

Paul Halsall
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Same-Sex Marriage, the Majesty of the Law, and the Power of Language:
_____ and _____ vs. the Attorney General of Canada (Affidavit of 2001)

Normative historical writing demands that historians take themselves out of the narrative and emulate a classical disembodied prose style. Invited to submit an affidavit for a same-sex marriage case in Canada, I discovered that the conventional format of discourse demanded by lawyers required that I put myself on the line. As in classical rhetoric, for lawyers the standing of the orator (or in this the “expert witness”) is a vital part of the persuasiveness of an argument. The personalism of the produced text is mitigated by an argumentative format of numbered paragraphs.

Historians and lawyers both seek to construct persuasive arguments about events through a combination of non-formal argumentation and possibly disjointed information derived from research. The professional discourse of history and the law, however, have reached diametrically opposed conclusions about what constitutes a persuasive argument. Rather than the historian’s disembodied but flowing prose, the lawyer prefers to draw attention to the writer but to present the writer’s arguments in a series of discrete persuasive pericopes.

This article, or affidavit, is based on earlier unpublished research, but the requirement to rewrite as an expert witness for a case before the Supreme Court of British Columbia proved to be an opportunity to rethink the issues and to improve documentation. As a historian my prime concern remains with the substantive historiographical argument, although I acknowledge that since this is an effort to make the past “usable” for modern people, I am already violating some canons of historical propriety. But in doing so I also became interested in the discursive power embedded in different types of narrative.

I submit this article then both for its historiographical content, but also as an experiment, an attempt, to empower the argument through the use of legal format. By bring into play legal

discourse I seek to show how the metaphors of legal texts which are so often invoked against same-sex partnerships can be used to constitute a counter hegemonic legal discourse.

No. [REDACTED]
[REDACTED] Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

[REDACTED]

Petitioners

AND

**THE ATTORNEY GENERAL OF BRITISH COLUMBIA
THE ATTORNEY GENERAL OF CANADA**

Respondents

AFFIDAVIT OF PAUL HALSALL
(Sworn December 14, 2000)

I, **Paul Halsall**, of the City of Jacksonville, in the State of Florida, in the United States of America, **MAKE OATH AND SAY:**

1. I am an assistant professor of history at the University of North Florida, and hold degrees from the University of Edinburgh (M.A. in History), the University of London (M.A. in Classical Civilization), and Fordham University (Ph. D. in History). My areas of specialization are Medieval and Byzantine history, and I have researched other aspects of the history of same-sex relationships since 1994. Attached to this my Affidavit as Exhibit "A" is my *curriculum vitae*.¹

2. I have been requested by the Petitioners in this matter to provide information on the diverse historical and cultural contexts in which same-sex relationships have occurred in

human history. The information contained in this Affidavit is based on my personal scholarly research and analysis, is true to the best of my knowledge and belief, and is offered for no improper purpose.

3. The information contained in this Affidavit deals with three main points: Definitions of 'marriage' that can be discerned from historical sources; transhistorical and cross-cultural evidence of the existence of and social significance of same-sex unions; and the diversity of the contemporary movement for marriage rights by lesbian and gay couples.

4. The general conclusion supported by the historical record is that same-sex marriages have occurred in sufficiently diverse historical and cultural contexts as to refute any assertion that 'marriage' is irretrievably or 'naturally' heterosexual, and that same-sex marital relationships have been and are conceivable to people in a wide range of periods and cultures.

DEFINITIONS OF 'MARRIAGE'

5. The issue of what is "marriage" is a core issue. The Roman Catholic Church, for instance, defines a *Catholic* marriage as a sacramental union entered into permanently between one baptized man and one baptized woman. There is a similar definition given in the *Corpus Iurus Civilis* - the basic text of later Roman Law. Such a definition, if accepted as a legal definition, can make the very idea of "same sex marriage" appear to be meaningless. But the issue cannot be settled by *a priori* definitions: as even conservative Catholic sources will acknowledge, real "marriages" exist in many forms that cannot be fit into simple models; for instance it would be pointless to deny that polygamous marriages were or are "real marriages."²

6. No one denies either that committed and even long term, same-sex relationships have occurred in many diverse cultures. But such *private* relationships are not what we consider as "marriage", any more than we would consider all long-term romantic relationships between a

man and woman as "marriages". When we do try to separate marriage from other union relationships, though, we face a problem - there are no simple lines of demarcation.

7. In past societies, and sticking with heterosexual examples, relationships called by the words we would translate as "marriage" have in fact comprised wildly divergent arrangements:

relationships between one man and many women. [*Polygyny* - in many societies, for example Islam, ancient Israel]

relationships between one man with a chief wife and subordinate wives and/or concubines. [China]

relationships between one woman and many men. [*Polyandry* - in Tibet]

age dissonant relationships between one man and one woman where the man was usually an adult of about 30 and the woman a fifteen year old [e.g. Classical Athens, Renaissance Italy]

relationships in which one man and one woman marry at roughly the same age, but without ever having met before. [Among some Orthodox Jews, in many Indian and Chinese societies.]

relationships in which one man and one woman marry because they love each other. [so-called "companionate marriage" - the modern norm, and often traced back to the Protestant Reformers views on marriage.]

In all these cases the relationships have been called "marriages". What do they have in common? Or in other words, can we establish a general definition of "marriage"? A viable alternative, after all, might be to accept that there is no such transcultural institution as "marriage", and that each society manifests essentially different patterns.

8. What such "marriage relationships" seem to have in common are these factors:

Domestic cohabitation

Communal recognition

Customary rules of conduct

Some sort of ceremonial inception

Some extension in time

9. Not included as essential are:

Legal recognition - marriage exists in societies without legal functions, or non-legal marriage is recognized even in "legally-minded" societies [e.g. in modern Scotland it is still possible to be married by "habit and repute".

Love relationships.

Child-rearing - children are often desired, but are not required.³

Monogamy.

Permanence - divorce or permanent separation is allowed in most societies.⁴

10. In modern American and Western European society, however, other factors than those offered in the first list are also almost always expected in what is defined as "marriage".

These include:

Emotional commitment

Legal recognition

Monogamy

11. In looking at marriages - same-sex and mixed-sex - in the past, I suggest that we

can take the word "marriage" to have a meaning. When certain criteria are met, it is legitimate for us to consider specific relationships as assimilable to what we consider "marriage." It may be that such relationships were not described by the word usually translated as "marriage" in the culture under discussion, or might not fit modern notions of "marriage." However, where the following aspects are found, I consider that there is evidence of "marriage" - same-sex or otherwise:

Domestic cohabitation

Public, or semi public, ceremonies of union

Communal recognition

Extension in time

12. I wish to acknowledge the "presentist" bias here, but since this affidavit is concerned to look at past arrangements to help inform current discussion, I think this is legitimate. To make this discussion concrete, let us take, for example, the Romans. Rome had a sophisticated legal culture in which "marriage" - *conubium* - could only be contracted between citizens: slaves could not marry, nor could citizens marry non-citizens. It is, in fact, quite possible that there were areas in which **most** people were legally incapable of "marriage". (One implication here is that very many early Christians - slaves and freed-people - in domestic "marital" relationships were not "married" according to Roman Law.) However, there was a special class of relationships for slave couples -- *contubernium* -- which was a class-based legal category that fell short of 'marriage' as understood for those of the citizen class. Where we come across a couple, living together and raising children, acknowledged by all as a couple, I think we can consider the relationship "marital". A classic case is that of St. Augustine of Hippo. He never legally married, yet he lived with a women for many years, raised a child with her, and, when he

eventually separated from her, took care to make sure that she did not go to another man. This was not a Roman *conubium*, and does not seem to have had a ceremonial inception, but would fulfill, I think, what any external observer, informed of the variety of world marital customs, would see as a "marriage". Certainly Augustine would have been "married" in Scotland. Where we find similar indications for same-sex couples - domestic cohabitation, public recognition of the relationship, extension in time, customary regulation - then I propose we also have evidence of "marriage."⁵

TRANSHISTORICAL AND CROSS-CULTURAL EVIDENCE

13. Egypt. Given the nature of the sources, and the extreme length of its history, generalizations about Egyptian homosexuality are still hard to make. Of significance for this inquiry though is the Tomb of Niankhkhanum and Khanumhotep that was discovered in 1964 in the necropolis of Saqqara. According to the Internet site that mounts an exhibition on the couple,

The tomb was found when archaeologists under the direction of Mounir Basta and Ahmed Mousa conducted a series of probes into the escarpment on the southern side of the causeway of Unas, where a series of rock-cut chambers were then discovered. When archaeologists began restoration work on the causeway it was discovered that certain of the blocks that were incorporated in its original construction had been appropriated in ancient times from a Mastaba that had been connected to the rock-cut chambers. The archaeologists reconstructed the mastaba using blocks found in the substructure of the causeway. It was revealed that this tomb had been built for two men to co-habit and that both shared identical titles in the palace of King Niusere of the Fifth Dynasty:

"OVERSEER OF THE MANICURISTS IN THE PALACE OF THE KING." ⁶

It is possible to take a tour of the tomb and to see some of the remarkable representations of these two men. Leaving aside the rather stereotypical occupation of the two men, this is one of the most dramatic, and probably the oldest, indication we have of a publicly acknowledged homosexual couple. Was it a "marriage"? Frankly I do not know, but their relationship certainly seems beyond any simple private *affaire*.

14. Ancient Greece. The aristocratic ideal of homosexual love in fifth century Athens emphasized romantic relationships between an older man and a post-pubescent youth. This ideal is reflected in a great deal of classical literature: but as an ideal it has also misled many modern writers into assertions that homosexuality was mostly an Athenian aristocratic pursuit based on short term and private *affaires*.⁷

15. In fact there has long been ample evidence of long term relationships, recognized by contemporaries. For instance Plato's *Symposium* contains one long-term couple - Agathon and Pausanias,⁸ and Aristotle discusses another couple, Philolaus and Diocles who capped a lifetime commitment by being buried together.⁹ The long term existence of male brothels in Athens should also give pause to anyone who wishes to claim that homosexuality only involved upper class men at the *gymnasia*.

16. It is somewhat difficult to establish, for Athens, that even these long term relationships were comparable to marriage. Outside Athens, however, there is rather strong evidence of public ceremonial couplings of same-sex lovers.

17. Cretan Boys' Ceremonial Partnerships. Numerous sources report on the Cretan custom of the ceremonial abduction of youths.¹⁰ The lover announced his intention to kidnap the beloved some days beforehand. There was a chase in the countryside; the beloved, once caught was given a gift; and witnesses engaged in a solemn meal, after which all parties returned to

town. The relationship remained acknowledged long after the ceremony. Similar ceremonies were known in Thebes and Chalchis.¹¹ According to Xenophon the love between a man and a youth was considered a conjugal union.¹²

18. Sparta. "In Sparta it seems to have been the practice for every youth of good character to have his lover or "inspirator" and for every well-educated man to be the lover of some youth. The relations between the inspirator and the listener were extremely intimate: at home the youth was constantly under the eyes of his lover, who was supposed to be to him the model and pattern of his life, in battle they stood near each other and their fidelity and affection were often shown until death; if his relatives were absent the youth might be presented to the public assembly by his lover."¹³

19. The Sacred Band of Thebes. "This band of men of noble blood, three hundred in number, who had exchanged an oath of love and friendship, was formed by Gorgidas...The sacred band proved itself brilliantly in the battle of Mantinea, in which Epaminondas fell with Cephisodorus, and the traditions of the gallant band maintained themselves until the defeat at Chaeronea, in which the flower of Greek freedom was broken. When the victor, King Philip of Macedon, surveyed the field of battle and saw that all the bodies of the three hundred had fatal wounds in their breasts, he could not suppress his tears and said: "woe to them who think evil of such men."¹⁴

20. There were then in ancient Greece public same-sex relationships, formalized by public ceremonial, and intended to be of long duration. In some cases the "kin" relationship created was recognized. What such relationships do not seem to have involved were property rights and transactions, a major aspect of heterosexual marriages.

21. **Ancient Rome.** In Roman, as in Greek, history, the tendency has been to accept that homosexuality was an expression of upper class male libido, but distinct from the realities of long term relationships and marriage. This is indeed the impact of literary texts such as Catullus and Martial. It is also worth noting, to begin with, that later Roman law defined *matrimonium* as *conjunctio maris et feminae* ("union of male and female").¹⁵ But law and literary convention, related above all to the ruling class of imperial centers, do not begin to describe the "anthropological" reality and variety of customs in practice. I have already noted the example of St. Augustine: from a Roman legal viewpoint he was never "married"; in every other way he was. Since I am concerned here to establish that "homosexual marriage" is a recurring custom in a variety of societies and historical periods, it is the *cultural* rather than *legal* practices which interest me.

22. **Long Term Homosexual Relationships.** Our sources remain elite, but if we avoid certain poetic conventions, the existence of homosexual relationships beyond mere sexual gratification is evidenced. Although later Romans sometimes asserted that homosexuality was imported from Greece, by the close of the sixth century BCE, Polybius reported, there was widespread acceptance of homosexuality.¹⁶ Some homosexual relationships are documented as long term: The sometime Consul, Lucius Quintus, a senator, and his long time lover were discussed by Plutarch in his *Marcus Cato*, [with another version of the story in his *Flamininus*].¹⁷

23. Lucius Quintus seems to have been a odious character, but what is of note is that his relationship was long term - indeed is said to have he gave as much power and respect to his lover as to the chiefest of his friends and relations. He was expelled from the Senate not for this relationship, but because of his abuse of his official powers as consul. I am not here asserting that Lucius Quintus was "married", just that Roman homosexual relationships could indeed be

public, involve cohabitation, and be long term.

24. In his *Second Philippic Against Anthony*, Cicero recounts that Mark Anthony, as a young man had been "promoted to wifely status" and united as if in a "stable and permanent marriage (*matrimonium*)" by Curio, the son of Curio the elder.¹⁸ The relationship had been opposed by the father, and by Cicero. What is interesting though, as John Boswell points out is that Curio had contracted debts because of his relationship with Anthony and Cicero persuaded Curio the Elder to honor them.¹⁹ It is doubtful that Cicero saw the relationship as a legal marriage, but this is another case [and they could be multiplied] where a long-term homosexual relationship was understood, even by a person as straight-laced as Cicero as in some sense congruent with a heterosexual union.

25. Homosexual Marriage in Literature. Under the Empire a number of writers refer to clear homosexual marriages. In his account of the emperor Nero, Suetonius reports that Nero married two men. The first was the boy Sporus, who Nero had castrated and then "he went through a wedding ceremony with him - dowry, bridal veil and all - took him to his palace..., and treated him as his wife."²⁰ Later on Nero was married by his freedman. Doryphorus now married him - just as he himself had married Sporus - and "on his wedding night he imitated the screams and moans of a girl being deflowered."²¹

26. What exactly these accounts mean is an interesting issue. Suetonius was a gossipmonger and a moralist. He checked his facts,²² but meant his stories to be scandalously amusing. Nero's activities are no indication of customary practice, and it is noteworthy that in both his marriages he emulated male-female roles. But it is also true that, in the context of all the other "homosexual marriages" we find around the world, that in Rome also, the idea was conceivable.

27. This is perhaps better illustrated in Juvenal's Second Satire *Against Hypocritical Queens*. The Second Satire is a vicious attack on Roman homosexuals, replete with references to their mincing walk and so forth. Then there is this passage:

Gracchus has given a dowry, substance and sum, twenty thousand
 To a cornettist, or maybe a type who plays the white flute.
 Sealed, delivered and signed. Happy Days. There's a crowd at the dinner
 The bride, almost in a swoon, reclines in the arms of her husband
 O ye nobles of Rome, is our need for a seer or a censor?
 Would you be startled more, be more aghast at the portent
 If a woman bore a calf, or a cow dropped a ewe lamb?
 Her is an ancient house, long privileged, long under tradition
 To carry Mars' nodding shields along in holy procession
 Sweating under their weight, the hand through the things of the leather
Yet here is a son of that house, a Gracchus, given in marriage
All tricked out in veil, in a bridal train, and in flounces!
Romulus, father - whence came disgrace like this on your shepherds?
Whence father mars, such and itch to fasten itself onto your grandsons?
Here is man renowned for wealth, distinguished in breeding,
*Being wed to a man, and you do nothing about it.*²³

28. The poet Martial also recounted a similar event:

The bearded Callistratus married the rugged Afer
 Under the same law by which a woman takes a husband
 Torches were carried before him, a bridal veil covered his face

Nor was the hymn to you, O God of marriage, omitted
 A dowry was even agreed on. Does this not, Rome, seem
 Enough? Do you expect him also to bear a child?²⁴

29. Passages such as these have led a number of scholars, such as John Boswell and Edward Westermarck to conclude that "formal marriages between men were introduced with all the solemnities of ordinary nuptials."²⁵ Other scholars, for instance Brent Shaw, attempt to dismiss such passages, noting that "Juvenal's lines would lack the wit and mordant punch that were obviously intended by their author" if homosexual marriages were commonplace.²⁶ This is a duck and, I think, a failure to grasp the nature of satire. Juvenal also writes against women, and against Greek immigrants. His satire would not work if some women had not been doing the things they were accused of, or at least something like them, nor that Greek immigrants were not numerous. It does mean that as a satirist Juvenal was taking grumpy and one-sided observations from hostile witnesses and turning them into poetry. The point is that satire is based on exaggeration of observation, not invention.

30. Some upper-class homosexual men in the imperial period do seem to have established long-term relationships, and also celebrated these relationships in the form of public marriage ceremonies. Many others attended the rites.

31. It was not only among the upper class that we come across same-sex marital relationships. In Petronius Arbiter's *Satyricon*, the central couple are the homosexual lovers Giton and Encolpius. [They are, by the way, about the same age]. Their relationship is referred to not as a *conubium* but as a *contubernium*.²⁷ This is interesting because it is the precise term given to slave "marital unions". Slaves, as unfree persons, could not *contract* a marriage in Roman law, but their long term relationships were recognized as forming a *contubernium*, perhaps best

understood as "customary cohabitation". This would have been the only form of "marriage" available to many early Christians. In other words, in the *Satyricon* at least, a long-term homosexual couple is understood in the same terms as heterosexual couplings. At one point Encolpius specifically states that his relationship with Giton "was like a bond of blood, unbreakable."²⁸ It is worth noting that, for the incontrovertibly sexual couple, Petronius uses the word "brothers" repeatedly. Again and again we find that the relationship between two male lovers can be understood as creating an artificial kin relationship [like heterosexual marriage], and that in groping for words, culture after culture ends up with "brothers".

32. China. There is a large literature in Chinese on homosexual love. Much of it concerns private love *affaires*, but, especially in connection with Fujian province, there is a great deal of evidence that open homosexual marriages were known.²⁹ The recent work of Michael Szonyi had show that such homosexual marriages were not only socially acceptable, but that there was a religious cult around a god (Hu Tianbao) of homosexual relationships.

33. Li Yu [1611-1679/80], a widely read writer of his time, is one major source, addressing the topic in a number of his works. In one story - the *Qing qi ji* [Chronicle of Extraordinary Love]. Li Yu sets the story in Fujian and says it concerns two men who become "husband and wife" (*fufu*). Jifang, the hero, falls in love with Ruiji and decides he wants to marry him, - using the word *qu* (which refers to marriage) to describe the intended marital relationship. Assuming that the custom of homosexual marriage would be unfamiliar to his [non-Fujianese] readers, Li Yu provides an explanation:

"In Fujian the southern custom is the same as that for women. One tries to discern a youth from whom this is the first marriage. If he is a virgin, men are willing to pay a large bride-price. They do not skip the three cups of tea, or the six wedding rituals - it is just like a

proper marriage with a formal wedding."³⁰

34. It was expected that at some time such an arrangement would come to an end as both men would later marry a woman, since the patrilineality of the Chinese family demanded male heirs. The plot of the *Qing qi ji* concerns how this is avoided by Ruiji essentially transforming himself into a woman. As Hinsch notes, Li Yu sees the devotion of homosexual marriage in the most idealistic terms: the change in gender is merely plot device.

35. Li Yu is not the only witness to this custom of homosexual marriage. The scholar Shen Defu (1578-1642) also wrote about it, and provides some interesting details. Of special interest is that two "united" men would often use sibling based terms - the older referred to as "adoptive older brother" (*qixiong*) and the younger as "adoptive younger brother" (*qidi*). Note that Shen Defu is quite explicit that these terms apply to sexual relationships.³¹

36. Other western scholars note that Shen Defu was quite clear that the male marriages in Fujian meant that the couples lived conventionally in households, and that the couple were supported by parents using money laid aside for their sons' marriage portion. The locals even created a special ideographic character to express these unions - substituting the component meaning "female" for the component signifying "physical strength" in the ideograph conventionally used for "male."³²

37. It is to be emphasized that the male marriage ceremony went beyond sworn friendship ceremonies. There is a description of the friendship ceremony from Li Yu. Two men sacrifice a carp, a rooster and a duck. They exchange the exact times of birth, smear each other mouths with the blood of the victims, and swear eternal loyalty to each other. The ceremony concludes with a feast on the victims.³³ In male marriage, though, the younger would move into

the elder's house, and would be treated as a son-in-law by parents. The marriages often lasted twenty or so years. At the end, the older partner might pay the bride-price for his husband to acquire a bride, to fulfill procreation duties.

38. Recently in a subtle and wide-ranging article the historian Michael Szonyi, of McGill University, has vastly expanded out knowledge of the social acceptability of homosexuality and homosexual marriage in China. He has shown that in late eighteenth-century Fuzhou, there was a cult and temple of a god called Hu Tianbao.³⁴ Although information on the cult is derived from hostile government records generated in a period when the non-Chinese Qing dynasty began a campaign against Chinese homosexual, it is clear that Hu Tianbao's function was as a patron of men who wanted to attract other men sexually.

39. As well as male homosexual marriages, there are also references in Chinese literature to "Golden Orchid Associations" - lesbian marriages, which seem to have been not uncommon in the Guangzhou area. The relationships were marked with ceremonies and long term co-habitation. The married lesbian couples could inherit from their families and adopt female children.³⁵

40. There may still be remnants of this tradition in China, it seems. The *Boston Globe* reported that two men - Ye Xing, 26, a People's Liberation Army Veteran, and Li Linxing, 30, married in traditional ceremony. Local officials were hostile.³⁶ At the very least, such an event is witness that desire of homosexuals to marry is not a result of recent American sexual politics, but represents a widespread desire by gay people.

41. The Chinese same-sex unions fulfill all the factors identified as central to marriage - domestic cohabitation, communal recognition, customary rules, ceremonial inception,

and extension in time. There can be no doubt that here we have one of the best examples from history of same sex marriages.

42. Japan. The literature on homosexuality in Japan is, if anything, more extensive than that of China. St. Francis Xavier reported - horrified - that it was common in Buddhist monasteries in the 16th century³⁷ and perhaps earlier.³⁸ The most famous aspect of Japanese homosexuality was without doubt the cult of homosexual love among the samurai, about which Ihara Saikaku's *The Great Mirror of Male Love* concerns itself. But the model of homosexuality assumed in the samurai literature is one in which romantic love and marriage are incompatible. The stories concern devoted relationships which end, or are transformed when the younger partner reached eighteen years old. Saikaku did distinguish between what we would call "bisexual" men and exclusively homosexual men [he calls them "women haters"], but even amongst the latter group it was assumed they would have a succession of younger lovers. But this model does not mean that Japanese homosexuality is not relevant to a consideration of same-sex marriage.

43. In the seventeenth century, since homosexual love was accepted as a completely normal aspect of male sexuality, it was governed by expected ethical standards. The beginning of a relationship between an adult and younger male was accompanied by the formal exchange of written and spoken vows, "giving the relationship a marriage like status,"³⁹ The relationships were not purely about sex: the *nenja* - the older lover - was supposed to provide social backing, emotional support and a model of manliness, and the boy was supposed to be a good student of samurai manhood.

44. In the towns there was expected to be a substantial age difference. In the countryside, however, the age difference might be rather small.⁴⁰ In these situations the

vocabulary of brotherhood was used - one taking the role of the elder brother *ani-bun*], the other the role of younger brother [*ototo-ban*]. Hierarchy was essential to all aspects of Japanese homosexual relations, as also heterosexual relations.

45. Whether or not we can qualify these Japanese relationships as marital remains problematic. They certainly involved, communal recognition, customary rules, and a ceremonial inception, but the issue of cohabitation does not seem central and extension in time was limited. There are certainly marriage like elements, but also distinct differences.

46. **South East Asia.** The early 20th century writer Edward Westermarck noted that in the Malay archipelago, homosexual love was common. In Bali it was quite open and the *basir* of the Dyaks were noted as men who made their living by witchcraft and who were often "formally married to other men."⁴¹

47. **Australia.** Again from Westermarck, it was noted that among the aboriginal people of the Kimberley district of Western Australia

"If a young man on reaching marriageable age can find no wife, he is presented with a boy-wife known as a chookadoo. In this case the ordinary exogamic rules are observed and the "husband" has to avoid his "mother in law" just as if he were married to a woman."⁴²

The boy-wives were usually aged between five and ten. Some groups denied that "sodomy" was practiced, but it was acknowledged amongst others. The same-sex marriage pattern was common among younger men, although clearly it was regarded as less desirable than marriage to a wife.

48. **India.** The history of sexuality in India is somewhat under explored at the moment. Although there is a vast private network of homosexual meeting places, house parties,

and relationships, there is no gay movement, few if any gay bars, and until very recently no gay publications. But the impulse to marry for same-sex couples is evident. The evidence here then points to the cross cultural conceivability of homosexual marriage not to its historical existence.

49. In December 1987 two policewomen - Lila Namdeo and Urmila Srivastava, members of the 23rd Battalion based near Bhopal, got married to each other. The ceremony consisted of an exchange of garlands - a *gandharva vivah* - conducted by a Brahmin in a Hindu temple at Sagar. Their parents had given their consent and were present at the ceremony.

50. The marriage caused an uproar. The women lost their jobs and were kept in solitary confinement for two days. Press coverage was immense, and raised the topic of sexuality in India as one for public discussion. Since official public discourse in India denied anything other than heterosexual existence until very recently, all sorts of media efforts were made to deny what the two women had done: it was said the relationship was not sexual; that Lila was a widow and Urmila a child bride who had rejected her husband; that their actions were determined by a cruel society. Overlooked was that they were both competent women employed in responsible adult work. Interviews with the women themselves showed that they did see themselves as a couple, and had got married, and got photographed getting married, to protest the harassment they received. They also suggested there were other same-sex couples in the Bhopal battalion.⁴³ India is a nation hardly touched by modern lesbian and gay politics, but here again we see that a same-sex marriage is both conceived and desired by same-sex couples.

51. **Africa.** Anthropologists have long discussed the wide variety of homosexual sexual practices and other same-sex relationships within African societies. Murray and Roscoe recently highlight the complexities of analysis arising from both the diversity of African practices and the ideological positions of commentators.⁴⁴ In this discussion the issues are considerably

clearer: a wide range of African societies named same-sex relationships as “marriage.”

52. More than thirty societies sanctioned woman-woman marriages in which one woman became socially acknowledged “female husband” of another.⁴⁵ The relationships were usually established by means of the “female husband” paying the brideprice for her wife. She was considered the legal father of any children (conceived with outside help).⁴⁶ Although the “female-husbands” acquired male prerogatives, they did not otherwise assume male social roles, so these are not cases of transsexual marriages. Anthropologists reporting on these marriages have usually denied that any sexual activity took place but this assumption has recently been challenged.⁴⁷

53. Documentation of African male same-sex marriages is less common than for female-female marriages, and perhaps the most famous example -- the “wives of the mines” (tinkonkana) of southern Africa -- seems more comparable to prison homosexuality in the West than to marriage.⁴⁸ Among the Zande of central Africa, however, age-differentiated male-male marriage is well attested. Men at many social levels would acquire “boys” (any male between twelve and twenty) as “boy-wives” by means of the same customs through which they would acquire female wives.⁴⁹ The “boy-wives” parents were referred to as “father in law” and “mother in law” and the husbands could sue for adultery any other man who had sex with his wife.

54. The Americas. The variety of cultures among native American groups was vast. There is ample evidence of cultural acceptance of sexual diversity; but the recurrent pattern centered on gender inversion rather than sexual orientation: in other words there were men who lived their lives as women. The usual term for these men is the French word *berdache*. They not only lived as women, but also could marry other men. This custom has been known to scholars for some time.

"In America homosexual customs have been observed among a great number of native tribes. In nearly every part of the continent there seem to have been, since ancient times, men dressing themselves in the clothes and performing the functions of women, and living with other men as their concubines or wives."⁵⁰

55. This was in addition to homosexual liaisons between young warriors, which do not seem to have taken a marital form. Westermarck notes evidence of berdache-type marriages among the Chukchi of the Kodiak peninsula,⁵¹ the Koriaks,⁵² and the Kamchadale.⁵³ The Kodiak same-sex marriages were especially widely noted.⁵⁴

56. Same-sex marriages, or concubinage, were also noted in New Mexico,⁵⁵ and as very widespread in Peru at the time of the conquistadors.⁵⁶ Without reference Paolo Mantegazza reports that "in certain northern parts of Mexico marriages were performed between men who, clad like women, were forbidden to bear arms."⁵⁷

57. Occasionally the obverse of the berdache is found. Among some Brazilian groups, there were women who adopted masculine dress and habits. "Each of these women has a woman who serves as her and with whom she says she is married: they live together as husband and wife."⁵⁸

58. Medieval Eastern Orthodoxy and Catholicism. This has been the historical area and period about which there has been most discussion in recent years, above all because of the many articles, talks and finally book by John Boswell, *Same Sex Unions in Pre-Modern Europe*. There have been a huge number of criticisms of Boswell, of his overall argumentation, of his footnotes and of his honesty. But some points have now been accepted by all, while others are still open to serious dispute:

59. In rural societies, where agriculture, farm work, and non-monetized property are the norm, heterosexual marriage will always predominate. With some exceptions, homoerotic unions are likely to flourish only in areas in which there are significant concentrations of people not immediately dependent on the rural rhythms of life - in cities, in the military, and among clerics and scholars. No one knows the extent of homosexual activity or relationships.

60. From the time of Justinian, perhaps earlier, sodomy was illegal in Roman, and hence Byzantine, law. What is disputed is: (1) The extent to which Law Codes impacted on behavior, or even judicial practice in later centuries. Some scholars see the law as determinative of later possibilities, others, taking note of limited legal education and direct violation of law in other areas of judicial practice, see this as unimportant. Divorce for instance is forbidden by Orthodox canon law, as expressed in the Quinisext Council, but allowed in judicial practice, and even in civil law divorce by consent was forbidden in Justinian's code, but seems to have taken place for centuries afterwards. (2) Was the law directed at anal sex, or did it apply to all forms of homosexual intimacy. Many scholars now hold that there was no concept of "homosexuality" in earlier times, only of certain acts. So, just as heterosexual oral intercourse was forbidden, or even heterosexual sex with the woman on top, the extent to which sodomy law would have been generalized is not determinable. (3) The extent to which a law against anal sex would prohibit all legal, and/or customary recognition of homosexual cohabitation relationships.

61. There was without a doubt a ceremony - called *adelphopoiia* in Greek, but also known to have parallels in Slavic countries, and among Greek-speaking Catholics in Italy, which celebrated the "uniting" of two men as brothers. This ceremony was usually conducted in Church as a blessing. Most surviving texts seem to envision it as taking place between two men, although there are indications that it could occasionally involve two women, or more than two people. In

Slavic countries it might also have been used between men and women. Most commentators, even those hostile to Boswell, acknowledge that the ceremony may have been used by homosexual couples, but without Church sanction. What is disputed is: (1) The signification of the word "brother." Although the cross- an intra-cultural evidence is rather strong that sibling language and marital eroticism are frequently combined,⁵⁹ some scholars still insist that there ceremonies are either some sort of fraternal adoption, or some sort of friendship ceremony. (2) The nature of the Church. Some commentators will only see ecclesiastical approval if central Church authorities clearly approved of such ceremonial "same sex unions". There is no evidence yet demonstrated for this. Other commentators take the view that if such ceremonies took place in a customary form among local Christian communities, and such communities knew what was occurring, then these ceremonies do have place in the Christian history of homoeroticism. Among modern Orthodox Christians the popularity of an ecclesiology, derived from Bulgakov, that defines the Church as "the local Eucharistic community" would support such a view. (3) The extent to which such unions can be seen as marriages. For those scholars who define marriage in legal terms, the issue is not completely closed, but by and large they would reject these unions as marriages. The problem of a complete rejection, even for the legalistically minded, is that some later Eastern texts show that a discussion was going as to whether such unions created inheritance rights of a clearly familial nature. Other scholars would be willing to say that if the same-sex couples were cohabiting in public after a ceremonial commitment ceremony, we have a clear example of a marriage-type relationship.

62. The general consensus, despite the viciousness of some of the attacks on Boswell, is that he did not prove the strongest version of his case. In other words the evidence has not been brought forward which demonstrates unequivocally that same-sex marriages, understood by all as

exactly equivalent to heterosexual marriages, were endorsed by central Church authorities in Eastern or Western Christendom. But this does not mean that Boswell's work can be dismissed. He has penetrated the barrier of suppression and silence surrounding a set of ceremonies that do in fact seem to have been used by homosexual couples as a way of obtaining some Church sanction for their relationships. It also seems certain that in some areas and at some times, such unions were understood as such by the communities involved. Since the point here is rather distinct from Boswell's - to establish that marital relationships between homosexual couples have been conceivable across time and culture - what might seem the weaker aspect of his work is enough.

63. Early Modern Europe. It is quite certain that in the later middle ages, from the thirteenth century on, a wide array of official secular and ecclesiastical decrees were issued against homosexual conduct: some of these decrees led to serious repression. This same period also sees a number of major developments in the area of a marriage. First it comes to be a much more frequently a Church ceremony, and begins to be discussed as a "sacrament."⁶⁰ Because of this the Latin Church came to define its official view of marriage in fairly rigorous terms, both in theology and canon law. Following the definitions of the ancient Roman jurist Herrenius Modestinus marriage was defined as the "union of a man and a woman", and laws about the validity, licitness and so forth were elaborated. It is these developments which are reflected in the secular law of modern states.

64. From a consideration of such activity and definition by ecclesiastical elites, it might then seem that the very idea of same sex marriage would not be conceivable in western societies. Indeed the importance of clear legal distinctions, as well as a tendency to think about everything in either/or terms, is often taken as a defining attribute of modern western culture.

Even against this background, however, there are occasional indications that same-sex marriage remained conceivable to some.

65. Italy. One of the most interesting passages relating to the widespread conceivability of gay marriage comes from France's premier essayist Montaigne. The story here is confirmed by other sources - records of a Venetian diplomat for instance, and so seems to refer to an actual event - a gay marriage, understood as such, in late 16th century Rome:

"On my return from Saint Peter's I met a man who informed me ... that on this same day [March 18, 1581] the [Holy Week] station was at San Giovanni Porta Latina, in which church a few years before certain Portuguese had entered into a strange brotherhood. They married one another, male to male, at Mass, with the same ceremonies with which we perform our marriages, read the same marriage gospel service, and then went to bed and lived together. The Roman wits⁶¹ said that because in the other conjunction, of male and female, this circumstance of marriage alone makes it legitimate, it had seemed to these sharp folk that this other action would become equally legitimate if they authorized it with ceremonies and mysteries of the Church. Eight or nine Portuguese of this fine sect were burned."⁶²

66. If Montaigne's informant was correct then a number of men took part in Catholic marriage ceremonies in Rome, with the argument that sexual intercourse and domestic partnership are what constitutes as marriage. Unless the ceremony was a sham, it also seem to indicate the desire of at least one "homosexual" couple to live in long term relationship. At some point this was tolerated by the authorities of at least one Roman church. It is not clear how long before "a few years" was. At some later date this group was considered a "sect" and some members were burnt.

67. **England.** Early modern England had quite distinct male and female homosexual subcultures. There is some evidence for both, however, that same sex marriages were conceivable, at least for the men and women involved, and took place. In his *Mother Clap's Molly House: The Gay Subculture in England 1700-1830*, Rictor Norton notes that getting "married" could amount to queer slang for having sex. But he also note that in the late 1720s fairly elaborate homosexual weddings took place and while some of these may have been mockeries others were ceremonies between couples described as being "deeply in love" and who lived together as couples. These couples were not reported to have any "gender" dissonance involved. About a century later - In 1810 - the Rev. John Church, a Church of England priest and a homosexual who wrote about the value of homosexual love performed a number of weddings at the Swan in Vere St. in London.⁶³ Again there is a possibility of mockery going on, but given Church's writings on the subject, Norton thinks that Church was consciously performing specifically religious ceremonies.

68. As well as his English evidence, the focus of his book, Norton, citing other modern historians, also notes other examples of gay marriage contracts, sealed in blood, in Holland in the 1730s⁶⁴ along with male convicts in 1840's Australia who claimed that they were married to each other.⁶⁵

69. Norton also has a chapter on Lesbian marriages,⁶⁶ but even more remarkable, because of the multiplicity of examples, are the cases of marriage between two women recorded by Emma Donahue in her recent *Passions Between Women: British Lesbian Culture 1668-1801*. Donahue's second chapter on "Female Husbands" includes discussions on a variety of cases of women marrying other women. Sometimes these were cases where one woman dressed as a man, and the marriage may have been undertaken for fraudulent reasons, but there a number of cases

where parish registers simply recorded that two women were married by the local clergyman, or that both partners had entered such a marriage willingly.⁶⁷ For instance the Parish Marriage Register of Taxal in Cheshire recorded the following marriages:

Hannah Wright and Anne Gaskill, Parish of Prestbury, 4th September 1707

Ane Norton and Alice Pickford, Parish of Prestbury, 3rd June, 1708

70. The Netherlands. The Netherlands possesses among the best documented and most researched early modern gay subcultures. See above for a brief discussion by Rictor Norton. Dick Jaap Noordam's article surveys the rise of a homosexual sub-culture in early modern Holland, and notes a number of cases of exclusive marital contracts between men in The Hague and in Leeuwarden.⁶⁸ Theo Van der Meer, writing about a later period, notes the same phenomenon: Lourens Hosponjon and Hermanus Moljon, both executed in 1730, had a contract which they called a "contract of marriage"; in 1802 Jan van Weert had a letter read out in court which displayed similar marital awareness - he wrote "Dear Jan, write me if your heart is still worthy of mine" and "Thou art faithful to me until death: who will separate us, nobody but the will of the Heavenly Father and we are tied in love forever."⁶⁹ It was not only men who thought of themselves as married: there are records of Dutch lesbians approaching the authorities for approval of marriage.⁷⁰

71. Pirates. The odd sexuality of pirates has been the subject of a study by B.R. Burg, *Sodomy and the Pirate Tradition: English Sea Rivers in the Seventeenth Century Caribbean*. Pirates are hardly part of normal society, but it is of some interest that they had a formal, and sexual, male bonding relationship called *matelotage*.⁷¹ This may have originated as a simple master-servant relationship, but Burg leaves no doubt that it came to be seen as a formal and inviolable relationship which gave both parties access and possession of each other's property.

Not quite marriage perhaps, but a relationship with clear parallels.

72. In all the cases here, the most complete information is derived by modern historians from trial and court records. In other words we only hear of same sex marriages where the couple are caught, and where the record of the trial survives. It is fairly certain that as this subject is explored by historians, more cases, and in other European countries, will be discovered of both same sex couples who wanted to get married, and at least some clergy and/or other officials who did not prevent them. The cases here, however, do give some indication that even against an apparently clear background of defined marriage laws and theologies, the concept and occasional practice of same sex marriage was not entirely suppressed in western culture.

DIVERSITY OF THE CONTEMPORARY MOVEMENT FOR MARRIAGE RIGHTS BY LESBIAN AND GAY COUPLES

73. **Modern Europe.** From the beginning of the 19th century until the 1950s, there was an ongoing campaign against homosexual activity, first on legal grounds, then medical, throughout the Western world. Although there is some evidence of women's romantic friendships being accepted in some circles, for most gay and lesbian people any public acknowledgment of relationships was simply dangerous. In remote areas of the Balkans it is certain that the old Orthodox *adelphopoiia* ceremonies have continued to be celebrated in some areas,⁷² but in the "civilized" world legal same sex marriage was impossible. Even France, where the ideal of the French Revolution that the state should criminalize private sexual behavior was strong enough to prevent criminalization, homosexuality was condemned and denigrated by the medical profession.

74. Since the late 1960s, however, throughout Europe homosexuality has become much more accepted. One result is that there has been continual pressure for gay marriage in

Europe, leading first to some forms of state recognition in Denmark, Norway and Sweden, with Finland, Slovenia and the Netherlands, and possibly Iceland and the Czech Republic, expected to follow suit soon. Gay common law marriage has also been recognized by the courts in Hungary. The legal categories created by such laws are distinct from heterosexual marriages: in particular for the most part gay couples, unlike straight couples, have to be citizens of the country in questions, and do not gain adoption rights or the right to marry in Church -- this is due to the relationship between the church and state in European countries. Moreover, since there is not equality with heterosexual marriages, governments do not equally represent citizens in such relationships to other countries with which they have bilateral and multilateral agreements. Given international labor mobility within Europe, this creates major inequities.

75. Various collations have been made of current developments in Europe - many by the American gay journalist Rex Wockner whose work is available on the vast Internet archive known as the Queer Resources Directory⁷³. What follows is a summary drawn from information collected by Wockner and others.

76. 1989: Denmark. Denmark became the first country to legalized same-sex unions, and has since provided a model to other Scandinavian states. By the end of 1991 about 1000 such unions had taken place, 3000 by then end of 1995. Although the legal ceremony creates a legal bond enforceable in law, it is not the same as marriage between men and women - gay/lesbian couples were not granted access to adoption, artificial insemination, in-vitro fertilization, or church weddings; the last prohibition, which reads oddly to North American readers is a consequence of the state church situation in the Nordic countries. Also one partner must be a citizen of Denmark. These limitations are to be copied in the laws of the other Nordic countries.

77. 1993: Norway. Gay and lesbian unions were made legal April 1 1993. The legislation passed the Odelsting chamber of the Norwegian parliament by a vote of 58-40 on March 29 and the Lagting chamber by a vote of 18-16 on April 1. The law came into effect Aug. 1, 1993.⁷⁴

78. 1994: Iceland. The Alltinget [Parliament] created a Gay rights commission which recommended this month that Iceland legalize gay/lesbian marriage, criminalize discrimination against gays, and substantially increase education about gays in schools.

79. 1995: Sweden. The law legalizing same sex unions came into effect Jan.1, 1995. The law had passed quite narrowly with a parliamentary vote of 171 to 141 with 5 abstentions and 32 absences. The Swedish Prime Minister Carl Bildt was quoted as saying: "We accept homosexual love as equivalent to heterosexual. Love is an important force to personal as well as social development, and should therefore not be denied."⁷⁵

80. 1995: Czech Republic. Ingeborg Polakova and Jan Bednar of SOHO, the leading gay-rights group in the Czech republic were reported as saying that a gay marriage law might pass soon. .The legislation will be considered when the parliament begins to update the Czech Civil Code. Under the proposal, registered same sex couples would have every right of marriage except to adopt children.

81. 1995: Spain. After decades of repression under the Franco regime, Spain's gay culture has seen a massive upsurge since the late 1970's. One aspect has been the virtual abandonment of Church attendance by the nation's youth and a willingness to consider anything and everything without concern for Church teaching. In 1995 Rex Wockner reported that roughly 30 Spanish cities currently register "civil" same sex unions, including Barcelona, Cordoba,

Granada, Ibiza, Toledo and Valencia (which has a regional law) and that gay and lesbian political leaders were agitating for the national government to register partnership for gay and straight couples. Proposed legislation received support in the media, regional parliaments, and the federal parliament, which even voted to tell the government to write its own proposal.

82. 1995: Hungary. In a legal decision the Hungarian Constitutional Court legalized "common-law" gay marriage on March 8 1995. The court said a law limiting common-law marriages to "those formed between adult men and women" was unconstitutional. "It is arbitrary and contrary to human dignity ... that the law (on common-law marriages) withholds recognition from couples living in an economic and emotional union simply because they are same-sex," the court wrote. The justices ordered parliament to make the changes necessary to implement common-law gay marriage by March 1, 1996. It may be noted that common-law and formally married couples have the same rights. A couple that lives together permanently and has sex is considered married under common law.

83. 1995: Slovenia. Wockner reported that the head of the government's Bureau for Women's Politics, Vera Kozmik, told the Slovene National TV program "Tednik" ("Weekly") March 23, 1995 that "Gay marriage should be legal in Slovenia in two years". This is an odd case of a government pushing ahead faster than the local gay movement - the Women's Bureau is co-sponsoring a petition to parliament along with gay activists, but it had only 155 signatures to date. According to a poll, 57 percent of Slovenians oppose gay marriage and 29 percent approve of it.

84. 1995: Netherlands. Based on information from the International Lesbian and Gay Association and journalist Bert Schuur, Wockner noted that over 90 Dutch towns now have same

sex union registries. Gays in some professions, including civil service, health care and education, as well as employees of the airline KLM, already receive spousal benefits. In 2001 the Dutch parliament removed the gender requirements in standard marriage law, making the Netherlands the first modern nation to open marriage - not some related legal union - to same sex couples.

85. 1995: Brazil. There are occasional reports of developments outside Europe and the US. For instance Australia has an active Lesbian and gay movement which is much effected by American and European developments, and in 1996 South Africa became the first state in the world to include gays and lesbians as a class protected from discrimination in its constitution. We can expect to see some activity in both countries around the issue of same sex marriage, then. There was also this rather interesting note from Brazil, usually considered so traditionally "macho":

Recent surveys in the Brazilian state capitals of Salvador, Curitiba and Aracaju found that 60 to 80 percent of Brazilians believe gays must have the same rights as heterosexuals and 50 to 65percent think gay couples should be able to get married, correspondent Luiz Mott reports from Salvador, Bahia. Seventy-three Brazilian cities and towns -- including Sao Paulo, Rio de Janeiro and Brasilia -- ban discrimination based on sexual orientation. Legislation to create civil-union contracts for same-sex couples was recently introduced nationally by Worker's Party Deputy Marta Suplicy, Mott said. Mott and his lover were united in a religious ceremony in the Pacifist Christian Church and Mott has demanded that the Justice Department recognize the marriage under civil law. He is waiting for a response.

86. Some commentators often stress the "European roots" of North American culture. What is quite clear is that throughout modern Europe, the notion of legally recognizing same sex

marriage is more and more widely accepted.

87. Modern United States. When the issue of gay marriage was raised in the United States in the early 1990s, there was a suggestion by some commentators that this was a new development. This assumption was incorrect -- in the United States the demand for legal gay marriage was expressed as soon as it was legally and culturally possible. We can also note that, contrary to some claims that same-sex marriage is of particular interest only to middle class and white gays and lesbians, couples from many different communities within the lesbian and gay community have been concerned over this issue.

88. 1970. The Los Angeles County Clerk requests the California legislature to tighten its laws on marriage after receiving many inquiries from gay couples wanting marriage licenses.⁷⁶

89. 1971. Baker v. Nelson in Minnesota, the first same-sex marriage case brought in the United States, ruled against plaintiffs Richard John Baker and James Michael.⁷⁷ The case was made by direct constitutional argumentation, citing the 9th and 14th amendment and recent rulings banning anti-miscegenation laws. The court rejected the case by stating that "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis," by arguing that "... abstract symmetry' is not demanded by the Fourteenth Amendment," and by rejecting the parallel with marital restrictions based upon race.

90. 1973. Jones v. Hallahan, a Kentucky case was also decided against the plaintiffs, both female.⁷⁸ The argument this time was based, inter alia, on the "right to marry" which had been ruled by the U.S. Supreme Court, the right to free exercise of religion, and an odd argument that refusal of a marriage license subjected petitioners them to cruel and unusual punishment .

Again the court rejected the case based on dictionary definitions of "marriage."

91. 1974. *Singer v. Hara*. Plaintiffs John F. Singer and Barwick argued that Washington marriage statutes did not prohibit same-sex marriages; therefore a license must be issued.⁷⁹ Although the usual US constitutional grounds were cited, the case here is interesting as the plaintiffs cited the state's Equal Rights Amendment (ERA) which forbade discrimination on the basis of sex. Since this strategy has apparently proved to be useful in Hawaii, it is noteworthy that it was used 20 years earlier.

92. 1974. Two black lesbian mothers from Dayton, Ohio sued for the right to marry. They lacked both legal representation and support from the local gay community. They lost.⁸⁰

93. 1975. Two men from Phoenix were granted a marriage license by a county clerk. This license was later revoked.⁸¹

94. 1975. The County Clerk of Boulder CO, Cela Rorex issued Dave Zamora and Ave McCord a marriage license, on advice of the states' DA, This causes a month-long rush on the clerk's office by same-sex couples seeking marriage licenses, until the state Attorney General voided the D.A.'s recommendation. All licenses were later revoked.⁸²

95. In April, the Arizona Supreme Court deemed recent gay marriage attempts unconstitutional, paving the way for the state legislature to pass an emergency bill defining marriage as possible only between a man and a woman.⁸³

96. 1975. A number of other efforts around same sex marriage in Maryland, Washington, D.C., and Chicago.

97. 1976-1985. In this period there seems to have been little action around same-sex

marriage. One reason may have been that until then the lesbian and gay movement was on an upswing. The backlash associated with Anita Bryant and her successful attack on gay rights in 1977 lead to some need to focus energies on protection of gains already made. And then AIDS from the early 1980s dominated the entire lesbian and gay agenda. It may have been discussions around AIDS and its cultural effects, however, which lead to a re-emergence of the same-sex marriage issue. In the first place AIDS dulled the exaltation of multiple partners celebrated by both male gay culture and gay leaders in the 1970s, and one of the most frequent attacks made on the Catholic Church in this period [and I will leave aside the fairness of the attack] was that by denying any institutional form and support for gay relationships it had helped "murder" people who died from AIDS.

98. Another aspect of the AIDS epidemic was that, like all the apparent disasters in modern gay and lesbian history, it did by making closeted gays come out, further the creation of a self-confident and increasingly self-assured lesbian and gay community. With the visible moral bravery of so many gays and lesbians, it became much easier, perhaps, to throw off ingrained heterosexist prejudices - for instance that gays were unloving, unstable and inherently immoral. The epidemic has buried such beliefs, at least for the public lesbian and gay community. Burial of such beliefs is, I suspect behind the demands of the large gay and lesbian population - against the advice of a more cautious leadership - for the right to marry. This most recent phase began in 1986.

99. **1986.** The ACLU's Executive Director and Board of Directors say their organization will seek to eliminate legal barriers preventing gays from marrying.⁸⁴

100. **1989.** The Bar Association of San Francisco calls for gay marriages, and in Chicago, two journalists for gay publications, Rex Wockner and Paul Varnell, file complaints

with the Illinois Department of Human Rights charging the state with sex discrimination because it refuses to allow gay marriages.⁸⁵

101. 1989. A Time magazine poll reports 69% of respondents disapprove of gay marriages; 23% approve, 8% are unsure.⁸⁶

102. 1990. Several gay couples apply for and are denied marriage licenses at the Cook County clerk's office in Chicago, and A bill is filed in the California legislature allowing for gay marriage. It is endorsed by the California Bar Association and the Bar Association of San Francisco.

103. 1991. The Massachusetts Coalition for Lesbian and Gay Civil Rights launches a campaign to pass a gay marriage bill. The group found a handful of Democratic co-sponsors.⁸⁷

104. 1991. *Dean v. D.C.*[15], a District of Columbia same-sex marriage case, was decided against plaintiffs Craig Dean and Patrick Gill. No constitutional issues were raised.⁸⁸ Plaintiffs argued that the D.C. Marriage and Divorce Act authorized gay marriage, and that the D.C. Human Rights Act forbade discrimination in issuance of marriage licenses. The court cited previous cases as well as the Bible, and alleged a legislative intent to disallow gay marriages. The D.C. Human Rights Commission sided with the couple, contending that the marriage bureau violated city law by discriminating on the basis of sexual orientation. The author of the city's Human Rights Act testified that the Council did not intend to forbid gay marriage. The court noted that two years prior to adoption of the act, the District did reject a proposal that would have explicitly recognized gay marriage. Tom Stoddard of the Lambda Legal Defense and Education Fund responded to the ruling: "If we do file another [gay marriage] case, it should be in a state with a political climate that is relatively favorable to gays and lesbians, and it should be

filed in a state court and deal with a state constitution." ⁸⁹

105. 1993 -- Baehr v. Lewin, a landmark same-sex marriage case in Hawaii, rules that the state's refusal to issue marriage licenses to three same-sex couples, Joseph Melillo and Pat Lagon, Genora Dancel and Nina Baehr, and Tammy Rodrigues and Antoinette Pregil. Dan Foley is their lawyer, presumptively violates Hawaii's Equal Rights Amendment (ERA) barring discrimination on the basis of sex (a "suspect class" due to the ERA). ⁹⁰

106. Conclusions. In his review of John Boswell's *Same Sex Unions in Pre-Modern Europe*, the classicist Brent Shaw sneered at Boswell for being "careless...with modern vocabulary" and for using the term "heterosexual matrimony" in respect to ancient Rome.⁹¹ From Shaw's legally orientated point of view, this might seem fair. It might also be fair comment if same-sex marriage as defined in the first section of this Affidavit introduction above were a cultural anomaly, a product of "pathological societies".

107. In light of the data presented here, such a position is impossible to maintain. Although much evidence has probably been suppressed or overlooked, there is no need to make an *e silentio* argument about same sex marriage. In a large variety of cultures and in many historical epochs, human individuals and human cultures have shared the idea that publicly recognized same-sex domestic relationships could be conceived in terms we would now describe as "marital." "Marriage" has been at some times and in some places a purely heterosexual phenomenon, but at a sufficiently large array of other times and in other places same-sex couples people have indeed been considered "married" as we now understand the term.

SWORN before me at the City of)
Jacksonville in the State of Florida,)
in the United States, this 14th day)
of December, 2000)

PAUL HALSALL

NOTARY PUBLIC

¹ My C.V. is not included here. Those who wish to may consult it online at <http://www.fordham.edu/halsall/cv.html>

² Although some commentators cite Catholic tradition in order to justify an exclusively heterosexual meaning of the word marriage, it is not clear that such commentators would be willing to invoke the full content of the Catholic tradition, which denies the state many rights over marriage, and are not indeed simply choosing references that support preconceived positions. In one of the most important modern era papal encyclicals on marriage, Pope Leo XIII gave a remarkably well informed and sophisticated account of the varieties of marriage over time, but it is not clear his conclusions would be acceptable to the courts of a modern state. He argued, for example, that the marriage laws and customs of non-Christian groups -- including those of Jews in the Old Testament -- were all defective and that civil unions between members of the faithful could not be considered marriages. See Leo XIII, *Arcanum: On Christian Marriage*, February 10, 1880. Online at <http://listserv.american.edu/catholic/church/papal/leo.xiii/113cmr.txt>.

³ While some societies have refused to treat a marriage as having occurred until a child born of the union, this is rare.

⁴ Shi'ite Islam specifically allows the practice of fixed-term temporary marriage (in Persian *nikah al-muwaqqat*). Such marriages may be for any length of time, even a matter of hours. See Moojan Momen, *An Introduction to Shi'i Islam*, (New haven: Yale University Press, 1985), 182-83; and Shahla Haeri, *Law of Desire: Temporary Marriage in Shi'i Islam*, (Syracuse NY: Syracuse University Press, 1989).

⁵ See discussion in Suzanne Dixon, *The Roman Family*, (Baltimore: Johns Hopkins University Press, 1992), Chapter 3.

⁶ For more on the Tomb of Niankhkhanum and Khanumhotep see "United For Eternity," *KMT: A Modern Journal of Ancient Egypt*, vol.4 no1 Spring, 1993, p22. See also follow-up letters in *KMT*, vol.4 no2 Summer, 1993 and *KMT*, vol.4 no3 Fall, 1993. For the complete photographic record of the tomb see Ahmed M. Moussa und Hartwig Altenmüller; *Das Grab des Nianchchnum und Chnumhotep*, (Mainz am Rhein, 1977). See also <http://www.sirius.com/~reeder/niankh.html>

⁷ See the popularization of this idea in Oswyn Murray, *Early Greece*, (Cambridge: Harvard University Press, 1993) .

⁸ Plato. *Symposium* 193C.

⁹ Aristotle. *Politics* bk.2. 1274A.

¹⁰ Ephorus of Cyme, *Historia*; Strabo x; Plutarch, *De lib. educ.* ii; Plato, *Laws* viii.

¹¹ Hans Licht, *Sexual Life in Ancient Greece*, (London: Routledge and Kegan Paul, 1932); Chapter "Male Homosexuality in Ancient Greece," repr. in Donald Webster Cory, *Homosexuality: A Cross Cultural Approach*, (New York: The Julian Press, 1956), 308-9.

¹² Licht, 311, citing Xenophon, *Rep. Lac.* 2, 13.

¹³ Edward Westermarck, *The Origin and Development of Moral Ideas*, (London: Macmillan, 1906); partially excerpted in Donald Webster Cory, *Homosexuality: A Cross Cultural Approach*, (New York: The Julian Press, 1956), 111, citing Aelian, *Varia historia* iii; Xenophon, *Historia graeca*, iv; Plutarch, *Lycurgus* xxv

¹⁴ Licht, 296; Plutarch, Pelopidas 18.

- ¹⁵ *Digest*, 23.2.11, and 1.1.3.
- ¹⁶ Polybius, *Histories*, xxxii, ii.
- ¹⁷ Plutarch. *Marcus Cato*.
- ¹⁸ Cicero, *Second Philippic Against Anthony* 18.
- ¹⁹ John Boswell, John, *Same-Sex Unions in Pre-Modern Europe*, (New York: Villard, 1994), *Same-Sex Unions in Pre-Modern Europe*, (New York: Villard, 1994), 80.
- ²⁰ Suetonius, *Nero* 28.
- ²¹ Suetonius, *Nero* 29.
- ²² The story is repeated in Tacitus, *Annals* 15.370, and Dio Cassius, *Epitome*, 62.28.
- ²³ Juvenal, *Satire* 2 [Humphries translation].
- ²⁴ Martial, 12.42.
- ²⁵ Boswell, 80ff; Westermarck, 106.
- ²⁶ Brent Shaw, "A Groom of One's Own", review of Boswell's Same Sex Unions, *The New Republic* July 18 and 25, 1994, 33-41.
- ²⁷ Petronius Arbiter, *Satyricon* 11, ref. in Boswell.
- ²⁸ Petronius Arbiter, *Satyricon* 80.
- ²⁹ Brett Hinsch,, *Passions of the Cut Sleeve: The Male Homosexual Tradition in China*, (Berkeley and Los Angeles: University of California Press, 1990),127-133
- ³⁰ Hinsch, 127.
- ³¹ Hinsch ,131.
- ³² Jonathan Spence, *The Memory Palace of Mateo Ricci*, (New York: Viking, 1984), 227.
- ³³ Hinsch, 131-32.
- ³⁴ Michael Szonyi, "The Cult of Hu Tianbao and the Eighteenth-Century Discourse of Homosexuality," *Late Imperial China* 19:1 (1998), 1. [Online at http://muse.jhu.edu/journals/late_imperial_china/v019/19.1szonyi.html]
- ³⁵ Hinsch, 177-78.
- ³⁶ *Boston Globe*, March 4, 1989), p.6. Ref. in Hinsch, 194. n46.
- ³⁷ Spence, 227.

³⁸ Westermarck, 106.

³⁹ Ihara Saikaku, *The Great Mirror of Male Love*, trans, Paul Gordon Schalow, (Stanford CA: Stanford University Press, 1990) 27.

⁴⁰ Saikaku, 28.

⁴¹ Westermarck, 103.

⁴² Westermarck, 104.

⁴³ Anu and Giti, "Inverting Tradition: The Marriage of Lila and Urmila", in Rakesh Ratti, ed., *A Lotus of Another Color: An Unfolding of the South Asian Gay and Lesbian Experience*, (Boston: Alyson, 1993), 81-84. For press reports see: *The Sunday Observer* [India], Feb 21, 1988; *The Times of India*, Feb 22, 1988, and Feb 23, 1988.

⁴⁴ Stephen O. Murray and Will Roscoe, eds, *Boy-Wives and Female Husbands: Studies of African Homosexualities*. New York: St. Martin's Press, 1998.

⁴⁵ Joseph M. Carrier and Stephen O. Murray, "Woman-Woman Marriage in Africa." In *Boy-Wives and Female Husbands: Studies of African Homosexualities*, ed. Stephen O. Murray and Will Roscoe, (New York: St. Martin's Press, 1998), 255, citing Denise O'Brien, "Female Husbands in Southern Bantu Societies," in *Sexual Stratification: A Cross-Cultural View*, ed. Alice Shlegel. (New York: Columbia University Press, 1977), 109-26.

⁴⁶ Carrier and Murray 256.

⁴⁷ Carrier and Murray 262-66.

⁴⁸ Murray and Will Roscoe 178-80.

⁴⁹ Murray and Will Roscoe 26-27.

⁵⁰ Westermarck 101.

⁵¹ Westermarck, 102.

⁵² Westermarck, 102-103.

⁵³ Westermarck, 103.

⁵⁴ Richard Burton, *Terminal Essay to The Book of the Thousand and One Nights*, (London: private edition, 1886); repr. in Donald Webster Cory, *Homosexuality: A Cross Cultural Approach*, (New York: The Julian Press, 1956), 235.

⁵⁵ Burton, 235.

⁵⁶ Burton, 238-39.

⁵⁷ Mantegazza, Paolo, "The Perversions of Love", repr. in Donald Webster Cory, *Homosexuality: A Cross Cultural Approach*, (New York: The Julian Press, 1956), 258.

⁵⁸ Westermarck 107, citing Magalhanes de Gandavo, *Histoire de la Province de Sancta-Cruz*, 116.

⁵⁹ See discussion of Chinese same-sex marriages above.

⁶⁰ In fact the whole area of sacramental theology was rather new in the 12th-13th centuries and the current list of seven sacraments only surfaces at this time - before then, although the number seven was important, exactly which ceremonies were included varied.

⁶¹ "Esperis" - the word might also mean "experts."

⁶² Montaigne, *Travel Journals*, trans. Donald M. Frame, trans., *Montaigne*, (Stanford: Stanford University Press, 1948), 954-55.

⁶³ Rictor Norton, *Mother Clap's Molly House: The Gay Subculture in England 1700-1830*, (London: GMP, 1992), Chapter 13., esp. 205.

⁶⁴ Norton, 254.

⁶⁵ Norton, 260.

⁶⁶ Norton, 236-34.

⁶⁷ Emma Donahue, *Passions Between Women: British Lesbian Culture 1668-1801*. (New York: HarperCollins, 1995, British. ed. 1993), 65-73. See also Norton, 237

⁶⁸ Noordam, Dick Jaap, "Sodomy in the Dutch Republic, 1600=1725", in *The Pursuit of Sodomy: Male Homosexuality in Renaissance and Enlightenment Europe*, ed., Kent Gerard and Gert Hekma, (New York: Harrington Park Press, 1988), 207-28 [= *Journal of Homosexuality* 16:1-2 (1988), 217-18.

⁶⁹ Van der Meer, Theo, "The Persecution of Sodomites in Eighteenth-Century Amsterdam: Changing Perceptions of Sodomy", in *The Pursuit of Sodomy: Male Homosexuality in Renaissance and Enlightenment Europe*, ed., Kent Gerard and Gert Hekma, (New York: Harrington Park Press, 1988), 263-310 [= *Journal of Homosexuality* 16:1-2 (1988), 289.

⁷⁰ Noordam 212-13.

⁷¹ B.R. Burg, *Sodomy and the Pirate Tradition: English Sea Rivers in the Seventeenth Century Caribbean*, (New York: New York University Press, 1984) 128-30.

⁷² The English historian Alan Bray exhibited a photograph of such a ceremony taking place in Serbia in 1969 at the September 2000 conference on Lesbian and Gay History held at the University of Chicago.

⁷³ <http://www.qrd.org>

⁷⁴ A newspaper report prior to the actual legislative activity, gives some indication of the scope of the laws

"Norway Second Country in the World with a Partnership Law for Homosexuals," *Norway Times* September 3, 1992

OSLO- The Norwegian government has proposed a partnership law for couples of the same sex, as briefly noted in a previous issue of *Norway Times*. The law proposal, which is not fully formulated, will not give homosexuals the opportunity to marry.

The issue is controversial, but a majority in the Parliament is expected to support the proposal. If it passes in the Parliament, Norway will become the second country in the world, after Denmark, to sanction homosexual partnerships by law.

The Labor and Socialist Left parties are expected to back the law, while the staunchest opposition will come from the Christian Party. A key argument for the partnership law is that the practical consequences of homosexual partnerships are largely the same as for marriage. These include matters such as national insurance benefits, pensions, inheritance, and the mutual duty to support each other financially.

Regardless of the accepted attitude towards the institution of marriage as a bearing element in society, it should be possible to regulate the practical sides of a homosexual relationship without thereby putting marriage and homosexual partnerships on an equal footing, says the Ministry of Children and Family Affairs.

⁷⁵ An American newspaper report indicates clearly that these unions are being conceived of as "marriages".

"Two Swedish Men Marry under New Gay Law," *San Jose Mercury News*, Tuesday, 1/3/95, p. 1D Stockholm, Sweden (AP) -- Hans Jonsson and Sven-Olov Jansson exchanged wedding vows Monday, becoming the first Swedish couple to marry under a new law allowing gay marriages.

"We have lived together for five years, but we feel it is important to be recognized by the society the same way heterosexual couples are," Jansson said.

Sweden became the third Nordic country--after Denmark and Norway--to allow gays to register partnerships with all the rights and obligations of marriage except adopting children or having a church wedding.

Johnsson, 42, and Jansson, 58, participated in a brief civil ceremony at the Ostersund town hall, 370 miles northwest of Stockholm.

Jorn Svensson, a former parliament member from Sweden's left party, presided over the ceremony. He wished the men, "happiness in your partnership and your home."

In five years, Denmark has registered the partnerships of 2,810 men and women. Norway allowed its first gay marriages in 1993.

⁷⁶ Mark Thompson, ed. *Long Road to Freedom*, (New York: St. Martin's Press, 1994), 36.

⁷⁷ McConnell. ref 291 Minnesota 191 N.W.2d 185 (1971).

⁷⁸ Court of Appeals Kentucky 501 S.W.2d 588 (1973).

⁷⁹ 11 Washington App. 247, 522 P.2d 1187 (1974).

⁸⁰ Thompson, 101.

⁸¹ Thompson, 115.

⁸² Thompson, 115.

⁸³ Thompson 115.

⁸⁴ "ACLU Seeks to Lift Gay Marriage Bans" (AP), in *The Chicago Tribune*, October 29, 1986.

⁸⁵ Clarence Page, "A Nontraditional Way to Say 'I Do'", in *The Chicago Tribune*, October 8, 1989.

⁸⁶ Walter Isaacson, "Should Gays Have Marriage Rights?", in *Time*, November 20, 1989, 101-102..

⁸⁷ Kay Longcope, "Coalition Readies Bill to Recognize Same-Sex Marriage." in *The Boston Globe*, June 12, 1991.

⁸⁸ District of Columbia Superior Court, No. 90-13892 (1991).

⁸⁹ "Gay Couple Sues D.C. Over Marriage License" by Richard Keil, in *The Boston Globe*, November 27, 1990; "Citing the Bible, Federal Judge O.K.'s Ban on Marriage" by Chris Bull, in *The Advocate*, February 11, 1992, p 20; "D.C. Couple Files Gay Marriage Suit; Outlook Called Dim" by Rick Harding, in *The Advocate*, January 1, 1991, 24.

⁹⁰ Hawaii Supreme Court, No. 15689 (1993).

⁹¹ Shaw, 36-37.