aspx?oid=4135 (last visited Feb. 5, 2007) (remarks of Robert Knight) (on file with the Washington and Lee Law Review); *see also* Matt Foreman, *Anti-Gay Groups Active in Massachusetts: A Closer Look*, at 12, *available at* http://www.thetaskforce.org/downloads/reports/reports/AntiGayGroupsMA.pdf.

90. Knight's casting of gays and lesbians as the "terrorists" in our midst whose aim it is to devise new and better ways to bring down the institution of marriage, set the stage for later comparisons between terrorism and the gay rights movement. For instance, Lou Sheldon, founder and Chairman of the Traditional Values Coalition, evoked similar imagery when he responded to the Supreme Court's decision in *Lawrence v. Texas* by drawing on the 9/11 trope: "This is a major wake-up call . . . . This is a 9/11, major wake-up call that the enemy is at our doorsteps. This decision will open a floodgate . . . . This will redirect the stream of what is morally right and what is morally wrong into a deviant kind of behavior." Robert B. Bluey,

Like Knight, Janet LaRue, Chief Counsel for Concerned Women for America (CWA), has deployed similar, albeit less incendiary, counterfeiting rhetoric to describe the legal regime that would have existed under the version of the Federal Marriage Amendment (FMA) that was first introduced in Congress in 2002. The original version of the FMA, which failed to pass in the Senate in 2003, defined marriage as a "union between a man and a woman," and stated, in part, that "[n]either this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."[91] The 2006 version of the FMA, which failed to pass in the Senate in June 2006, altered some of the language of the 2002 version to read, in part, that "[n]either this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."[92] Whereas the 2006 version, unlike its predecessor, targets the unions of same-sex couples exclusively, both versions leave open the possibility that state legislatures will confer the legal incidents of marriage upon unmarried same-sex couples, even if they are not required to do so under either the federal Constitution or their respective state constitutions. While the drafters and proponents of the FMA contended that "[t]he traditional autonomy of state legislatures on family law matters is preserved by the text of the Amendment,"[93] LaRue decried the counterfeit scheme that its permissive language failed to capture:

> America has federal laws to protect our currency because we recognize that counterfeit currency is a serious threat to our national economy. We must have laws to preserve and protect marriage because counterfeit marriage is

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Homosexuals Push for Same-Sex Marriage After Sodomy Ruling, CHRISTIAN NEWS SERVICE, June 27, 2003, http://www.cnsnews.com/Culture/Archive/200306/CUL20030627a.html (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

91. The full version of the original FMA read: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." H.R.J. Res. 93, 107th Cong. (2002). The original FMA was drafted by the Alliance for Marriage (AFM).

92. S.J. Res. 1, 109th Cong. (2006). The 2006 version of the FMA—which was itself based on an earlier version that failed to pass in Congress in 2004—therefore allows courts to confer the legal incidents of marriage upon unmarried cross-sex couples, something which the 2002 version did not permit. *See generally* H.R.J. Res. 106, 108th Cong. (2004); S.J. Res. 40, 108th Cong. (2004).

93. Janet LaRue, *Why Concerned Women for America Opposes the Federal Marriage Amendment*, Aug. 18, 2003, http://www.cwfa.org/articledisplay.asp?id=4452&department=LEGAL&categoryid=family (last visited Feb. 5, 2007) (statements of Matt Daniels, Founder and President, Alliance for Marriage) (on file with the Washington and Lee Law Review).

> a serious threat to the stability of society and the health and welfare of children. CWA opposes the Federal Marriage Amendment (FMA) [of 2002] because it would not prevent state legislatures from recognizing and benefiting civil unions and other such relationships, which would result in legalized counterfeit marriage.[94]

LaRue further remarked that "[t]he FMA does not prevent legislative acts that would create civil unions that are counterfeit marriages. Although legally distinct from marriage, it is a distinction without a difference in all other respects."[95] For this reason, "CWA believes that an amendment to preserve marriage should do more than preserve it in name only."[96]

Knight and LaRue's comparison of civil unions to counterfeit currency has become a routine way of characterizing any legal regime that recognizes either, or both, civil unions and the extension of marriage-like rights to same-sex couples. Thus, when the St. Thomas More Law Center sued the Ann Arbor, Michigan public school district in 2003 for using taxpayers' dollars to extend insurance benefits to same-sex partners, Richard Thompson, the Center's chief counsel, stated that "[t]he purpose of this lawsuit is to stop these counterfeit marriages."[97] Similarly, Utah's Amendment 3 both defines marriage exclusively in cross-sex terms and provides that "[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."[98] Its supporters stated that the amendment would, among other things, "[p]revent the courts or other government officials from subverting that definition [of traditional marriage] by authorizing counterfeit marriage."[99] Supporters of similar amendments and laws in other states, like Arkansas, Pennsylvania and Ohio, have remarked that an expansive marriage protection amendment is necessary in order both to prevent "counterfeit marriage that devalue[s] traditional marriage in the same way counterfeit money devalues real money"[100] and to

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94. *Id.*

95. *Id.*

96. *Id.*

97. Brian Burch, *Law Center Sues to Stop Taxpayer Funding of Same-Sex Benefits in Michigan*, Sept. 22, 2003, http://www.thomasmore.org/news.html?newsid=115 (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

98. *Utah Marriage Amendment Deserves Support*, Sept. 7, 2004, http://www.marriage debate.com/2004/09/utah-marriage-amendment-deserves.htm. (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

99. *Id.*

100. Arkansas Marriage Amendment Committee: A Campaign to Protect Marriage in Arkansas, *Judicial and Legal Questions*, http://www.arkansasmarriage.com/static/about/faq.php (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review); *see also*

"identif[y] marriage as having a unique place in our society and protect[ ] it from any counterfeits."[101]

Some opponents of civil unions and similar de facto marriage equivalents push the counterfeiting metaphor even further to suggest a parallel relationship between the injurious effects of counterfeit currency on the actual capital of the economy and the injurious effects of de facto marriage on the symbolic capital of marriage. As one representative in Virginia's House of Delegates opined:

> Counterfeit money hurts our wallets. Counterfeit marriage will do the same to real marriage. Homosexuals need no special institution parallel to marriage, such as civil unions, to enjoy the same rights under law to vote, buy a house, go to public colleges, start businesses, and exercise rights and opportunities now available to all Virginians.[102]

Or, as Tony Perkins, President of the Family Research Council, recently remarked: "We do not support the civil union and domestic partnership laws because we see them as counterfeit institutions. Just as counterfeit $20 bills impact our economy, we feel these counterfeit unions have an impact on our culture."[103] For these and other marriage traditionalists who flatly oppose the extension of legal and economic benefits to same-sex couples, "[c]ivil unions are nothing but a counterfeit form of marriage. Just as counterfeiting currency has the potential to bankrupt an economy, redefining the social foundation of civilization by transforming homosexual behavior into a public norm has the potential to wreak havoc on social life as Americans know it."[104] It is worth

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American Family Association of Pennsylvania, *March 15–Marriage Protection Amendment (MPA) Voted Out of Committee—But What Happened the Next Day?* (Mar. 27, 2006), http://www.afaofpa.org/action_ alert_archives_2006.htm (last visited Feb. 5, 2007) ("[S]ame-sex marriage [and] its counterfeit—civil unions.") (on file with the Washington and Lee Law Review).

101. State v. Knipp, No. 2004 CRB 039103, 2005 WL 1017620, at *4 (Ohio Mun. Ct. Mar. 10, 2005) (quoting the Ohio Campaign to Protect Marriage website, www.ohio marriage.com/legal_issues_&_news.shtml).

102. Rep. Robert G. Marshall, Letter to the Editor, *No 'New Jim Crow' in Virginia*, WASH. POST. July 3, 2004, at A25, *available at* http://www.washingtonpost.com/wp-dyn/articles/A24784-2004Jul2.html (supporting Virginia's Marriage Affirmation Act); *see also* Ruth Padawer, *Seeking Society's Embrace: Gay Couples Sue New Jersey for Right to Marry*, THE RECORD (Hackensack, NJ), July 21, 2002, *available at* http://www.lambdalegal.org/news/in-the-news/seeking-societys-embrace.html (quoting the head of the New Jersey Family Policy Council, Len Deo's, remarks that "[a]ny attempt to counterfeit marriage as anything different than one man and one woman degrades the real thing") (on file with the Washington and Lee Law Review).

103. Timothy Dailey, *The Slippery Slope of Same-Sex Marriage*, Family Research Council, Sept. 2005, http:// www.frc.org/get.cfm?i=BC04C02 (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

104. PBS Online Newshour, *The Battle Over Same-Sex Marriage*, http://www.pbs.org/

noting that similar counterfeiting analogies also surfaced in the debate surrounding the extension of marriage-like benefits to same-sex couples in England during the passage of the Relationships (Civil Registration) Bill, which became law in that country on November 18, 2004. Simon Calvert, Deputy Director of The Christian Institute in England, remarked that the effect of the Bill would be to "devalu[e] the currency of marriage in the law. It's Monopoly money—not the real thing."[105]

Just as civil unions, domestic partnerships, and benefits for same-sex couples more generally have been compared to a counterfeit form of marriage, so, too, has same-sex marriage itself been compared to a counterfeit form of the cross-sex archetype. Robert Knight relied on the counterfeiting trope as early as 1995, when he stated that "[s]ame-sex couples do not qualify [for marriage]. It might be called a partnership, but if it's called marriage, it's a counterfeit version. And counterfeit versions drive out the real thing."[106] More recently, and as mentioned in this Article's Introduction, Marilyn Musgrave deployed the analogy in support of the Federal Marriage Amendment in 2003.[107] Since that time, a significant number of same-sex marriage opponents have made such remarks as same-sex marriage is "a counterfeit, which cheapens the real thing"[108] and "[s]ame sex marriage devalues traditional marriage the same way counterfeit money devalues real currency."[109] In their view, "it is a falsehood to call it a marriage. Those who are claiming social or legal recognition of their relationship as if it were a true marriage are thus asking society and the law to affirm a falsehood."[110] Indeed, testifying before the Maryland House Judiciary Committee in January 2006 in support of that state's proposed marriage amendment, Knight remarked that "creating counterfeits [like same-sex

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newshour/bb/law/gay_marriage/q2.html (remarks of Peter Sprigg, Director of the Family Research Council's Marriage and Family Studies) (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

105. Press Release, The Christian Institute, Gay Partnerships Bill Creates Counterfeit Marriage (Oct. 24, 2001), http://www.christian.org.uk/pressreleases/2001/october_24_2001.htm (last visited Feb. 5, 2007) (on file with the Washington and Lee Law review).

106. Dunlap, *supra* note 5, at A18.

107. Wetzstein, *supra* note 4, at A8.

108. Sandy Rios, *How Does Gay Marriage Hurt the Traditional Thing? Let's Count the Ways*, HISPANIC MAGAZINE.COM, Mar. 2004, http://www.hispaniconline.com/magazine/2004/march/Forum/index.html (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

109. Jan Dean, *Gay Marriage Attacks Family Unit: Protestor*, MISSISSAUGA NEWS, Mar. 4, 2005.

110. Kenneth D. Whitehead, *Why Same-Sex "Marriage" Is a Bad Idea*, CATHOLIC WORLD NEWS, June 1, 2006, http://www.cwnews.com/news/viewstory.cfm?recnum=32617 (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

marriage] undermines support in the law and culture for the real thing."[111] Or, as made clear in a public statement issued by the St. Thomas More Law Center immediately after the successful passage of a constitutional marriage amendment in Michigan on Election Day, 2004: "The amendment is intended to prohibit courts or other efforts to impose same-sex marriage, polygamy, or any other form of counterfeit 'marriage' on the state."[112] Similar counterfeiting rhetoric also surfaced in the controversy over same-sex marriage in Spain, which legalized that relationship in 2005. Following the Spanish cabinet's approval of a proposal allowing same-sex couples both to marry and to adopt children, which was signed into law on July 2, 2005, Juan Antonio Martinez Camp, a spokesperson for the Spanish Bishops' Conference, stated on national television that "permitting same-sex marriage would be like imposing a virus on society" and that "the decision would be tantamount to introducing a counterfeit currency" in Spain.[113]

Opponents of same-sex marriage have deployed counterfeiting rhetoric to convey not only their concern that same-sex marriage cheapens and devalues its cross-sex counterpart, but also their belief that same-sex partnerships are intrinsically non-procreative. As Janet LaRue remarked:

> Granting same-sex couples a license to marry will not create true marriage. Neither two men nor two women can become one flesh. Licensing the unnatural does not make it natural. It would be a state-sanctioned counterfeit, a sham and a fraud. A licensed electrician cannot produce power by taping two same-sex plugs together. Homosexual sex is dangerous and destructive to the human body and powerless for human reproduction.[114]

This idea that two (or too) similar entities—two same-sex electrical plugs, two men, two women—cannot mix in a positively reproductive way, resonates with a similar analogy that was recently made by Glen Lavy, Senior Counsel of the Alliance Defense Fund (ADF) and Senior Vice President of ADF's Marriage Litigation Center, in reference to a lawsuit brought in Israel challenging that

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111. *The Maryland Marriage Amendment: Hearing on Maryland H.B. 48 Before the House Judiciary Comm.*, 2006 Session (statement of Robert Knight).

112. Thomas More Law Ctr., *Michigan Voters Join Nationwide Mandate in Support of Traditional Marriage—Law Center Prepared to Defend Bans if Challenged*, Nov. 3, 2004 http://www.thomasmore.org/news.html?NewsID=247 (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

113. Marlise Simons, *Spain's Secular Agenda Infuriates the Clergy*, INT'L HERALD TRIBUNE, Oct. 5, 2004, at *2, available at 2004 WL 5285873.

114. Janet LaRue, *Talking Points: Why Homosexual "Marriage" Is Wrong*, Sept. 16, 2003, http://www.cwfa.org/articledisplay.asp?id=4589&department=LEGAL&categoryid=family (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

country's same-sex marriage restriction. Commenting on one of the reasons why same-sex marriage warrants prohibition, Lavy said: "It takes sodium and chloride to make salt. If you add sodium to sodium, you don't have salt. If you add chloride to chloride, you don't have salt . . . . It takes a man and a woman to make babies."[115]

The remarks of other commentators similarly evoke a connection between counterfeit and non-procreative sex. As one critic of same-sex marriage commented:

> A same-sex marriage is no marriage at all. It is a counterfeit, a fraud. Governments have wisely encouraged true marriages because they stabilize society and benefit governments in a dozen different ways. Same-sex marriages are counterfeit, immoral, totally sterile, lacking the No. 1 reason for marriage—procreation—ignoring the wisdom of ages and common sense.[116]

The Catholic Civil Rights League of Ottowa, Canada, made this connection between non-procreative sex and counterfeit even more explicit:

> Excluding same-sex couples from marriage is not related to their homosexual orientation, or to them as individuals. Rather, the exclusion of their relationship is related to the fact that it is not inherently procreative, and, therefore, if it is included within marriage, marriage cannot institutionalize and symbolize respect for the transmission of life. To recognize same-sex relationships as marriage would unavoidably change and eliminate this function of marriage. Same-sex "marriage" devalues the real thing in the same way that any counterfeit devalue[s] the authentic.[117]

It bears noting that similar statements have found their way into the Congressional Record. Testifying before Congress on behalf of DOMA in 1996, Gary Bauer, former President of the Family Research Council, remarked that, were the state to recognize a marriage between same-sex partners:

> [T]he fiction [of same-sex marriage would be] imposed on everyone and the counterfeit [would] do great harm to the special status that the genuine institution has earned. . . . [M]arriage is a unique bonding of the two sexes,

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115. Michael Foust, *Israel, Too? Supreme Court in Holy Land to Hear 'Gay Marriage' Case in Late May*, BP NEWS, Apr. 6, 2006, http://www.bpnews.net/bpnews.asp?ID=22990 (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

116. Morton James, Letter to the Editor, *Same-Sex Marriage Is No Marriage at All*, CHI. DAILY HERALD, Apr. 25, 2004, at 17, *available at* 2004 WLNR 5637560.

117. CATHOLIC CIVL RIGHTS LEAGUE, ENGAGE IN THE MARRIAGE DEBATE, http://www.ccrl.ca/index.php?id=122 (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

> with the probable expectation of procreation of children. . . . [C]reating a counterfeit would be a slap in the face to millions of Americans.[118]

Indeed, each of these statements call to mind the *D. v. C.* court's remarks that even a cross-sex marriage without procreative sex is a "mock marriage"—a "sham" and a "fraud"—as well as the *Santos* court's suggestion that a marriage without "normal sexual intercourse" is not a "true marriage" at all.[119]

B. Undoing the Counterfeiting Analogy

The counterfeiting trope that same-sex marriage opponents have deployed to illustrate the threat that both civil unions and same-sex marriage represent defies logic for the following reason: Neither civil unions nor same-sex marriage *as their opponents conceptualize them* resembles what we typically think about when we think about counterfeits. For instance, LaRue notes that the difference between marriage and civil unions represents a "distinction without a difference" and that the original FMA as drafted preserved marriage "in name only," thus suggesting that civil unions and marriage are substantively the same as, or at least similar to, each other.[120] LaRue's conceptualization of civil unions as counterfeit, however, is descriptively inaccurate because her vision of counterfeit does not reflect what a true counterfeit is. We typically think about a counterfeit as a product that is identical in form to, although different in substance (or intrinsic worth) from, the original that it is attempting to copy.[121] Indeed, the critical difference between a Louis Vuitton original and a Louis Vuitton counterfeit is the fact that the latter differs in substance from the former even though the two assume the same name or form—to wit, a Louis Vuitton. LaRue, however, appears to be suggesting quite the opposite: While civil unions are nominally or formally distinguishable from marriage (i.e., they are *in name* something else), they are substantively similar to that institution (i.e., they guarantee similar rights and benefits, thus differing *in name* only).

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118. *Defense of Marriage Act of 1996: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Congress (1996) (statement of Gary L. Bauer, President, Family Research Council).

119. *See supra* notes 75–84 and accompanying text (discussing *Santos* and *D. v. C.*).

120. *See* LaRue, *supra* note 93 (arguing that civil unions are "legalized counterfeit marriages").

121. For instance, under the Lanham (Trademark) Act a counterfeit is defined as "a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of this chapter are made available by reason of section 220506 of Title 36." 15 U.S.C. § 1116 (2000).

Under this formulation, civil unions are not a counterfeit at all because they alert the public that they are not, in fact, a Louis Vuitton marriage original.

Similarly, Knight's deployment of the counterfeiting trope to describe both same-sex marriage and civil unions does not hold up because neither of those relationships is a true counterfeit. To recall, in 1995, Knight remarked that while same-sex couples might form a partnership, they cannot form a genuine marriage: "[I]f it's called marriage, it's a counterfeit version. And counterfeit versions drive out the real thing."[122] More recently, and with respect to the extension of non-marital rights to same-sex partners, Knight has suggested that the FMA "allows for legislatures to enact the rest of the homosexual agenda right up to civil unions and other forms of counterfeit marriage. As written, the amendment will give politicians cover while they promote homosexuality by other means. . . . Marriage is too important to be defended in name only."[123]

A fundamental incongruity marks Knight's (and LaRue's) deployment of counterfeiting rhetoric to describe civil unions and same-sex marriage. As with LaRue, in Knight's estimation, the problem with civil unions is that they are substantively similar to marriage but are called something else—the only difference between them being a nominal one that acts as a cover for what really lies beneath. Furthermore, the problem with same-sex marriage is that it both shares all the attributes of marriage *and* is called the same thing: "If [a same-sex partnership] is called something else [other than just a partnership] . . . it's a counterfeit version."[124] In other words, if the problem with civil unions is that they are nominally distinct from marriage but possess many of the substantive attributes thereof, the problem with same-sex marriage is that it both possesses all of the substantive attributes of marriage *and* is called the same thing. What Knight fails to recognize, however, is that, under this formulation, neither civil unions nor same-sex marriage represents a true counterfeit—a product that looks formally identical to, but is substantively different from, the original that it is attempting to copy. In either instance, the counterfeiting trope *as it has been deployed* fails accurately to depict what is fraudulent about civil unions and marriage, respectively. Indeed, to accuse same-sex couples of perpetrating a fraud is curious in light of the fact that their relationships are so often characterized as a form of flaunting that is best relegated to the closet. Unlike a counterfeit, and as mentioned in the

122. Dunlap, *supra* note 5, at A18.

123. Robert H. Knight, *No Room For Compromise: Lending Legitimacy To Any Sex Outside Marriage Is Not a Reasonable Position*, NATIONAL REVIEW ONLINE, Aug. 9, 2001, http://www.nationalreview.com/comment/comment-knight080901.shtml (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

124. Dunlap, *supra* note 5, at A18.

Introduction, same-sex marriage is, for many, akin to the obscene: "I know it when I see it."[125]

Given its descriptive imprecision, one wonders why the counterfeiting trope has had such resonance in the same-sex marriage debate. Put another way, what exactly is driving counterfeiting rhetoric notwithstanding the fact that, when analyzed closely, neither same-sex marriages nor civil unions are a true or authentic counterfeit? This Article submits that the answer to both this question and that posed in the previous Part—why the procreation rationale for same-sex marriage prohibitions has persisted in the law despite its flaws—lies somewhere at the *intersection* of counterfeiting and procreation. The claim here, which this Article will more fully develop in the next two Parts, is the following: Just as the counterfeiting trope makes more sense when viewed in light of the unnatural and deceptive non-procreative acts that it signifies, the procreation rationale for same-sex marriage prohibitions makes more sense when viewed as a kind of counterfeit or fraud perpetrated upon the public. While procreation alone might not constitute even a rational basis for same-sex marriage prohibitions, the prevention of *fraud* surely does. For this reason, it is necessary to understand the relationship between counterfeiting and procreation in order to see how each is shoring up the other in the same-sex marriage debate.

IV. Sodomy, Miscegenation, and the Counterfeiting Analogy

Analogies between non-normative sexual practices and subversive forms of commercial exchange have a history and a tradition both in and outside the law. The purpose of this Part is to survey that history in order to provide a structure for Part V, where this Article will discuss the work that the procreation rationale is doing in the contemporary same-sex marriage debate. Section A examines selected texts from the early-modern period that describe sodomy and counterfeiting in analogous terms. Part V will use this history to argue that the procreation rationale reflects a similar anxiety over sodomy as a crude counterfeit of cross-sex reproduction that allows intra-relationally sterile sexual minorities to accumulate wealth that the rest of the population lacks. Section B examines the nineteenth-century deployment of counterfeiting rhetoric to describe the counterfeit product of that era's signature non-normative sexual relationship, miscegenation. Part V will use the miscegenation parallel to argue that the procreation rationale reflects a similar

125. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (reasoning that although obscenity is not easily defined, it is easily recognized).

anxiety over same-sex procreation as a counterfeit form of exchange that allows the families of same-sex couples to pass for the real thing.

A. Sodomy and Counterfeiting

In November 2001, "homosexual activists" were accused of "waging a war" against the Salvation Army when they launched the "Queer Dollars Campaign" against that charitable organization in Cleveland, Ohio.[126] As a form of public protest against the Salvation Army's discriminatory employment policies toward sexual minorities in the areas of hiring and domestic-partner benefits, LGBT activists from Anti-Racist Action of Cleveland deposited phony three-dollar bills into the Salvation Army's kettles during its annual drive—"queer" bills that contained the following slogan: "When the Salvation Army ends its policy of religious bigotry against gay, lesbian, bisexual and transgender people, then and only then will this be a real dollar bill."[127] One website reported the incident with the following headline: "Homosexuals Attack Salvation Army with Counterfeit Currency."[128]

The symbolic protest undertaken by Cleveland's Anti-Racist Action was no doubt inspired by the slang phrase "queer as a three dollar bill," the origins of which may be traced back to the early-modern association between queer as homosexual activity and queer as counterfeit money. According to the *Oxford Dictionary of Modern Slang*, two seemingly distinct, yet conceptually related, definitions exist for the word queer, specifically, "homosexual" and "counterfeit money."[129] The Dictionary explains that the latter use of queer-as-counterfeit derives from at least the seventeenth century, when "counterfeiters" and "receivers of false coins" were labeled "queer-cole-maker[s]" and "queer-cole-fencer[s]," respectively.[130] The Dictionary is silent, however, as to the etymology of queer as homosexual, other than noting that this particular slang version of queer exists. According to the more comprehensive *Oxford English Dictionary*, however, the poet and writer, W. H. Auden, was the first person to

126. Martha Kleder, *Homosexual Activists Target Salvation Army Kettles*, CONCERNED WOMEN FOR AMERICA, Nov. 28, 2001, http://www.cwfa.org/articles/322/CFI/cfreport/index.htm (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

127. *Id.*

128. Marcellus Watts, *Homosexuals Attack Salvation Army With Counterfeit Currency*, FREE REPUBLIC, Nov. 19, 2001, http://www.freerepublic.com/focus/fr/574336/posts (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

129. THE OXFORD DICTIONARY OF MODERN SLANG 182 (John Ayto & John Simpson eds., 1992) (giving two definitions of queer).

130. *Id.*

use queer to mean homosexual in 1932.[131] While both Oxford dictionaries therefore observe the two-fold use of the word queer to denote counterfeiting and homosexuality, neither appears to recognize its dual usage as signifying anything but a linguistic coincidence. That is, neither dictionary accounts for a more comprehensive connection (or interrelationship) between the subversive economic practice of counterfeiting and homosexuality—or, perhaps more accurately, the "utterly confused category"[132] of sodomy that the latter has come to represent.

Scholars of language and early-modern literature, however, have suggested otherwise. They maintain that the use of queer to describe both subversive economics and subversive sexuality is not adventitious. Rather, "[q]ueer as homosexual appears to grow out of . . . antecedent coining terminology;" moreover, "[t]he modern usage might be traced to early sexological formulations in which homosexuality was seen as an illegitimate, or counterfeit, imitation of heterosexuality."[133] In his examination of the "historical overlapping of these seemingly distinct queer discourses"[134] during the early-modern period, Fisher cogently demonstrates that "sodomy and counterfeiting were . . . united *conceptually* long before the linguistic connection was established."[135] In Fisher's view, a "particular cultural logic . . . structures the connection between sodomy"[136] and the economic transgression of counterfeiting—the same logic that gave rise to the dual use of queer in the first place. As another scholar of the early-modern period has noted: "The common denominator [between queer as homosexual and queer as counterfeit] is difference, unnaturalness, fraudulence; but within that thwarting of the straight, the signifier queer shuttles between spheres of the material—money and geometry—to more inchoate spheres of ethics and identity."[137]

In order to understand the current formulation of same-sex relations as counterfeit, then, it is necessary to understand the cultural origins of the early-modern association between sodomy/homosexuality and counterfeiting. At first blush, and using the analogy of queer-as-a-three-dollar-bill as our starting point, it would appear that the association between queer as homosexual and queer as counterfeit is descriptively inaccurate *if* it is intended merely to suggest that

131. XII OXFORD ENGLISH DICTIONARY 1015 (2d ed. 1989) (entry for queer, sb. lang.).

132. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME 1: AN INTRODUCTION 37 (Trans. Robert Hurley 1999).

133. Will Fisher, *Queer Money*, 66 ENGLISH LITERARY HISTORY 1, 14 n.5 (1999).

134. *Id.*

135. *Id.*

136. *Id.* at 2.

137. Casey Charles, *Queer Writes*, 28 WOMEN'S STUD. 32, 36 (2005).

sexual minorities are deceptive in the same way that counterfeit bills are deceptive. While this idea that sexual minorities—to whom the language of passing is applied no less than it is to counterfeit currency—is no doubt behind the analogy between queers and counterfeit, something else is doing the work to shore up the cultural logic that unites counterfeiting and homosexuality. The slang idiom "queer as a three dollar bill" cannot simply intend to cast the homosexual as fraudulent in the sense of being deceptive because a queer three dollar bill presents or announces itself as a fake by virtue of the fact that it is, after all, a three dollar bill.[138] For this reason, to accuse LGBT activists of attacking the Salvation Army with counterfeit three dollar bills—as one website did—is a curious, albeit common, slip.[139]

It is worth thinking about the conceptual relationship between queer as homosexual and queer as counterfeit not just in terms of deceptive imitation, even though deceptive imitation is very much a concern for same-sex marriage opponents who routinely talk about same-sex relations in the language of fraud.[140] Rather, we should think about this conceptual relationship in terms of the intrinsically non-procreative sexual relations in which queers are presumed to engage. This notion that sexual minorities are queer as a three dollar bill because they engage in non-procreative sex not only links up with the procreation rationale for same-sex marriage prohibitions—insofar as that rationale rests on the *inability* of a same-sex couple to cause sexual procreation—but it also explains at least part of what is driving the current analogy between same-sex relations and counterfeiting. It also explains, as Part V will show, the casting of sexual minorities in the contemporary same-sex marriage debate as individuals who have monetary resources and political power precisely because they are thought to engage in non-procreative activity. For this reason, they do not need the protections of the law in the form of marriage.

During the early-modern period, counterfeiting and sodomy together figured as unnatural forms of non-procreative exchange. Fisher has noted that a number of early-modern texts conceptualize sodomy and counterfeiting in parallel terms. He remarks that "[s]ometimes, the language of counterfeiting is used to describe a sodomitical relationship . . . ; sometimes, the sodomite is actually accused of making false coins . . . . In [these texts], sodomy and

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138. It should be noted, however, that a large volume of genuine three dollar bills were, in fact, in circulation in the early to mid-nineteenth century. *See* Fisher, *supra* note 133, at 1 (citing James R. Toland, *Not-So-Phony $3 Bill*, S.F. CHRON., Oct. 22, 1976, at 29).

139. *See supra* notes 126–28 and accompany text (discussing the LGBT Salvation Army protest).

140. *See infra* Part V (discussing deceptive imitation)

counterfeiting are coterminous."[141] For instance, in Elizabeth Cary's *The History of the Life, Reign, and Death of Edward II*,[142] written in 1680, the author describes the English King's renowned "sodomitical" tendencies in subversive numismatic terms. Cary relates that after Edward sent Piers Gaveston, the Earl of Cornwall and the King's alleged lover, away from the Court, the King's "wandering eyes [ravaged] through the confines of the great Court, made loose by his example. Here he seeks out some Piece, or Copper metal, whom by his Royal stamp he might make current."[143] Fisher suggests that Cary's use of numismatic imagery in this passage nicely conveys Edward's equally injudicious social and sexual transgression.[144] He explains:

> [T]he King's transgression here is not so much the stamping itself, but rather the fact that the minion is not of the proper mettle, or rank. Edward's actions are imagined as creating disorder because the base (whether metal or man) is given preferment at the expense of the noble. According to Cary, Edward makes base social and sexual relations current in the court—the court is said to be 'made loose by his example'—just as he makes base coins current in the realm.[145]

Under Fisher's interpretation, then, Cary deploys the counterfeiting metaphor to suggest that the King is engaging (or desires to engage) in a form of sexual exchange, sodomy, that represents a perverse imitation of the true and natural form of stamping that characterizes both legitimate coining *and* legitimate—i.e., procreative, heterosexual—sex.

The confluence of economic and sexual imagery that marks Elizabeth Cary's historical account of King Edward II similarly appears in certain accusations that were hurled at the English playwright, Christopher Marlowe, by the informer Richard Baines after the former was arrested for atheism in 1593. In a note given to the Privy Council, the group of advisors who worked closely with Queen Elizabeth, Baines accused Marlowe of holding the following irreverent views with respect to sodomy and counterfeiting, respectively: (1) that "St. John the Evangelist was bedfellow to Christ and

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141. Fisher, *supra* note 133, at 5.

142. ELIZABETH CARY, THE HISTORY OF THE LIFE, REIGN, AND DEATH OF EDWARD II, *reprinted in* 2 THE EARLY MODERN ENGLISHWOMAN: A FACSIMILE LIBRARY OF ESSENTIAL WORKS, PART I: PRINTED WRITINGS, 1500–1640 (Betty S. Travitsky & Patrick Cullen eds., 1996) (1627).

143. *Id.*

144. The stamping of a piece was the "generic term for both coins . . . and sexual objects," and copper metal was considered to be a "base metal that was specifically associated with the anus." Fisher, *supra* note 133, at 5.

145. *Id.*

leaned alwaies in his bosome, that he used him as the sinners of Sodoma"; and (2) that "he [Marlowe] has as good Right to Coine as the Queen of England, and that . . . he ment through help of a Cunninge stamp maker to Coin French Crownes . . . and English shillinges."[146] Baines' characterization of Marlowe's alleged suggestion that Christ and St. John were lovers—and thus sinned in the manner of the "sinners of Sodoma"—contains language reminiscent of monetary exchange, as "to use" was a verb that denoted both expenditure and sexual intercourse during the Elizabethan period.[147] Conversely, Baines' characterization of Marlowe's alleged counterfeiting scheme contains language reminiscent of sexual exchange, as "to stamp" was a verb that denoted both the minting of coins and procreative sexual intercourse[148]—the irony here, of course, being that Marlowe was allegedly promoting non-procreative sexual acts. Baines's accusatory testimony thus not only suggests that Marlowe advocated both sodomy and counterfeiting, but also describes Marlowe's alleged sexual and economic crimes in interchangeable terms.

Just as sodomy (and the sodomite) was figured in subversive numismatic terms, so, too, was counterfeiting (and the counterfeiter) figured in eroticized terms—or, at the very least, in terms that suggest that counterfeiting was thought to be a sexualized sin or crime. One English writer of the early seventeenth century recounts that the punishment administered to counterfeiters during that time was to have their "privy members . . . sund[e]red from [their] bod[ies]."[149] Another writer from around that same time observes that the Normans reserved the same punishment—that is, "cutting off . . . [the] genitals—[for] false coyners."[150] In other words, the counterfeiter's punishment rendered him sterile and thereby placed him in the same position of *castrato* that the homosexual symbolically occupied. Moreover, from at least the early thirteenth century, castration was also a common punishment in several European countries for men who engaged in sodomy.[151] Where the

146. MARLOWE: THE CRITICAL HERITAGE, 1588–1896, 37 (Millar Maclure ed., 1979).

147. XIX OXFORD ENGLISH DICTIONARY 351–52 (2d ed. 1989) (entry for use, v.).

148. XVI OXFORD ENGLISH DICTIONARY 481–82 (2d ed. 1989) (entry for stamp, v.); *see also* Fisher, supra note 133, at 8–9 (discussing the eroticization of coining language).

149. WILLIAM FULBECKE, A PARALLELE OR CONFERENCE OF THE CIVILL LAW, THE CANON LAW, AND THE COMMON LAW OF THIS REALME OF ENGLAND 89 (London, Wight 1601).

150. WILLIAM CAMDEN, REMAINES CONCERNING BRITAINE: BUT ESPECIALLY ENGLAND, AND THE INHABITANTS THEREOF 169 (London, Waterson 1629).

151. *See* Jo Ann Hoeppner Moran Cruz, The Roman De La Rose and the Thirteenth-Century Prohibitions of Homosexuality (Oct. 27, 1995) (unpublished paper), *available at* http://www.georgetown.edu/labyrinth/conf/cs95/papers/moran.html (noting 13th century laws in Spain, Portugal, and France that prescribed castration as punishment for sodomy) (on file with the Washington and Lee Law Review).

sodomite's punishment was intended to prevent him from having penetrative sex, however, the counterfeiter's punishment was intended to prevent him "from sexually reproducing."[152] On a symbolic level, his punishment "prevented him from breeding false coins."[153] Finally, "[a]s the punishment demonstrates, counterfeiters were imagined to be male, undoubtedly because the stamping involved in producing coins was itself considered to be analogous to male penetration. According to this logic, female stamping (and hence a female counterfeiter) is virtually unthinkable."[154]

It bears mention that Dante, the early-modern Italian poet, chose an historical personage whose name is Master Adam to be his representative counterfeiter in *The Divine Comedy*'s eighth circle of Hell—the circle where the fraudulent, including the counterfeiters, are punished. A notorious counterfeiter of the Florentine florin who was burned alive for his crime in 1281,[155] Master Adam's name surely evokes the archetypal Adam whose sin was at once sexual and symbolically economic. As Nietzsche reminds us, it is on account of this first man's sexual sin that humanity was forever cast into the position of a debtor race charged with seeking spiritual redemption.[156] I will return to Dante's punishment of the counterfeiters that appears in *Inferno* 30 of *The Divine Comedy* in order to suggest a connection between the early-modern treatment of counterfeiting/perverse sexuality and the current representation of sexual minorities by certain marriage traditionalists in the same-sex marriage debate.

Based on these select early-modern sources, it would appear that the early-modern mind conceptualized sodomy as a kind of counterfeiting (and vice

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152. Fisher, *supra* note 133, at 10.

153. *Id.*

154. *Id.* at 10 n.42.

155. DANTE ALIGHIERI, THE DIVINE COMEDY, INFERNO PART 2: COMMENTARY 555 n.61 (Charles S. Singleton trans., Princeton Univ. Press 1970) (c. 1310).

156. *See* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 62 (Maudemarie Clark & Alan J. Swensen trans., Hackett Publishing Co. 1998) (1887) (arguing that religion fosters feelings of guilt in mankind). Nietzsche says:

> There can be no doubt: first of all against the "debtor," in whom from this point on bad conscience, firmly set in him, eating into him and spreading out like a polyp, grows wide and deep, until finally, with the impossibility of discharging the debt, people think up the idea of the impossibility of removing the penance, the idea that the debt cannot be paid off (eternal punishment). Finally however, those ideas of "debt" and "duty" turn back even against the "creditor." People should, in this matter, now think about the *causa prima* [first cause] of humanity, about the beginning of the human race, about their ancestor who from now on is loaded down with a curse ("Adam," "original sin," "no freedom for the will") . . . .

Id.

versa) for two interrelated reasons, each of which highlights the non-procreative attributes of the former.

First, sodomy and counterfeiting together represented unnatural and perverted imitations of production—biological reproduction and economic/monetary production, respectively. If sodomy was unnatural because it was a form of sex that took place outside the conventional context of marital procreation, counterfeiting was unnatural because it was a form of coining that took place outside the conventional context of economic production. On a certain level, it made perfect sense for early-modern writers to describe sodomy in subversive numismatic terms, as the art of coining mimicked the biological, reproductive process. The act of coining, which involved the stamping or imprinting of the monarch on a piece of metal, was "similar to the generational act as understood within Aristotelian reproductive biology: The active male form impressing itself on female matter."[157] Any stamping and generation of coins that occurred in the absence of regal (and therefore divine) authority was therefore no less perverse, and no more naturally procreative, than sodomy itself. Just as the counterfeiter arrogated to himself the King's (or the state's) prerogative of defining the manner in which money was bred and thus of ensuring the proper transmission of currency, the sodomite arrogated to himself God's (or Nature's) prerogative of defining the manner in which sex occurred and thus of ensuring the proper transmission of life. Both the counterfeiter and the sodomite, then, not only disrespected God's process, so to speak, but also generated mere excess—the counterfeit coin and non-procreative semen, respectively.

Second, sodomy and counterfeiting represented not only uneconomical distortions of the natural procreative process, but also an unnatural union and generation of similar (or externally identical) entities: Two same-sex persons and counterfeit money, respectively. For the early-modern—and, as Part V demonstrates, the contemporary—mind, same-sex relations and counterfeiting equally represented a non-procreative, narcissistic, and avaricious passion for sameness. Just as same-sex marriage opponents today have highlighted the fraudulent aspects of joining together two identical identities that cannot procreate,[158] so, too, did early-modern thinkers conceptualize counterfeiting as an unnatural breeding of the same and a narcissistic obsession with the same.

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157. Fisher, *supra* note 133, at 9.

158. *See supra* notes 115–19 and accompanying text (explicating the argument that nonprocreative partnerships cannot constitute marriages). One might also here recall Glen Lavy's statement that "[i]t takes sodium and chloride to make salt. If you add sodium to sodium, you don't have salt. If you add chloride to chloride, you don't have salt . . . . It takes a man and a woman to make babies." Foust, *supra* note 115.

At this point, this Article returns to Dante's treatment of the counterfeiters that appears in *The Divine Comedy*, specifically their association with narcissism. The symbolic representation of counterfeiters that appears in that text is instructive because it highlights just that aspect of counterfeiting that often goes unnoticed—its narcissistic qualities—but that nonetheless renders it a suitable analogy to same-sex relations in the eyes of same-sex marriage opponents. As Part V will explore at length, Dante's suggestion that sterile counterfeiters both generate and accumulate excess in a narcissistic and avaricious manner corresponds to the contemporary framing of sexual minorities as an intra-relationally sterile class that selfishly and narcissistically accumulates tangible resources and economic power, which, in turn, supposedly justifies receipt of less legal protection than other minority groups. The twin images of the homosexual as non-procreative sodomite and the homosexual as greedy narcissist not only figure implicitly in Justice Scalia's *Romer v. Evans* dissent, where an image of the homosexual as counterfeiter appeared for the first time in constitutional jurisprudence,[159] but also play a dominant role in shoring up the procreation rationale for same-sex marriage prohibitions today. Understanding the connection between economic fraud and homosexuality that Dante nicely elucidates for us is critical to seeing just how much the procreation rationale is about sodomy, fraud, and the disgust that both elicit.

Dante's allusion to two Ovidian figures who harbored an unnatural obsession for similitude—Myrrha and Narcissus—in the same canto where Dante depicts the counterfeiters is surely no accident. Early in canto 30 of the *Inferno*, Dante is informed by one of the damned that Myrrha, Ovid's infamous daughter who tricked her father into having sex with her by impersonating someone else, resides in the eighth circle of hell along with the counterfeiters because she "contrived to sin with [her father] . . . , counterfeiting in herself another's person."[160] Later in that same canto, Dante alludes to Narcissus when Master Adam tells another falsifier, Sinon, who is parched with thirst, that "thou hast burning fever and aching head and wouldst need little persuasion to lap Narcissus' mirror."[161] Master Adam's reference to Narcissus's mirror is, of course, an allusion to the legendary Greek youth who fell in love with his own reflection and who was punished accordingly when the gods turned him into the flower now known as the narcissus.

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159. *See infra* notes 222–25 and accompanying text (arguing that Scalia's focus on gay and lesbians' wealth and political power evokes the early-modern image of the narcissistic counterfeiter).

160. DANTE, *supra* note 155, at 373.

161. *Id.* at 377.

The allusions to Myrrha and Narcissus in a canto devoted to the sins of counterfeiting specifically, and falsification more generally, are neither casual nor superfluous. Quite the contrary, Myrrha and Narcissus epitomize the same unnatural sexual desire for, and cultivation of, similitude that the sins (and crimes) of counterfeiting and homosexuality symbolically represented. Myrrha's incestuous desire for her father places her in a position that corresponds to both the counterfeiter and the sodomite, as her counterfeiting involves a non-normative sexual relationship that not only conjoins two similar entities, but does so in a way that is thought to pervert nature's conventional procreative process. As I have argued elsewhere, part of the reason why incest and homosexuality are so often linked on the proverbial slippery slope from same-sex marriage to incest[162] is because an incestuous relationship is like a same-sex relationship in this sense.

Similarly, Narcissus's autoeroticism (and latent homosexuality)[163] links him to the counterfeiters, sodomites, and incestuous in two related ways. First, his unnatural desire for himself locks him into an entirely self-reflexive mode of exchange. Second, that mode of exchange represents a perversion—indeed, a refutation—of nature's procreative process. Ovid makes explicit that Narcissus's flaw is at once a sexual *and* an economic one by using monetary language to characterize his denial of the nymph, Echo, with whom he might have had a natural, procreative sexual relationship. When Echo, whose fate of quite literally becoming an echo mirrors that of her beloved and involves a replication of the same that evokes all of the crimes here discussed, beseeches Narcissus, Narcissus flees and says: "May I die before my riches [copia] is yours."[164] Narcissus here uses the word "copia" to convey the "riches" that he would like to keep for himself rather than share with Echo. In so doing, Ovid suggests that Narcissus's sexual spurning of her is tantamount to a miserly and excessive accumulation of wealth. The Latin word, "copia," denotes abundance or plenty[165] and was the name given to the Roman goddess of abundance (Copia), who was identified iconographically by her cornucopia, or horn of plenty—the same horn that was imprinted on coinage during the reign of Emperor Claudius II and that appeared in the hand of Aequitas, a minor

162. Cahill, *supra* note 10, at 1543.

163. *See, e.g.*, Marta Powell Harley, *Narcissus, Hermaphroditus, and Attis: Ovidian Lovers at the Fontaine d'Amors in Guillaume de Lorris's* Roman de la rose, PMLA 324, 331–34 (1986) (considering the implications of the myth's suggestions of homosexuality).

164. OVID, THE METAMORPHOSES (Frank Justus Miller trans., Loeb Classical Library 3d ed. 1977) (1916).

165. Latin Dictionary and Grammar Aid, http://archives.nd.edu/latgramm.htm (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

goddess of fair trade and honest merchants.[166] Ovid's use of this term that both symbolically represented money and at one time appeared on money nicely captures the veritable greed that self-love signifies. Indeed, at the very moment that Narcissus realizes that it is himself with whom he has fallen in love, he laments his fate by once again using the language of copia: "What I desire, I have; the very abundance of my riches beggars me [inopem me copia fecit]."[167] Here, Ovid strategically places two words that derive from the same root—"ops," which means riches, goods, abundance, or plenty[168]—in a chiastic poetic structure[169] in order to convey the painful double bind in which Narcissus is trapped: Already possessing that which he cannot truly have. As this Article will show, the legal discourse surrounding same-sex marriage prohibitions, as well as the procreation rationale for those prohibitions, place sexual minorities in a strikingly similar double bind.

Ovid's use of economic language to describe an erotic situation that is at once non-procreative, miserly, and bankrupt did not escape the attention of Dante, who was most certainly aware of the Roman poet's economic spin on the Greek legend when he chose to include Narcissus among the counterfeiters in canto 30 of the *Inferno*. There is another reason, however, why Dante likely found Narcissus to be a suitable figure for a canto about falsification generally, and counterfeiting in particular. Here, we must return to the language that Narcissus uses to describe the paradoxical (and painfully intractable) situation in which he finds himself. The same Latin word that denotes material abundance, *copia*, also denotes a copy or imitation—as the English "copy" derives from the Latin *copia*.[170] In this sense, Narcissus quite literally falls in love *with* a copy or counterfeit of himself when he gazes admiringly upon his reflection in a pool of water—a *copia* which, in turn, he keeps to himself rather than exchange it with the outside world. Dante therefore intimates that those who erotically desire a likeness or copy of themselves—Myrrha, Narcissus, and

166. Sarah Blake Wilk, *Donatello's* Dovizia *as an Image of Florentine Political Propaganda*, 7 ARTIBUS ET HISTORIAE 9, 19 n.29 (1986) (describing the items that appear on a silver denerius).

167. OVID, *supra* note 164. An English translation that more closely tracks the Latin would be: my riches beggarly make me (my translation).

168. Latin Dictionary and Grammar Aid, *supra* note 165.

169. The *Oxford English Dictionary* defines chiasmus as "a grammatical figure by which the order of words in one of two parallel clauses is inverted in the other." III OXFORD ENGLISH DICTIONARY 103 (2d ed. 1989) (entry for chiasmus, n.). An example of chiasmus is John F. Kennedy's "ask not what your country can do for you; ask what you can do for your country."

170. According to the *Oxford English Dictionary*, the English word, copy, derives from the Latin *copia*. In addition, the Dictionary's first definition for "copy" is "plenty, abundance, a copious quantity." *Id.* at 915–16 (entry for copy, n.).

the homosexual that Narcissus symbolized for early-modern readers—[171]are self-counterfeiting in a way that recalls the counterfeiter's unnatural and avaricious breeding of monetary copies. Part V will demonstrate that the current analogy between same-sex relations and counterfeiting, as well as the procreation rationale itself, similarly reflect a belief that gays and lesbians are ultimately sterile and narcissistic, and, as such, uneconomical. Recent procreationist rhetoric is therefore in some very real sense a case of Narcissus redux and of history, and myth, repeating itself.

B. Miscegenation and Counterfeiting

The current deployment of counterfeiting rhetoric in the same-sex marriage debate also recalls the legal deployment of counterfeiting language in the mid-nineteenth century to describe mixed-race individuals who passed for white. This historical parallel to the contemporary framing of same-sex relations as counterfeit is useful because it offers a way to connect miscegenation and same-sex marriage on a substantive level in a way that the structural miscegenation analogy to sexual orientation discrimination has largely overlooked.[172] The miscegenation parallel, moreover, makes a great deal of sense in this particular context by virtue of the fact that counterfeiting terminology is implicit in the very language of racial and sexual orientation passing. According to the *Oxford English Dictionary*, the act of deceiving another person with counterfeit is technically referred to as "passing counterfeit" or "to pass counterfeit."[173] The act of presenting oneself as white, or straight, to the public is also, of course, routinely referred to as passing.[174]

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171. *See supra* note 163 and accompanying text (commenting on Narcissus' latent homosexuality).

172. For the sexual orientation-race analogy, see generally Siobhan B. Somerville, *Queer* Loving, 11 GLQ: A J. OF GAY AND LESBIAN STUD. 335 (2005); Marc Spindelman, *Reorienting* Bowers v. Hardwick, 79 N.C. L. REV. 359, 430–46 (2001) (discussing the analogy and its criticisms); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 202 (1994) (discussing the taboo against homosexuality and the taboo against miscegenation in analogous terms); Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993) (finding that Hawaii's same-sex marriage prohibition constituted an impermissible form of sex discrimination under the state constitution and comparing that prohibition to the criminal miscegenation statute at issue in *Loving v. Virginia*).

173. XI OXFORD ENGLISH DICTIONARY 307–08 (2d ed. 1989) (entry for passing, v.).

174. *See, e.g.*, RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 283 (2003) (defining passing as "a deception that enables a person to adopt specific roles or identities from which he or she would otherwise be barred by prevailing social standards"); Yoshino, *supra* note 3, at 839 (discussing passing in the sexual orientation context). I should preface this brief overview of counterfeiting and miscegenation by recognizing that it

Counterfeiting analogies appear in nineteenth-century cases to denote mixed-race passing as well as fugitive slaves who escaped from a slave-holding into a free state. In one case, *State v. Anderson*,[175] the Supreme Court of Missouri considered whether the court below erred when it allowed the jury in a rape prosecution to determine the race of the victim, as well as the status and race of the defendant, merely by looking at them in court and by hearing testimony that the latter was a slave.[176] In that case, the defendant, "a negro slave,"[177] was indicted for "attempt[ing] to ravish a white female,"[178] a crime that carried higher penalties than had the defendant been, and the victim not been, white. The defendant objected to the trial court's jury instructions on the ground that they permitted the jury to determine the "color, sex and race of the prosecuting witness and the defendant"[179] merely on the basis of sight and on proof that the defendant was a slave. The trial court, however, refused his objections and the jury returned a verdict of guilty and a sentence of castration.[180] In upholding the trial court's ruling, the Supreme Court of Missouri noted that the defendant's attorneys made the following argument on appeal:

> The averments in the indictment, that the prosecutrix was a white female, and the defendant a negro, were material and had to be proved. . . . The court erred in telling the jury they might find that the prosecutrix was a white female, from seeing her on the witness stand, and that the defendant was a negro, from seeing him in court, and proof that he was a slave. If this be law, then it would be proper in a larceny case to instruct the jury that they might find the material fact of value from seeing the article, *or in a case of passing counterfeit money, that the money was counterfeit or genuine from seeing it in court* . . . . Under the statute, the question before the jury was not merely one of color, but of race. Such questions are often of the greatest difficulty, requiring for their solution scientific skill. There

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represents a very narrow contribution to the ample academic literature that already exists on the sexual orientation/race analogy specifically and on the legal treatment of miscegenation more generally. *See generally* WERNER SOLLORS, NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE (1997) (describing the use of the term "passing" in the context of crossing a line that divides two groups); PETER BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255 (2002).

175. State v. Anderson, 19 Mo. 241 (1853).

176. *See id.* at 242 (describing the proceedings below).

177. *Id.* at 241.

178. *Id.*

179. *Id.* at 243.

180. State v. Anderson, 19 Mo. 241, 242 (1853) (describing the outcome of the trial).

> are albinoes, mulattoes, and quadroons, who excel Caucasians in whiteness of skin. Yet, before the jury could convict the defendant, it was necessary that they should find that he was a negro, and the prosecutrix a Caucasian. These facts they could only find upon proof. . . . Slavery does not raise the legal presumption of black color, although the converse is true.[181]

It was therefore the defendant's contention on appeal that, just as the state would have to prove that money was truly counterfeit before a jury could find a defendant guilty of passing counterfeit money, so, too, must the state prove, with "scientific skill,"[182] that the defendant was truly black. Perhaps more important, the state must also prove that the victim was truly white—and not, like counterfeit money, someone (a "mulatto" or a "quadroon") who was passing for white.[183]

Similar counterfeiting rhetoric appears in *State v. Jacobs*,[184] in which the Supreme Court of North Carolina considered whether a lower court erred when it permitted a slave-owning witness to testify for the state in a criminal case as an expert on "the effect of the intermixture of negro or African blood with that of other races."[185] In that case, the defendant was tried for carrying firearms as a "free negro," defined statutorily as "one who is 'descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person.' He may, therefore, be a person who . . . has only a sixteenth part of African blood in his veins."[186] To determine whether the defendant was a "free negro" (or whether he was "white") under the statute, the prosecution called a witness to testify as an expert in "the intermixture of negro or African blood with the white and Indian races,"[187] specifically, a slave owner who claimed expertise in "distinguish[ing] between the descendants of a negro and a white person, and the descendants of a negro and Indian; and further, [who claimed] that he could . . . say whether a person was full African or negro, or had more or less half negro or African blood in him."[188] To that end, the witness testified that, in his opinion, "the defendant was what is called a mulatto—that is, half African and half white,"[189] and therefore a "free negro" under the terms of the criminal statute.

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181. *Id.* at 243–44 (first emphasis added).
182. *Id.* at 243.
183. *See id.* (describing defendant's argument on appeal).
184. State v. Jacobs, 51 N.C. (1 Jones Eq.) 282 (1859).
185. *Id.* at 282.
186. *Id.* at 286 (citations omitted).
187. *Id.* at 282.
188. *Id.* at 283.
189. State v. Jacobs, 51 N.C. (1 Jones Eq.) 282, 283 (1859).

In upholding the lower court's decision to admit the testimony as expert evidence,[190] the Supreme Court of North Carolina remarked that:

> [I]t appears to be admitted that the opinion of witnesses, possessing peculiar skill, is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. . . . In support of the principles thus announced, it has been decided that seal-engravers may be called to give their opinion upon an impression, whether it was made from an original seal, or from another impression . . . . So, the opinion of an artist in painting is evidence of the genuineness of a picture . . . . It has been said that the genuineness of a post-mark may be proved by the opinion of one who has been in the habit of receiving letters with that mark . . . . *Merchants and bankers, who are daily engaged in handling the notes of particular banks, and have thus become thoroughly acquainted with their whole appearance, may prove whether a particular note is genuine or counterfeit* . . . . Many other instances of the application of the principle might be given, but those to which we have referred are sufficient to show that it is extensive enough to embrace the case now before us. The effect of the intermixture of the blood of different races of people is surely a matter of science, and may be learned by observation and study. Nor does it require a distinguished comparative anatomist to detect the admixture of the African or Indian with the pure blood of the white race.[191]

Like the *Anderson* court, the *Jacobs* court analogized the "science" of determining race—or, more specifically, the difference between "admixture" and purity—to the science of determining the difference between a genuine and a fraudulent banknote. In so doing, it suggested that a mixed-race person that passed for a white person was tantamount to a counterfeit note that passed for an authentic one.

The counterfeiting language that appears in these nineteenth-century cases that struggled with the anxiety-provoking question of racial purity—both in theory and in fact—is surely no accident, as the very crime of passing counterfeit captured on a linguistic level what was so disturbing about multi-racial passing on both an ideological and a material level. Beyond the linguistic connection that counterfeiting and multi-racial passing share, however, the idea that non-whites were analogous to fraudulent currency surely made sense to a legal (and cultural) regime that treated non-whites as a form of property.[192] In this sense, the counterfeiting analogy to multi-racial passing was not just an

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190. *Id.*

191. *Id.* at 283–84 (internal quotations and citations omitted) (emphasis added).

192. For a related phenomenon—the idea of whiteness as property—see generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

analogy but rather a different way of denoting the commercialization of one's personhood that the institution of slavery represented. Thus, it was not at all strange for a federal district court in Pennsylvania to reason that, under the United States Constitution, a slave owner from one state had the right to recover his slave, who had absconded to another state, by using "every art, device or stratagem to decoy the slave into his power" because "[i]t is every day's practice to detect counterfeiters, and those who pass counterfeit money, by employing persons to purchase it from them."[193] Here, the court's characterization of the plaintiff's slave, who had temporarily taken up residence with the defendant as "a runaway slave,"[194] as counterfeit currency is not just metaphorical. To the contrary, the slave, quite literally the property or currency—or, what historian Nell Irvin Painter has nicely termed the "embodied currency"[195]—of the plaintiff-slave owner, is attempting to self-counterfeit, or pass, as free in a way that would compromise the plaintiff-slave owner's aggregate wealth. The court therefore deployed a commercial metaphor to capture the truly commercial interests that were at stake in that case.

The historical analogy between counterfeiting and miscegenation not only projected an image of the slave (or multi-racial person) as currency, but also reflected a more deep-seated concern over the relationship between money and racial equality—one that became especially current after the Civil War. If, before the Civil War, counterfeiting rhetoric captured the extent to which non-whites (including, of course, those who might pass for white) were embodied currency, after the Civil War counterfeiting rhetoric captured the fear surrounding social amalgamation. Historian Michael O'Malley has explored the extent to which "[e]ssentialism—the search for fundamental, intrinsic, 'essential' categories of being or laws of nature—characterized much of nineteenth-century public discourse" centering on race and money.[196] O'Malley argues that the intense anxiety over the production of greenbacks[197]

193. Johnson v. Tompkins, 13 F.Cas. 840, 843 (C.C.A. Pa. 1833).

194. *Id.* at 841.

195. Nell Irvin Painter, *Thinking About the Languages of Money and Race: A Response to Michael O'Malley, "Specie and Species,"* 99 AHR FORUM 396, 398 (1994).

196. Michael O'Malley, *Specie and Species: Race and the Money Question in Nineteenth-Century America*, 99 AHR FORUM 369, 369 (1994).

197. "Greenback" was the name given to bank notes issued by Northern banks during the Civil War. Greenbacks were not backed by precious metal (gold and silver) and thus tied to the gold standard, but rather derived their value by virtue of the fact that Congress approved their issuance under the National Banking Act of 1863. O'Malley observes that "[t]he Union issued $450 million in 'legal tender' greenbacks during the Civil War. Backed by nothing more than federal authority, the notes had no intrinsic value. Under the National Banking Act of 1863, the

and similar counterfeit[198] currency during both the Civil War and the Reconstruction periods reflected an anxiety over Northerners' use of "greenback dollars to help form biracial governments."[199] Although greenbacks were authorized by the federal government, their critics often conceptualized them as an inferior substitute or counterfeit of real money, that is, currency tied to the gold standard.[200] Similarly, although newly freed slaves were rendered equal to whites by the Fourteenth Amendment, critics of racial equality often conceptualized them as an inferior substitute of a real person, that is, one whose identity was tied to the white standard.[201]

Most interestingly, O'Malley observes that the two, greenbacks and the newly-freed slaves, inspired similar and coterminous fears over "the instability of value and identity in American society."[202] Critics of greenbacks and racial equality contended that the former would help to achieve the latter, even as the value of both was derived through artificial means—namely, congressional legislation and the Constitution, respectively. O'Malley explains:

> Deploring greenbacks, Henry Adams called "the law of legal tender . . . an attempt by artificial legislation to make something true which was false." Just as no legal enactment could create value, no government could affect the Negro's nature. "No legislation of Congress can elevate or improve the physical, moral or intellectual condition of the negro," maintained Senator George Vickers of Maryland in 1869. "We cannot legislate into them any fitness or qualifications which they do not now possess. . . ." [By contrast, f]rom the greenback perspective, a legal declaration of equality, an expression of political or cultural authority, could bring about equality just as a congressional declaration of the value of paper money could give the paper value.[203]

Similarly, "[g]reenbacks symbolized the power of government to overturn the natural law arguments that justified slavery."[204] This notion that the

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Union also taxed state bank notes out of existence, creating a uniform currency for the first time . . . . Practically from the date of issue, the greenbacks began depreciating relative to gold." *Id.* at 378.

198. Greenbacks were not technically counterfeit because they were issued under federal authority. Nevertheless, because "Northerners . . . used greenback dollars to help form biracial governments," greenbacks came to be associated with counterfeit currency—as "the enterprise of African-American equality [was connected to] fraudulent or counterfeit bills." *Id.* at 377.

199. *Id.*

200. *See id.* (noting the dubious character of greenbacks during Reconstruction).

201. O'Malley, *supra* note 196, at 377 (drawing a parallel between money and race).

202. *Id.* at 375.

203. *Id.* at 378–79.

204. *Id.* at 383.

government cannot legislate value, be it of money or of people, into existence was surely behind the Supreme Court's majority opinion in *Plessy v. Ferguson*, where the Court noted that "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."[205] While the Fourteenth Amendment might have granted Plessy legitimacy in the form of citizenship, and while Plessy might have passed for white, his passing was deemed no more legitimate than the passing of counterfeit currency. This notion that artificial legislation cannot transform a counterfeit into the real thing is also behind, as the next Part shows, the idea that the law simply cannot, and should not, alter the true face of marriage by recognizing same-sex marriage.

Although O'Malley focuses on the distinctly economic consequences of racial equality, we should also think about the distinctly economic consequences of miscegenation. Above, it was suggested that counterfeiting analogies from the early to mid-nineteenth century revealed the extent to which slaves, and non-whites more generally, were conceptualized as a form of embodied currency in order to capture the truly economic interests at stake in institutionalized slavery. It is also worth considering, however, the extent to which miscegenation, both before but more notably after the Civil War, was thought to produce a counterfeit product that, in turn, posed a uniquely economic threat. Indeed, what would happen if a master's child-slaves, once free and no longer considered to be a part *of* his property, laid claim *to* his property? Or, to project forward through time, what would happen if Mildred and Richard Loving had a child—a "mongrel breed," as the Virginia Supreme Court of Appeals in *Naim v. Naim*[206] described it—who then laid claim to Richard's estate, a property right that would be especially problematic if Richard had "non-mongrel" children from a prior marriage in a state that did not recognize interracial marriage (which he did not) who also laid claim to his property? While the possibilities are endless and surely beyond the scope of this Article, suffice it to say here that miscegenation was thought to produce a counterfeit product that, in turn, raised serious inheritance, that is, serious economic, concerns as well as serious social concerns. In *Brewer's Lessee v. Blougher*,[207] the Supreme Court of the United States captured just this economic parade of horribles that the anti-miscegenation laws were intended to prevent. At issue in that case was an 1852 Maryland statute that would allow

205. Plessy v. Ferguson, 163 U.S. 537, 551 (1896). O'Malley discusses *Plessy v. Ferguson* in similar terms. *See* O'Malley, *supra* note 196, at 395 (discussing *Plessy*).

206. Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) (upholding Virginia's anti-miscegenation statute).

207. Brewer's Lessee v. Blougher, 39 U.S. (14 Pet.) 178 (1840).

even "bastard" children to inherit property from their mother.[208] While the Supreme Court upheld the statute on federalism grounds, an attorney attempted to convince it otherwise by arguing that, if "bastards of colour [who] mingled with whites" were allowed to inherit under state statute, then "in such a state of illegitimacy, how could persons and families proceeding from [the same] female, as the root, establish their right to inherit any estate from each other?"[209] Counterfeit persons therefore confused social roles in a way that had material, economic consequences.

This Article suggests that both counterfeiting rhetoric and the procreation rationale for same-sex marriage prohibitions are, on a symbolic level, repeating the history of racial miscegenation. To be sure, same-sex marriage advocates, and some courts, have long recognized the structural similarities between race and sexual orientation discrimination from a doctrinal standpoint. Moreover, in some instances, the miscegenation analogy has proven quite successful as a litigation strategy.[210] Nevertheless, because commentators have focused almost exclusively on the similarities between racial and sexual orientation *discrimination*, they have missed the more substantive connections that exist between the *practice* of miscegenation and same-sex procreation per se. This Part suggests that courts are increasingly talking about same-sex procreation as a kind of miscegenation unto itself, one that will inalterably change the face, or physiognomy, of the original marriage model and that also raises the specter of economic fraud.

V. The Legacy of the Counterfeiting Analogy in the Same-Sex Marriage Debate: Narcissus and Miscegenation Revisited

How does the history behind the counterfeiting analogy help us to understand the current deployment of counterfeiting rhetoric in the same-sex marriage debate? More important, how does it clarify the work that the procreation rationale is doing in shoring up same-sex marriage prohibitions today? This Part explores and answers these questions by looking more closely at the way in which history is repeating itself on two levels. First, Section A uses the historical casting of sodomy as counterfeit to explain why non-procreative sex is such a concern for marriage traditionalists and for many

208. *Id.* at 197.

209. *Id.* at 198.

210. *See* Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993) (holding that Hawaii's same-sex marriage prohibition constituted a gender classification under the state constitution and comparing that prohibition to the criminal miscegenation statute at issue in *Loving*).

courts, namely, because it allows those who engage in same-sex conduct, a counterfeit form of the cross-sex model, to acquire riches and political power that the rest of the population lacks. Because same-sex couples therefore have more political clout, they need less by way of legal protection. In this sense, same-sex couples are modern avatars of Narcissus—simultaneously having too much and not enough. Section B uses the historical casting of miscegenation as counterfeit to explain why same-sex families are such a concern for marriage traditionalists and for many courts, namely, because artificial reproductive technology is allowing them to pass for the real marriage archetype. In this sense, same-sex couples are repeating the crime of miscegenation by engaging in an artificial form of procreation that attempts to pass itself off as the real thing.

A. The Power of Non-Procreative Sex: Narcissus Redux

The early-modern treatment of sodomy and counterfeiting (both together and singly) helps to explain the contemporary framing of the same-sex marriage debate as well as the legal treatment of same-sex marriage prohibitions in at least three interrelated ways. It should be noted here that this Article is not suggesting that either contemporary counterfeiting rhetoric or the procreation rationale flow consciously and deliberately from, say, Ovid and Dante. Rather, that the counterfeiting analogy and the procreation rationale are better understood in light of the procreative logic that underlies both, and that the early-modern treatment of sodomy and counterfeiting helps to elucidate that logic. To rely on Professor Yoshino's larger project in *Suspect Symbols*, the symbol of the counterfeiter that emerges from Dante's economic casting of the Narcissus myth provides a "thicker response" to the procreation rationale for same-sex marriage prohibitions than strictly legal criticisms of that rationale have permitted.[211]

First, and as discussed at greater length above, sodomy and counterfeiting were considered to be analogous modes of exchange that did not follow nature's/the state's procreative process. If the latter represented a perverse imitation of the way in which the state naturally bred or procreated currency, the former was arguably worse because it did not guarantee any procreation even though it was an equally perverse imitation of the way in which a cross-sex couple reproduced. This early-modern notion that sodomy amounts to counterfeit because it is non-procreative conforms to the contemporary framing

211. *See* Yoshino, *supra* note 1, at 1756 (discussing the role of symbols in strengthening the argument for heightened protection of sexual minorities under the Equal Protection Clause).

of same-sex marriage as counterfeit on account of the fact that it is not "inherently procreative."[212] To recall the remarks of one same-sex marriage opponent: "Same-sex marriages are counterfeit, immoral, totally sterile, lacking the No. 1 reason for marriage—procreation—ignoring the wisdom of ages and common sense."[213]

Second, and relatedly, early-modern sources suggest that non-procreative sodomy represented a threat to the continuity of the state no less than counterfeiting represented a threat to the continuity of the state's currency. In his examination of sodomy and male homosexuality in Renaissance England, *Sodometries: Renaissance Texts, Modern Sexualities*, Jonathan Goldberg has observed that "sodomy is, as a sexual act, anything that threatens alliance—any sexual act, that is, that does not promote the aims of married procreative sex."[214]

> As the term [sodomy] was repeatedly invoked and came to take on a whole variety of linked but distinct meanings, those meanings always operated by an analogy, however distant, to the original notion of the sodomite as a destroyer of that most basic unit of the social fabric, the procreative, married, heterosexual couple.[215]

These sources therefore reveal not only the extent to which the counterfeiting analogy reflects a fear about procreation, but also why the non-procreative attributes of sodomy pose such a threat—namely, because of their capacity to undermine "that most basic unit of the social fabric, the procreative, married, heterosexual couple."[216] The procreation rationale for same-sex marriage prohibitions similarly rests on this idea that same-sex relationships (and their intrinsic *non*-procreativity) threaten to destroy this "most basic unit of the social fabric."[217] As Justice Cordy reasoned in his *Goodridge* dissent: "[A] society without the institution of marriage, in which heterosexual intercourse,

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212. CATHOLIC CIVL RIGHTS LEAGUE, ENGAGE IN THE MARRIAGE DEBATE, http://www.ccrl.ca/index.php?id=122 (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

213. Morton James, Letter to the Editor, *Same-Sex Marriage Is No Marriage at All*, CHI. DAILY HERALD, Apr. 25, 2004, at 17, *available at* 2004 WLNR 5637560.

214. JONATHAN GOLDBERG, SODOMETRIES: RENAISSANCE TEXTS, MODERN SEXUALITIES 19 (1992).

215. Jody Greene, *"You Must Eat Men": The Sodomitic Economy of Renaissance Patronage*, 1 GLQ: A J. OF LESBIAN AND GAY STUD. 163, 166 (1994).

216. *See id.* (discussing the origins of the idea of the sodomite as a destroyer of social capital).

217. *Id.*

procreation, and child care are largely disconnected processes, would be chaotic."[218]

Third, and perhaps most important here, the early-modern notion that counterfeiters are uneconomical narcissists conforms to the contemporary framing of gays and lesbians as selfish and narcissistic because of the non-procreative homosexual conduct in which they are presumptively thought to engage. Rhetorical and legal claims centering on the alleged narcissism and affluence of gays and lesbians have assumed a variety of forms, some more incendiary than others. For instance, sexual minorities have at times been accused of being narcissists (or narcissistic) because they are thought to flout certain religious and moral tenets in favor of an alternative "lifestyle" that runs directly counter to those tenets. As Pat Robertson, founder of the Christian Coalition of America, recently remarked: "[Homosexuals are] self-absorbed narcissists who are willing to destroy any institution so long as they can have affirmation of their lifestyle."[219] Or, in the words of the Family Research Council: "The activist homosexual agenda and worldview are fundamentally incompatible with Christianity or any form of true religion, because homosexuality is ultimately narcissism. It denies the nature of our bodies and the nature of our spirits."[220]

More often than not, however, the language of narcissism and avarice is less inflammatory and ironically appears to cast sexual minorities/same-sex couples in a positive light with respect to their enhanced economic resources. Justice Scalia's insistent focus in his *Romer* dissent on gays and lesbians' so-called "disproportionate political power" and "high disposable income"—the former of which is likely a consequence of the latter, in his estimation, and both of which militate against enhanced judicial protection for sexual minorities—evokes the early-modern image of the sterile, narcissistic, and avaricious counterfeiter.[221] In his words:

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218. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

219. *Robertson: Gays and Lesbians Are "Self-Absorbed Narcissists" Responsible For No-Fault Divorce and Abortion*, MEDIAMATTERS FOR AMERICA, Aug. 17, 2005, *available at* http://mediamatters.org/items/200508170006 (on file with the Washington and Lee Law Review).

220. Robert E. Ritchie, *Protest and Reparation in Manhattan*, The Am. Soc'y for the Def. of Tradition, Family and Prop., (Sept.–Oct. 1998) *available at* http://www.tfp.org/anf/anti_blasphemy/corpus.htm (remarks of Steve Schwalm) (on file with the Washington and Lee Law Review).

221. Romer v. Evans, 517 U.S. 620, 647 (1995) (Scalia, J., dissenting). Justice Scalia's casting of "homosexuals" as a "politically powerful minority" that aggregates in powerful sub-communities which facilitate political mobilization, represents an inversion of the relationship between minority status (and the conditions that ordinarily flow from it) and political power as

> The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, . . . have high disposable income, . . . and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.[222]

Justice Scalia here relies on what has come to be known as the "myth of gay affluence,"[223] that is, the widely-held belief that sexual minorities have more money and consequently more political power than the public at large—the "public," like the "seemingly tolerant Coloradans" in *Romer*, whose "modest" attempts at lawmaking are outweighed by the mobilization of a "politically powerful minority."[224]

This myth of gay affluence or gay narcissism, which has enjoyed some success in the courts,[225] casts gays and lesbians in a role not unlike that reserved for the early-modern counterfeiter. The myth not only promotes the idea that sexual minorities are greedy and narcissistic as compared to the modest citizens who possess relatively less political power and fewer resources, but also highlights the non-procreative conduct in which they presumptively engage—the same non-procreative (read: counterfeit) conduct which, in turn, *leads to* the selfish accumulation of wealth. More specifically, Justice Scalia suggests that a causal link exists among sexual minorities' non-procreative homosexual conduct, high disposable income, and rather immodest political power. In this sense, the myth of gay affluence rests on the same logic as does the counterfeiting analogy itself: Sex that represents an uneconomical, narcissistic,

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set forth in *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

222. *Romer*, 517 U.S. at 645–46 (1996) (Scalia, J., dissenting). Justice Scalia continued, stating that "[t]he constitutional amendment before us here is not the manifestation of a 'bare . . . desire to harm' homosexuals . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." *Id.* at 636. He also stated that Amendment 2 "sought to counter . . . the geographic concentration and the disproportionate political power of homosexuals." *Id.* at 647.

223. *See* M. V. LEE BADGETT, INCOME INFLATION: THE MYTH OF AFFLUENCE AMONG GAY, LESBIAN, AND BISEXUAL AMERICANS (1998) (rebutting the idea that gay, lesbian, and bisexual Americans can earn more income via statistical analysis and comparison).

224. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

225. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990) (stating that "homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation") (quoting Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985)).

and non-procreative obsession with copies ironically generates financial *copia*. In addition, and more interesting still, the myth of gay affluence has been deployed in such a way so as to deprive sexual minorities of the benefit of heightened judicial scrutiny and therefore of certain legal rights. Because barren and childless sexual minorities are presumed to possess more resources and political power than other citizens, they ostensibly need less by way of legal protection. The myth therefore places them in the same double bind in which Narcissus, a symbolic counterfeiter, finds himself—possessing a surplus of resources that renders them legally powerless.

Significantly, the myth of gay affluence/gay narcissism has found its way into the more recent same-sex marriage cases as well as the critical commentary surrounding the same-sex marriage debate. While the language of narcissism that the myth inspires is not always explicit in the cases and commentary, it nevertheless surfaces in the following three ways.

First, states sometimes advert to the allegedly superior economic position of same-sex couples relative to cross-sex couples in support of their same-sex marriage prohibitions. For instance, in *Goodridge*, the Commonwealth attempted (unsuccessfully) to justify its same-sex marriage prohibition by relying, in part, on a rationale that highlighted gays and lesbians' ostensible economic surplus—a surplus which, in the Commonwealth's view, entitled them to less protection.[226] As the Supreme Judicial Court of Massachusetts noted, "[t]he marriage restriction is rational, [the Commonwealth] argues, because the General Court logically could assume that same-sex couples are *more financially independent* than married couples and thus *less needy* of public marital benefits."[227]

Second, the private welfare version of the procreation rationale assumes that same-sex couples possess an abundance of resources, financial and otherwise, which allow them to engage in responsible procreation. For instance, the *Morrison* court observed that same-sex couples may become parents through "artificial reproduction methods [which are] frequently costly and time-consuming."[228] In a footnote, the court remarked that two women may reproduce by relying on *in vitro* fertilization (IVF), one cycle of which "has been estimated at $12,400."[229] Alternatively, a same-sex couple may

226. Goodridge v. Dep't. of Pub. Health, 798 N.E. 2d 941, 964 (Mass. 2003) (summarizing and dismissing the Commonwealth's argument that same-sex couples are less financially dependent on each other than opposite-sex couples).

227. *Id.* (emphasis added).

228. Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. App. 2005) (comparing various methods of becoming parents as same-sex versus cross-sex couples).

229. *Id.* at n.10.

choose to adopt, which costs "as much as $40,000 or more."[230] In other words, *Morrison* recognized that artificial procreation is not only more responsible but more costly as well. Its analysis of that rationale rests on the assumption that same-sex couples who are reproducing already possess the financial resources to invest in child-bearing; for this reason, they do not need marital rights. Once again, gays and lesbians are placed in a situation where their non-procreative, counterfeit sex guarantees them riches (or *copia*) which, in turn, render them bereft of legal protection.

Third and last, critics of same-sex marriage have at times adverted to the myth of gay affluence/gay narcissism in order to defend a contrary position, namely, that same-sex couples should not be awarded marital rights because they are *not* investing their resources in having and raising children. Whereas the *Morrison* court at least suggests that same-sex couples are *overinvesting* in child-bearing by spending upwards of $12,400 for one IVF cycle (noting also that "it frequently takes multiple cycles in order to succeed"[231]) or "as much as $40,000 or more"[232] to adopt, some opponents of same-sex marriage have argued that same-sex couples *underinvest* because they allegedly do not bear the costs of having and raising children. Under this view, same-sex couples are hoarding their resources in a narcissistic and self-centered way.

Professor Douglas Kmiec is one such proponent of the latter view. In support of the procreation rationale for same-sex marriage prohibitions, Kmiec has recently likened all advocates of same-sex marriage to the legendarily narcissistic Manichees, a third-century religious sect that:

> [S]ubscribed to the notion that human beings were sparks of light or energy that were imprisoned by the created world order. Good in a Manichean society took the form of defying created human nature, including procreative intercourse. The Manichees in essence taught that it was salutary to hate one's body. The Manichees not surprisingly did not have a large impact upon the social order of their time, or any other, but their self-centeredness was certainly part of the Roman order, which indulged numerous sexual practices, including prostitution, homosexual relations, and masturbation.[233]

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230. *Id.*

231. *Id.*

232. *Id.*

233. *See* Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 664 (2005) (discussing the possible rationales for limiting same-sex marriage).

Furthermore, Kmiec has argued that it would be unfair to extend marital rights to these "self-centered" and "Manichean" same-sex couples because, in his view, they do not bear the financial responsibility of raising children:

> [T]oday, traditional parents make an investment of over $200,000 (exclusive of college) to bring up a child to age 18, and yet, they often receive the same economic benefits as those who do not invest in raising children. Adding an increased number of childless [married] homosexual partners to the mix makes matters worse.[234]

Similarly, Professor George Dent has remarked that "[b]ecause gay couples do not bear children . . . many gay marriages would be marriages of convenience entered into primarily *for the tangible benefits*."[235] It is partly on account of this purported utilitarian approach to same-sex marriage that Dent has labeled that relationship one "of convenience," and argues that most Americans consider same-sex marriage a "burlesque," a "mere parody," and a "caricature of the real thing."[236] Where *Morrison* therefore sees surfeit (or overinvestment in children), Kmiec and Dent see lack (or underinvestment in children). Nevertheless, under both views, same-sex couples have too much to spend in large part because they engage in a kind of sex whose non-procreative attributes allow for the disproportionate accumulation of wealth, the "high disposable income" to which Justice Scalia alluded in his *Romer* dissent.

When viewed through the lens of the counterfeiting trope and its history, the procreation rationale for same-sex marriage prohibitions is in some very real sense repeating the history of sodomy regulation. While the rhetorical strategies have shifted from disgust to counterfeit—or what Didi Herman has termed a shift from a rhetoric of purity to a rhetoric of pragmatism[237]—the underlying assumptions are the same. In the current same-sex marriage debate, sexual minorities do not need the protections of the law because they engage in non-procreative (and narcissistic) conduct that confers upon them monetary privilege and power, the very same reasoning that largely fueled Justice Scalia's

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234. *See id.* at 658 (arguing that an economic advantage exists for same-sex couples that should support limiting same-sex marriage).

235. *See* George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 424, 424 (2004) (emphasis added) (discussing possible motivators for same-sex couples to marry).

236. *See id.* at 425 (quotations and citations omitted) (discussing Americans' general feelings toward same-sex marriage).

237. *See* Didi Herman, *(Il)legitimate Minorities: The American Christian Right's Anti-Gay-Rights Discourse*, 23 J. LAW & SOC. 346, 353 (1996) (criticizing the Christian Right's attack on gays' minority status). For Herman's book-length treatment on this rhetorical trajectory, see DIDI HERMAN, THE ANTI-GAY AGENDA, ORTHODOX VISION AND THE CHRISTIAN RIGHT (1997).

Romer dissent and traces of which appear in his *Lawrence v. Texas* dissent.[238] Given the history behind the counterfeiting trope and its integral association with non-procreative sex, it is no surprise that an image of the counterfeiter surfaces in these two dissenting opinions which deal either implicitly or quite explicitly with same-sex conduct.

The early-modern image that perhaps best captures the extent to which history is repeating itself is that of the usurer ingesting feces. While not a counterfeiter, the usurer—he who lends money at interest—was nevertheless someone who, for the early-modern mind, committed an economic crime (and sin) that connected him to the sodomites and brought him within sodomy's ambit. The early-modern association between usury and sodomy followed from Aristotle, for whom usury was "the birth of money from money" and "of all modes of making money . . . the most unnatural."[239] Strange bedfellows, the usurers and the sodomites had one thing in common: They both generated excess through unnatural means. Where the sodomite produced and exchanged semen in a non-reproductive way, the usurer produced and exchanged money in a legendarily unnatural way—as his riches increased purely by dint of interest rather than by dint of investment.[240] In a sense, the usurer was the inverse of the sodomite: Where the former turned an otherwise sterile product (money) into something fruitful, the latter turned an otherwise fruitful product (semen) into something sterile. Nevertheless, and not coincidentally, Dante places the usurers and the sodomites together in the same level of hell *above* the counterfeiters, where they are punished for violating "Nature" and "God's art," respectively, and where they both reside on a burning plain, an image of the sterility that marks their unnatural economic and sexual activity.[241]

Medieval historian, Jacques Le Goff, describes the image of the usurer that appears in the fresco of Hell in the Collegiate Church of San Gimignano, Italy, as someone who is orally ingesting the devil's excrement—excrement which turns out to be gold coins[242]—and who is placed alongside a sodomite.[243]

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238. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (stating that "[t]oday's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct").

239. *See* ARISTOTLE, POLITICS 71–72 (B. Jowett ed. & trans., 1996) (discussing various means of becoming wealthy).

240. Fisher, *supra* note 133, at 14.

241. DANTE, *supra* note 155, at 25.

242. JACQUES LE GOFF, YOUR MONEY OR YOUR LIFE: ECONOMY AND RELIGION IN THE MIDDLE AGES 50 (Patricia Ranum trans., 1990).

243. *Id.* at 50–51 (noting that Dante consequently placed the usurers in Hell with the

The image of the usurer with a mouth laden with the devil's excrement recalls the image of the feces-eating homosexual that surfaced in the rhetorical campaign surrounding the passage of Colorado's Amendment 2[244]—an image that at least implicitly appears in Justice Scalia's *Romer* dissent, which at once highlights homosexual conduct and homosexual power. It also conveys the disgust that we might feel when in the company of a swindler, thus explaining the modern slang that we use to describe someone who is, in Professor William Ian Miller's words, "faking it."[245] More than this, the image of the commercial fraudster placed next to a sodomite perfectly captures the Janus-faced discourse that has marked the construction of sexual minorities in the law over the last ten years: A class whose non-procreative activity renders it at once a source of disgust and a paradigm of fraud—or, perhaps more accurately, a class whose non-procreative fraud inspires disgust.

In this sense, both the procreation rationale, and the current casting of gay and lesbian couples in the same-sex marriage debate as avaricious counterfeiters, suggest that what is repugnant about sodomy is not the act itself; surely, as *Bowers* and *Lawrence* remind us, cross-sex couples do the same. Rather, what is repugnant is the fraud that such non-procreative activity represents, something which the *Santos* and *D. v. C.* courts also recognized. By calling it fraud and by talking about it in terms reminiscent of fraud, however, same-sex marriage opponents and some jurists would appear to be on sound constitutional ground. That is, while what *Lawrence* really "holds" (and how it gets there) has been the subject of much critical debate, the majority opinion makes one thing fairly certain: Morality, as the embodiment of our collective disgust, is no longer even a legitimate basis for laws that regulate what certain individuals do behind closed door in the confines of their home. Casting same-sex relationships and same-sex procreation as a kind of fraud, then, attempts to transform disgust over private acts into something that is legally defensible after that landmark case. The claim here would be: Same-sex marriage prohibitions do not flow from disgust but rather from a concern over public fraud.

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sodomites).

244. *See* Martha Nussbaum, *"Secret Sewers of Vice": Disgust, Bodies, and the Law*, *in* THE PASSIONS OF LAW 27–28 (Susan A. Bandes ed., 1999) (documenting that campaign).

245. *See generally* WILLIAM IAN MILLER, FAKING IT (2005) (describing the "daily hypocrisies" of the average person). This also explains, at least in part, why Leon Kass has characterized the duplicative—and duplicitous—reproductive practice of cloning as "repugnant." *See generally* Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679 (1998) (criticizing the cloning of humans and advocating a bar on the practice).

The history behind the sodomy-counterfeiting analogy and its resurfacing in the same-sex marriage debate, however, suggest that certain conduct is disgusting precisely *because* it is fraudulent. While perhaps more palatable than the claim that what these people do disgusts me and for that reason should be legally prohibited, the procreation rationale is merely a kinder, gentler way of expressing why certain acts disgust us in the first instance. Once again, we should not forget that in Dante's infernal underworld, counterfeiters are *worse* than the sodomites—even as the two represent two sides of the same proverbial coin. Nor should we forget that Dante places a truly iconic figure of incest, Ovid's Myrrha, among the counterfeiters because she falsified herself in order to have sex with her father—thus suggesting that incest is an archetypal form of disgust because it is *the* archetypal form of fraudulent desire.

B. Marriage Miscegenation

The historical analogy between miscegenation and counterfeiting helps to explain the more recent, private welfare version of the procreation rationale, one that has stumped commentators, and some judges, because it ironically places same-sex couples in a superior position relative to their cross-sex counterparts. Indeed, how might we explain the tortured logic that assumes that same-sex couples do not need the protections of the law because they are better than straight couples when it comes to having children? The Narcissus myth and the double bind that it projects already supplies us with one answer, namely, same-sex couples do not need the protections of the law because they already have monetary power and the privileges that flow from it. The miscegenation analogy, however, supplies us with a better answer, namely, the superior form of procreation in which same-sex couples engage is allowing them to look too much like the cross-sex family paradigm. As such, the procreation rationale increasingly functions to prevent fraudulent same-sex marriage passing.

Part II argued that the more recent version of the procreation rationale reflects an implicit fear of the reality of same-sex procreation. While some courts have continued to emphasize the extent to which same-sex reproduction is different from the cross-sex model,[246] most courts that have upheld same-sex marriage prohibitions on the basis of procreation are increasingly recognizing that same-sex couples are reproducing and having families through asexual

246. *See, e.g.*, Morrison v. Sadler, 821 N.E.2d 15, 28 (Ind. App. 2005) (noting the "highly significant difference" in the way in which cross-sex couples and same-sex couples become parents).

means. In *Hernandez*, for example, the lower court stated that "the reality is that significant numbers of couples in New York have formed same-sex families, and numerous couples will continue to do so, whether they are allowed to marry or not."[247] Even those courts that have upheld same-sex marriage prohibitions on the basis of encouraging responsible procreation have recognized the reality of same-sex families. In *Standhardt*, for instance, the court recognized that "some same-sex couples also raise children," even as it concluded that the "exclusion of these couples from the marriage relationship does not defeat the reasonableness of the link between opposite-sex marriage, procreation, and child-rearing."[248] Similarly, in *Lewis*, in which the New Jersey Superior Court upheld that state's same-sex marriage prohibition partly on the basis of procreation, Judge Collester, in dissent, stated bluntly that "[t]he fact is some persons in committed same-sex relationships can and do legally and functionally procreate . . . [The plaintiffs] in this case . . . each gave birth to their children following artificial insemination."[249] The very thing that rendered same- and cross-sex partners intrinsically different and that justified differential treatment of those two classes from a constitutional perspective in the early same-sex marriage cases—the ability to procreate—is the same thing that is starting to bridge the gap between them.

A burgeoning anxiety that same-sex families are beginning to look too much like, and are therefore passing as, the cross-sex family paradigm has accompanied the courts' (and the public's) increased awareness of the reality of same-sex procreation. Such a fear is reflected in contemporary counterfeiting rhetoric and the emphasis that it often places on deceptive imitation: Robert Knight remarks that "if [same-sex partnerships are] called marriage, it's a counterfeit version. And counterfeit versions drive out the real thing."[250] Such a fear is also reflected in the private welfare procreation rationale for same-sex marriage prohibitions. Because the private welfare procreation rationale captures the reality that same-sex couples are reproducing, it raises the possibility that they are, or at least might be, passing for real families.

The private welfare procreation rationale sometimes casts same-sex procreation as a better version or product than its cross-sex counterpart. For instance, while the *Morrison* court remarked in a footnote that the principal methods of same-sex child-bearing, artificial reproduction and adoption,

247. Hernandez v. Robles, 794 N.Y.S.2d 579, 599 (N.Y. Sup. 2005), *rev'd and vacated by* 805 N.Y.S.2d 354 (2005), *aff'd* 855 N.E.2d 1 (N.Y. 2006).

248. Standhardt v. Superior Ct. of Ariz., 77 P.3d 451, 462 (Ariz. App. Div. 2003).

249. Lewis v. Harris, 875 A.2d 259, 285 (N.J. 2005) (Collester, J., dissenting), *aff'd as modified by* 908 A.2d 196 (N.J. 2006).

250. Dunlap, *supra* note 5, at A18.

involve significant costs, it also implied that the couples who avail themselves of such methods might be better parents because of their substantial investment ex ante:

> Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide [a stable environment for children], with or without the "protections" of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place.[251]

Once again, same-sex couples need less (legal protection) because they have invested more (financial and emotional resources). What is most interesting here from the perspective of the counterfeiting analogy to same-sex relations, however, is the suggestion that the artificial reproductive imitation (or counterfeit) has not diluted or devalued the real thing but rather surpassed it. When viewed in this light, the counterfeit is not a counterfeit at all but rather a completely new (and better) product. The *Morrison* court's explicit casting of same-sex reproduction as an artificial imitation that is better than the natural paradigm—an image of procreation that has appeared in other cases that have upheld same-sex marriage prohibitions on the basis of this rationale[252]—thus ironically conflicts with the image of same-sex reproduction that emerges from counterfeiting rhetoric more generally: An unworthy replica of the real thing. Moreover, this image of a superior procreative product (and process) suggests that same-sex couples would be getting an unfair advantage were the state to extend them marital rights because presumably they already have the monetary resources to invest in responsible procreation.

At the same time, however, the private welfare rationale also works in concert with the notion that same-sex marriage not only is a degraded form of the real thing but also devalues the real thing. For instance, in *Lewis*, the New Jersey Superior Court upheld the state's same-sex marriage prohibition by adverting, in part, to the rational basis of encouraging responsible procreation.[253] In so doing, a concurring opinion remarked that the most "vital" purpose of marriage is "to control or ameliorate [procreation's] consequences—the so-called 'private welfare' purpose."[254] The opinion went on to suggest that

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251. Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. App. 2005).

252. *See supra* note 60 and accompanying text (discussing other cases that have relied on this same rationale).

253. It bears noting that the Attorney General of New Jersey "disclaim[ed] the promotion of procreation as a rationale for prohibiting same-sex marriage." Lewis v. Harris, 875 A.2d 259, 284 (N.J. App. 2005) (Collester, J., dissenting).

254. *Id.* at 276 (Parrillo, J.A.D., concurring).

it is this procreative function of cross-sex marriage that renders that relationship "meaningful" and that confers upon it a "specialness" that same-sex marriage (and the artificial reproduction that may occur within that context) lacks.[255] Under this view, cross-sex marriage derives its uniqueness by virtue of the kind of procreation that it both guarantees and protects. Procreation is no longer about propagation of the species, as it was during the early phase of marriage litigation in the 1970s and 1980s, but rather about preserving the uniqueness of the relationship in which it ideally occurs.

Moreover, and as the opinion further notes, to recognize relationships where procreation does not occur between two unrelated, cross-sex individuals would be to dilute the distinctiveness of the original marital model. Perhaps speculating on the substance of those "other reasons . . . to promote the institution of marriage"[256] to which Justice O'Connor alluded in her *Lawrence* concurrence,[257] the *Lewis* concurrence stated that "there are reasons for limiting unfettered access to marriage. Otherwise, by allowing the multiplicity of human choices that bear no resemblance to marriage to qualify, the institution would become non-recognizable and unable to perform its vital function [of controlling or ameliorating the consequences of cross-sex procreation]."[258] By preserving the unique and special connection that exists among marriage, cross-sex intercourse, and procreation, the private welfare rationale thus ensures that a marriage copy—a state-sanctioned relationship, for example, where procreation between two people does not occur through sexual means—does not render the original on which it is based "non-recognizable."[259] Instead of ensuring the continuation of society, procreation is now being deployed to ensure the continuation of marriage. Sexual procreation no longer figures as a necessary condition of marriage. Rather, marriage is a necessary condition of sexual procreation—and only sexual procreation.

The emphasis placed here on the uniqueness of cross-sex procreation, within the marital context, invites us to consider same-sex procreation as an artificial counterfeit of the former that devalues—and dilutes—it in the process of imitating it. The language that the concurring opinion uses to describe what would happen were the state to recognize a form of marriage that does not promote the vital purpose of encouraging responsible procreation reflects a situation analogous to the introduction of counterfeit currency into the market.

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255. *Id.* at 277 (Parrillo, J.A.D., concurring).

256. Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

257. *See id.* (O'Connor, J., concurring) (stating that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group").

258. *Lewis*, 875 A.2d at 277 (Parillo, J.A.D., concurring).

259. *Id.* (Parillo, J.A.D., concurring).

Specifically, the recognition of same-sex marriage would cause the uniqueness of the institution of marriage to fade—"to become non-recognizable and unable to perform its vital function"[260]—in a way that recalls the power of a counterfeit to compromise the distinctiveness and efficacy of the real thing. The *Lewis* concurrence, together with the materials surveyed in the previous Part, therefore suggest that same-sex relationships operate as counterfeit in three different, albeit interrelated senses: (1) those who partake of such a relationship presumptively engage in counterfeit sex that constitutes a crude imitation of real—that is, procreative—sex; (2) those who partake of such a relationship sometimes "cause procreation"[261] through an artificial—that is, a counterfeit—process; and (3) that counterfeit process enables same-sex couples to create a counterfeit product—that is, the "same-sex family"—that can, in turn, pass for the real thing.

If we push the counterfeiting analogy a bit further, however, the concurring opinion's fear that artificial substitutes that "bear no resemblance"[262] to marriage will render marriage less distinctive makes no more sense than does the counterfeiting analogy to civil unions and same-sex marriage. As Part III.B queried, if civil unions are not called marriage, and if same-sex marriage is legally the same as cross-sex marriage, then how do civil unions and same-sex marriage operate as counterfeit? So, too, here: If same-sex marriage truly bears no resemblance to cross-sex marriage, then how could it possibly render that archetypal institution non-recognizable? Put another way, how does an imitation pass for—and, in the process, dilute—an original if it is not really an imitation at all?

The historical linking of counterfeiting and miscegenation surveyed in Part IV offers a way to understand just what is going on in the *Lewis* concurrence and what is really behind the procreative fear that it projects. Nineteenth-century counterfeiting rhetoric captured, in part, what was so threatening about the consequences of miscegenation—namely, the creation of an individual (like Homer Plessy) who, in the eyes of essentialists, did not bear any resemblance to a white man but who was nevertheless passing as one. In the process, the value of whiteness became non-recognizable and unable to perform its vital function of maintaining racial hierarchy. The irony, of course, is that Homer Plessy did resemble the white man whom he was, in the eyes of essentialists, trying to imitate (or pass for) because Homer Plessy was, in fact, multi-racial. The point

260. *Id.* (Parillo, J.A.D., concurring).

261. Marriage Cases, 2005 WL 583129, at *12 n.3 (Mar. 14, 2005).

262. Lewis v. Harris, 875 A.2d 259, 284 (N.J. App. 2005) (Collester, J., dissenting), *aff'd as modified by* 908 A.2d 196 (N.J. 2006).

here is that traditional marriage in the *Lewis* concurrence, and in the eyes of marriage traditionalists more generally, assumes the same position that whiteness did for nineteenth-century essentialists. Like ethnic miscegenation, marriage miscegenation produces copies that pass for the real thing, and, in the process, render the real thing less distinctive. In recognizing the reality of same-sex procreation and the danger that it poses, then, the private welfare rationale acts as barrier to prevent marriage-mixing. It is for precisely this reason that the *Lewis* concurrence also remarks that the state must "draw[] principled boundaries"[263] around the traditional institution of marriage in order to preserve its unique, procreative function.

This Part concludes here by briefly offering two additional reasons for why the miscegenation analogy to same-sex marriage makes sense on a more substantive level, each of which returns to the counterfeiting analogy. First, marriage traditionalists have deployed counterfeiting rhetoric in the same-sex marriage debate in a way that is uniquely tied to an anxiety over subversive and deceptive reproduction. As Part III set forth at length, opponents of same-sex marriage label same-sex couples a counterfeit in large part because they presumptively engage in non-procreative sex (i.e., a counterfeit process) that mimics the real thing and because they produce families (i.e. a counterfeit product) that attempt to pass for the real thing. It is surely no coincidence that opponents of reproductive cloning, a practice that is routinely characterized as deceptive and fraudulent—and as with same-sex relationships, repugnant because it is deceptive and fraudulent[264]—associate that technology specifically with same-sex couples.[265] Cloning represents just those aspects of same-sex procreation that are most threatening—a narcissistic obsession with the same and a deceptive reproduction of the same—writ large. Similar reproductive concerns, of course, inspired lawmakers to criminalize miscegenation. In *Loving*, the state of Virginia argued, and the appeals court agreed, that its criminal anti-miscegenation statute was necessary in order to prevent a "mongrel breed of citizens."[266] In *State v. Jackson*, the Supreme Court of Missouri went so far as to claim that miscegenation, like sodomy, defeated

263. *Id.*

264. *See* Kass, *supra* note 245, at 687 (stating that repugnance of human cloning is caused by the understanding that it is a "violation of things we rightfully hold dear").

265. *See* WILLIAM N. ESKRIDGE, JR. & EDWARD STEIN, *Queer Clones*, *in* CLONES AND CLONES: FACTS AND FANTASIES ABOUT HUMAN CLONING 95 (Martha C. Nussbaum & Cass R. Sunstein eds., 1998) (discussing queer cloning and concluding that while it may trigger anti-gay or anticloning measures, it may also expand gays' and lesbians' options when forming families).

266. Loving v. Virginia, 388 U.S. 1, 5 (1967) (quoting Naim v. Naim, 87 S.E. 2d 749, 756 (1955)).

procreation. As the court stated: "It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny."[267] Although miscegenation historically represented the mixing of two entities that were not too alike but rather too different, it nevertheless equally signified an illegitimate (and therefore counterfeit) form of reproduction. For instance, a colonial law that prevented intermarriage between blacks and whites in Massachusetts, entitled "An Act for the Better Preventing of a Spurious and Mixed Issue,"[268] highlighted just this deceptiveness of mixed-race reproduction. Like today, in 1705 "spurious" denoted "a sham or a counterfeit" as well as non-marital progeny.[269]

Second, the nineteenth-century anxiety that surrounded counterfeit (or greenback) currency, racial equality, and the artificial legislation that would ostensibly guarantee both finds its counterpart in the recent anxiety over same-sex marriage. Not only is same-sex marriage, like mixed-race persons and newly-freed slaves, conceptualized in terms of counterfeit, but the rhetoric that surrounds same-sex marriage highlights the fact that the law simply cannot change what is the naturally given marital paradigm. Marriage traditionalists routinely appeal to natural law arguments in order to justify both what the current legal regime is and what it should be.[270] Moreover, like the nineteenth-century essentialists, they also suggest that a positive law that recognizes same-sex marriage is (or would be) fraudulent because it contravenes natural law. It is for precisely this reason that Professor Wardle has suggested that "a state that confers the legal status of marriage upon same-sex unions commits fraud when it presents a false image of same-sex unions as comparable to traditional marriage."[271] The Concerned Women for America expressed a similar concern when it remarked that the original Federal Marriage Amendment as drafted "would result in legalized

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267. State v. Jackson, 80 Mo. 175, 179 (1883).

268. *See* An Act for the Better Preventing of a Spurious and Mixed Issue, *reprinted in* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY, 779, 748 (T. B. Wait and Co. 1814) (1705) ("None of her majesty's English or Scottish subjects, nor of any other Christian nation within this province, shall contract matrimony with any negro or mulatto; nor shall any person duly authorized to solemnize marriages, presume to join any such in marriage.").

269. XVI OXFORD ENGLISH DICTIONARY, *supra* note 148, at 376 (entry for spurious, a.).

270. *See, e.g.*, Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 189, 194 (2004) ("Marriage is a pre-political moral and cultural institution upon which the law *supervenes*, the law recognizes marriage, regulates it, promotes it, protects it. But it does not encourage it."); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 305 (1995) (rejecting "the proposition that sex can be legitimately instrumentalized, that is, treated as a mere means to any extrinsic end, including procreation").

271. Wardle, *supra* note 86, at 775 (emphasis added).

counterfeit marriage"[272]—relying on the oxymoronic phrase, "legalized counterfeit," to underscore the state's role in perpetrating a fraud upon the public.[273] Indeed, under this view, a legal regime that both condoned and encouraged same-sex passing would be no less fraudulent than a counterfeiter herself.[274]

VI. Normative Implications and Queering the Double Bind

This Article has shown that the counterfeiting trope is descriptively inaccurate as applied to same-sex relationships: Same-sex marriage is, quite simply, not a counterfeit. At the same time, however, this Article has also shown that the counterfeiting trope makes sense in light of its history: Same-sex marriage is, in fact, a counterfeit for the same reasons that both sodomy and miscegenation once were (and, in the case of sodomy, continues to be). Having surveyed the history behind counterfeiting rhetoric and used that history to explain the procreation rationale, this Part now turns to a more normative critique of counterfeiting rhetoric and to the future. The objective of this Part is twofold. Section A demonstrates that counterfeiting rhetoric, like the law more generally, continues to place sexual minorities in a double bind in precisely that area of the law, domestic relations, where the double bind has operated to deny that group a panoply of rights. Section B, which is more prospective in purpose and scope, proposes what a "queer" reading of the queer as counterfeit analogy might look like.

A. Counterfeit, Imitation, and the Double Bind

The counterfeiting analogy to same-sex relationships warrants criticism for three reasons. First, and most obvious, same-sex relationships are not deceptive

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272. LaRue, *supra* note 93 (emphasis added).

273. Professor Kmiec has characterized San Francisco Mayor Gavin Newsom's decision to hand out "counterfeit" marriage licenses to same-sex couples in violation of California law in 2004 as an instance where the "bald-faced claims of counterfeit equality overlook[ed] the irreplaceability of the civilizing agency of the traditional family altogether." Maria Kennedy, *San Francisco's Gay Revolution*, SAN FRAN. FAITH, Apr. 2004, http://www.sffaith.com/ed/articles/2004/0404mk.htm (last visited Feb. 5, 2007) (on file with the Washington and Lee Law Review).

274. It is worth noting that in 1980, a court that looked favorably upon same-sex marriage prohibitions felt otherwise when it suggested that only "an affirmative enactment of Congress" could lead to a situation where same-sex relationships are "characterized as 'marriages.'" Adams v. Howerton, 486 F. Supp. 1119, 1125 (1980).

on their face. Second, that analogy continues to place gays and lesbians in a vicious double bind. Third, and relatedly, that analogy perpetuates the discourse or rhetoric of fraud that has surrounded the legal construction of sexual minorities for centuries. Remarkably, even some radical feminist critics who believe that marriage is not a "path to liberation" for sexual minorities[275] have characterized same-sex marriage as a kind of imitation—albeit the imitation not of a superior product, but of an intrinsically flawed institution that perpetuates gender discrimination and inequality. Professor Nancy Polikoff, for instance, has remarked that "I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."[276] Polikoff is not alone among feminist and queer theorists in advocating that the queer community shift its focus from the "unacceptably conservative" prospect of marriage to more progressive social concerns, such as universal healthcare "regardless of marital status."[277] Nevertheless, Polikoff's characterization of gays and lesbians' desire to marry as a kind of mimicry in and of itself is noteworthy because it suggests that even those who would likely take issue with the conservative casting of same-sex marriage as counterfeit are thinking about same-sex marriage in terms of deceptive impersonation.

The language of mimicry and counterfeiting which has pervaded the same-sex marriage debate—on both sides—perpetuates the double bind in which the law routinely places sexual minorities. Indeed, counterfeiting rhetoric, along with the procreation rationale, places queers in a number of double binds. For instance, by depicting selfish sexual minorities as at once having an overabundance of economic capital (tangible resources) and a dearth of procreative capital (true riches in the form of children), counterfeiting rhetoric places them in the impossible position of having too much, and yet not enough.

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275. Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, *in* LESBIAN AND GAY MARRIAGE 20, 20 (Suzanne Sherman ed., 1992).

276. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) (emphasis added).

277. Judith Butler, *Is Kinship Always Already Heterosexual?*, *in* UNDOING GENDER 109 (2002) ("For a progressive sexual movement, even one that may want to produce marriage as an option for nonheterosexuals, the proposition that marriage should become the only way to sanction or legitimate sexuality is unacceptably conservative."). *But see* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 5–6 (1996) ("For some, gay marriage is unnatural or abominable. For others, it is an assimilative sellout. For me—and I hope for you after you read this book—same-sex marriage is natural and just.").

Similarly, by at once emphasizing that same-sex couples cannot have children through sexual means and that they can bear children in a more responsible manner, the procreation rationale for same-sex marriage prohibitions places sexual minorities in the hopeless position of being both inferior and superior to their cross-sex counterparts in terms of procreative ability. In this sense, the evolution of the procreation rationale itself perpetuates the double bind that counterfeiting rhetoric reflects.

The idea, though, that sexual minorities are deceptive because they are attempting to mimic (and pass for) married, cross-sex couples and their families helps to perpetuate yet another double bind, one that has functioned most vigorously in the family law context. The law routinely requires gay and lesbian parents to cover their sexual identity—or, more drastically, to pass as straight—should they desire to retain even limited custodial or visitation rights over their children. While a homosexual sexual orientation operates as a per se bar on custody and/or visitation in only a minority of jurisdictions,[278] same-sex conduct that occurs in the presence of children—including, but not limited to, displays of affection between same-sex partners—continues to operate as a significant factor in custodial and visitation decisions in a majority of jurisdictions.[279] As Yoshino has observed, most courts not only regularly penalize gay and lesbian parents for failing to cover, but some courts have even "articulated a standard that suggests that the [gay or lesbian] parent must convert."[280] In the custodial and visitation context, then, gay and lesbian parents are effectively required to self-counterfeit—that is, required to assume the very traits or qualities of mimicry and counterfeit that same-sex marriage opponents appear to despise most.

Moreover, in some jurisdictions, same-sex partners who are parents (or single gays and lesbians) are ineligible to adopt because they cannot pass for cross-sex parents. For instance, in *In re* Adoption of Charles B., the Court of Appeals of Ohio found that sexual minorities were barred from adopting under that state's adoption law even though sexual orientation did not operate as an explicit statutory bar to adoption.[281] In refusing "[t]o impute to the

278. Yoshino, *supra* note 3, at 858–59 n.497 (listing Florida as the only state with a statutory per se bar and citing cases in other jurisdictions, including Kentucky, Missouri, North Dakota, Oklahoma, and Virginia, where courts have found that "homosexuality alone is a *per se* reason for denying custody or visitation rights").

279. *See id.* at 859 (suggesting that courts are more likely to grant custodial rights to those gay or lesbian parents that cover or mask their activity from their children).

280. *Id.* at 862.

281. *In re* Adoption of Charles B., 1988 Ohio App. LEXIS 4435 (Ohio Ct. App. 1988).

legislature . . . an intention to make homosexuals eligible to adopt,"[282] the court invoked the very language of passing to express its belief that gay parents could not "imitate" and "pass for" cross-sex families because "homosexuals" could not sexually procreate:

> Homosexuality negates procreation. Announced homosexuality defeats the goals of adoption. *It will be impossible for the child to pass as the natural child of the adoptive "family"* or to adapt to the community by quietly blending in free from controversy and stigma. A principle inherent in adoption since Roman days is "adoptio naturam imitatur," adoption imitates nature. The fundamental rationale for adoption is to provide a child with the closest approximation to a birth family that is available.[283]

More recently, in *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit upheld Florida's law that prohibited sexual minorities from adopting partly on the rational basis that adoptive households should "resemble the nuclear family as closely as possible."[284]

The criticism that sexual minorities are unable to pass (or cover) that emerges from these cases conflicts with the more general criticism that sexual minorities are deceptive because they do often pass (or cover). For instance, in *Weigand v. Houghton*, the Supreme Court of Mississippi upheld a lower court's decision refusing a gay father's petition for custody partly on the basis that the father did not engage in "open sign[s] of affection" with his partner in front of his child; rather, the father "merely retreat[ed] behind closed and locked door, hiding and secreting his own sexuality from Paul."[285] While Yoshino reads the *Wiegand* court's statement as a covering demand that is "tantamount to a demand for conversion,"[286] it may also be read as a criticism that rests on the father's deceptiveness and that at least implies that he is being dishonest by hiding and secreting his authentic self and instead impersonating someone else in front of his son. Of course, if the father did not engage in this kind of self-counterfeiting, the court would likely have found that he was not covering enough. Suffice it to say here, though, that as with the deployment of counterfeiting rhetoric by marriage traditionalists, the judicial treatment of gay and lesbian parents in the custodial context perpetuates a double bind that casts

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282. *Id.* at 5.

283. *Id.* at 6 (citations omitted) (emphasis added).

284. Lofton v. Sec'y of the Dep't of Children & Family Serv., 358 F.3d 804, 818 (11th Cir. 2004). For the conceptualization of the adoptive family as an artificial family that ideally mirrors the natural family, see Naomi Cahn, *Perfect Substitutes for the Real Thing?*, 52 DUKE L.J. 1077, 1144 (2003).

285. Weigand v. Houghton, 730 So. 2d 581, 586 (Miss. 1999).

286. Yoshino, *supra* note 3, at 863.

sexual minorities as both fraudulent (attempting to pass) and not fraudulent enough (refusing or being unable to pass).

B. Queering the Double Bind

Is it possible to recast the counterfeiting analogy to same-sex relationships—and the freight of negative connotations that the very term, counterfeit, bears—in a positive way and put it to constructive use? In the words of George Lakoff, cognitive linguist and founder of the Rockridge Institute, is it possible to "reframe" the marriage debate in a way that highlights the *salutary* aspects of imitation? Or, are sexual minorities forever doomed to being conceptualized as deceptive, derivative, *and* deceptively derivative?

By co-opting the very stereotype of "queer as counterfeit" and turning it back on itself as a form of political opposition, the protestors who launched the Queer Dollars Campaign in Cleveland attempted to do precisely that—that is, attempted to use the rhetoric of deceptive imitation to their own advantage. Specifically, the Campaign quite literally returned the pejorative "queer as counterfeit" metaphor or trope—the latter of which denotes the turning away of a word from its original meaning[287]—back to its origins. On a certain level, the Campaign's political strategy was quite ingenious: At the same time that the activists were announcing or revealing themselves as queer in the sense of counterfeit, they were symbolically passing queer or counterfeit currency. Their strategy therefore involved a simultaneous process of outing and passing. But the Campaign took it one step further still. By publicly staging or performing what is typically considered to be a deceptive act of passing—be it the passing of counterfeit currency or the passing of one's sexual identity—the activists were undoing the very act that gave rise to the queer as counterfeit stereotype in the first instance.

In his seminal piece on covering, Professor Yoshino chooses "the word 'queer' to denominate 'gays who refuse to cover,'" that is, to downplay their sexual identity.[288] While noting that such a definition "represent[s] precisely the essentialization of sexual identity [that queer theorists] resist,"[289] Yoshino nevertheless observes that "[i]n popular parlance . . . the perception that 'queers' are gays who refuse to cover is common, not least because normals have cast them in these terms."[290] Yoshino's definition of queer is noteworthy

287. XVIII OXFORD ENGLISH DICTIONARY 581 (2d ed. 1989) (entry for trope, n.).

288. Yoshino, *supra* note 3, at 839.

289. *Id.*

290. *Id.* Yoshino defines "normals" as "a group of people who are openly gay, but who

and of particular relevance here because it highlights an additional aspect of the queer as counterfeit analogy that this Article has not discussed but that inheres in the very idea of a queer three dollar bill, namely, the fact that queer connotes something that is strange or unusual[291]—that is, something whose eccentricity and deviation from the norm (say, a one or a five dollar bill) calls attention to itself. Earlier this Article suggested that the slang phrase, "queer as a three dollar bill," cannot simply convey counterfeit in the sense of deceptive because everybody knows that a three dollar bill is a fake when they see one.[292] Part of what makes queers different from normals, it would seem, is that their refusal to cover is accompanied by a sense that they are flaunting their so-called deviation from the norm and thereby forcing the public to take account of the fact that they are three dollar bills. At first blush, then, these two senses of queer, queer as counterfeit and queer as strange, are in disharmony and appear to perpetuate the double bind in which sexual minorities are routinely placed: Whereas the former sense of queer connotes covert deception (passing and/or covering), the latter sense of queer connotes visible difference (outing and/or flaunting).

The Queer Dollars Campaign's activists, however, effectively played on this disharmony (or dual sense of queer) by publicly performing an identity that is routinely cast in deceptive, counterfeit terms. Their public staging and performative recasting of the queer as counterfeit trope represents an example of what queer theorist Judith Butler might call "parodic performativity," that is, the process by which ostensibly stable and essential categories like "sex and gender [are] denaturalized by means of a performance which avows their distinctness and dramatizes the cultural mechanism of their fabricated unity."[293] Butler's paradigm example of parodic performativity is drag, which, she suggests, complicates "the relation between the 'imitation' and the 'original'" by "play[ing] upon the distinction between the anatomy of the performer and the gender that is being performed."[294] Moreover, "[i]n imitating gender, drag implicitly reveals the imitative structure of gender itself—as well as its contingency."[295] In a similar vein, postmodern theorist, Jean Baudrillard, contends that an imitation or copy of an archetypal model has the power to displace the ontological primacy and basis of that model.[296] In *Simulacra and*

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seek to cover their sexual orientations, emphasizing their commonality with straights." *Id.*

291. XII OXFORD ENGLISH DICTIONARY, *supra* note 131, at 1015 (entry for queer, n.).

292. *See supra* Part IV.A (discussing the three dollar bill analogy).

293. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 138 (1990).

294. *Id.* at 137.

295. *Id.*

296. JEAN BAUDRILLARD, SIMULACRA AND SIMULATION 6 (Shelia Faria Glaser trans., Univ.

Simulation, Baudrillard writes that a simulation (an image or imitation) of reality (an original form) undergoes a four-step process whereby it (1) "is the reflection of a profound reality;" (2) "masks and denatures a profound reality;" (3) "masks the absence of a profound reality;" and (4) "has no relation to any reality whatsoever: It is its own pure simulacrum."[297] Baudrillard's theory of simulation, and the simulacra that simulation produces, recalls Butler's theory of the process by which drag reveals not only the "absence" of the "reality" of sex and gender, but their imitative structure as well.

How might Butler and Baudrillard's respective theories of performative imitation and simulation, each of which is far more comprehensive than the cursory analysis here permits, supply us with a lens through which to consider the productive possibilities of the counterfeiting analogy to same-sex relations? Fortunately, the Queer Dollars Campaign has already provided us with an instance where the queer and postmodern theories casually discussed here have been put into practice. Where same-sex marriage opponents, commentators like Professor Dent, and even some radical queer theorists regard same-sex marriage as mimicry, fraudulent, a counterfeit, a "mocking burlesque," a "mere parody," and a "caricature of the real thing,"[298] the Campaign's activists understood the fertile, performative possibilities of that very "counterfeit" or "parody." Moreover, where the Campaign performatively enacted the double bind of the queer as a three dollar bill counterfeiting trope, we might imagine a situation where the counterfeiting trope that has been applied to same-sex marriage (and same-sex reproduction) might similarly be turned on itself. Perhaps queer activists might publicly stage a wedding while putting counterfeit dollars into the Salvation Army's kettles—revealing that marriage, like money, is an eminently imitable construct that earns its legitimacy from the law that so orders it. Marriage—like sex, gender, whiteness—might emerge as no more naturally given than the counterfeiting rhetoric that supports it. To mimic marriage in this way is not to suggest that marriage is a bad thing or that queer activists should refocus their energies on less conservative causes. Rather, all it means is that same-sex marriage opponents have reminded us that marriage is a product or fungible good that can be counterfeited—one whose exchange value is determined by the law and whose form lends itself to daring imitative possibilities. In this sense, counterfeiting rhetoric reveals the power of its own transformative potential.

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of Michigan Press 1994) (1981).

297. *Id.*

298. *See* Dent, *supra* note 235, at 425.

VII. Conclusion

This Article has considered the historical relationship between unorthodox sexual/reproductive practices and counterfeiting in order to suggest the following: Just as counterfeiting rhetoric rests on the same logic that shores up the procreation rationale for same-sex marriage prohibitions, so too does the procreation rationale rest on the same logic that shores up counterfeiting rhetoric. Understanding how the counterfeiting analogy and the procreation rationale for same-sex marriage prohibitions intersect with each other helps to explain what is driving each. How can same-sex marriage opponents possibly characterize same-sex marriage as counterfeit? Because same-sex couples both engage in non-procreative sex and are having families through artificial means that allow them to pass for the real thing. Similarly, why has the procreation rationale been so successful in recent same-sex marriage litigation if that rationale, in whichever form it has assumed, is so logically flimsy? Because both same-sex sex and the kind of families that same-sex couples quite literally reproduce are considered to be fraudulent reproductions of the real thing, which, in turn, attempt to pass for the real thing.

Earlier this Article suggested that we view the evolution of the procreation rationale for same-sex marriage prohibitions through the interpretive lens of Reva Siegel's theory of "preservation-through-transformation,"[299] that is, the theory that status hierarchies are maintained, in part, because the "justificatory rhetoric" that supports them evolves over time to assume a kinder, gentler tone.[300] Commenting on Siegel's theory, Yoshino has remarked that "[p]reservation-through-transformation does not foreclose the possibility of real social change. Nor does it assume bad intent on the part of the individual legal actors. It does, however, caution that progress narratives about status hierarchies should be approached with intense skepticism."[301] This Article has looked at the extent to which two such progress narratives, including the evolution of the procreation rationale for same-sex marriage prohibitions and the rhetorical re-casting of gays and lesbians as society's counterfeiters rather than disgust-inducing outcasts, have worked together to maintain a pre-existing status hierarchy based on sexual orientation. Moreover, it has done so by turning to historical and literary narratives about the interrelationship among counterfeiting, non-procreative sex, and miscegenation—the latter of which represents a fitting parallel to the fears surrounding marriage mixing and

299. Siegel, *supra* note 28, at 1113.

300. Siegel, *supra* note 29, at 2179.

301. Yoshino, *supra* note 3, at 826.

passing that have surfaced in the legal controversy over same-sex marriage. It has shown that historical and literary narratives provide us with the tools by which to channel the intense skepticism that progress narratives so often inspire and with which to challenge the rhetorical tropes that have become such an integral part of the way in which we justify certain status hierarchies that we barely even notice them.