

Affidavit of William Eskridge Jr., affirmed November 14, 2000

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Court File No. 684/00

*Ontario*  
**SUPERIOR COURT OF JUSTICE**  
**(DIVISIONAL COURT)**

BETWEEN:

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**HEDY HALPERN and COLLEEN ROGERS**  
**MICHAEL LESHNER and MICHAEL STARK**  
**MICHELLE BRADSHAW and REBEKAH ROONEY**  
**PETER MAGEE and DAVID BRIGGS**  
**DAWN ONISHENKO and JULIE ERBLAND**  
**CAROLYN ROWE and CAROLYN MOFFATT**  
**BARBARA McDOWALL and GAIL DONNELLY**  
**ALISON KEMPER and JOYCE BARNETT**

Applicants

- and -

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**THE ATTORNEY GENERAL OF CANADA**  
**THE ATTORNEY GENERAL OF ONTARIO**  
**NOVINA WONG, THE CLERK OF THE CITY OF TORONTO**

Respondents

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**AFFIDAVIT of WILLIAM N. ESKRIDGE, JR.**  
**(Sworn November 14, 2000)**

**Introduction**

1. I am over the age of 18 and competent to testify to the matters contained herein.
2. My professional education has been in two disciplines: history (Masters degree, Harvard, 1974) and law (Juris Doctor, Yale, 1978). Since 1998, I have been the John A. Garver Professor of Jurisprudence at the Yale Law School. Before 1998, I was a Professor of Law at the

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Georgetown University Law Center, the leading law school in the United States that is affiliated with the Roman Catholic Church. At Georgetown, I devoted years of academic research to issues of religion and sexual orientation (among other topics). My best-known book is *The Case for Same-Sex Marriage* (1996). My *curriculum vitae* is attached to this affidavit and lists other publications and positions held.

10 3. An issue that has long interested me is whether it is factually or normatively correct to believe, as most people in the modern West do, that marriage is an institution that must be limited to one man and one woman. I was surprised to find that historians, social anthropologists, and scholars of comparative literature have been writing about same-sex unions and marriages for most of this century. As a matter of fact, I have come to the conclusion that same-sex relationships have been recognized as unions or marriages throughout human history. As a matter of value, I have come to the conclusion that same-sex unions or marriages can contribute to the same economic, companionate, and even procreative human projects that different-sex marriages do. The remainder of this affidavit sets forth what I found, together with some caveats and provisional generalizations.

20 4. Start with the caveats. A general history of human relationships may never be written, because the records of people's everyday lives no longer exist or exist in hard-to-decipher form. A history of same-sex unions will be even more fragmentary. Relatedly, it is perilous to generalize about institutions across cultures as well as time periods. I shall use the convention *same-sex unions* to refer to any kind of culturally or legally tolerated institution whereby people of the same sex are bonded together in relationships for reasons of affinity, economy, or society. Included within the general category of same-sex unions are *same-sex relationships*, which are culturally but not legally recognized in the society, and *same-sex marriages*, which have sanction or consequences under the society's legal regime. That a polity recognizes same-sex marriages does not mean that everyone or even most people in the polity approve of such marriages.

30 5. I am not using the term "marriage" casually. Although some of the same-sex relationships described below have marriage-like features, I don't deem most of them same-sex marriages. The term is used only when the same-sex union was treated by contemporaries and legal authorities as about the same as different-sex marriage *and* meets one or more of the traditional functions of marriage: long-term emotional support and bonding between the couple, economic security and division of labor in the household, and legitimacy and support of a family, including children. In cases of ambiguous evidence, I shall note the ambiguities, sometimes in the notes. Please note that I do not assume that sexual intercourse necessarily takes place within a same-sex union. Just as different-sex couples sometimes marry or unite without sex, so do same-sex couples. More importantly, the pre-1870 cultures I describe (including the West) did not structure people's thought around the concept of *sexuality*.

6. I do not use the term "homosexual marriage"(or union) as a synonym for "same-sex marriage" (or union). It is anachronistic to refer to same-sex intimacy or sodomy as

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“homosexual” before 1870, for the simple reason that the word “homosexual” did not exist until after 1870, and for the more complicated reason that the idea of “homosexuality” was not possible until after 1870.<sup>1</sup> As I shall explain later on in this affidavit, see ¶¶ 55-57 below, Western culture in the twentieth century viewed same-sex marriage as automatically “homosexual” or “gay,” but there is no justification to read that social understanding back into second century Rome, ninth century Europe, sixteenth century Native America, seventeenth century China, nineteenth century Africa, or twentieth century Melanasia. Indeed, there is strong reason not to do so.

10 7. The following survey is not a definitive history of same-sex marriage, even within the limits I have already identified. For older or more primitive cultures, scholars have too little information to form rigid judgments; new discoveries and factual information can change our conclusions significantly. So for those cultures, I suggest probabilities more than certainties. For modern Western culture, the problem of incomplete information relates to the future rather than the past. Because the story is still in its early stages of unfolding, the way we understand recent facts will change as public norms change.

20 8. For narrative convenience, I shall set forth this history of same-sex unions in three segments: the pre-modern antecedents of Western (European) culture, see ¶¶ 9-25 below; Native American, African and Asian cultures, with a focus on the treatment of same-sex unions prior to westernization, see ¶¶ 26-40 below; and the modern period, in which Western culture has dominated the world, see ¶¶ 41-67 below. The first two segments reveal that many communities, including pre-modern Western society, recognized same-sex unions, including marriages. In the modern period of Western society, same-sex marriage has been suppressed, forced into a closet from which it has recently emerged. This lawsuit is part of the social movement which seeks primarily to seek legal equality for lesbian and gay couples, but secondarily to reclaim the human history of same-sex unions which has been unknown and now is often denied. These three descriptive segments will be followed by an explicitly normative part, ¶¶ 68-81 below. There I shall discuss the ways in which the factual history of same-sex unions and marriage can inform the same-sex marriage debate today.

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30 <sup>1</sup> The statement in text reflects the famous thesis that “the homosexual” and “homosexuality” are socio-medical constructs particular to the post-1870 West. See ¶ 54 below. This thesis is now widely accepted among serious historians of the history of gender and sexuality. See, e.g., *Hidden From History: Reclaiming the Gay and Lesbian Past* (Martin Duberman et al. eds. 1989); David M. Halperin, *One Hundred Years of Homosexuality* 81 (1990); Angus McLaren, *The Trials of Masculinity: Policing Sexual Boundaries, 1870-1930* (1997). Indeed, the term “heterosexuality” is an even more recent semantic and intellectual construction than “homosexuality” is. See Jonathan Ned Katz, *The Invention of Heterosexuality* (1995).

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### Premodern Western Cultures

9. The early Egyptian and Mesopotamian societies that are considered important antecedents for Western culture apparently tolerated and sometimes celebrated same-sex *relationships* in their culture, literature, and mythology. Because of a dearth of sources about these old societies, evidence that these societies recognized same-sex *marriage* is usually speculative – as is evidence of different-sex marriage in some cases. Later, however, one finds more tangible evidence of same-sex marriages in classical Greece, imperial Rome, and medieval Europe. Same-sex relations were met in these cultures with a mix of tolerance and anxiety.

10 *Ancient Civilizations (Egypt and Mesopotamia)*

10. Because there are so few surviving records pertaining to family and sexual matters, we know little of the most ancient cultures' specific practices, namely, those of Egypt, Mesopotamia and their environs. At the very least, one can say that the leading ancient cultures sometimes treated same-sex relationships similarly to marriages involving different-sex partners.

20 11. Information about Egyptian unions, whether different- or same-sex, is suggestive. Some artifacts have depicted same-sex couples in intimate poses, evidence that Egyptian society at some points in its history was accepting of same-sex relationships. For example, a tomb for two male courtiers of the Fifth Dynasty (about 2600 B.C.) includes bas-reliefs of the two men holding hands, embracing, noses touching, poses that are strikingly more erotic than those depicting different-sex couples in Egyptian tombs. Social historian David Greenberg maintains that the men were lovers, whose same-sex relationship was apparently accepted by the state, since the Pharaoh provided their tomb. Indeed, the tomb of at least one Pharaoh, the renowned Ikhnoton, contains figures of the Pharaoh and his male consort posed even more intimately.<sup>2</sup>

30 12. The most interesting evidence of culturally or legally recognized same-sex unions in ancient Egypt is fascinatingly indirect. After living for several generations in Egypt, the Israelites fled that land, ultimately settling in Canaan near the end of the second millennium B.C. Their religion rejected many Egyptian mores. Chapter 18, verse 3 of the Old Testament book of Leviticus admonished the Israelites to avoid the “doings of the land of Egypt, wherein ye dwelt . . . neither shall ye walk in their ordinances.” Verses 24 and 27 referred to those “doings” as “abominations” that defiled “the nations,” apparently Egypt and perhaps also Canaan. Verse 22 is more specific: “Thou shalt not lie with mankind, as with womankind: it is abomination.” The implication that same-sex intimacy was common in Egypt and Canaan is elaborated by the *Sifra*, an exegetic midrash interpreting Leviticus. The *Sifra* says of chapter 18:<sup>3</sup>

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<sup>2</sup> See David F. Greenberg, *The Construction of Homosexuality* 130 (1988).

<sup>3</sup> 3 Jacob Neusner, *Sifra: An Analytical Translation* 74 (1988) (translating Chapter 193, “Parashat Ahare Mot Parashah”).

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- A. If “You shall not copy the practices of the land of Egypt . . . or of the land of Canaan,”
  - B. might one think that they are not to build their buildings or plant vineyards as they did?
  - C. Scripture says, “nor shall you follow their laws”;
  - D. “I have referred only to the rules that were made for them and for their father and their fathers’ fathers.”
  - E. And what would they do?
  - F. A man would marry a man, and a woman would marry a woman, a man would marry a woman and her daughter, a woman would be married to two men.
  - G. That is why it is said, “nor shall you follow their laws.”

20 Given the parallel references to marriage by a man to a woman and her daughter and by a woman with two men, the author of this midrash was using the term “marry” in its juridical sense. This evidence would suggest that same-sex unions at least functionally similar to marriages were sometimes accepted in Egypt and possibly Canaan, but not by the Israelites. Unfortunately, the *Sifra* is not conclusive evidence of same-sex marriage in Egypt, because it was a biased account of Egyptian culture and was written long after the practices it described.

30 13. Mesopotamian mores pertaining to same-sex relationships are illustrated in the most celebrated of the Near Eastern myths, the *Epic of Gilgamesh*. Written through a collective process over several generations, the epic describes the relationship between Gilgamesh, the great powerful ruler of Uruk, and Enkidu, a male created by the gods to divert Gilgamesh from wrecking havoc in the world.<sup>4</sup> Gilgamesh and Enkidu become comrades, friends, and lovers before Enkidu dies at the hands of the fates. Enkidu is often called Gilgamesh’s “brother” (*ahu*), a term connoting family-like intimacy. Significantly, Gilgamesh’s feeling for Enkidu is modeled on sexual attraction. In the two dreams that presage the arrival of Enkidu, Gilgamesh takes pleasure in his vision of Enkidu as in a woman. The Assyrian version of the myth refers to Enkidu, “[I loved it, and like] a wife I caressed it.”<sup>5</sup> When Enkidu dies, Gilgamesh mourns for him like a widow (literally, “a wailing woman”) and veils his corpse as if it were a bride. Because the *Epic of Gilgamesh* was a collective project and achieved great popularity in ancient

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<sup>4</sup> See Halperin, *One Hundred Years*, 81.

<sup>5</sup> This and other quotations from the epic are taken from the translation in Jeffrey H. Tigay, *The Evolution of the Gilgamesh Epic* (1982).

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times, one might infer that same-sex relationships had some resonance in the cultures of ancient Babylonia and Assyria. This inference is supported by evidence that several Mesopotamian monarchs (notably Hammurabi, the great Babylonian lawgiver) openly enjoyed male lovers. Moreover, the *Almanac of Incantations* contained prayers favoring, on an equal basis, the love of a man for a woman, a woman for a man, and a man for a man.<sup>6</sup>

10 14. Consider also Mesopotamian statutes, which have been preserved, escaping the fate of the lost Egyptian laws. None of Mesopotamia's early legal codes – the Laws of Urukagina (2375 B.C.), the Laws of Ur-Nammu (2100 B.C.), the Laws of Eshnunna (1750 B.C.), the Laws of Hammurabi (1726 B.C.) and the Hittite Laws (around 800 B.C.) – prohibited or disapproved of same-sex relationships, even though sex and marriage were otherwise heavily regulated.<sup>7</sup> On the other hand, the legal codes contained no provision either sanctioning or disapproving same-sex marriages, with one possible exception. Table 1 of the Hittite Laws regulated marriage, specifically the husband's payment of bride-price to the wife. While it was assumed that this regulation applied to the advantage of free Hittite citizens, special provisions in Table 1 afforded explicit legal authority for slaves to obtain brides in this way; otherwise, slaves apparently could not marry. For example, section 34 provided: "If a slave gives the bride-price to a woman and takes her as his wife, no-one shall [make him] surrender her."<sup>8</sup> According one translation, section 36 then provided: "If a slave gives the bride-price to a free youth and takes him to dwell in his household as spouse, no-one shall [make him] surrender him."<sup>9</sup> There has for generations been legitimate controversy over the correct reading of section 36 (see note 9). If the quoted reading were correct, a male slave with money (the bride-price) to pay for a male spouse could do  
20 so and expect that the transaction would be enforceable at law. If a slave were allowed to do this.

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<sup>6</sup> See Greenberg, *Construction of Homosexuality*, 124-25.

<sup>7</sup> Id. at 124-25. Most of the statutes are translated in Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor* (1995), and James B. Pritchard, editor, *The Ancient Near East: An Anthology of Texts and Pictures* 133-67 (1958).

<sup>8</sup> Ephraim Neufeld, *The Hittite Laws* 10 (1951).

30 <sup>9</sup> The language in text is the reading of John Boswell, *Christianity, Social Tolerance, and Homosexuality* 20-21 and note 39 (1980), who disputes the reading preferred by Neufeld, *Hittite Laws*, 10-11: "If a slave gives the bride-price to a free youth and takes him to dwell in his household as husband [of his daughter], no-one shall surrender him." The bracketed portion is an interpolation by Neufeld, who admits as much. Id. at 151. He also reports that earlier scholars had interpreted § 36 as a state sanction for "homosexual" relations among slaves and that "such a relationship among free men did not require any special legal provisions." Id. Boswell rejects Neufeld's speculations as a strained effort by a modern historian to read his own prejudices into another culture's text. Boswell, *supra*, at 20-21. Boswell's reading, in turn, is rejected by Greenberg, *Construction of Homosexuality*, 125 note 3, and Roth, *Mesopotamia and Asia Minor*, 222.

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it would go without saying that a free Hittite citizen could do the same.

*Classical Greece and Pre-Christian Rome*

15. Classical Greek culture was keenly interested in and developed rich cultural norms for same-sex relationships, some of which were close to marriages. Plato's *Symposium* is the first recorded essay in "the praise of Love" (line 177E), with love and relationships between men its primary focus.<sup>10</sup> One of the speakers, Pausanias, delivered an impassioned defense of companionate same-sex relationships:

10 [T]hose who are inspired by . . . Love are attracted to the male: they find pleasure in what is by nature stronger and more intelligent. But, even within the group that is attracted to handsome boys, some are not moved purely by this heavenly Love; those who do not fall in love with little boys; they prefer older ones whose cheeks are showing the first traces of a beard – a sign that they have begun to form minds of their own. I am convinced that a man who falls in love with a young man of this age is generally prepared to share everything with the one he loves – he is eager, in fact, to spend the rest of his own life with him. [Lines 181C-D.]

20 Likewise, Phaedrus praises unselfish love (*agape*), citing as examples Alcestis' willingness to die for her husband Admetus (lines 179B-C) and Achilles' willingness to die for his lover Patroclus (lines 181C-D). This analogy suggests both a companionate feature of same-sex relationships and the formal distinction Plato observed between same-sex relationships and different-sex marriage.

16. Historians of classical Greece and its romantic institutions consider the *Symposium* to reflect the attitudes toward same-sex relationships prevailing in at least some of the Greek city-states. In Athens and (it appears) other major city states, no law prohibited same-sex relationships. They were socially institutionalized for free male citizens, who were expected to court and have a relationship with a boy in their early adulthood. While historians have not ventured to consider these relationships to be marriages, they have demonstrated that they often followed the same courtship rituals as marriages.<sup>11</sup> A closer link between same-sex relationships

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30 <sup>10</sup> Quotations in text will be from *On Homosexuality: Lysis, Phaedrus, and Symposium* (Benjamin Jowett tr., with selected retranslation, notes, and introduction by Eugene O'Connor). Plato's normative stance regarding sex between men is complicated by his *Laws*, which is ambivalent about same-sex attraction. See Eva Cantarella, *Bisexuality in the Ancient World* 61-63 (Cormac O Cuilleain tr. 1992); Gregory Vlastos, *Platonic Studies* 40-41 (1981).

<sup>11</sup> Kenneth J. Dover, *Greek Homosexuality* 89-91 (1978), argues for "common ingredients" between different-sex marriages and Greek same-sex relationships. For the latter, he describes a formal "courtship" by the dominant party (the husband/man) toward the receptive

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and marriage was a ritualized same-sex courtship in Crete. The ancient geographer Strabo described the “peculiar laws regarding love” followed on that island, whereby two men would become “partners” (or “companions”) after the abduction of one by the other, followed by a feast where the partners announce their mutual intentions before witnesses.<sup>12</sup> Several historians have characterized these Cretan abduction ceremonies as same-sex “marriages.”<sup>13</sup> Another Greek island, Lesbos, gave the Western world the concept of female relationships, which probably had broader currency. Eva Cantarella believes that some of the lesbian relationships arising out of female collectives (*thiasoi*) were “initiation marriages” similar to the male same-sex unions common in the city states.<sup>14</sup>

10           17. The consensus among historians is that republican Rome, like classical Greece, was tolerant of same-sex relationships.<sup>15</sup> Imperial Rome considered some of them marriages. The best documented are the same-sex marriages of Rome’s emperors. Roman historian Suetonius, disapprovingly, reports that the first-century emperor Nero “went through a wedding ceremony with [Sporus] – dowry, bridal veil and all – which the whole Court attended; then brought him home and treated him as a wife. He dressed Sporus in fine clothes normally worn by an Empress and took him in his own litter not only to every Greek assize and fair, but actually through the Street of Images at Rome, kissing him amorously now and then.” Later a freedman, Pythagorus, “married [Nero] – just as he himself had married Sporus – and on his wedding night he imitated

20           party (the wife\boy) and the expectation that the receptive party will respond to advances coyly. As is often the case in traditional marriages, the family would become involved in the receptive party’s decision whether to accept the dominant party’s advances. Finally, both types of relationships met with social disapproval if sexual relations occurred outside of the accepted courtship-to-wedding-vow relationship.

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<sup>12</sup> Strabo, *The Geography* 10.4.21. H.L. Jones’s translation, 5 *The Geography of Strabo*, 155-59 (1917-1933), renders this as “peculiar customs.” John Boswell, *Same-Sex Unions in Pre-Modern Europe* 89 and note 175 (1994), renders the Greek more literally as “peculiar laws.”

30           <sup>13</sup> Boswell, *Same-Sex Unions*, 189-90. See also L.R. de Poge-Castries, *Histoire de L’Amour Grec dans L’Antiquité* 42-46 (1930); Bernard Sergent, *Homosexuality in Greek Myth* (Arthur Goldhammer tr. 1986); Mark Golden, “Slavery and Homosexuality at Athens,” 38 *Phoenix* 308, 319 note 49 (1984).

<sup>14</sup> See Cantarella, *Bisexuality in the Ancient World*, 81-83.

<sup>15</sup> Contrary to earlier belief, it is now clear that republican Rome did not prohibit same-sex relationships. See Cantarella, *Bisexuality in the Ancient World*, 106-14; Saara Lilja, *Homosexuality in Republican and Augustan Rome* 130-31 (1983); Paul Veyne, “Homosexuality in Ancient Rome,” in Phillipe Aries and Andre Bejin, editors, *Western Sexuality* (Anthony Foster tr. 1995).



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the screams and moans of a girl being deflowered."<sup>16</sup> Dio Cassius, another contemporary historian, confirms Nero's marriages to these men<sup>17</sup> and also provides a reliable account of the same-sex and different-sex marriages of third-century emperor Elagabalus.<sup>18</sup> Indeed, it was said that men seeking advancement in Elagabalus' imperial court rushed to marry other men to curry favor with the emperor.<sup>19</sup> Second-century emperor Hadrian was renowned through the ancient world love for his wise and moderate reign, and for his love of the tragic youth Antinous. Though not Hadrian's spouse, Antinous attained the status of legend, acclaimed for generations in sculpture, architecture, painting, coins, and literature.<sup>20</sup> The marriages of emperors such as Nero stand as un rebutted examples of publicly celebrated (even if privately condemned) same-sex marriages in the same period.

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18. Other evidence indicates that same-sex marriages were not limited to imperial fiat. The satirists Martial and Juvenal sarcastically noted the casual way in which men married other men by the end of the first century. "I have a ceremony to attend tomorrow morning in the Quirinal valley," says the interlocutor in Juvenal's *Satires*. "What sort of ceremony?" "Nothing special: a friend is marrying another man and a small group is attending."<sup>21</sup> Martial described the marriage of "bearded Callistratus" to the "brawny Afer," complete with torches, wedding veil, songs, and dower.<sup>22</sup> The novel *Babylonica*, an early exemplar of the pulp

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<sup>16</sup> Gaius Suetonius Tranquillus, *The Twelve Caesars*, 223 (Sporus), 224 (the freedman) (Robert Graves tr. 1975). Book 15 of Tacitus' *Annals* reports Nero's marriage to the freedman Pythagorus. See *The Complete Works of Tacitus*, 376 (Alfred John Church and William Jackson Brodribb tr. 1942).

<sup>17</sup> Dio Cassius, *Epitome*, book 62; Ernest Cary's translation, 8 *Dio's Roman History* 135-37 (1914-1927). According to Dio, the Greeks celebrated "even to the extent of praying that legitimate children might be born of them." Id. book 62.13; Cary translation, 159. Dio was not amused. See also Edward Gibbon, *The Decline and Fall of the Roman Empire* chapter 4 (Dero A. Saunders ed. 1952).

<sup>18</sup> See Dio Cassius, *Epitome*, book 80; Cary translation, volume 9, 465-71.

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<sup>19</sup> Lampridius, *Antoninus Elagabalus*, book 11; David Magie translation, *Scriptores Historiae Auguste*, volume 2, 129 (1922-1932). Lampridius' account of Elagabalus' same-sex marriage is in id., book 10; Magie translation, 125-129.

<sup>20</sup> See Royston Lambert, *Beloved and God: The Story of Hadrian and Antinous* (1984); Marguerite Yourcenar, *Memoirs of Hadrian* (1954).

<sup>21</sup> Juvenal, *Satires*, book 2; G.G. Ramsey translation, *Juvenal and Persius*, 132-35 (1950). The reference is to the marriage of Gracchus.

<sup>22</sup> Martial, *Epigrams*, book 7.42; Walter C.A. Ker translation, 347-49 (1950).

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romance, had a subplot involving the passion of Egypt's Queen Berenice for the beautiful Mesopotamia, who was snatched from her. After one of the Queen's servants rescued Mesopotamia from her abductors, "Berenice married Mesopotamia, and there was war between [the abductor] and Berenice on account of Mesopotamia."<sup>23</sup> These and other references do not exclude the possibility that same-sex marriages were culturally or legally distinct from different-sex marriages, but they suggest the existence of same-sex unions in imperial Rome.

*Christian Rome and the Middle Ages*

10 19. The late Roman Empire grew less tolerant of same-sex unions than either the Republic or the earlier Empire had been. In 342 A.D., Rome adopted a statute that seemingly – but perhaps facetiously – prohibited same-sex marriages:<sup>24</sup>

When a man "marries" in the manner of a woman, a "woman" about to renounce men, what does he wish, when sex has lost its significance; when the crime is one which it is not profitable to know; when Venus is changed into another form; when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment.

20 While the statute reinforces the impression that same-sex marriages were not uncommon in the Roman Empire, it also evidences an anxiety about same-sex unions that antedated the fourth century. At the end of the second century, for example, Plutarch's *Moralia* included a dialogue filled with invective both for and against same-sex relationships, suggesting that their propriety was a matter of controversy. A subsequent anonymous dialogue entitled *Affairs of the Heart* was sympathetic to same-sex relationships but sharply distinguished them from marriage.<sup>25</sup>

30 20. Imperial Rome's anxiety about same-sex relations was related to the institutionalization of companionate marriage, in which husband and wife were friends and marital partners in the creation of the family unit. The rise of companionate marriage also involved the linkage of procreation with sexual partnership. There might also be a connection between the statute of 342 A.D. and the increasing influence of Christianity during the late Roman Empire. Inspired in part by its Judaic heritage (recall Leviticus, quoted above), the early

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<sup>23</sup> Translated in Boswell, *Same-Sex Unions*, 82.

<sup>24</sup> The text is from the Theodosian Code 9.vii.3, and is translated in Greenberg, *Construction of Homosexuality*, 229. Cantarella, *Bisexuality in the Ancient World*, 175-76, maintains that the statute only penalized passive anal sex.

<sup>25</sup> The ancient sources in text are discussed in Michel Foucault, *The Care of the Self*, 72-80 (Robert Hurley tr. 1986) (volume 3 of Foucault's *The History of Sexuality*).

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Christian tradition advocated companionate different-sex marriage, which served procreative purposes, and was correspondingly ambivalent about or hostile to same-sex relationships.<sup>26</sup> The major philosophical traditions of the Late Empire – Stoicism, Neo-Platonism, and Manicheanism, all of which influenced Christianity – were intolerant of most forms of sexual pleasure and equivocal about the merits of same-sex relationships. Some of the Manicheans, for example, thought homosexual pleasures worse than heterosexual ones since they did not reproduce the race, though others viewed same-sex relations more leniently.

10 21. The collapsing Roman Empire grew increasingly inhospitable to same-sex unions, and after Rome's fall in 476 A.D. state attitudes toward such unions became more hostile. In the surviving Eastern Empire, the Justinian Code of 529 A.D. flatly outlawed same-sex intimacy, placing it in the same category as adultery, both of which violated the then-entrenched ideal of companionate different-sex marriage. In the remains of the Western Empire, the Visigoth state in Spain criminalized same-sex intimacy around 650 A.D.,<sup>27</sup> though most of the other Germanic states showed little interest in either advocating or decrying same-sex relationships. At first glance, it would appear that the same-sex unions of the earlier Roman Empire all but died out during the early Middle Ages. A closer look reveals the story to be more complicated.

20 22. The complication owes much to the Roman Catholic and Greek Orthodox Churches' ambivalent responses to same-sex unions. During the early and high Middle Ages, the Church was doctrinally critical of same-sex erotic intimacy, because it could not result in procreation and because it constituted sex outside of companionate marriage ideal. On the other hand, the Church favored same-sex companionate intimacy; agapic love between brothers in the Church such as the famous martyrs Sergios and Bacchus was in fact the Christian ideal.<sup>28</sup> Church practice thrust the faithful into homosocial environments (schools, monasteries, nunneries) sure to engender what we would today deem sexual responses. Erotic feelings repeatedly arose between teachers and students, clerics and their fellows, and priests and acolytes, yearnings which are documented in a proliferation of love letters, poems and stories originating from the early and high Middle Ages.<sup>29</sup>

30 23. In the early Middle Ages the Church developed institutions, memorialized in liturgies included in the Church's formal collections, that combined the Church's spiritual commitment to companionate relationships with its members' desire to bond with people of the

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<sup>26</sup> See Peter Brown, *The Body and Society: Men, Women and Sexual Renunciation in Early Christianity* (1988).

<sup>27</sup> *The Visigothic Code*, title V, § VI (Samuel P. Scott ed. & tr. 1910).

<sup>28</sup> For an account of Sergios and Bacchus, see Boswell, *Same-Sex Unions*, 146-56.

<sup>29</sup> See the sources collected in Boswell, *Christianity, Social Tolerance and Homosexuality*, 186-94.

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same sex. The existence of Roman Catholic and Greek Orthodox rituals of *brother-taking* or *enfraternization* have been known in the academic literature for decades and were brought to my attention by the Reverend Alexei Michalenko, the Catholic Chaplain at the Georgetown University Law Center.<sup>30</sup> Ceremonies creating these brotherhoods were performed for same-sex couples (often male missionary pairs) from the fifth century onward. According to Church archives, these early liturgies were typically structured as follows:<sup>31</sup>

- The couple stand in front of the lectern, on which are placed the Gospel and a cross. The older of the brothers stands to the right.
- 10 ● The ceremony starts off with prayers and litanies celebrating earlier examples of same-sex couples or friends in the early Church. Sergios and Bacchus were the most frequently invoked precedent.
- The couple is girded with a single belt, signifying their union as one, and they place their hands on the Gospel and receive lit candles.
- The priest reads from one of Paul's epistles (1st Corinthians 12:27 ff.) and the Gospel (John 17: 18-16), followed by more prayers and litanies.
- 20 ● The assembled are led in the Lord's Prayer, followed by Holy Communion, the Eucharist, for the couple.
- The priest leads the couple around the lectern, each holding the hand of the other, while the assembled sing a hymn.
- The couple exchange a kiss, and the service concludes with the singing of Psalm 132:1 ("Behold how good and sweet it is for brothers to live as one.").

Significantly, this early brotherhood liturgy was acted out in formal terms very similar to the liturgy later developed by the Church for the purpose of performing different-sex marriages.

- 30 24. The main difference between the brotherhood liturgy and the one originally used to

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<sup>30</sup> They are reported in William N. Eskridge, Jr., "A History of Same-Sex Marriage," 79 *Va. L. Rev.* 1419 (1993), which has as an appendix my translation of one of the services of "spiritual brotherhood."

<sup>31</sup> E.g., Pavel Florenskij, *La Colonna e il Fondamento della Verita*, 521-25 (1974, translated into Italian by Pietro Modesto, introduction by Elemire Zolla). Boswell, *Same-Sex Unions*, 283-344, appends translations of a variety of liturgical ceremonies resembling the one in text.

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wed different-sex couples was that the former emphasized the companionate (see Psalm 132) rather than the procreative (see Psalm 127) nature of the relationship. Hence, rather than orating on procreation, one version of the enfraternization liturgy read:<sup>32</sup>

10 O Almighty Lord, you have given to man to be made from the first in Your Image and Likeness by the gift of immortal life. You have willed to bind as brothers not only by nature but by bonds of the spirit Your most celebrated Apostles Peter, the Chief of them all, and Andrew; James and John the Sons of Zebedee; Philip and Batholomew. You made as very brothers Your Holy Martyrs Sergios and Bacchus, Cosmas and Damien, Cyrus and John. Bless Your Servants united also that, not bound by nature, [they be] joined with bonds of love. Grant them a love mutual and without offense and a brotherhood upset by naught of hatred all the days of their lives, through the might of Your All-Holy Spirit and through the intercession of our All-Holy spotless ever-Virgin Lady . . . .

The precise significance of these enfraternization liturgies remains mysterious. They may have simply been friendship ceremonies or send-offs for missionaries.

20 25. Medieval historian John Boswell has argued for a broader reading of these enfraternization liturgies.<sup>33</sup> Expanding upon earlier academic examinations of these liturgies that Father Michalencko had suggested to him, Boswell uncovered a large variety of manuscript versions of Christian same-sex union liturgies in libraries and ecclesiastical collections throughout Europe. Although his earlier claim that these liturgies are identical to same-sex marriages<sup>34</sup> was overstated, he insisted upon tangible connections between these same-sex unions and different-sex marriages. The same-sex union ceremonies are usually located right after different-sex marriage ceremonies in the liturgical collections Boswell consulted. As previous scholarship had established, the same-sex ceremonies were structurally and thematically similar to the different-sex ones, but Boswell contended for a more ambitious connection. “[I]n the case of the same-sex ceremony, standing together at the altar with their right hands joined (the traditional symbol of marriage), being blessed by the priest, sharing Communion, and holding a banquet for family and friends afterward – all parts of same-sex union in the Middle Ages --

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30 <sup>32</sup> *Ritualae Graecorum Complectens Ritus et Ordines Divinae Liturgicae* 707 (Milan: Ruscioni Editore, 1974, originally edited and translated by R.P. Jacobi Goar).

<sup>33</sup> Boswell, *Same-Sex Unions*, chapters 5 and 6.

<sup>34</sup> John Boswell, “Homosexuality and the Religious Life: A Historical Approach,” in Jeannine Grammick, editor, *Homosexuality in the Priesthood and the Religious Life*, 3, 11 (New York: Crossroad, 1989); John Boswell, “1500 Years of Blessing Gay and Lesbian Relationships: It’s Nothing New to the Church” (videotape of lecture to the Washington, D.C. chapter of Integrity, a gay and lesbian Episcopal group).

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most likely signified a marriage in the eyes of ordinary Christians.”<sup>35</sup> Critics contest this claim and find much of Boswell’s argumentation “tendentious.”<sup>36</sup> Notwithstanding these criticisms, which strike me as fair but not conclusive, it can be said with strong probability that the Church did sanction these brotherhood ceremonies, and with some likelihood that the brothers so joined enjoyed relationships of affinity and erotic possibilities.

### Non-Western Cultures

10 26. There is strong evidence demonstrating the existence of same-sex unions, including legally recognized marriages, in Native American, African, and Asian cultures. I shall not attempt to survey all the cultures here and shall instead introduce three recurring patterns: same-sex marriages with gender-bending *berdaches*; same-sex unions serving social, economic, or companionate needs of various cultures; and woman marriages for purposes of procreation.

#### *Same-Sex Marriages with Berdaches*

20 27. Accounts by stunned Spanish explorers, missionaries, and bureaucrats provide early evidence of same-sex relationships and marriages in the Americas. For one of many examples, Francisco Lopez de Gomara’s *History of the Indies* (1552) reported that “the men marry other men who are impotent or castrated and go around like women, perform their duties and are used as such and who cannot carry or use the bow.”<sup>37</sup> Same-sex unions between women were also reported. Pedro de Magalhaes de Gandavo’s *History of the Province of Santa Cruz* (1576)

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<sup>35</sup> Boswell, *Same-Sex Unions*, 191. See also *id.* at 192-98, for Boswell’s doubts about other interpretations of the same-sex union ceremonies.

30 <sup>36</sup> Brent D. Shaw, Book Review, *New Republic*, July 18, 1994, at 33, is a scholarly critique of Boswell’s tendency to overread or misread his sources. Ralph Hexter responds to Shaw and Shaw responds to Hexter in *New Republic*, October 3, 1994, at 39. Reviews by scholars more favorable to Boswell include Marina Warner, “More Than Friendship,” *New York Times*, § 7 (Book Review Supplement), August 28, 1994, at 7; Wendy Doniger, “Making Brothers,” *Los Angeles Times*, July 31, 1994, Book Review Supplement, at 1. I found all of these reviews informative and thoughtful.

<sup>37</sup> Alvar Cabeza de Vaca also witnessed unions between same-sex couples, stating in *Narrative of the Expeditions and Shipwrecks of Cabeza de Vaca* (1542), that he “saw a man married to another man.” Juan de Torquemada, in the *Monarchia Indiana* (1615), described a common custom whereby “parents [gave] a boy to their young son, to have him for a woman and to use him as a woman; from that also began the law that if anyone approached the boy, they were ordered to pay for it, punishing them with the same penalties as those breaking the condition of a marriage.” These original sources (as well as those quoted in text) are collected in Francisco Guerra, *The Pre-Columbian Mind* (1971). See also the documents collected in Jonathan N. Katz, *Gay American History*, 281-334 (1992 revised edition).

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describes Native American women in northeastern Brazil who “give up all the duties of women and imitate men, and follow men's pursuits as if they were not women. . . . [E]ach has a woman to serve her, to whom she says she is married, and they treat each other and speak with each other as man and wife.”

10 28. What these accounts describe is the *berdache* tradition which was institutionalized in the Indies and throughout what is now the United States, as well as in the Aztec, Mayan, and Incan civilizations. The Native American *berdache* is a person who deviates from his or her traditional gender role, taking on some of the characteristics and perceived responsibilities of the “opposite” sex. The *berdache* does not, however, cross gender lines so much as mix them. Indeed, many Native American cultures considered *berdaches* to be a third sex.<sup>38</sup> Most important for this affidavit, *berdaches* married individuals of the same sex, and those marriages were well-recognized by many Native American laws and cultures.

20 29. Outsiders' depictions of the Native American *berdache* have often been colored by their anti-homosexual attitudes. The accounts of Spanish authors such as those quoted above usually expressed shock, invoking Native American same-sex unions as evidence of these cultures' barbarism, which they sought to correct. Until the twentieth century, accounts by Western anthropologists suppressed the tradition. The first detailed academic study focusing on Native American same-sex unions was George Devereux's article on the Mohave *berdaches*.<sup>39</sup> Devereux reported that gender-crossing men (*alyha*) and women (*hwame*) had long been tolerated by the Mohave, and that their same-sex marriages were institutionalized and socially accepted. Thus, under tribal custom and law *alyha* married (and divorced) men, and *hwame* married (and divorced) women.

30 30. Ethnographers and anthropologists studying the culture and evolution of various Native American tribes throughout this century discovered similar *berdache* institutions.<sup>40</sup>

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<sup>38</sup> See Charles Callender and Lee M. Kochems, “Men and Not-Men: Male Gender-Mixing Statuses and Homosexuality,” in Evelyn Blackwood, editor, *The Many Faces of Homosexuality: Anthropological Approaches to Homosexual Behavior* 165 (1986).

30 <sup>39</sup> George Devereux, “Institutionalized Homosexuality of the Mohave Indians,” 9 *Human Biology* 498, 513-15 (1937).

<sup>40</sup> Other leading monographs include Charles Callender and Lee M. Kochems, “The North American Berdache,” 24 *Current Anthropology* 443 (1983); Donald G. Forgey, “The Institution of Berdache Among the North American Plains Indians,” 11 *Journal of Sex Research* 1 (1975); W.W. Hill, “The Status of the Hermaphrodite and Transvestite in Najavo Culture,” 37 *American Anthropologist* 273 (1935); Nancy O. Lurie, “Winnebago Berdache,” 55 *American Anthropologist* 708 (1953); Elsie C. Parsons, “The Zuni La’Mana,” 18 *American Anthropologist* 521 (1916); James S. Thayer, “The Berdache of the Northern Plains,” 36 *Journal of Anthropological Research* 287 (1980); Harriet Whitehead, “The Bow and the Burden Strap: A

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10 Drawing from earlier accounts as well as his own field work, Walter Williams' *The Spirit and the Flesh* (1986) synthesizes existing scholarship probing the Native American *berdache* tradition.<sup>41</sup> On the basis of these accounts, Williams concludes that *berdaches* have been an accepted and in fact valued part of culture and law in a large majority of Native American tribes. Most academic attention has been focused on male *berdaches*, who frequently became revered leaders in their communities. Often, a male child was consciously raised to be a *berdache*, who assumed a special role in the community, mediating between the spiritual and physical worlds. Marriages between men and male *berdaches* were widespread among Native American cultures. As a general matter, same-sex marriages tended to conform to traditional Native American marriage patterns, in which labor was divided between the wife, who kept house, and husband, who hunted and directed the household. The men who married male *berdaches* were usually attracted to women as well as to men and were not themselves considered *berdaches*. Many such men preferred *berdache* wives for economic advantages, as *berdaches* not only would do the housework, but would help with hunting and other traditionally male activities as well. Others believed that marrying a *berdache* guaranteed greater marital stability, while still other conventional men pursued male *berdaches* on the basis of simple sexual attraction.

20 31. Although they have received less academic attention, female *berdaches* comprised an important cultural institution in most Native American communities. Like her male counterpart, the female *berdache* assumed many of the responsibilities traditionally performed by the opposite sex, including hunting and heading a household. And she would commonly marry another woman.<sup>42</sup> Female *berdaches* and woman-woman marriages were integral to women's ability to achieve a higher status in most Native American cultures. Thus, a female *berdache* would marry a *non-berdache* woman and would assume a position as head of the household, together with economic responsibilities for hunting and other traditionally "male" jobs.

32. Most American scholarship about *berdaches* draws from Native American cultures, but the phenomenon is worldwide. An authoritative survey of sexual practices across the world found in 1951:<sup>43</sup>

30 New Look at Institutionalized Homosexuality in Native North America," in Sherry B. Ortner and Harriet Whitehead, editors, *Sexual Meanings: The Cultural Construction of Gender and Sexuality* 80 (1981).

<sup>41</sup> Walter L. Williams, *The Spirit and the Flesh: Sexual Diversity in American Indian Culture* (1986). A second edition was brought out in 1992, but my citations will be to the first edition.

<sup>42</sup> Id. at 246-47; Evelyn Blackwood, "Sexuality and Gender in Certain Native American Tribes: The Case of Cross-Gender Females," 10 *Signs* 27 (1984).

<sup>43</sup> Clellan S. Ford and Frank A. Beach, *Patterns of Sexual Behavior*, 130-31 (1951).



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In 49 (64 percent) of the 76 societies other than our own for which information is available, homosexual activities of one sort or another are considered normal and socially acceptable for certain members of the community.

...  
... In many cases this [same-sex] behavior occurs within the framework of courtship and marriage, the man who takes the part of the female being recognized as a *berdache* and treated as a woman. In other words, a genuine mateship is involved.

10 Anthropological field work since 1951 has not only confirmed but deeply elaborated upon this observation. Particular attention has been paid to the *mugawe* of the Kenyan Meru, the Siberian Chuckchee, Tahitian *mahus*, and the Indian *hijras*.<sup>44</sup> With the exception of the *hijras*, the unions of these *berdaches* to people of the same sex have been treated by their indigenous cultures as culturally and legally recognized marriages.

#### *Functional Same-Sex Unions*

20 33. Same-sex unions in non-Western cultures have served companionate, economic, or cultural functions. This section will sample several prominent examples of same-sex unions that display different kinds of functions. Often arising in homosocial situations, the following examples involve bonding between two people of the same sex. The bonding may be sexual, but its main functions transcend the partners' sexual intimacy and were economic, professional, or social in nature. The unions may be temporary and are not necessarily legal marriages, though they usually offer marriage-like features and even terminology.

34. The most common functional same-sex unions in history have involved pair bonding in military settings. Akin to the Achilles-Patroclus and Gilgamesh-Enkidu relationships of ancient myth, many societies institutionalized same-sex relationships among warriors or soliders. The samurai warriors of feudal and Tokugawa Japan went to battle accompanied by apprentice warrior-lovers.<sup>45</sup> Literary sources, such as Ihara Saikaku's *The Great Mirror of Male Love*, depict these relationships as romantic, with strong loyalty on each side, and highly choreographed.<sup>46</sup> The beginning of a relationship between an apprentice (*wakashu*) and a

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30 <sup>44</sup> See Waldemar Bogoras, *The Chuckchee* (1975); Greenberg, *Construction of Homosexuality*, 58-61 (detailing other cultures with *berdache* traditions as well); Serena Nanda, *Neither Man Nor Woman: The Hijras of India* (1990); Robert I. Levy, "The Community Function of Tahitian Male Transvestism," 44 *Anthropological Q.* 12 (1971).

<sup>45</sup> See Greenberg, *Construction of Homosexuality*, 260; Stephen O. Murray, *Oceanic Homosexualities* 111, 130 (1992).

<sup>46</sup> See Paul Gordon Schalow, "Introduction" to Ihara Saikaku, *The Great Mirror of Male Love* (1990).

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samurai involved a formal exchange of written and spoken vows, giving the relationship a marriage-like status. Each participant promised to love the other in this life and the next – one step beyond our “till death do us part.” As in marriage, sex was only one element of the samurai relationship. The samurai was supposed to provide social backing, emotional support, and a model of manliness for the apprentice. In exchange, the latter was expected to be worthy of his lover by being a good student of samurai manhood.

10 35. The warrior tradition epitomized by the samurai can be illustrated in African cultures even more vividly. E.E. Evans-Pritchard documented the institution of “boy wives” for military men among the Azande in what is now Sudan.<sup>47</sup> The Azande considered the relationship a marriage both legally and culturally. The warrior paid bridewealth (some five spears or more) to the parents of his boy and performed services for them as he would have done had he married their daughter; if he proved to be a good son-in-law they might later replace the son by a daughter. Also, if another man had relations with his boy he could sue him at court for adultery. The warrior addressed the boy as *diare* (wife), and the boy addressed the warrior as *kumbami* (husband). The relationship was both sexual (the warrior would have intercourse with the boy between his thighs) and functional (the boy performed traditional wifely duties such as housekeeping). Anthropologists have reported finding similar institutions in other African societies.<sup>48</sup>

20 36. Marriage-like same-sex unions have been documented in China during the Yuan and Ming Dynasties (1264-1644).<sup>49</sup> Useful evidence comes from the widely read seventeenth century stories of Li Yu. Many of his stories speak openly and approvingly of companionate love affairs between men, a practice particularly associated with Fujian and other provinces in southern China. In at least one story, Li Yu describes the tragic romance of two men (Jifang and Ruiji) who become “husband and wife.” In describing the couple’s wedding, Li Yu goes out of his way to emphasize that the couple adhered to the formal requisites of marriage (brideprice, the various wedding rituals), giving some indication that similar same-sex marriages were common in southern China and perhaps elsewhere in the region. It has been inferred from Li Yu’s work and other evidence that there were “institutionalized relationships between males in some areas, and that these relationships were often expressed in terms of marriage and carried out in [the

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30 <sup>47</sup> E.E. Evans-Pritchard, “Sexual Inversion Among the Azande,” 72 *American Anthropologist* 1428, 1429-30 (1970).

<sup>48</sup> E.g., Walter Cline, *Notes of the People of Siwah and el Garah in the Libyan Desert* (Leslie Spier ed. 1936).

<sup>49</sup> See Bret Hinsch, *Passions of the Cut Sleeve: The Male Homosexual Tradition in China* (1990); James McGough, “Deviant Marriage Patterns in Chinese Society,” in Arthur Kleinman and Tsung-Ti Lin, editors, *Normal and Abnormal Behavior in Chinese Culture*, 171 (1990).

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same] social forms connected with 'regular' marriage."<sup>50</sup> Same-sex relationships elsewhere were celebrated as "brotherly" unions, "sworn friendships," and even adoptions – close but platonic relationships reminiscent of the early Christian Church's enfraternization ceremonies. Although the Manchus of the Qing Dynasty sought to discourage same-sex relationships, outlawing same-sex eroticism in 1740, these alliances continued for generations after peaking in the seventeenth century.

10 37. Less is known of female same-sex unions in China. While some historians credit accounts of woman-woman unions during the Qing Dynasty as marriage-like institutions, the first well-documented unions were those associated with the "marriage resistance movement" in nineteenth and early twentieth century southern China. The development of China's international silk industry during this period helped many women to attain their economic independence from men. After acquiring this newly-found freedom, thousands of women renounced marriage and became *sou hei* (literally, "self-combers"). Upon deciding to become *sou hei*, a woman took a formal ceremonial vow to remain unwed at least for a time, moved out of her parents' house, and built "spinster houses" with other *sou hei*. These women formed "sisterhoods" in which small groups of women (typically five to seven) would bond together for mutual support and affection. Andrea Sankar reports that physical as well as emotional bonds often developed between two or three of the sisters.<sup>51</sup> Other scholars believe that sisterhood relationships shared many attributes of marriage, including a ceremony with witnesses and a division of labor within the family unit.<sup>52</sup>

20 *Woman Marriage and Female Husbands*

38. A form of same-sex union which may be unique to African cultures is the institution of "woman marriage." Noted as a curiosity by earlier researchers, the institution was not given serious attention until anthropologists Eileen Jensen Krige and Melville Herskovits publicized it

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<sup>50</sup> McGough, "Deviant Marriage Patterns," 187-88. See also Hinsch, *Passions of the Cut Sleeve*, 129; Jonathan D. Spence, *The Memory Palace of Matteo Ricci* 226-31 (1984); Vivien W. Ng, "Homosexuality and the State in Late Imperial China," in Duberman et al., editors, *Hidden From History*, 76.

<sup>51</sup> Andrea Sankar, "Sisters and Brothers, Lovers and Enemies: Marriage Resistance in Southern Kwangtung," in *The Many Faces of Homosexuality*, 69.

<sup>52</sup> See Hinsch, *Passions of the Cut Sleeve*, 176-77.

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in the 1930s.<sup>53</sup> An early description of woman marriage among the Nuer of Sudan reports:<sup>54</sup>

What seems to us, but not at all to the Nuer, a somewhat strange union is that in which a woman marries another woman and counts as the pater [father] of the children born of the wife. Such marriages are by no means uncommon in Nuerland, and they must be regarded as a form of simple legal marriage, for the woman-husband marries her wife in exactly the same way as a man marries a woman. . . . We may perhaps refer to this kind of union as woman-marriage.

10 A woman who marries in this way is generally barren, and for this reason counts in some respects as a man. . . . [I]f she is rich she may marry several wives. She is their legal husband and can demand damages if they have relations with men without her consent. She is the pater [father] of their children, and on the marriages of their daughters she receives the cattle which go to the father's side in the distribution of bridewealth. Her children are called after her, as though she were a man, and I was told that they address her as 'father.'

20 Krige describes woman marriage as "the institution by which it is possible for a woman to give bridewealth for, and marry, a woman, over whom and whose offspring she has full control, delegating to a male genitor the duties of procreation." She suggests that woman marriage is "closely bound up with rights and duties arising from the social structure" of the culture, a "flexible institution that can be utilized in a number of different ways to meet a number of different situations."<sup>55</sup> For example, in African cultures where women occupy a high position and can acquire property or other forms of wealth, woman marriage is one way that a woman may strengthen her economic position and establish her "household."

39. Woman marriages were common in Africa. "The term female husband . . . refers to a woman who takes on the legal and social roles of husband and father by marrying another woman according to the approved rules and ceremonies of her society . . . [and] she may belong to any one of over 30 African populations," writes Denise O'Brien.<sup>56</sup> She reports that the

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30 <sup>53</sup> See Melville Herskovits, "A Note on 'Woman Marriage' in Dahomey," 10 *Africa* 335 (1937); Eileen Jensen Krige, "Note on the Phalaborwa and Their Morula Complex," 11 *Bantu Studies* 357 (1937).

<sup>54</sup> E.E. Evans-Pritchard, *Kinship and Marriage Among the Nuer* 108-09 (1951).

<sup>55</sup> Eileen Jensen Krige, "Woman-Marriage, with Special Reference to the Lovedu -- Its Significance for the Definition of Marriage," 44 *Africa* 11, 11 (first quotation in text), 29 (second quotation) (1974).

<sup>56</sup> Denise O'Brien, "Female Husbands in Southern Bantu Societies," in Alice Schlegel, editor, *Sexual Stratification: A Cross-Cultural View* 109 (1977).

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institution is most popular in three parts of Africa: (1) West Africa, especially Nigeria and Dahomey; (2) South Africa, including the Southern Bantu upon whom O'Brien reports; (3) and East Africa and the Sudan (the Nuer).<sup>57</sup> In contrast to Krige's view that woman marriage empowers women, O'Brien believes that the institution helps keep women in their subordinate place. Woman marriage, she argues, is usually a social adaptation by which a male-dominated society allows powerful wealthy women to take a leadership role, but only if they assume the social role of a man, acting as husband and father.

10 40. Contrast African woman marriages with the Native American *berdache* marriages, Azande boy wives, and Chinese sisterhoods described above. The same-sex unions described earlier occurred because of companionate emotional bonds between the partners as well as traditional divisions of labor within the household. Woman marriages might have occurred for those reasons, but they more typically occurred so that a woman can have children (heirs) through a surrogate. In other words, same-sex marriage in some societies was a legal and cultural way in which human procreation was carried out.

#### The Modern West

20 41. Notwithstanding acceptance of same-sex unions in Greece, Rome, and even the medieval Church, modern Western culture has been peculiarly hostile toward same-sex unions. The most critical point in the West's attitudes toward same-sex unions or marriages can be located in the thirteenth century.<sup>58</sup> It was then that many secular governments enacted their first laws prohibiting "crimes against nature" and that prior ecclesiastical laws came to be more stringently enforced. The Church took a stronger stand against same-sex intimacy. Leading scholastic thinkers Albertus Magnus and Thomas Aquinas systematized theological arguments against such behavior. In contrast to the relatively open and tolerant attitudes expressed during the eleventh and twelfth centuries, Europe after 1200 acted in an increasingly persecutorial

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30 <sup>57</sup> O'Brien, "Female Husbands in Southern Bantu," 110. For other studies supporting the observation in text, see Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (1987); Laura Bohannon, "Dahomean Marriage: A Reevaluation," in Paul Bohannon and John Middleton, editors, *Marriage, Family, and Residence*, 85 (1968), reprinted from *19 Africa* 273 (1949); H. Huber, "'Woman Marriage' in Some East African Societies," *63/64 Anthropos* 745 (1969); Krige, "Woman Marriage" (Lovedu); Regina S. Oboler, "Is the Female Husband a Man? Woman/Woman Marriage Among the Nandi of Kenya," *19 Ethnology* 69 (1980).

<sup>58</sup> See Boswell, *Christianity, Social Tolerance and Homosexuality*, 269-332; Greenberg, *Construction of Homosexuality*, 268-92, 301-46; Judith Brown, "Lesbian Sexuality in Medieval and Early Modern Europe," in *Hidden From History*, 67, 72.

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manner toward any kind of behavior that transgressed established gender lines, including not just same-sex intimacy but also aggressive, independent behavior such as cross-dressing by women.<sup>59</sup>

10 42. *Huon of Borbeaux*, an early thirteenth century version of an older French romance.<sup>60</sup> illustrates this point. Ide, the work's female protagonist, dressed in man's garb and surreptitiously employed her skill as a warrior with such proficiency so as to earn her not only a knighthood, but also the hand of the emperor's daughter in marriage. Ide went through with the marriage ceremony but later revealed her biological sex to her bride, who snitched to her imperial father. Condemning the possibility of "buggery" between the two women, the emperor decreed that Ide be burned to death. Though Ide was saved at the last minute by metamorphosizing into a man, the drastic punishment imposed for her predicament was consistent with the harshened thirteenth century attitudes towards same-sex intimacy and cross-dressing.

20 43. Why this shift in attitudes occurred is not clear. It can be said that more punitive attitudes coincided with the quickening of a culture in the West that was urban, bourgeois, and statist. The aborning urban culture created more occasions for people to find, pursue, and enjoy same-sex partners. Increasing economic opportunities available to the bourgeoisie gave substantial numbers of men more freedom to choose and diversify the nature of their sexual liaisons. Urbanization, on the other hand, rendered such activity more prominent or widespread, and perhaps more troubling. At the same time, powerful nation- and city-states were emerging in the West. The political powers taking this new form flexed their muscles against nonconforming people of many stripes; state aggression directed against Jews, heretics, and witches stood out as an important theme in European history after 1200.<sup>61</sup>

30 44. During the early modern period (about 1400-1700), Western society's obsession with bad categories of people became more pronounced. Isolated persecutions of individuals engaging in sinful conduct (heresy, witchcraft, sodomy) gave way to hysterical persecutorial crazes which swept up throngs of people (heretics, witches, sodomites) in popular, ecclesiastical, and official dragnets. Thus, same-sex unions which had been viewed as merely problematic during the Middle Ages, were believed in the early modern period to constitute a severe threat to the social order and the now-powerful state. For example, even as Montaigne was reporting that same-sex marriages were performed by Catholic priests in Rome's Church of St. John during the

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30 <sup>59</sup> See Vern L. Bullough and Bonnie Bullough, *Cross Dressing, Sex, and Gender* (1993); H.R. Trevor-Roper, *The European Witch-Craze of the Sixteenth and Seventeenth Centuries and Other Essays* 90 (1969); Vern L. Bullough and James Brundage, editors, *Sexual Practices and the Medieval Church* 206 (1982).

<sup>60</sup> *Huon of Bordeaux* (Sir John Bouchier and Lord Berners trs., 1895).

<sup>61</sup> In addition to the sources in note 59 above, see Guido Ruggiero, *The Boundaries of Eros: Sex Crime and Sexuality in Renaissance Venice* (1985) (case study of state repression of same-sex intimacy in Venice).

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1570s, other observers reported that some of the male couples married in St. John's were later burned in the city square.<sup>62</sup> The Church and its rival and ally, the state, were becoming officially unambivalent about same-sex unions.

10 45. The West's hostility to same-sex unions and its state-sanctioned suppression of them affected other cultures' attitudes towards such unions. Just as Western nation states in the early modern period conquered the New World, colonized and enslaved Africa, and cartelized and evangelized Asian cultures, so they aggressively suppressed these cultures' indigenous attitudes and institutions concerning same-sex unions. Thus, the Spanish persecuted the *berdache* tradition in what is now Latin America, with the United States supporting a less concerted campaign against such relationships as it stripped Native Americans of their land and culture.<sup>63</sup> Slavetraders and colonial administrators broke up family institutions (including same-sex family institutions) in Africa and sometimes disrupted economic patterns that gave women standing and authority to command female marriages. Missionaries in Africa, China, Japan, Melanasia, and other cultures imposed an increasingly rigid, official Christian view of sexuality and marriage upon "converted" peoples, discouraging and sometimes persecuting traditional practices including same-sex unions.<sup>64</sup>

*The Survival of Same-Sex Unions in the West*

20 46. While the modern turn in Western attitudes and their ascendancy in the world surely threatened same-sex unions, they survived nonetheless. Because the modern West has been distinctively intolerant of unions that depart from its norm of different-sex companionate marriage, same-sex unions have occurred primarily in the interstices and at the fringes of society. Consider three fascinating contexts within which same-sex unions flourished.

30 47. *Women Passing as Men.* Countless female couples married in the modern era. This was accomplished by marriage of one woman to another woman who was "passing" as a man. While hundreds of women are known to have passed during the early modern era, the story of Elena de Cespedes (1545-88) is mysterious and unusually interesting.<sup>65</sup> Raised as a girl, Elena escaped from the traditional women's work of weaving by dressing and passing as a man, becoming a soldier and then a tailor, now named Eleno. Eventually Eleno fell in love with a peasant woman, and obtained a license to marry her after passing a physical inspection designed

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<sup>62</sup> Compare Michel de Montaigne, *Journal de Voyage en Italie par la Suisse et l'Allemagne en 1580 et 1581*, 231 and 481 note 515 (Charles Dedeyan ed. 1946), with Spence, *Matteo Ricci*, 226.

<sup>63</sup> See Williams, *Spirit and the Flesh*, 175.

<sup>64</sup> See Spence, *Matteo Ricci*, 227-32

<sup>65</sup> See Bullough and Bullough, *Cross Dressing*, 94-112.

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to establish manhood. Unhappily, Eleno's former lover challenged the forthcoming marriage on grounds of fraud, asserting that the first inspection was inaccurate and that Eleno was really a woman. In response to this challenge, the Madrid authority ordered a more thorough inspection to be conducted by physicians and surgeons, who once again pronounced Eleno a man. Following the marriage, Eleno was inspected for yet a third time, and on this occasion the examiners determined that Eleno, the husband, was a woman.<sup>66</sup> After the damning verdict was rendered, Elena was referred to the Inquisition, where she was convicted of devilry and promptly immolated.

10 48. Elena-Eleno's case was far from unusual in the early modern period. Records kept by the Dutch East India Company reveal hundreds of women who were caught passing as men. The leading study of cross-dressing women concludes that they did so for both economic and personal reasons. Many women not only passed as men in the workforce, but enjoyed intimate relationships with and even married other women.<sup>67</sup> Women passed as men just as easily in the United States as they did in Europe, and for a similar mix of economic, social and personal reasons. As many as 400 women passed as men in order to serve in the Union Army during the Civil War, for example. Of the women who passed as men, a substantial number sought female relationships, and hundreds of passing women legally married other women.<sup>68</sup> For example, Mary Anderson passed as Murray Hall in New York City for thirty years before death in 1901.<sup>69</sup> Hall made boatloads of money, was active in Tamany Hall politics, and gained a reputation as a "man about town," marrying twice, the first ending in separation and the second cut short by her wife's death.

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49. An even more interesting history is that of Nicholai de Raylan, who passed as a man named Nicholas de Raylan, a masquerade that proved a success apparently for most of her days.

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<sup>66</sup> It is a mystery as to why the doctors could not get it right. One possibility is that Elena was a hermaphrodite, a person whose genitalia are ambiguous. See John Money and Anke A. Ehrhardt, *Man & Woman, Boy & Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity* (1972); Anne Fausto-Sterling, "The Five Sexes: Why Male and Female Are Not Enough," *The Sciences*, March/April 1993, at 20-24.

30 <sup>67</sup> See Bullough and Bullough, *Cross-Dressing* 97-98.; see also id. at 100-03, 134-38, 164-68. One eighteenth century passing woman married three different wives, each of whom was persuaded she was actually a man.

<sup>68</sup> See Katz, *Gay American History*, 209-279 (an entire section on "Passing Women: 1780-1920"); The San Francisco Lesbian and Gay History Project, "'She Even Chewed Tobacco': A Pictorial Narrative of Passing Women in America," in *Hidden from History*, 183-94. For examples of marriages between women and passing women, see Katz, supra, 225-26, 232-38, 240-42, 248-49, 250-51, 254-79.

<sup>69</sup> Bullough and Bullough, *Cross Dressing*, 164.



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According to one doctor's account of her life,<sup>70</sup>

10 She was born in Russia and was in many respects very feminine, small and slight in build, but was regarded as a man, and even as very "manly," by both men and women who knew her intimately. She was always very neat in dress, fastidious in regard to shirts and ties, and wore a long-waisted coat to disguise the lines of her figure. She was married twice in America, being divorced by the first wife, after a union lasting ten years, on the ground of cruelty and misconduct with chorus girls[!] The second wife, a chorus girl who had been previously married and had a child, was devoted to her "husband." Both wives were firmly convinced that their husband was a man and ridiculed the idea that "he" could be a woman. I am informed that De Raylan wore a very elaborately constructed artificial penis. In her will she made careful arrangements to prevent detection of sex after death, but these were frustrated, as she died in a hospital.

According to another account of de Raylan's life, the two wives were incredulous that their husband had been a woman, and expressed no regrets about their marriages.<sup>71</sup>

20 50. *Female Friendships and Boston Marriages.* Women did not have to pass as men in order to enjoy intimate relationships with other women. Historian Lillian Faderman has documented many examples of intense, marriage-like friendships between pairs of women from the Renaissance to the twentieth century. Such passionate friendships took off as a social phenomenon in the eighteenth century, when a greatly increased number of women had the economic means to be independent of men (without passing as men). For many, these same-sex relationships generated a great deal more emotional intensity than they could find in marriages. For example, the celebrated "Ladies of Llangollen," Sarah Ponsonby and Eleanor Butler, disguised themselves as men and eloped together in 1778. They settled down in Llangollen Vale in 1780 and shared every moment together for the next 53 years.<sup>72</sup> Their "Davidean friendship" (as poet Anna Steward termed it) became a celebrated romantic ideal, and the ladies' friend William Wordsworth, described them as:

Sisters in love, a love allowed to climb  
Ev'n on this earth, above the reach of time.

30 The ladies' union is the most famous of this period, but Faderman has found evidence of many

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<sup>70</sup> See Katz, *Gay American History*, 250 (reprinting doctor's account).

<sup>71</sup> See id. at 251.

<sup>72</sup> See Lillian Faderman, *Surpassing the Love of Men: Romantic Friendship and Love Between Women from the Renaissance to the Present* (1981); Elizabeth Mavor, *The Ladies of Llangollen: A Study in Romantic Friendship* (1971).

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other romantic female relationships occurring throughout the late eighteenth century.

51. These relationships proliferated in the nineteenth century, as expanded economic opportunities gave some women greater freedom to marry or not and to fashion their own personal relationships. This era even came up with a name for a long-term monogamous relationship between two otherwise unmarried women: a "Boston marriage."<sup>73</sup> These relationships were so called, because they were similar to the lives of a female couple in Henry James' 1885 novel, *The Bostonians*. Boston marriages were very popular among well-educated, professional women in particular. For example, James' sister Alice James lived most of her adult life in a *Boston marriage* with another woman.<sup>74</sup>

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52. *The Love of Comrades*. The emotional, and surely sometimes sexual, needs that Boston marriages filled for women found parallels in male "buddy" relationships during the eighteenth and nineteenth centuries. Men in frontier communities without women tended to form personal and often sexual partnerships with other men. Such intimate buddy or sidekick relationships have been documented for communities of pirates, hoboes, cowboys, and miners. The accounts are striking in the parallels between these informal same-sex relationships and the customs of different-sex marriage.<sup>75</sup> Even in mainstream contexts, male relationships were not uncommon in nineteenth century America. For example, Thomas Wentworth Higginson wrote of his Harvard classmate William Henry Hurlbut: "I never loved but one male friend with passion – and for him my love had no bounds – all that my natural fastidiousness and cautious reserve kept from others I poured on him; to say that I would have died for him was nothing. I lived for him."<sup>76</sup> Notwithstanding this passionate language, it is not clear that Higginson and Hurlbut engaged in sexual activities, but there is such evidence for other male-bonded friends of

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<sup>73</sup> See Faderman, *Surpassing the Love of Men*, 190-230. See also Letitia Rupp, "'Imagine My Surprise': Women's Relationships in Mid-Twentieth Century America," in *Hidden From History*, 395.

<sup>74</sup> See The History Project, *Improper Bostonians: Lesbian and Gay History from the Puritans to the Playland* (1998).

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<sup>75</sup> See B.R. Burg, *Sodomy and the Perception of Evil: English Sea Rovers in the Seventeenth Century Caribbean* (2d ed.1995) (pair bonding among pirates as male unions); Williams, *Flesh and the Spirit*, 162, 169-174 (cowboy sidekicks formed so-called "male marriages"); Joshua Flynt, "Homosexuality Among Tramps," in Havelock Ellis, editor, *Studies in the Psychology of Sex* 359 (1946); T. Dunbar Moodie, "Migrancy and Male Sexuality in the South African Gold Mines," in *Hidden from History*, 411 ("mine marriages").

<sup>76</sup> Quoted in Robert K. Martin, "Knights-Errant and Gothic Seducers: The Representation of Male Friendship in Mid-Nineteenth Century America," in *Hidden from History*, 169.

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that era.<sup>77</sup>

53. The poet Walt Whitman sought to describe this “manly love,” what he called the “love of comrades,” in the 45 *Calamus* poems published in the 1860 edition of *Leaves of Grass*. Although modestly closeted by today’s standards, Whitman glorified male companionate relationships:

10 Clear to me now, standards not yet published – clear to me that my Soul,  
That the Soul of the man I speak for, feeds, rejoices only in comrades:  
Here, by myself, away from the clank of the world,  
Tallying and talked to here by tongues aromatic,  
No longer abashed – for in this secluded spot I can respond as I would not dare elsewhere.  
Strong upon me the life that does not exhibit itself, yet contains all the rest.  
Resolved to sing no songs to-day but those of manly attachment,  
Projecting them along that substantial life,  
Bequeathing, hence, types of athletic love,  
Afternoon, this delicious Ninth Month, in my forty-first year.  
I proceed, for all who are, or have been, young men.  
To tell the secrets of my nights and days,  
To celebrate the needs of comrades.

20 Whitman was the century’s master of a male eroticism barely concealed beneath the language of comradeship, and he developed an international following, especially in Canada and Great Britain.<sup>78</sup> In Canada, interestingly, Whitman’s exaltation of male comradeship had its most important influence on Flora McDonald Dennison, an early feminist leader.<sup>79</sup>

54. In 1869, German psychiatrist Carl von Westphal published a case study of a woman who cross-dressed and was erotically attracted to other women. While such preferences presented nothing new in human history, Westphal’s prognosis did: the woman, he concluded, was a “congenital invert” whose abnormality was not an adaptation to the boring lot women faced day in and day out, but was instead a result of physical degeneration and mental neurosis. Westphal’s study and subsequent ones conducted by Richard von Krafft-Ebing and Havelock

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<sup>77</sup> E.g., Martin N. Duberman, “Writhing Bedfellows in Antebellum South Carolina: Historical Interpretation and the Politics of Evidence,” in *Hidden from History*, 153.

<sup>78</sup> See Michael Lynch, “The Lovers of His Friends and Hot Little Prophets: Walt Whitman in Ontario,” 67 *Body Politick*, Oct. 1980, at 29-31.

<sup>79</sup> See Deborah Gorham, “Flora McDonald Dennison: Canadian Feminist,” in Linda Kealy, editor, *A Not Unreasonable Claim: Women and Reform in Canada, 1880s-1920s*, at 47, 66-67 (1979).

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10 Ellis became a popular as well as medical sensation. Once the category of the "true invert" (soon popularized as "the homosexual") gained currency among the European and North American middle class, same-sex relationships became newly problematic. Same-sex intimacy, once stigmatized as sodomy, was now evidence of "inversion" or "homosexuality." Everyone now had a sexual identity, some healthily normal, others abominably "perverted." In this context, Whitman's *Calamus* poems took on a different kind of meaning. Whereas his late nineteenth century contemporaries were alternately impressed, mystified, and scandalized by Whitman's erotic romanticism, early twentieth century medical critics used it to expose Whitman's homosexuality, his passive inversion, and his "thorough consciousness of abnormality."<sup>80</sup> Just as male comradeship grew problematical, so did intimate female friendships; Boston marriages had become objects of suspicion by 1920.<sup>81</sup> After World War I, the phenomenon of same-sex unions became joined with North America's increasing hysteria about homosexuality.

*"Homosexual" Marriages*

20 55. The West's new obsession with sexual identity yielded results that the new inquisitors did not desire. In the face of (and perhaps even because of) increased scrutiny of sexual practices, more and more people attracted to those of their own sex gravitated to underground communities inhabited by like-feeling residents, namely, subcultures of sexual inverts in urban areas. Such subcultures existed in London, Paris, most major Dutch cities including Amsterdam, most major Italian cities including Venice, and elsewhere by the early eighteenth century.<sup>82</sup> Same-sex relationships were not uncommon once these subcultures became established. On occasion such couples were legally married. Same-sex male and female couples repeatedly sought legal marriages in sixteenth and seventeenth-century Netherlands. At least one female couple obtained a marriage authorization, and other couples entered into marriage contracts that might have been binding.<sup>83</sup>

56. In North America, discernible subcultures of "inverts" were well-established in

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30 <sup>80</sup> Dr. W. C. Rivers, *Walt Whitman's Abnormality* (1913), excerpted and supplemented with contemporary correspondence in Martin C. Duberman, *About Time: Exploring the Gay Past* 106, 109 (rev. ed. 1991).

<sup>81</sup> See Faderman, *Surpassing the Love of Men*, 239-53, 297-313.

<sup>82</sup> See Kent Gerard and Gert Hekma, editors, *The Pursuit of Sodomy: Male Homosexuality in Renaissance and Enlightenment Europe* (1989); Robert P. MacCubbin, editor, *'Tis Nature's Fault: Unauthorized Sexuality During the Enlightenment* (1987).

<sup>83</sup> Dirk J. Noordam, "Sodomy in the Dutch Republic, 1600-1725," in *The Pursuit of Sodomy*, 207, 212-13, 217.

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Toronto, New York City, Chicago, San Francisco, and other cities before World War I.<sup>84</sup> The subcultures were built around gathering places for people who recognized themselves as inverted: YMCAs, tenements similar to London's eighteenth century "molly houses," bars and poolhalls, private bathhouses, and public streets and parks. Socializing beyond the margins of society and united primarily by sexual interests, these early denizens of "the life" did not create many lasting relationships. For men in particular, the characteristic common activity was "cruising" for sex partners, and the common enemy was the vice squad and its decoys. Apart from the fun of sex, these men often reveled in the cat-and-mouse games they had to play with potential partners (Is he one of us?), family (What excuse can I give tonight?), and cops (Is this a trap?). Strong social disapproval of inversion and uneven legal surveillance contributed to a community of outlaws and lone rangers.

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57. The culture of cruising did not satisfy the emotional needs of everyone in the aborning homosexual community, however. Many homosexuals were able to form lasting relationships, especially after World War I. Expatriates Gertrude Stein and Alice Toklas are probably the best-known example of an American same-sex couple in this era, but others less noted by history were able to come together in North America. In Harlem's thriving subculture, butch/femme lesbian couples married each other in large wedding ceremonies, replete with bridesmaids and attendants. "Real marriage licenses were obtained by masculinizing a first name or having a gay male surrogate apply for a license for the lesbian couple. Those licenses were actually placed on file in the New York City Marriage Bureau. The marriages were often common knowledge among Harlem heterosexuals."<sup>85</sup> Similar stories can be told for homosexual people other cities. Lesbians in particular were able to combine same-sex socializing in bars and streets with the formation of companionate relationships.<sup>86</sup> Men attracted to other men were less successful even when they strongly desired commitment from one other person.

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58. World War II stimulated a major expansion of homosexual subcultures. Many of the men and women thrown into homosocial situations during the war fell in love with persons of the same sex; once they enjoyed feelings they thought were reserved for different-sex relationships,

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<sup>84</sup> See George Chauncey, Jr., *Gay New York* (1994); Lilian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth Century America* (1991); Steven Maynard, "Through a Hole in the Lavatory Wall: Homosexual Subcultures, Police Surveillance, and the Politics of Discovery," 5 *J. Hist. Sexuality* 234 (1994) (Toronto).

<sup>85</sup> Faderman, *Odd Girls and Twilight Lovers*, 73. See also Eric Garber, "A Spectacle in Color: The Lesbian and Gay Subculture of Jazz Age Harlem," in *Hidden from History* 318.

<sup>86</sup> E.g., Elizabeth Lapovsky Kennedy and Madeline D. Davis, *Boots of Leather, Slippers of Gold: A History of a Lesbian Community* (1993).

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they realized they were homosexuals.<sup>87</sup> Once the war was over, these people flocked to the big cities, where they added their numbers to the previously existing subcultures. The growth of these communities made it easier to find partners, and with more support from friends some of these partnerships lasted longer. James Egan, a small businessman, met his life partner, Robert Nesbitt, in 1948, soon after the war. Although Egan and Nesbitt could not legally get married, their union was a marriage in all but name – and a mutual commitment that supported Egan as he came to be the premier leader in Canada’s gay rights movement in the 1950s and beyond.<sup>88</sup>

10 59. The upswing in same-sex partnering fueled interest in “homosexual marriages.” As early as 1953, the Mattachine Society (the leading early homophile organization in the United States) was debating the issue.<sup>89</sup> A Swedish homophile group petitioned that country’s government for recognition of same-sex marriage in 1954.<sup>90</sup> Some same-sex couples engaged in what Donald Webster Cory and John LeRoy described in 1963 as “mock weddings” at which “all the formalities of an actually legally certified and religiously sanctioned ceremony are carefully copied.” They continued:<sup>91</sup>

Cases have been known of an all-male couple, one of whom will don an expensive bridal gown, or if they are both females, one of the women will wear a tuxedo. Engraved invitations are sent out, an elaborate cake is baked, and a banquet is prepared. If a ‘gay’ (homosexual) religious official is known, his services may be sought. . . .

20 With or without the aid of a religious official, however, some form of ceremony may take place in which the partners vow lifelong devotion to each other, and the

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<sup>87</sup> See, e.g., Maurice Leznoff, “The Homosexual in Urban Society” 196 (M.A. Thesis, McGill Univ. 1954) (Canadian World War II veteran first found homosexual love in the armed forces); Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War II* (1990) (account of several American homosexual soldiers in the U.S. armed forces and the love they found during World War II).

30 <sup>88</sup> See Robert Champagne, compiler, *Jim Egan: Canada’s Premier Gay Activist* (1987). Egan and Nesbitt’s relationship is also recounted in the judicial opinions arising out of the litigation they brought in *Egan v. Attorney General*, [1995] 2 S.C.R. 513.

<sup>89</sup> See E.B. Saunders, “Reformers’ Choice: Marriage License or Just License?,” *One, Inc.*, Aug. 1953.

<sup>90</sup> See Darren Spedale, *Nordic Bliss* ch. 9 (1999 draft book recounting the political process by which the Scandinavian countries came to create registered partnerships for same-sex couples).

<sup>91</sup> Donald W. Cory & John LeRoy, “Homosexual Marriage,” 29 *Sexology* 660, 661 (1963). Cory is a pseudonym, LeRoy probably so.

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wedding rings are put in place. The bridal march is played, while the guests follow the patterns of normal weddings.

10 60. In 1963, it went without saying that these “marriages” enjoyed neither legal recognition nor prospect for legal recognition anywhere in North America. Not only were homosexuals still socially marginal, but they were politically despised. At the same time homosexuals were congregating together in greater numbers, mainstream culture was seeking to reaffirm traditional gender and family values. The result was a politics of panicked reaction. The postwar craze against political subversives focused equally on sexual subversives. Far from tolerating open homosexual relationships, this era sought out homosexuals and persecuted them. It was a period where employer investigations (especially in the public sector) rooted out homosexual employees, police dragnets emptied lesbian and gay bars, and military witch-hunts purged thousands of homosexuals from the armed services in both Canada and the United States.<sup>92</sup>

*The Gay Marriage Movement*

20 61. In North America and Europe, the sexual revolution of the 1960s challenged traditional sexual mores and gender roles on an unprecedented scale. Sexual minorities who had cringed in their closets during the antihomosexual kulturkamps of the 1950s and early 1960s, threw open the closet doors in the late 1960s and early 1970s. The uncloseted lesbians, gay men, and bisexuals organized in hundreds of social and legal action groups, including (for Canada) the Vancouver Gay Liberation Front (1970), the Front de Libération du Québec (1971), and Toronto Gay Action (1971). Similar organizations formed in the United States and Europe. The homophile movement became gay liberation, with an ambitious agenda of legal demands for equal treatment. A demonstration of more than 200 lesbians and gay men in Ottawa on August 28, 1971 protested the government’s failure to extend equal rights to gay people – including spousal and family benefits equivalent to those accorded married heterosexuals.<sup>93</sup>

30 62. As lesbians, gay men, and bisexuals became more open about their sexuality, gay ghettos have expanded and flourished in western cities. As more lesbians, bisexuals, and gay men out of their closets and politically active, police harassment of gay people and their establishments eased, as did open state and private discrimination against gay employees and customers. With greater social support and less state harassment, same-sex couples have come together in greater numbers than ever before in human history. Empirical surveys in the 1970s

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<sup>92</sup> See Gary Kinsman, *The Regulation of Desire* 169-212 (2d ed. 1996) (postwar witch-hunts and crackdowns in Canada); William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (1999) (the fiercer antihomosexual “kulturkampf” in the United States).

<sup>93</sup> See Kinsman, *Regulation of Desire* 291 (describing the new gay liberation groups and the 1971 demonstration).

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found that lesbian, gay, and bisexual people coupled in a range of patterns, with a strong preference for, and trend toward, closed-coupled unions. The partners in closed-coupled unions generally considered themselves committed, and many considered themselves “married.”<sup>94</sup> Studies in the 1980s and 1990s have found an even more pronounced tendency for lesbian and gay relationships to involve longterm commitment that both partners consider deeply satisfying.<sup>95</sup>

63. In the 1950s, when homosexuals first publicly articulated their demand for same-sex marriage, the idea was inconceivable to most people. In the 1970s, the idea was seriously studied in Denmark and Sweden,<sup>96</sup> and litigated in numerous courts in the United States.<sup>97</sup> In none of these countries was favorable action taken, for the idea attracted strong and intense opposition. Given powerful opposition, the gay rights movement focused its activism on issues such as the repeal of consensual sodomy laws, equalization of the age of consent for homosexual and heterosexual intercourse, and adoption of laws prohibiting discrimination on the basis of sexual orientation. Throughout Europe and North America, these goals were substantially achieved in the 1980s,<sup>98</sup> and in many countries same-sex marriage bars were the most significant formal inequality remaining for lesbians, gay men, bisexuals, and transgendered people. Gay rights organizations redoubled their efforts, both in legislatures and in courts.

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<sup>94</sup> The leading investigations are Allen P. Bell and Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* (1978) (“close-coupled” relationships found to be the happiest); Philip Blumstein and Pepper Schwartz, *American Couples: Money, Work, Sex* (1983) (study of lesbian, gay, and straight couples; authors find lesbian couples most stable and least materialistic); Joseph Harry and William B. DeVal, *The Social Organization of Gay Males* 80-100 (New York: Praeger, 1978) (section on “Marriages Between Gay Males”); Mary Mendola, *The Mendola Report: A New Look at Gay Couples* 48-53 (1980) (nonempirical survey of lesbian and gay couples, most of whom considered themselves “married,” i.e., in a relationship involving “commitment between two people”).

<sup>95</sup> See Lawrence Kurdek, “Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples,” 60 *J. Marr. & Fam.* 553 (1998).

<sup>96</sup> See David Bradley, *Family Law and Political Culture: Scandinavian Laws in Comparative Perspective* (1996) (excellent account of state recognition of same-sex unions in Denmark, Norway, and Sweden and the political demand for it in the 1970s and 1980s).

<sup>97</sup> See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

<sup>98</sup> See William N. Eskridge, Jr., “Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition,” 31 *McGeo. L. Rev.* 641, 663-70 (2000) (appendix 1), for a country-by-country review.



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10 64. In 1987, Sweden adopted a nationwide law providing many legal benefits (fewer than marriage) for cohabiting couples. In 1989, Denmark enacted a Registered Partnership Act<sup>99</sup> that provides same-sex couples with almost all the rights and obligations of different-sex marriages. The Act applies only to same-sex couples (section 1), and at least one partner must have his or her permanent residence in Denmark and be a Danish citizen (section 2[2]). Once registered, the partners have most of the rights, benefits, and obligations of married spouses (section 3).<sup>100</sup> Danish divorce law generally governs the terms by which a registered partnership is dissolved (section 5). Norway adopted a similar statute in 1993, Sweden expanded its cohabitation law to the same effect in 1994, and The Netherlands followed in 1998 with a law extending registered partnerships to different-sex as well as same-sex couples. The registered partnership laws were the next step toward same-sex marriage – but these separate-but-equal laws were not considered sufficient because they did not treat same-sex couples the same as different-sex couples.

20 65. European countries will probably take the next step toward full equality. The European Parliament in February 1994 passed a resolution calling for study and ultimately adoption of a European Community recommendation to end “the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework.”<sup>101</sup> In September 2000, the Lower House of the Netherlands’ Parliament overwhelmingly passed a bill recognizing same-sex marriages in that country; the Upper House is expected to act favorably by early 2001. If The Netherlands acts favorably, lesbian and gay rights organizations will press the Scandinavian countries to adopt policies of full and formal equality as well.

20 66. Constitutional litigation has pressed other countries toward some recognition of lesbian and gay unions. Such countries have included Hungary, whose constitutional court required the legislature to expand cohabitation laws to include same-sex couples; South Africa and Israel, whose highest courts have required the state to treat same-sex couples as married for specified purposes; and some of the states of the United States. Most notably, the Vermont Supreme Court in 1999 required the state to pass legislation providing lesbian and gay couples

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30 <sup>99</sup> Danish Act Number 372, June 7, 1989 (the Registered Partnership Act); Danish Act Number 373, June 7, 1989 (amending the Danish marriage, inheritance, penal, and tax laws to conform to the Registered Partnership Act); see Linda Nielsen, “Family Rights and the ‘Registered Partnership’ in Denmark,” 4 *Int’l J.L. & Fam.* 297 (1990).

<sup>100</sup> The 1989 law provided that registered partners do not enjoy the same rights of adoption that married couples enjoy (§ 4[1]). In 1999, Denmark opened up adoption by registered partners.

<sup>101</sup> Resolution on Equal Rights for Homosexuals and Lesbians in the EC, ¶ 14, 1994 *Official Journal of the European Communities* 40 (Feb. 28, 1994).

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the same benefits and duties the state affords straight married couples.<sup>102</sup> In response, the state adopted a law creating civil unions for same-sex couples; such unions carry with them all the same benefits and duties of marriage, but not the name.

10 67. As in Europe, the national and provincial legislatures in Canada have adopted laws extending many of the benefits and duties of marriage to same-sex couples, but not "marriage" itself. As in the United States, many of the laws have been in response to constitutional litigation. The Supreme Court's decision in *M. v. H.* has spurred much of this legislation of late. The principle underlying the Court's decision, that the Charter presumptively requires that the state treat lesbian and gay couples the same as straight couples, raises the question whether the state must recognize same-sex marriages.

### **The History of Same-Sex Marriage and the Normative Evolution of "Marriage"**

68. When Western governments were required to defend their exclusion of same-sex couples from marriage in the 1970s and afterward, their main defenses were that (1) same-sex unions cannot be "marriages," which are inherently different-sex; (2) same-sex marriages would undermine the entire institution of marriage; and (3) legal recognition of same-sex marriages would constitute a "stamp of approval" on conduct and relationships most people find disgusting.<sup>103</sup> The history of same-sex marriage has some bearing on these and other normative arguments.

20 69. *The Definition of Marriage Argument.* As this affidavit makes clear, the first claim in ¶ 68 is factually and historically erroneous. Same-sex unions have been culturally and legally recognized as marriages in dozens, and probably hundreds, of societies in human history. At the very least these must include the same-sex marriages of imperial Rome, Native American marriages between men and male *berdaches* (and women with female *berdaches*), and woman marriage in Africa. Culturally accepted same-sex unions in Lesbos and Crete, brotherhoods liturgically recognized in the early Christian Church, relationships between soldiers in some African and Asian societies, sisterhoods and early male unions in China, samurai and other cultures' male military marriages, might also be counted. Although speculating a bit more, I would also not rule out Egyptian same-sex unions criticized in the Torah and in *Sifra*, same-sex marriages among the Hittites, and so forth.

30 70. Another lesson of my study is that the term and the idea of "marriage" are not nearly as hard-wired as many people claim. Language as well as law change when confronted with new circumstances. When thousands of lesbian and gay couples come together in committed

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<sup>102</sup> See *Baker v. State*, 744 A.2d 589 (Vt. 1999).

<sup>103</sup> See Eskridge, *Case for Same-Sex Marriage* 89-122 (setting forth and analyzing these objections).

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relationships, many of them with children, as they have done in Canada after World War II. the state needs to treat those couples with equal respect – and that means rethinking its traditional definition of marriage.

10 71. Consider this historical parallel. The anthropology profession was impelled to reconsider its traditional definition of marriage when the community of social anthropologists came to notice African woman marriages.<sup>104</sup> One official publication defined marriage in 1951 as “a union between a man and a woman such that children born to the woman are the recognized legitimate offspring of both partners.”<sup>105</sup> In light of woman marriages, this definition was considered to be a parochial cultural statement more than a professional yardstick. Edmund Leach, a noted social anthropologist, suggested that marriage be defined more loosely as a bundle of rights that society associates with intimate relationships.<sup>106</sup> Some anthropologists objected, arguing that such a definition was too open-ended. To accommodate woman marriages but not other relationships, Kathleen Gough proposed to delineate marriage as “a relationship established between a woman and one or more other persons, which provides that a child born to the woman under circumstances not prohibited by the rules of the relationship, is accorded full birth-status rights.”<sup>107</sup>

20 72. Leach responded that Gough’s definition was too restrictive in light of male-male marriages also documented in African and Native American cultures. He argued that, in light of social practice, marriage should be defined as one or more of the following: (1) the rights and duties inhering in spousedom, (2) the personal relationship between people considered spouses, and/or (3) relationships and alliances created or cemented by espousal.<sup>108</sup> Eileen Jensen Krige, author of the earliest work to focus on female husbands, maintained that “[m]arriage can take widely different forms, even sometimes within the same society, each involving different

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<sup>104</sup> For accounts of the debate, see Alan Barnard and Anthony Good, *Research Practices in the Study of Kinship* 89-91 (1984); Edmund R. Leach, *Social Anthropology* 176-203(1982); E. Kathleen Gough, “The Nayars and the Definition of Marriage,” 89 *J. Royal Anthropological Inst.* 23, 23-24, 32-33 (1959); Gloria A. Marshall, “Marriage: A Comparative Analysis,” 10 *Int’l Encyclopedia Soc. Sci.* 8-19 (1968).

30 <sup>105</sup> Royal Anthropological Institute, *Notes and Queries on Anthropology* 110 (6<sup>th</sup> ed. 1951).

<sup>106</sup> Edmund R. Leach, “Polyandry, Inheritance and the Definition of Marriage,” 53 *Man* 182, 183 (1955).

<sup>107</sup> Gough, “Nayars and the Definition of Marriage,” 32.

<sup>108</sup> Leach, *Social Anthropology*, 182-83. Accord, Barnard and Good, *Study of Kinship*, 89-91; Rodney Needham, “Remarks on the Analysis of Kinship and Marriage,” in Rodney Needham, editor, *Rethinking Kinship and Marriage* 5-8 (1971).

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categories of rights and duties” and “may be entered upon by people of the same sex.”<sup>109</sup> The Krige-Leach approach to marriage is now the more accepted among anthropologists, and there is no great metaphysical reason keeping the rest of us from following it as well.

10 73. *The Defense of Marriage Argument.* The second claim traditionally made by skeptics is that same-sex marriage will undermine “marriage” as an institution. From a historical point of view, this is a most curious argument. The nature of marriage within a society has no relationship that I can see to whether the polity recognizes same-sex unions as marriages. Woman marriage did no harm to male-female marriages in Africa; marriages to *berdaches* did not undermine the institution for different-sex couples among Native Americans; and so forth. If these same-sex marriages had undermined marriage in these other societies, I should have expected to see mention of it in archival and anthropological accounts, yet there are none. Instead, the opposite is true: a society that insists on rigid gender roles within marriage will only recognize same-sex marriages that conform to such a pattern, such as marriages between Native American male hunters and male *berdaches*, who performed domestic functions. A society that insists that women procreate will be open to woman marriages as in Africa, where an infertile woman can legally procreate through marriage to another woman. Neither of these models of same-sex marriage would be appropriate for a society such as Canada’s that does not insist on rigid gender roles and, instead, valorizes companionate marriage. In such cultures, same-sex marriages will be companionate.

20 74. Similarly, marriage is not a static institution within any society. It evolves as society changes. The main change in the institution has been the elevation of women’s roles within marriage.<sup>110</sup> Rural societies with gendered divisions of labor and needs for lots of children did not emphasize companionate marriage among social equals; this was true for same-sex as well as different-sex unions in Greece, Rome, Egypt, and elsewhere. Urban societies offering women many opportunities outside the home and fewer economic and social pressures to bear lots of children will press marriages to be companionate; this will be true for same-sex as well as different-sex marriages. Indeed, the demand for same-sex marriage by lesbians and gay men in countries like Canada and the United States is a direct consequence of the elevated role of women, compared with 200 years ago: as gender roles have come into question, women who

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30 <sup>109</sup> Eileen J. Krige, “Woman-Marriage, with Special Reference to the Lovedu -- Its Significance for the Definition of Marriage,” 44 *Africa* 11, 11 (1974).

<sup>110</sup> This and other points about the dynamic nature of marriage as a legal as well as social institution are developed in historical detail by Professor Nancy Cott of Yale University’s History Department in her forthcoming book, *Public Vows: A History of Marriage and the Nation* (Harvard Univ. Press 2000). Her testimony on this issue was highly informative for the Vermont legislature. See Thomas A. Little, “Summary: Work of the House Judiciary Committee for the Week of January 17-20, 2000,” at 2. Chair Little’s weekly summaries of testimony can be found on the Vermont Legislative Bill Tracking System website for “Civil Unions,” <[www.leg.state.vt.us/baker/baker.cfm](http://www.leg.state.vt.us/baker/baker.cfm)> (visited Nov. 1, 2000).

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emotionally or sexually prefer the company of other women are increasingly acting on those preferences (same for men), and demanding that state recognition is important to a neutral regime of equality for people of all orientations.

10 75. So when people worry that “marriage” is in decline, because, for example, many couples do not remain married for life, they are worrying about an ideal institution rather than an historical one. Companionate marriages, where both spouses must be satisfied, will not be as long-lasting as noncompanionate marriages, and this is especially true where the law makes divorce easy. The latter point bears emphasis: if the state wants to deploy the law to make marriages last longer, the state ought to change the law to make divorce more difficult or to require counseling before spouses are permitted to divorce or to provide real economic protection for the dependent spouse who is often pauperized by divorce. Excluding committed same-sex couples does nothing for this project. If anything, the state is undermining marriage if it uses the same-sex marriage bar as a reason to think it is “protecting” marriage, and therefore a reason not to think about real solutions, such as divorce and spousal support rules.

20 76. Moreover, the historical, literary, and anthropological cases described above contribute to the counterclaim that same-sex marriages can serve the same social goals as different-sex marriage. The major social goal of state-recognized or socially-encouraged marriage is *unitive*: the state or society recognizes the committed couple as a decisionmaking unit, as an economic partnership, and as a mutual support group. There is no doubt that many different-sex couples benefit from the unitive features of marriage. This affidavit shows how many same-sex couples have historically benefitted from those same unitive features of marriage. Sergios and Bacchus, the early Christian martyrs, loved one another by all accounts, and their mutual love sustained them against torture and persecution by Roman anti-Christian bigots. Jim Egan and his partner, early leaders of Canada’s gay rights movement, loved one another by all accounts, and their mutual love sustained them against slurs and taunts of antigay bigots and even nonbigoted critics. There are many other examples in the sources I have cited in this affidavit, but these examples ought to be just confirmation of what the reader already knows in her or his heart: today’s lesbians, gay men, bisexuals, and transgendered people find commitment and mutual love and support in unions that society considers same-sex (or “homosexual”), and those relationships face the same challenges and offer the same joys as different-sex (or “heterosexual”) relationships.

30 77. What about procreation? Woman marriages served the social goal of procreation in rural African societies. Today’s Western urban societies do not regard procreation as essential to marriage in the way rural premodern societies did. To be sure, one reason the state recognizes marriage is to provide a stable and secure household for the rearing of children – again, a function that same-sex marriages perform. Many lesbians and gay men bring children from prior relationships to their same-sex unions, and many more today are adopting children or bearing them through alternative insemination or surrogacy. One reason why lesbian couples in particular value legal recognition is that they want to affirm not only their commitment to one another, but also to the children they raise as a couple.

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78. *The Stamp of Approval Argument.* At the outset, the stamp of approval argument has a logical problem: when a state gives a couple a marriage license, it is not placing a stamp of approval on their particular relationship – instead, the state is placing a stamp of approval on the status of “being married,” for that couple as for others. In my country, for example, the Supreme Court has ruled that the state cannot deny convicted prisoners the right to marry without strong justification.<sup>111</sup> That does not mean that the state is placing its stamp of approval on “rapists” or “rapist marriages” because it is allowing convicted rapists to marry; the state is approving marriage for the rapist as for the law-abiding citizen.

10 79. The stamp of approval argument has a long history: every time marriage is opened up to reform, the argument is made that the state is placing a stamp of approval on behavior that people don’t like. In my country, most states refused to recognize different-race marriages until the 1960s. When different-race couples challenged their exclusion, the state response was that the state should not place its stamp of approval on miscegenation (sexual relations between people of different races), which was morally disgusting to most citizens of the state.<sup>112</sup> Even if most people did find miscegenation disgusting, it was not right to deny different-race couples the same rights same-race couples took for granted. There are many different-sex marriages that I find questionable, but I don’t think the state should deny consenting couples the right to marry just because I disapprove of their choices.

20 80. The miscegenation analogy helps us see what the correct legal analysis must be for exclusions of same-sex couples from marriage. Once the U.S. Supreme Court ruled that race was a suspect basis for apportioning state benefits and duties, it became a foregone conclusion that the state could not constitutionally deny marriage licenses to couples based upon race, and the Supreme Court so held.<sup>113</sup> The Supreme Court of Canada has ruled that sexual orientation as well as sex are suspect classifications under section 15 of the Canadian Charter.<sup>114</sup> Once that decision has been made, a court must carefully and skeptically scrutinize the exclusion of couples

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<sup>111</sup> See *Turner v. Safley*, 482 U.S. 78 (1987).

30 <sup>112</sup> See generally Harvey M. Appelbaum, “Miscegenation Statutes: A Constitutional and Social Problem,” 53 *Geo. L. J.* 49 (1964); A. Leon Higginbotham and Barbara K. Kopytoff, “Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia,” 77 *Geo. L.J.* 1967 (1989); James Trosino, “American Wedding: Same-Sex Marriage and the Miscegenation Analogy,” 73 *B.U.L. Rev.* 93 (1993) (student note)

<sup>113</sup> See *Loving v. Virginia*, 387 U.S. 1 (1967), analyzed in Eskridge, *Case for Same-Sex Marriage*, ch. 6.

<sup>114</sup> See, e.g., *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Supreme Court of Canada).

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from marriage on the basis of either sex or sexual orientation.<sup>115</sup>

81. The miscegenation analogy also provides an argument against a halfway remedy in cases like this one – such as a new institution like registered partnerships (Denmark) or civil unions (Vermont). Creating a new institution for gay people smacks of the “separate but equal” regime – apartheid – which my country and South Africa have made infamous. If the court were faced with a different-race couple seeking the right to marry denied them because of their races, the court would grant relief. Is it conceivable that the relief could be the creation of a new institution, such that white couples could marry, while white-black couples could only register as partners?

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### Some Concluding Thoughts

82. Some of the historical examples of culturally or legally recognized same-sex marriages were nonetheless unpopular in some quarters – as same-sex marriage is today in Canada and other parts of North America. But they were nonetheless recognized, as plaintiffs in this case argue they should be today in Canada. Such recognition would not be popular. But equality is not a matter of majority tastes, nor should judicial enforcement of constitutional guarantees be calibrated by opinion polls. The Charter, like the American Constitution, requires the judiciary to follow fundamental principles, and this is a good thing in the long term.

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83. The United States Supreme Court came under enormous criticism for declaring apartheid a violation of our Equal Protection Clause, and then for requiring the states to recognize different-race marriages. From the vantage point of 1954 or 1967, the Justices may well have doubted that they had done the politically astute thing – but they knew in their hearts they had done the right thing. Almost fifty years later, their unpopular equality judgment has earned them universal praise. Indeed, their insistence on equality has proven so robust that young people cannot understand how much fuss their rulings provoked. I foresee the same phenomenon with same-sex marriage. If recognizing it in 2000 seems unpopular in some quarters, every judge knows in her heart that denying it is wrong and unequal. And in 2050, young Canadians will wonder why it was that the state ever denied marriage rights to same-sex couples.

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84. I hope the foregoing information and analysis are helpful to the court, and to the state generally, as they deliberate on this issue. I appreciate the opportunity to share my thoughts.

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<sup>115</sup> The exclusion of same-sex couples operates as both a sex and a sexual orientation discrimination. It is the latter, because it operates overwhelmingly against lesbian and gay couples. It is sex discrimination because the regulatory classification that separates those getting licenses (male-female) and those not (female-female and male-male) is the sex of one partner.

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I solemnly affirm, under the penalties of perjury, that the contents of the foregoing paper are true based on my knowledge, information and belief.

*William N Eskridge Jr*  
William N. Eskridge, Jr.

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Date: November 14, 2000

*Marianne Dietz*  
**MARIANNE DIETZ**  
**NOTARY PUBLIC**  
MY COMMISSION EXPIRES FEB. 28, 2004

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Exhibit "A": Curriculum Vitae

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***THIS IS EXHIBIT "A" ATTACHED TO  
THE AFFIDAVIT OF  
WILLIAM N. ESKRIDGE, JR.  
SWORN NOVEMBER 14, 2000***

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*A Commissioner, etc.*

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*Marianne Dietz*  
**MARIANNE DIETZ  
NOTARY PUBLIC  
MY COMMISSION EXP. FEB. 29, 2004**

Exhibit "A": Curriculum Vitae (*cont'd*)

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**WILLIAM N. ESKRIDGE, JR.**

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(203) 432 9056 (office)

209 "C" Street. S.E.  
Washington, DC 20003  
(202) 543-2980 (home)

32 Highland Street  
New Haven, CT 06511  
203 624 3180

**EDUCATION**

- 10 Davidson College, Bachelor of Arts (History), 1973
- Summa cum laude, high departmental honors  
Algernon Sydney Sullivan Award  
Phi Beta Kappa, Phi Eta Sigma (president), Omicron  
Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha  
(president)
- Harvard University, Master of Arts (History), 1974
- Reading ability certified in French, German, Latin  
Passed Ph. D. oral examinations (with distinction)
- 20 Yale University, Juris Doctor, 1978
- The Yale Law Journal, 1976-78  
Note & Topics Editor (volume 78), 1977-78  
Yale prison services clinic, 1975-78

**POSITIONS HELD**

- John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present
- 30 Visting Professor of Law at Various Schools
- 1995 - Yale
  - 1995 - Stanford
  - 1994 - Harvard
  - 1993 - NYU
- Professor of Law, Georgetown University  
1990 - 1998
- Associate Professor of Law, Georgetown University  
1987 - 1990

Exhibit "A": Curriculum Vitae (*cont'd*)

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Assistant Professor of Law, University of Virginia  
1982 - 1987

Attorney, Shea & Gardner  
1979 - 1982

Law Clerk, The Honorable Edward Weinfeld  
1978 - 1979

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**(SELECTED) PUBLICATIONS**

*Books*

**Legislation and Statutory Interpretation** (Foundation, 1999) (co-authored with Philip Frickey and Elizabeth Garrett)

**Gaylaw: Challenging the Apartheid of the Closet** (Harvard University Press, 1999)

20

**Constitutional Tragedies and Stupidities** (NYU Press, 1998) (co-authored and edited with Sanford Levinson)

**Sexuality, Gender, and the Law** (Foundation Press, 1997) (co-authored with Nan Hunter)

**The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment?** (Free Press, 1996)

Henry Hart and Albert Sacks, **The Legal Process** (Eskridge and Frickey eds., Foundation Press, 1994)

30

**Dynamic Statutory Interpretation** (Harvard Press, 1994)

**Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century** (West Publishing Co. 1993; 2d ed. 1998) (co-authored with Daniel Farber & Philip Frickey)

**Legislation: Statutes and the Creation of Public Policy** (West Publishing Co. 1987; 2d ed. 1994) (co-authored with Philip Frickey)

**A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem** (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

Exhibit "A": Curriculum Vitae (*cont'd*)

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*(Selected) Articles*

- "No Promo Homo: Sedimented Antigay Discourse and the Channeling Effect of Judicial Review," NYU L. Rev. (Nov. 2000)
- "Destabilizing Due Process and Evolutive Equal Protection," 47 UCLA L. Rev. 1183 (2000)
- "The Circumstances of Politics and the Application of Statutes," 100 Colum. L. Rev. 558 (2000) (book review)
- 10 "Norms, Empiricism, and Canons of Statutory Interpretation," 66 U. Chi. L. Rev. 671 (1999)
- "Hardwick and Historiography," 1999 U. Ill. L. Rev. 631
- "Should the Supreme Court Read *The Federalist* But Not Statutory Legislative History?" 66 Geo. Wash. L. Rev. 1301 (1998)
- "Textualism, the Unknown Ideal," 96 Mich. L. Rev. 1509 (1998) (book review)
- 20 "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981," 25 Hofstra L. Rev. 817 (1997)
- "A Jurisprudence of 'Coming Out': Religion, Sexuality, and Liberty/Equality Collisions in Public Law," 106 Yale L.J. 2411 (1997)
- "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," 24 Fla. St. U.L. Rev. 703 (1997)
- "Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946," 82 Iowa L. Rev. 1007 (1997)
- 30 "Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism," 68 U. So. Cal. L. Rev. 1447 (1995) (co-authored with Jenna Bednar)
- "Virtual Logrolling: How the Court, Congress, and the States Multiply Rights," 68 U. So. Cal. L. Rev. 1545 (1995) (co-authored with John Ferejohn)
- "Regulatory Variables and Statutory Interpretation," 73 Wash. U.L.Q. 1103 (1995) (co-authored with Judith Levi)
- "The Many Faces of Sexual Consent," 37 Wm. & Mary L. Rev. 47 (1995)
- "Fetch Some Soupmeat," 16 Cardozo L. Rev. 2209 (1995)

Exhibit "A": Curriculum Vitae (*cont'd*)

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- "The Supreme Court, 1993 Term – Foreword: Law as Equilibrium." 108 Harv. L. Rev. 26 (1994) (co-authored with Philip Frickey)
- "The Elastic Commerce Clause: A Political Theory of American Federalism," 49 Vand. L. Rev. 1355 (1994) (co-authored with John Ferejohn)
- "The Making of 'The Legal Process,'" 107 Harv. L. Rev. 2031 (1994) (co-authored with Philip Frickey)
- 10 "From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct," 29 Harv. C.R.-C.L. L. Rev. 319 (1994) (co-authored with David Cole)
- "The Economics Epidemic in an AIDS Perspective," 61 U. Chi. L. Rev. 733 (1994) (review essay co-authored with Brian Weimer)
- "Gaylegal Narratives," 46 Stan. L. Rev. 607 (1994)
- "Post-Enactment Legislative Signals," 57 Law & Contemp. Probs. 75 (Winter 1994)
- "The Judicial Review Game," 88 Nw. U.L. Rev. 382 (1993)
- 20 "Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet." 2 Reconstruction 52 (1993)
- "The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell," 61 Geo. Wash. L. Rev. 1731 (1993)
- "A History of Same-Sex Marriage," 79 Va. L. Rev. 1419 (1993)
- "The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation," in *The Rule of Law (Nomos, 1993)* (co-authored with John Ferejohn)
- 30 "A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda," 102 Yale L.J. 333 (1992) (review essay)
- "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 Vand. L. Rev. 593 (1992) (co-authored with Philip Frickey)
- "The Article I, Section 7 Game," 80 Geo. L.J. 523 (1992) (co-authored with John Ferejohn)
- "Overriding Supreme Court Statutory Interpretation Decisions," 101 Yale L.J. 331 (1991)
- "Making the Deal Stick: Enforcing the Original Constitutional Understanding," J.L.

Exhibit "A": Curriculum Vitae (*cont'd*)

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- Econ & Org. (1991) (co-authored with John Ferejohn)
- "Reneging on History? Playing the Court/Congress/President Civil Rights Game," 79 Calif. L. Rev. 613 (1991)
- "The New Public Law Movement: Moderation as a Postmodern Cultural Form," 89 Mich. L. Rev. 707 (1991) (co-authored with Gary Peller)
- "The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases," 88 Mich. L. Rev. 2450 (1990)
- 10 "Legislative History Values," 66 Chi.-Kent L. Rev. (1990)
- "Dynamic Interpretation of Economic Regulatory Statutes," 21 L. & Pol'y Int'l Bus. 663 (1990)
- "Gadamer/Statutory Interpretation," 90 Colum. L. Rev. 609 (1990)
- "The New Textualism," 37 UCLA L. Rev. 621 (1990)
- "Statutory Interpretation as Practical Reasoning," 42 Stan. L. Rev. 321 (1990) (co-authored with Philip Frickey)
- 20 "Spinning Legislative Supremacy," 78 Geo. L.J. 319 (1989)
- "Public Values in Statutory Interpretation," 137 U. Pa. L. Rev. 1007 (1989)
- "Metaprocedure," 98 Yale L.J. 945 (1989) (review essay)
- "Interpreting Legislative Inaction," 87 Mich. L. Rev. 67 (1988)
- "Overruling Statutory Precedents," 76 Geo. L.J. 1361 (1988)
- 30 "Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation," 74 Va. L. Rev. 275 (1988)
- "Dynamic Statutory Interpretation," 135 U. Pa. L. Rev. 1479 (1987)
- "Legislation Scholarship & Pedagogy in the Post-Legal Process Era," 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)
- "*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem," 25 Va. J. Int'l L. 281 (1985)
- "One Hundred Years of Ineptitude," 70 Va. l. Rev. 1083 (1984)

Exhibit "A": Curriculum Vitae (cont'd)

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"The Iranian Nationalization Cases." 22 Harv. Int'l L.J. 525 (1981)

"*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA." 86 Yale L.J. 885 (1977) (student note)

**ENDOWED LECTURES**

The Dean's Diversity Lecture at Vanderbilt University School of Law, February 2000, "Prejudice and Theories of Equal Protection"

10

Steintrager Lecture at Wake Forest University, February 1999, "Jeremy Bentham and No Promo Homo Arguments"

Adrian C. Harris Lecture at the University of Indiana School of Law. October 1998, published as "Multivocal Prejudices and Homo Equality," Ind. L.J. (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 5, 1998, "Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law"

20

The Baum Lecture at the University of Illinois School of Law, November 1997, published as "*Bowers v. Hardwick* Reconsidered," 1998 U. Ill. L. Rev.

The Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 16, 1996, published as "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981," 25 Hofstra L. Rev. 817 (1997)

The Mason Ladd Lecture at the University of Florida State University College of Law, April 1996, published as "Privacy Jurisprudence and the Apartheid of the Closet," 24 Fla. St. U.L. Rev. 703 (1997)

30

The Murray Lecture at the University of Iowa, January 1996, to be published as "From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," Iowa Law Review (1998)

The Cutler Lecture at William and Mary School of Law, February 1995, published as "The Many Faces of Sexual Consent," 37 Wm. & Mary L. Rev. 47 (1995)

The Donley Lectures at West Virginia University School of Law, published as "Public Law from the Bottom Up," 97 W. Va. L. Rev. 141 (1994)

Exhibit "A": Curriculum Vitae (cont'd)

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**Congressional Testimony**

*H.R. 1283, The Fairness in Asbestos Compensation Act*, House Comm. on the Judiciary, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999) (jumbo consolidations in asbestos litigation)

*S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993*, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1<sup>st</sup> Sess. (1993)

10 *Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan*, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

*S. 2279, the Lobbying Disclosure Act of 1992*, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

*Statutory Interpretation and the Uses of Legislative History*, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101<sup>st</sup> Cong., 2d Sess. (1990)

20 *Adjustable Rate Mortgages (ARMs)*, Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98<sup>th</sup> Cong., 2d Sess. (1984)

30