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FOLLOW THE FOOTNOTE OR THE ADVOCATE AS HISTORIAN OF SAME-SEX MARRIAGE

*Peter Lubin & Dwight Duncan**

Sex as an institution, sex as a general notion, sex as a problem, sex as a platitude—all this I find too tedious for words. Let us skip sex.

Vladimir Nabokov, *Strong Opinions*¹

But you're not a girl—you're a guy. Why would a guy want to marry a guy?

Tony Curtis to Jack Lemmon, *Some Like It Hot*²

Early in the twentieth century a talented group of Russian literary critics, known collectively as the Formalists, began to analyze literary prose as a collection of “devices” that could be isolated, described, understood, and—by the right student—copied. One of these Formalist critics, Viktor Shklovsky, developed the theory of “art as device” in his study “*Iskusstvo kak Priyom (Art as Device)*”,³ in which he famously analyzed the technique of “making strange” (*ostranenie*). In “making strange,” a writer, according to Shklovsky, would take the familiar, the ordinary, the taken-for-granted, and describe it as if seen for the first time.⁴ The writer thus removes the cobwebs of cliché and convention, all the words and responses on tap, and makes each of us into a Miranda espying Ferdinand for the first time. Everything we may take for granted—weather vanes, Walmart, window displays, and even wedding

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1. VLADIMIR NABOKOV, *STRONG OPINIONS* 23 (1973).

2. *SOME LIKE IT HOT* (United Artists 1959).

3. The essay “*Iskusstvo kak Priyom*” appears in Shklovsky’s early work “*O Teorii prozy*,” Knigoizdatel'stvo Gelikon, Moskva, 1929.

4. See Gary Kern, *Introduction to BORIS EIKHENBAUM, THE YOUNG TOLSTOI* ix (Gary Kern ed., Ardis 1972) (explaining that the Russian practice of *ostranenie*, or “making strange,” was predicated on the assumption that “perception can be awakened only by altering the stimulus, distorting it, transferring it to unaccustomed surroundings, making it strange again”).

vows between a man and a woman—suddenly can be endowed with a sense of the unfamiliar, the strange, the bizarre.

One *locus classicus* for the Formalists is Tolstoy's description, in *War and Peace*, of Natasha attending the opera for the first time.⁵ A more recent example is in Vladimir Nabokov's description of a pencil sharpener, "that highly satisfying, highly philosophical implement that goes ticonderoga-ticonderoga, feeding on the yellow finish and sweet wood, and ends up in a soundlessly spinning ethereal void as we all must."⁶ Here, advocates of unusual practices, as yet unaccepted by the broad mass of humanity, sometimes indulge in a rhetorical strategy that can be described as "making strange" in reverse. That is, advocates attempt to familiarize what normally would be seen as strange, as not only familiar, but also an acceptable and plausible part of the moral life we ought to take for granted. This "making strange" in reverse is evident in recent efforts by homosexual propagandists, including historians, journalists, and professors of law, to convince us that same-sex marriage is not an exotic rarity, a kind of behavioral *hapax legomenon*, but something that always has existed in many societies.⁷ In this view, from China to Peru, you find examples of same-sex marriage recognized by the circumambient society.⁸ Only one small part of humanity, that affected by certain

5. See R. F. CHRISTIAN, *TOLSTOY: A CRITICAL INTRODUCTION* 144-45 (1969). Professor Christian describes Tolstoy's use of the device of "making strange" thus:

Shklovsky regarded Tolstoy as an exponent of "the device of making it strange," [sic] which meant, simply speaking, removing a word or object from its conventional context, calling it by a different name, refusing to recognise it, pretending it is something else, doing anything with it, in fact, to rescue it from being a verbal cliché with no power to evoke a response. Perhaps the classic example of this "device"—this ironical oversimplification as I would call it—is the description of the opera in Moscow as seen through Natasha's eyes, which begins:

"The floor of the stage consisted of smooth boards, at the sides was some painted cardboard representing trees, and at the back was a cloth stretched over boards. In the centre of the stage sat some girls in red bodices and white skirts. One very fat girl in a white silk dress sat apart on a low bench, to the back of which a piece of green cardboard was glued. They all sang something

To Natasha, newly arrived from the country, the artificiality of operatic convention seemed ludicrous and grotesque, and these deflationary sentences with their ironical naïveté well convey her mood."

Id. (quoting LEO TOLSTOY, *WAR AND PEACE* II, 5,9).

6. VLADIMIR NABOKOV, *PNIN* 69 (1989)

7. See Andrew Sullivan, *Introduction to Whose Life Is It Anyway? The Real World of Love and Marriage*, in *SAME-SEX MARRIAGE: PRO AND CON* 295 (Andrew Sullivan ed., 1997) (insisting that "[s]ame-sex marriage exists in life, it simply doesn't exist in law").

8. See JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* XXVI (1994) ("Many cultures other than Western ones have recognized and institutionalized same-sex unions—Japanese warriors in early modern times, Chinese men and women under the

ideas stemming largely from Judaism and Christianity, has been seemingly unreceptive to the idea.⁹

Even within the Christian West, the most famous of these advocates, the late John Boswell, Professor of History at Yale, claimed to have found a “secret history” of such acceptance. In two books, *Same-Sex Unions in Premodern Europe*,¹⁰ and *Christianity, Social Tolerance, and Homosexuality*,¹¹ Boswell purportedly discovered that same-sex marriages had existed within Christian Europe, particularly before the thirteenth century.¹² He even adduced evidence of solemn Church ceremonies for the act of *adelphopoiesis*, or “brother-making,” that bound man to man in marriage.¹³

Many reviewers originally greeted Boswell’s work as unassailable.¹⁴ As time passed, however, especially since Boswell’s death, his work seems to have lost much of its luster. A second look has been taken, not least by homosexual advocates unwilling to have their case made sloppily, and by

Yuan and Ming dynasties, Native Americans from a number of tribes (mostly before white domination), many African tribes well into the twentieth century, and residents (both male and female) of the Middle East, South-East Asia, Russia, other parts of Asia, and South America.”).

9. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 35 (1996) (“[M]odern Western culture is peculiarly hostile toward same-sex unions.”).

10. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980).

11. JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994).

12. See BOSWELL, *supra* note 10, at 281. Boswell argued that despite a kind of deliberate inattention, until the mid-thirteenth century, the Church was not seriously opposed to homosexual practice, either on biblical, patristic, or historical grounds. See *id.* at 162-261. He asserted that the reality of such same-sex unions sanctioned by the Christian Church constitutes a kind of “secret history” that is only now being revealed because, as Boswell says, “I discovered it.” See *id.* at 281.

13. See *id.* at 19-20, 178-79.

14. Reviewers used such phrases as “remarkable,” “truly ground breaking,” “work of unrelenting scholarship and high drama,” and “revolutionary challenge to some of Western culture’s most familiar moral assumptions.” These phrases are taken from Martin Duberman, Paul Robinson, and Jean Strouse, and are found on the back of the paperback edition of Boswell’s *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY*. The reviews from which the phrases are taken appeared in *THE NEW REPUBLIC*, *THE NEW YORK TIMES BOOK REVIEW*, and *NEWSWEEK*, respectively. Boswell’s second and even bolder effort in this vein, *SAME-SEX UNIONS IN PREMODERN EUROPE*, received similar acclaim, though a few dour souls among the historians and philologists refused to be buffaloed, including Brent Shaw in *THE NEW REPUBLIC* and Daniel Mendelsohn in *ARION* (Fall 1995-Winter 1996). For a full list of the reviews of Boswell’s work, see Paul Halsall, *People With a History: An Online Guide to Lesbian, Gay, Bisexual and Tran History: John Boswell Page* (visited July 21, 1998) (referring to the two reviews as highly critical of Boswell’s book, *Same-Sex Unions in Premodern Europe*). <http://www.fordham.edu/halsall/pwh/index-bos.html#reviews> [hereinafter *People With a History*].

now a great deal of Boswell's edifice lies in ruins.¹⁵

Since Boswell, the most tireless scholarly advocate of same-sex marriage has been Professor William Eskridge, heretofore known chiefly for his work in constitutional law and statutory interpretation.¹⁶ In a recent work, entitled *The Case for Same-Sex Marriage*,¹⁷ based partly on a previously published law review article he had written,¹⁸ Professor Eskridge went far beyond Boswell. Instead of limiting his analysis to the Judeo-Christian West in his attempt to find a sturdy tradition of same-sex marriage, Eskridge went far afield—as far as the North American Indian tribes, the inhabitants of West Africa, the putative traditions of Tokugawa Japan, and other civilizations remote in time, or space, or both, from contemporary American culture.¹⁹ Boswell had stumbled badly in his attempt to reclaim the Western Christian tradition for same-sex marriage and Eskridge had learned from that.²⁰ In his own writing, Eskridge was careful to dissociate himself rhetorically from much of Boswell's claims.²¹ Indeed, Boswell's efforts proved useful as a foil by which Eskridge assured the reader that his own scholarship was far more sober, judicious and reliable.

Arguments exist that might be made on behalf of same-sex marriage that do not rely on an appeal to history. Many practices condoned in the past, such as cannibalism or slavery, now offend our moral sense. Advocates of same-sex marriage could denounce the historic practice of narrow-mindedly confining a certain legal and moral status, marriage, to a

15. Two of the most critical, and damaging, reviews have been by openly declared homosexuals, Brent Shaw and Daniel Mendelsohn. See Halsall, *People With a History*, *supra* note 14.

16. See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (1993); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

17. ESKRIDGE, *supra* note 9.

18. See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

19. See ESKRIDGE, *supra* note 9, at 29-30 (characterizing woman-woman marriages among Native American cultures as a significant feature that enabled women to obtain a higher social status).

20. See *id.*

21. See *id.* at 27 (noting that, with respect to Boswell's assertion that ceremonial practices involving same-sex marriages was evidence that ordinary Christians recognized these unions as "marriages" during the Middle Ages, criticisms characterizing this argument as "tendentious" "strike me as firm but not conclusive"). Moreover, Eskridge also acknowledged that critics justifiably had charged Boswell with misinterpreting many of his source materials that supposedly supported the world-wide acceptance of same-sex marriage as a historic institution. See *id.* at 27 n.37 (stating that allegations of misinterpretation have "been repeatedly and persuasively made against Boswell's earlier work").

couple made up of one man and one woman, and in so doing exhibit that relaxed, easygoing, sophisticated tolerance that *bien pensants* believe they must continuously strive to achieve. But that is not the argument Professor Eskridge wishes to make. Like Boswell, he is keenly interested not in claiming a new understanding, and approval, of same-sex unions, but rather in appealing to history and to the claim that such unions have, in many societies, received the official recognition and approval that Western civilization willfully continues to withhold.

I. ANECDOTAL EVIDENCE

For our purposes, the critical chapter in Eskridge's book is the second, *A History of Same-Sex Marriage*.²² It may at first impress the unwary, but if we follow the footnotes stolidly, Eskridge's insight undazzles and dims. The chapter begins:

We'wha was an important cultural and political leader in the Zuni community in the late nineteenth century. At one point he served as an emissary from that southwestern Native American nation to Washington, D.C. He was the strongest, wisest, and most esteemed member of his community. And he was a *berdache*, a male who dressed in female garb. Such men were revered in Zuni culture for their supposed connection to the supernatural . . . Ifeyinwa Olinke lived in the nineteenth century as well. She was a member of the Igbo tribe, situated in what is now eastern Nigeria. She was an industrious and wealthy woman in a community where most of the entrepreneurial opportunities were seized by women. Ifeyinwa socially overshadowed her less prosperous male husband. As a sign of her prosperity and social standing, she herself became a female husband to other women. Indeed, the epithet *Olinke* refers to the fact that she had nine wives.²³

Only after presenting these two strangely mystifying, as yet undeveloped and incomplete, bits of anecdotal evidence, transporting us to the farther, as well as wilder, shores of love, does Professor Eskridge resume his own narrative flow and explain what he is about:

This chapter presents a minihistory of same-sex unions. To the modern Western mind it is surprising how common same-sex unions and even marriages have been in other times and other cultures. While there has been plenty of anxiety about these unions as well, they have at least been tolerated in most

22. See ESKRIDGE, *supra* note 9, at 15.

23. *Id.* (footnotes omitted).

societies—except in Western society since the thirteenth century. I shall leave it to others to argue why the West became and remained intolerant for so long. Instead, I only wish to put to rest the argument that same-sex marriage is somehow so unnatural or dysfunctional as to be unheard of. Hear of it now.²⁴

Professor Eskridge's introduction prompts several observations. First, the rhetoric paints the desired picture: the narrow-minded, uninformed "modern Western mind" that discovers to its surprise "how common same-sex unions and even marriages have been."²⁵ Where? "[I]n other times and other cultures."²⁶ There is sleight of word: the slippery slide from "same-sex unions" to "even marriages," a slide which turns out to be characteristic of the entire chapter, with the word "union" being frequently and carelessly employed as a synonym of "marriage."²⁷ Eskridge maintains that the "intolerant" West needs to understand that same-sex marriage is not "so unnatural or dysfunctional as to be unheard of."²⁸ This is a red herring. To the contrary, no one has ever argued that same-sex marriages are "unheard of." Rather, it has been argued only that the world's major civilizations, and most of its minor ones, have not conferred upon same-sex unions the status of marriage as that has been understood in each of those civilizations. In fact, many civilizations are familiar with some famous same-sex "marriages" in history, including those of such self-indulgent and crazed rulers as Nero and Elagabalus.²⁹

Eskridge carefully selected the two paragraphs with which he opened this chapter. By opening with what appears to be anecdotal evidence, citing the practices of two societies that to the Western reader will be exotic, remote, and above all little-known—the Zunis and the Igbo—Eskridge simultaneously accomplishes several objectives. First, he impresses those who are easy to impress. Second, he immediately shifts attention away from major and important world civilizations to the less significant ones, the tangential, the small societies on the margin. Third, he can operate with impunity, knowing that few will take the trouble to refute that which would require special effort, such as reviewing his sources on We'wha or on "female husbands" in West Africa. The modern reader is

24. *Id.* at 16.

25. *Id.*

26. *Id.*

27. *Id.* "Marriage" itself, that can mean very different things depending on time and place, is never clearly defined or distinguished from "union."

28. *Id.*

29. See Suetonius, *THE LIVES OF THE TWELVE CAESARS* 258 (Joseph Gavorse ed. & trans., 1931) (discussing Nero); Edward Gibbon, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 168 (1994) (discussing Elagabalus).

more inclined to let his glazed eyes glance over the appropriate footnote, and to accept uncritically and incrementally each morsel of proffered authority. Bullied by footnotes, the reader's critical faculties surrender without a fight.

II. NECESSARY DRUDGERY: WE'WHA THE ZUNI

In evaluating Eskridge's work, the task is to look steadily and thoroughly at each passage and each source, and to refuse to be inveigled by sleight of word. At times, such careful scrutiny will be tedious, but there is no other way to rebut such a reckless catalogue of presumptions. First, consider the initial reference to the Zuni We'wha.³⁰ Even being told that We'wha was a *berdache* puts the reader at a disadvantage because of the obscurity of the term. A "berdache," we learn, is "a male who dressed in female garb."³¹ Both the chapter heading and context lead one to believe that the "berdache" was necessarily homosexual; however, this turns out not to be true.³² We assume also that since the chapter is about "same-sex marriage," We'wha, of course, will have entered into such a marriage, duly recognized by the Zuni tribe. So it comes as some surprise to read that Professor Eskridge's authority for the story of We'wha is a recent book, entitled *The Zuni Man-Woman* by Will Roscoe.³³ At no point in that book is We'wha described as having been in a recognized "marriage." It is true that We'wha was a *berdache* and likely a homosexual.³⁴ But the story of We'wha is evidence only of the fact that in Zuni culture, men who preferred to dress as women and to perform women's tasks had available a socially sanctioned role that allowed them to live and function according to these desires.³⁵ In other words, the evidence suggests only that among the Zuni Indians (assuming that all *berdaches* were homosexual), homosexuals played a social role.³⁶ Moreover, the evidence indicates that at least one particular *berdache*, We'wha, acquired a certain celebrity, even in the white man's world, and was respected within his

30. See ESKRIDGE, *supra* note 9, at 15.

31. *Id.* at 15. "Berdache" is a phoenetic and semantic corruption of the Arabic "bardash," which is a synonym for a catamite or an urning.

32. See *id.*; see also Charles Callender and Lee M. Kochems, *The North American Berdache*, in 24 CURRENT ANTHROPOLOGY 443, 449-51 (Aug.-Oct. 1983) (providing an authoritative survey of the state of knowledge about the berdache phenomenon, and noting that "the assumption that berdaches were homosexual is oversimplified. Like their other attributes, sexual behavior was variable and very complex.").

33. WILL ROSCOE, *THE ZUNI MAN-WOMAN* (1991).

34. See *id.* at 5, 125.

35. See *id.* at 5, 24-28, 125, 168-69.

36. See *id.* at 2, 53-66, 69-73, 98, 126.

tribe.³⁷

The Zuni Man-Woman turns out to be a work of unusual provenance. Its author, Will Roscoe, is described on the book jacket as “the editor of *Living the Spirit: a Gay American Indian Anthology*,” and as a member of the Gay Indian Alliance.³⁸ Roscoe notes in his acknowledgments that he “ha[s] been genuinely honored by the trust placed in [him] by the GAI [Gay American Indian] Board of Directors” and “would like to honor the memory of . . . three openly gay American Indians who lived and died in service to their communities.”³⁹ Roscoe putatively “tells for the first time the story of the U.S. government’s concerted but ultimately ineffective efforts to change Indian ‘morals’ and suppress berdaches. Today the berdache tradition has been undergoing a surprising renewal among contemporary gay American Indians.”⁴⁰ In the end, Roscoe’s book turns out to be a brief for berdacherie. Given Roscoe’s self-declared allegiances, one may assume that if there were any solid evidence of Zuni (or other American Indian) approval of same-sex marriage, he would have eagerly presented it. Yet a close reading of the more than 200 pages of Roscoe’s book reveals only that:

the Zuni berdache engaged in many behaviors inconsistent with the “role and status of the opposite sex.” To begin with, We’wha participated in both male and female economic pursuits In the area of religion, We’wha also participated in male roles. He was an active member of the male kachina society. He recited prayers and legends on ceremonial occasions and folk tales on informal occasions—also male roles [H]e [also] made prayer sticks, another male activity.⁴¹

We learn further that “We’wha engaged in both male and female economic pursuits.”⁴² We learn about naming customs among the Zuni, Zuni concepts of individual development, and We’wha’s “immersion into the white world” in cultural preservation, economic development, and cross-cultural relations.⁴³ Most of all, we have a great deal of musing on the subject of the tyranny of categorization. Grimly fixing people as hetero- or homosexual, Roscoe says, ignores the fluidity of categories which

37. *See id.* at 69-71.

38. *See* ROSCOE, *supra* note 33, book jacket.

39. *Id.* at xix.

40. *Id.* at book jacket.

41. *Id.* at 126.

42. *Id.* at 127.

43. *Id.* at 203; *see also id.* at 195-214 (providing a detailed account of the development of the berdache tradition).

are, he insists, questions of “social construction.”⁴⁴ The “social construction of sexuality” is, *bien entendu*, an unavoidable and nearly omnipresent theme in much recent academic writing in literature and history.⁴⁵ The flavor of Roscoe’s prose and the quality of his thought are captured nicely by this self-parodying paragraph on such a theme:

The single-dimensional Western category of homosexuality is an historical construct. It would be ironic indeed if this category were used to exclude data on sex and gender variance in other cultures from the current discourse on the meaning of homosexual identity. Such an approach is inherently ethnocentric, for it privileges Western definitions at the expense of non-Western insights. Rather than trying to fit berdaches into historically relative categories, our inquiries ought to use the example of the berdache to improve these categories and free them of their cultural bias.⁴⁶

“Historical construct,” “discourse,” “ethnocentric,” “privileges” as a verb, “insights,” “cultural bias”—all of this hand-me-down but perhaps still modish vocabulary is employed to suggest the existence of a world in which everything can be seen as something else, where what we call “homosexual” and “heterosexual” can vary according to the circumambient culture. Thus, “terms like *gay* and *homosexual* are not discrete categories with fixed boundaries as determined by agencies of social control. Their meaning is subject to intense dispute and negotiation within a discourse too volatile to allow prediction of the eventual consensus.”⁴⁷

We’wha may not even with certainty be described as homosexual. After all, there exist heterosexual males who prefer female roles even in our society. According to two leading authorities on this subject, some American Indians became berdaches because they were afraid of the role of warrior and hunter; berdacherie may have been a means of avoiding certain dangers.⁴⁸ However inspirational the story of We’wha may be,

44. *Id.* at 207-11 (arguing that Western classifications such as “homosexual” and “gay” do not correlate to the roles played by the berdache who shared some of the behavioral characteristics).

45. One of the classic works of the genre is DAVID GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988).

46. ROSCOE, *supra* note 33, at 211.

47. *Id.* at 210.

48. See Callender & Kochems, *supra* note 32, at 448 (noting that “[b]erdache status is often described as a sanctuary for males who were unable or unwilling to accept the role of warrior”). The practices of berdaches were occasionally interpreted as a sign of disgrace that was imposed on cowardly males. See *id.* at 443. Moreover, “[t]his practice did not exist among some societies in the upper Midwest.” *Id.* Callender & Kochems cite to an extensive list of authorities, among them some of the most celebrated anthropologists. See

there simply is no evidence presented that he was ever part of a same-sex marriage, and hence cannot be made to represent an assumed Zuni acceptance of such an arrangement.

III. NECESSARY DRUDGERY: AMONG THE IGBO

Eskridge's second paragraph is more exotic than his first; the Igbo of West Africa are even less familiar to us than the Zuni. This paragraph mentions the taking of a "female husband" by an Igbo widow.⁴⁹ A reader's natural inclination is to assume that if the phrase "female husband" is used, then a relationship between female and "female husband," akin to that between female and male in an ordinary heterosexual marriage, is clearly implied. Such a marriage, one would assume, should normally include sexual relations. Yet Eskridge's source for the life of Ifeyinwa is *Male Daughters, Female Husbands: Gender and Sex in an African Society* by Ifi Amadiume.⁵⁰ According to Amadiume, however, in Igbo society there is no real effacing of gender and sex, as the book's title suggests, and as Eskridge's use of the "female husband" story more than insinuates.⁵¹ In Igbo tradition, "males and females were physically and ideologically distanced."⁵² Amadiume also notes that "[t]he sexual division of space between men and women was so strong that not even 'male daughters' might break the rule."⁵³ In Igbo society, having children is central to status, the basis for everything:

Men and women were talked of or judged according to the roles expected of them as full social adults, that is, according to their status as fathers and mothers.

What was stressed about men was their duty to provide for and protect their families . . .

Bad women were those who failed in their wifely and maternal duties and sentiments.⁵⁴

The traditional Igbo society was not unsettled about sex. Amadiume explained it this way:

id. at 444. Callender & Kochems do not, however, agree with those writers' concept of berdachehood as such a "sanctuary" for all the tribes they have studied, but note that "[i]ts frequent equation with homosexuality, even by explicitly gay writers, distorts the sexual aspects of berdachehood." *Id.* at 444 (internal citation omitted).

49. See ESKRIDGE, *supra* note 9, at 15.

50. IFA AMADIUME, *MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AFRICAN SOCIETY* (1987).

51. *Id.* at 92.

52. *Id.*

53. *Id.*

54. *Id.* at 93.

The likening of a woman to a breakable plate reflects indigenous ideas about male and female sexuality, which supported the socio-cultural significance made of the female biological process . . . [T]his culture stigmatized pregnancy before marriage, [and] the socialization of girls stressed sexual restraint and preparation for their future roles as wives and mothers.⁵⁵

And what of the “female husbands” on which Eskridge places such significance? According to his footnoted source, the book by Ifi Amadiume, here is what the institution of a “female husband” is all about:

The second son of Ada Eze stated that as his mother was a very wealthy woman, she acquired a wife. According to him, it was Ada Eze who married the woman before she was inherited by Ada Eze’s son, Obiora.

Two explanations were given to me as to why Ada Eze acquired a wife. 1) was a matter of status and prestige; she was a very wealthy woman and an aristocrat, therefore she acquired a wife; 2) was a matter of necessity. Things had changed. All her sons had left to seek employment and live in the urban centres. The daughters had left for their husbands’ homes, some of which were not even in Nnobi. Consequently, she was alone and without help; therefore some of her children, especially the daughters, decided that she should acquire a wife. Her last daughter, now a woman in her sixties, recounted how they went to a neighbouring town to acquire a wife. According to her, it was a quick business and very little money was paid to acquire rights over the very young girl.⁵⁶

This passage is critical because it indicates that the “female husband” has little in common with the “male husband.” She is simply a wealthy, heterosexual widow who acquires someone in her household to fulfill the roles both of domestic servant and of companion or *dame de compagnie*. This “wife” performs household chores and keeps the mistress company. But there is neither a hint of a sexual relationship, nor one in which adopted children could be raised—both of which are implicated when we talk of same-sex marriage.

Igbo informants have stated that the idea of the “female husband” never includes any sexual aspect.⁵⁷ Among those informants is Mr. Augustine Nzenwa, the eldest son of a prominent member of the Olokoro clan from Umiagata in Abia State. Nzenwa has confirmed that the taking of a wife by a “female husband” is still practiced in Nigeria,

55. *Id.* at 94.

56. *Id.* at 129.

57. *See id.*

and that our understanding is the correct one.⁵⁸ Specifically, Nzenwa testifies that this is an entirely asexual relationship and one where the phrase “female husband” must be interpreted broadly.⁵⁹ A female who is barren may take a “wife” in order to have her produce a male heir for reasons of property settlement.⁶⁰ The father’s identity will then be of little consequence, or she may take a wife for company and, as Nzenwa puts it, “to do errands, because a man cannot do errands for a woman.”⁶¹

In other words, the “female husband” takes a young girl “in order to have her produce a male heir” or “for company” or to “do errands.” None of this is evidence that the Igbo culture tolerates same-sex marriages of the sort Professor Eskridge contemplates. In fact, according to Augustine Nzenwa, “homosexuality is absolutely taboo in Igbo society, not even discussed.”⁶² Notwithstanding the irrelevance of both the Igbo “female husband” and of the story of We’wha, Professor Eskridge does not quite claim these stories as direct support for his thesis that same-sex marriage has been widely accepted. But note his misleading comments after he introduces us to the “stories” of We’wha and Ifeyinwa Olinke, stories that:

[r]esonate strangely in modern American minds. Most twentieth century Americans consider marriage to be an institution that intrinsically involves different—rather than same-sex—partners. While numerous Americans are willing to tolerate same-sex relationships, and even to sanction them to some extent, few consider them to be marriages. In contrast, historians, social anthropologists, and scholars of comparative literature have been writing about same-sex unions and marriages for most of this century, with a boomlet in the last two decades. Though few critics like to admit it, same sex marriages are a commonplace in human history and have served civilizing functions, providing couples with social support and integrating them into the larger culture.⁶³

IV. OUT OF AFRICA

Later in the chapter Professor Eskridge returns to explore Africa and deliberately darkens the sky of his prose with willful obnubilation. He

58. Interview with Augustine Nzenwa (July 24, 1997).

59. *See id.*

60. *See id.*

61. *Id.*

62. *Id.*

63. *See* ESKRIDGE, *supra* note 9, at 16.

claims, and simultaneously is forced to disclaim, “initiator unions” as part of his catalogue of same-sex unions.⁶⁴ He describes, for example, the “mummy-baby” games among young Basotho girls in Lesotho:

Same-sex relationships have also frequently served as social or even sexual initiations prefatory to marriage. An interesting example is the “mummy-baby” games among Basotho girls in Lesotho. In contrast to women in many other African societies, those in Lesotho are particularly vulnerable, both economically and socially, because they are dependent on males who tend to be employed as migrant workers. For these women, relationships outside of marriage serve as important support networks, and young girls are initiated into such relationships beginning with mummy-baby games played in their grade school years. In a mummy-baby relationship, an older girl, acting as “mummy,” develops an intimate, maternal association with a younger one, the baby. Typically, the mummy presents gifts to the baby who reciprocates by obeying and respecting the mummy. The two share emotional and informational exchanges and are physically, and sometimes sexually, intimate. Rather than displacing marriage, these relationships help to prepare younger girls for marriage, including its rockier moments. Scholars have documented similar female-female friendships in other African societies.⁶⁵

What is the relevance of any of this to the notion that same-sex marriage is accepted around the world? There is none. Professor Eskridge has simply described a kind of play-acting that pre-adolescent Basotho girls engage in, clearly involving development, and expression of the maternal instinct.⁶⁶ Moreover, “[r]ather than displacing marriage, these relationships help to prepare younger girls for marriage.”⁶⁷ In other words, contrary to Professor Eskridge’s view, Basotho girls grow up and enter into heterosexual marriages—the *only* kind their society recognizes.⁶⁸ These practices are irrelevant to the case he would like to make.

Having adumbrated the theme of “woman marriage” with the “story” of Ifeyinwa Olinke, Eskridge develops it more fully, exploring other parts of Africa later in the chapter,⁶⁹ where he relies heavily on the work of Eileen Jensen Krige:

64. *See id.* at 32-33.

65. *See id.* (footnotes omitted).

66. *See id.*

67. *See id.* at 33.

68. *See id.* at 33-35.

69. *See id.*

A form of same-sex union that may be unique to African cultures is the institution of "woman marriage." . . . [Yet] [this] institution was not given serious attention until anthropologists Eileen Jensen Krige and Melville Herskovits publicized it in the 1930s. The following is an early description of woman marriage among the Nuer of Sudan:

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.

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."⁷⁰

Had Eskridge quoted more fully, he might have noted that Krige describes "woman marriage" as "a last resort in raising a male heir to perpetuate the name and inherit the property of a man."⁷¹ Moreover, Eskridge disregarded Krige's description of woman marriages as a political and social vehicle to achieving greater stability.⁷² Krige suggests that woman marriage is "closely bound up with rights and duties arising from the social structure" of the culture and is a "flexible institution that can be utilized in a number of different ways to meet a number of different situations."⁷³ When Eskridge enlists Krige in his argument, he downplays, though he cannot completely ignore, the fact that "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."⁷⁴ In con-

70. *Id.* at 33-34 (footnotes omitted).

71. Eileen Jensen Krige, *Woman-Marriage, with Special Reference to the Lovedu—Its Significance for the Definition of Marriage*, in 44 *AFRICA* 11, 29 (1974).

72. *See id.*

73. *Id.*

74. *See* ESKRIDGE, *supra* note 9, at 34.

trast, Eskridge's agenda involves sex, not the disposition of property.

Additionally, Professor Eskridge makes free, too free with such words as "common" and "usual" to support the assertion that "[w]oman marriages were common in Africa."⁷⁵ Well, are they? Where? And what are woman marriages? Eskridge supports this astonishing claim by stating that: "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."⁷⁶ But, the point is this: there is *no* sexual element involved in these marriages. Rather, the word "marriage" is only a verbal crutch, employed, in the absence of another term, to describe a relationship that in its *most significant aspect* differs from real marriage, not only as it is understood in the West, but as it is understood in the various African societies. Krige and Herskovitz call this "a somewhat strange union," but make use of the word that comes most immediately to hand, "marriage."⁷⁷ In their case, it was an innocent groping for a word, with a full understanding that "marriage" was a greatly imperfect and hasty verbal solution. Only a careless scholar, however, would efface the central distinction between this kind of "marriage" and "marriage" as it is commonly understood in the East. While not all heterosexual marriages involve sexual activity, such a marriage implies the possibility, and even the likelihood. Yet Eskridge avoids confronting the essential truth that African woman-woman "marriages" do not involve sexual activity.

A leading investigator in African anthropology, Professor Regina Oboler, notes that the "basic institution of woman-woman marriage is widespread in African patrilineal societies."⁷⁸ However, Oboler also notes that "[a] female husband is a woman who pays brideswealth for, and thus marries (but does not have sexual intercourse with) another woman."⁷⁹ The logical conclusion is that in African woman marriage, it is property, not sexual behavior, and certainly not a putative socially sanctioned tolerance for this or that sexual practice, that is the crux. Professor Oboler's study of the Nandi of Kenya reinforces what we find among

75. *Id.*

76. *Id.*

77. Melville Herskovitz, *A Note on "Woman Marriage" in Dahomey*, in 10 *AFRICA* 335 (1937); Krige, *supra* note 71.

78. Regina Smith Oboler, *Is the Female Husband a Man? Woman/Woman Marriage Among the Nandi of Kenya*, in 19 *ETHNOLOGY* 69, 69 (1980); see also ESKRIDGE, *supra* note 9, at 34 ("Woman marriages were common in Africa."); Krige, *supra* note 71, at 11 (noting that woman marriages are prevalent in many African cultures).

79. Oboler, *supra* note 78, at 69.

the Igbo of West Africa:

[T]he key to the question of the female husband's gender lies in her relationship to the property that is transmitted through her to the sons of her wife [L]et it be said that it is an extremely important canon of Nandi ideology that the most significant property and primary means of production—livestock and, in the modern setting, land—should be held and managed exclusively by men [T]he strength of the female husband's identification as a male is dependent on the social context in which the identification is made. In contexts which directly implicate the issues of property and heirship, Nandi informants are unanimous in considering it of the utmost importance to insist that the female husband is a man and behaves in exact accordance with the ideal model of the male role. Such areas are the management of family property, legitimate authority over the wife and children and the responsibility to provide for the wife and children in a material sense. The further one moves away from these issues into other aspects of the cultural definition of the male role the weaker become both the female husband's own attempts to conform to male role behavior and informants' dogmatic insistence that they in fact do so. To say that a female husband is a man in certain contexts but not in others lends a degree of clarity to the situation which is not present in fact.⁸⁰

As with the Igbo, a reader can see that the Nandi "woman-woman marriage" is very different from the "same-sex marriage" referenced by Professor Eskridge. The African variety, whether among the Igbo, Nandi, Bantu, or the Nuer, has nothing to do with sexual activity and everything to do with preserving property rights through what Shakespeare calls the "primogenity and due of birth."⁸¹

Professor Eskridge's discussion of "woman marriage" willfully disregards what his own sources reveal about the absence of a sexual component. Eskridge must have known that the Nandi women who took female wives did not have sexual activity with them and that "[t]he motivation of a woman who becomes a female husband is fairly clear-cut; it is the acquisition of a male heir for her property."⁸² Furthermore, he must have read Amadiume's account of the elderly Igbo widow who "was alone and without help: therefore some of her children, especially

80. *Id.* at 70.

81. WILLIAM SHAKESPEARE, *TROILUS AND CRESSIDA*, act 1, sc. 3.

82. See Oboler, *supra* note 78, at 74.

the daughters, decided that she should acquire a wife.”⁸³ Because Eskridge makes such a rhetorical fetish of his careful use of the evidence (in putative contradistinction to Boswell), he should have transmitted such findings in his sources and then proceeded either to discuss them, attempt to refute them, or accept them but argue that, in any case, such woman-woman “marriages” at least indicate an openness to other possibilities. Instead, he reads selectively, and hence misreads, his sources.

With regard to man-man “marriages” in Africa, Eskridge’s use of his sources is equally worrisome. He writes of the “functional union . . . involv[ing] pair bonding in military settings. Many societies have institutionalized same-sex relationships, akin to the Achilles-Patroclus and Gilgamesh-Enkidu relationships of ancient myth, among warriors or soldiers.”⁸⁴ And in Africa he finds a number of such military pair bondings.

This attempt to enroll celebrated literary characters, the *Iliad*, and the *Gilgamesh* epics in his argument, is bizarre. Instead of ineluctably interpreting the relationship of Patroclus and Achilles as one involving homosexual love, for example, we might with as great justification note that Achilles’ wrath originates with his fury at having a slave girl, Briseis, taken from him by Agamemnon.⁸⁵ Is there not at least a plausible argument that this could be evidence of Achilles’ heterosexuality?

Eskridge’s discussion of such “functional unions” in fact, not fiction, is equally unsatisfactory. He finds the following as the most convincing example of such “military wives” among the Azande in southern Sudan:

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. The Azande considered the relationship a marriage both legally and culturally. The warrior paid bride-price (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

83. See AMADIUME, *supra* note 50, at 129.

84. See ESKRIDGE, *supra* note 9, at 30.

85. See HOMER, *THE ILIAD* 14-23 (Robert Fitzgerald trans., 1974).

thighs) and functional (the boy performed traditional wifely duties such as housekeeping). Anthropologists have reported finding similar institutions in other African societies.⁸⁶

But, here is what Evans-Pritchard, the celebrated anthropologist, *actually* wrote about the unmarried warriors among the Azande:

It was the custom for members of bachelor companies, some of whom would always be living in barracks at court, to take boy-wives. This was undoubtedly brought about by the scarcity of marriageable women in the days when the nobility and also the richer commoners kept large harems and were able to do so because bridewealth was hard to come by and they were able to acquire it more easily than poorer men [T]he only way youths could obtain satisfaction from a woman was in adultery. But that was a very dangerous solution to a young man's problem, for the fine his father would have to pay was heavy—twenty spears and a woman So, the risk being too great, it was the custom for cautious bachelors in the military companies who were living at court . . . to marry boys and satisfy their sexual needs with them. A youth of position in his company might have more than one boy (*kumba gude*). To these boys their warrior mates were *badiya ngbanga* 'court lovers.'

That it was on account of *the difficulties of getting satisfaction in heterosexual relationships* that boy marriage was a recognized *temporary union* is, I believe, shown by the fact that boy marriage has in post-European times entirely disappeared Azande, I think rightly, attribute the giving up of the custom to its having become easier for youths to marry and, in the general breakdown of morals and of the suppression of customary punishments, to indulge in adultery and fornication. Boy marriage was owing, Azande say, to *zanga ade* 'lack of women.'

As one man put it, "What man would prefer a boy to a woman? A man would be a fool to do so. The love of boys arose from lack of women"

The custom of boy marriage had died out before I first visited Zandeland

. . . With regard to the sexual side, at night the boy slept with his lover, who had intercourse with him between his thighs (Azande expressed disgust at the suggestion of anal penetration)

86. ESKRIDGE, *supra* note 9, at 31 (internal footnotes omitted); see also E.E. Evans-Pritchard, *Sexual Inversion Among the Azande*, in 72 AMERICAN ANTHROPOLOGIST 1428-34 (1970) (discussing the practice of homosexuality among the Azande of the Sudan).

. . . When they ceased to be boys they joined the companies of warriors to which their at-one-time husbands belonged . . . so the period of marriage was also one of apprenticeship.⁸⁷

The reader will realize, from a comparison of Evans-Pritchard with what Eskridge makes of Evans-Pritchard, that Eskridge was careful to leave out critical details. For example, Eskridge disregarded that “Azande expressed disgust at the suggestion of anal penetration.”⁸⁸ Moreover, Eskridge did not inform the reader that the practice of boy-marriage had died out completely, and that it had its origins not in any homosexual impulse, but simply in the dearth of available female sexual partners. Whether bemused, horrified, or supremely indifferent to the “any port in a storm” justification of the practice offered by the Azande, Eskridge has a duty to report accurately Evans-Pritchard’s position. He did not. Nor did he report that boy-marriage was clearly a temporary arrangement, and that all Azande were expected to end up in a marriage involving a male and (several) females.⁸⁹ In contrast, an adult married man who continued to have any sexual contact with boys was regarded as bizarre. Evans-Pritchard reports: “I have heard of only one senior prince—deposed by the administration—who, although he had several wives, still habitually slept with boys. *For this and other reasons he was regarded by Azande as slightly crazy.*”⁹⁰

Evans-Pritchard also dealt with lesbianism, and reported that whatever examples of the practice might be found among the Azande, the reasons were similar to those of the temporary homosexual unions among men—simple necessity. For Evans-Pritchard, lesbianism:

[m]ust be regarded as a product, like male homosexuality, of polygamy on a large scale; for if this precluded young men from normal sex, so in large polygamous homes it prevented the wives, or some of them, from receiving the amount of sexual attention they wished for from their common husband, who, moreover, might well have been elderly and not at the height of his sexual vigor

. . . It was in such polygamous families, Azande say, that lesbianism was practiced.⁹¹

Eskridge’s selective rendition is insufficient in at least two respects.

87. Evans-Pritchard, *supra* note 86, at 1429-30 (emphasis added).

88. *Id.* at 1430.

89. *See id.*

90. *Id.* (emphasis added).

91. *Id.* at 1431.

First, Eskridge fails to emphasize the temporary nature of Azande same-sex unions and the reasons for it. Second, he fails to note that the kind of acceptable sexual contact did not include all forms of homosexual behavior, such as anal penetration which was regarded with disgust.⁹² These distortions are characteristic of Eskridge's method.

V. A POLYGAMOUS INTERLUDE, *OU LA MAITRESSE LÉGITIME*

Having discussed the Azande, a tribe that accepted polygamy,⁹³ it might be instructive to employ Eskridge's "historical" method of justifying same-sex marriage on behalf of the practice of polygamy. We could note that polygamy has been accepted in almost every primitive society that Eskridge discusses⁹⁴—the American Indian, the Igbo, the Nanda, the Nuer, the Azande, and in a good many others as well. Polygamy also has been widely accepted throughout human history, in China, India, the Islamic world, and even among one group, the Mormons, who are part of the Western world.⁹⁵ Eskridge's historical argument could be far more tellingly deployed on behalf of polygamy, which might be said "deep biology" on its side, reflecting the heterosexual male desire for sexual novelty with women, an impulse far more widespread, well-recognized, and historically sanctioned than the homosexual impulse that animates, according to many studies, a mere 2-3% of the population.⁹⁶

VI. BERDACHERIE REVISITED

Just as he resumed the story of the "female husband" and other same-sex unions in Africa, Professor Eskridge returns to the theme of his first paragraph on We'wha, namely, the socially sanctioned role of the man who dresses like a woman and adopts female characteristics.⁹⁷ This berdache phenomenon is found mostly among some of the American Indian tribes. According to Eskridge, the phenomenon was supposedly once widespread before the European settlers, soldiers, and, latterly, a small

92. See *id.* at 1430.

93. See *id.* at 1429, 1431 (describing Azande society as being comprised of harems and, alternatively, as polygamous).

94. For a complete—and witty—presentation of the case for polygamy, and a *tour d'horizon* of polygamous practices around the world, see GEORGES-ANQUETIL, *LA MAITRESSE LÉGITIME* (Les Editions Georges-Anquetil 1923).

95. See *id.*

96. EDWARD O. LAUMANN, ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 297 (1994) (providing the results of a study that indicated nearly 1.4% of women and 2.8% of the men who participated identified a same-gender sexual pleasure).

97. See ESKRIDGE, *supra* note 9, at 27.

army of anthropologists descended upon the American continent.⁹⁸ Sensing the disapproval of the powerful whites, the Indians severely limited the practice of berdacherie, in some cases ending it altogether.⁹⁹ Eskridge offers no evidence to support this assertion. Although plausible, it is also entirely possible that the berdache phenomenon was always limited to a very few tribes.

Given the availability of sober disinterested studies by such anthropologists as George Devereux or Callender and Kochems, why should a reader not rely on their studies and conclusions rather than on the plausible unprovabilities of Professor Eskridge? Eskridge argues that the berdache phenomenon supports the argument for same-sex marriage, explaining that: "most important for the present study, *berdaches* (like We'wha) married individuals of the same sex, and those marriages were recognized by Native American laws and cultures."¹⁰⁰ A comparison of Eskridge's assertion with his own sources, however, reveals a different story. Eskridge correctly refers to the work of George Devereux on the Mohave Indians as being "[t]he first detailed academic study focusing on Native American same-sex unions."¹⁰¹ According to Eskridge, Devereux "reported that gender-crossing men (*alyha*) and women (*hwame*) historically had 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."¹⁰² But Devereux, the pioneer student of the berdache phenomenon, who completed his field study in an earlier period before the berdache phenomenon might have been "cleaned up," as Eskridge suggests, in response to aggressively inquiring anthropologists, offered a different interpretation from that which was imposed on his

98. *See id.* at 17.

99. *See id.* at 28.

100. *Id.*

101. *Id.*

102. *Id.* To support this assertion, Eskridge cites George Devereux, *Institutionalized Homosexuality of the Mohave Indians*, in 9 HUMAN BIOLOGY 498, 513-15 (Raymond Pearl ed., 1937); *see also* ESKRIDGE, *supra* note 9, at 28 n.40. But Eskridge deliberately misread, or has decided not to convey to the reader, what George Devereux offered as his own analysis of the berdache phenomenon. *See id.* at 28. Devereux treated the berdache as an example, not of the acceptance of homosexuality but rather of practices that were viewed with disdain. *See* Devereux, *supra*, at 513 (reporting that "on occasion a man went through the habitual courtship for an *alyha*, because it appealed to his sense of the preposterous"). Aside from Devereux's 1937 paper, Eskridge hardly could fail to have noticed the extensive mention of Devereux in several of his sources, including the papers by Callender and Kochems, by Greenwood, and by Levy.

work in Eskridge's version.¹⁰³ In his 1937 article, Devereux suggested that one of the functions of the practice of institutionalized homosexuality, that is, the berdache phenomenon, "was to create 'an abscess of fixation' and [to localize] the disorder in a small area of the body social."¹⁰⁴ This channeling of homosexuality into an "abscess of fixation," this use of the berdache to localize "the disorder" by limiting it to "a small area of the body social" is a plausible one, accepted by later students of similar phenomena, such as the Tahitian *mahu*.¹⁰⁵ Eskridge must have known of Devereux's own analysis of the phenomenon, because that celebrated anthropologist is mentioned at great length not only by Levy, but by Evelyn Blackwood, by Callender and Kochems, and by virtually every writer on Native American berdachehood.¹⁰⁶ Nonetheless, Eskridge fails to provide any hint of Devereux's analysis.

Furthermore, Eskridge's treatment of contemporary works concerning the berdache is also misleading. Eskridge refers to the two leading anthropologists in this field, Callender and Kochems. These anthropologists doubt the equalization of the berdache with homosexuality:

[The berdache phenomenon's] frequent equation with homosexuality . . . distorts the sexual aspects of berdachehood. Certain interests were often believed to foreshadow the assumption of this status, but only one account cites homosexual behavior. Rather than homosexuals becoming berdaches, many berdaches, perhaps most of them, became homosexual; but their sexual partners were always nonberdaches. Evidence for homosexual activity unrelated to this status is abundant. North American homosexuality transcended berdaches; though they were its most visible and—except for their spouses—its most consistent participants, their orientations could be bisexual or heterosexual.¹⁰⁷

Callender and Kochems also are skeptical about the assumptions of Western observers of berdache sexuality, writing that:

Sexual behavior is the aspect of the berdache status in which the reticence of informants most often combines with the prudery of observers to obscure actual practice and in which suppo-

103. See generally Devereux, *supra* note 102.

104. See Robert I. Levy, *The Community Function of Tahitian Male Transvestitism: A Hypothesis*, in 44 ANTHROPOLOGICAL Q. 12, 19 n.10 (1971) (quoting Devereux) (alteration in original).

105. See *id.*

106. See ESKRIDGE, *supra* note 9, at 224-26 (citing Levy, Blackwood, and Callender & Kochems).

107. Callender & Kochems, *supra* note 32, at 444 (internal citations omitted).

sitions have been most frequent. Early European observers, when aware that berdaches were not intersexual, tended to assume that men who dressed and acted like women were necessarily homosexual [T]his belief, reflected in their use of the word “berdache,” was sometimes only an assumption [I]f often accurate, the assumption that berdaches were homosexual is oversimplified. Like their other attributes, sexual behavior was variable and very complex.

Questioning whether homosexuality was an integral feature of berdache status, [one scholar] pointed out that informants emphasized its social aspects—transvestism and occupations—rather than sexual behavior [I]t seems possible that if some cultures considered homosexual activity a significant aspect of this status, others did not.¹⁰⁸

Although Eskridge argues that the earlier investigators minimized the homosexual aspect of berdache behavior, Callender and Kochems assert the opposite.¹⁰⁹ It is amusing to consider that it is Eskridge who exhibits a *narrower* sense of human possibilities here, though he ostensibly argues for a broader view. Apparently, Eskridge does not comprehend that the berdache might not always be homosexual, that human sexual behavior is “variable and very complex.”¹¹⁰ Indeed, Eskridge hardly recognizes the possibility that the berdache “became homosexual” through the role he played, rather than the reverse—just as among the Nuer or the Nanda, homosexual behavior reflected not a permanent orientation but a temporary solution, behavior abandoned as soon as heterosexual outlets become possible.¹¹¹ Although Callender and Kochems do not deny that many berdaches may exhibit homosexual natures, they are careful to quote other investigators who have come to other conclusions. For example, Callender and Kochems explained that:

[H]omosexuality is the orientation most often described or assumed for berdaches, it is not the only one recorded or implied. Kroeber suggested that some of them may have found transvestism—including general social behavior—satisfying in itself. Benedict held that the status included some men who were impotent or had a weak sexual drive. Both suggestions draw some support from the ethnographic evidence. Osgood concluded that his information about Ingalik berdaches sug-

108. *Id.* at 449 (internal citations omitted).

109. *See id.* at 444 (“Its frequent equation with homosexuality, even by explicitly gay writers, distorts the sexual aspects of berdachehood.” (internal citation omitted)).

110. *Id.* at 449.

111. *See id.* at 454-55; *see also* Evans-Pritchard, *supra* note 86, at 1429-30.

gested asexuality. Teit's denial that Flathead berdaches were homosexual, corroborated by Turney-High's later study, may also have held for their Nootka counterparts. The Pima prohibited homosexuality . . . *We conclude, then, that the berdache category included some essentially asexual persons; perhaps certain cultures even defined this orientation as proper.*¹¹²

Moreover, Callender and Kochems suggest that some berdaches actually are heterosexual, a possibility that Eskridge neither entertains nor allows the readers to consider for themselves, explaining that:

Other accounts ascribe heterosexual behavior to berdaches, either exclusively or as part of a general bisexual orientation. Olson described those of the Haisla as entirely heterosexual, male berdaches marrying women and female berdaches men. The sexual partners of one male Quinault berdache were elderly women. McIlwraith reported that some male Bella Bella and Bella Coola berdaches married women. One male Osage berdache had a wife. Although Navaho intersexes were restricted to male sexual partners, their berdaches were essentially bisexual, engaging in sexual relations with males and females.

Besides reports of open heterosexual behavior that was culturally approved or at least viewed neutrally, some accounts describe berdaches as engaging in this surreptitiously. Discounting a Yurok suggestion that transvestism afforded males sexual access to women without rousing suspicion, Kroeber accepted this as an occasional possibility. Miami berdaches may have taken similar advantage of their status. Stevenson recorded a parallel belief among the Zuni.¹¹³

For some readers, these extensive excerpts taken from the leading anthropologists of male berdaches may be wearying, but they are quoted from so copiously in order to demonstrate that Eskridge's major assumption, that berdaches are always homosexual, is not universally accepted. In fact, there is much observation and analysis to the contrary.¹¹⁴ Eskridge writes as if the berdache phenomenon is clearly understood and derived from a considerable catalogue of data.¹¹⁵ In contrast, Callender and Kochems cautiously describe the data as "scanty, fragmentary, and often

112. Callender & Kochems, *supra* note 32, at 450 (internal citations omitted) (emphasis added).

113. *Id.* (internal citations omitted).

114. See AMADIUME, *supra* note 50; Evans-Pritchard, *supra* note 86; Krige, *supra* note 71.

115. See ESKRIDGE, *supra* note 9, at 27-30.

poor in quality.”¹¹⁶

Because Eskridge relies so heavily on the berdache phenomenon to make his case,¹¹⁷ one would expect him to explain just how commonly it occurred. Instead, Eskridge allows the reader to believe that among American Indian tribes it was a widespread phenomenon.¹¹⁸ His own sources suggest that berdachehood was far from universal and that, while reports of “North American Cultures Recognizing the Berdache Status” concern 113 tribes, many of the larger tribes—the Sioux, Apache, Seminole, Creek, Cherokee, and others—apparently have no reports of berdachehood; that 113 tribes may seem like a lot until one remembers that there were several thousand different Indian tribes in North America; that the “berdache status . . . seems to have been far from universal” and was almost nonexistent to the east of the Mississippi, except in the Great Lakes region; that even among these tribes the phenomenon was often “rare or uncommon.”¹¹⁹

Again, Callender and Kochems are bracingly sober in their own review of the scholarly literature, writing that:

[b]erdaches are usually described as rare or uncommon; numbers, if given, are few. Holder reported a total of six among the Gros Ventre, five among the Teton Dakota, four for the Flathead, two for the Nez Perce, and one for the Shoshoni. Kroeber estimated that one Yurok man in a hundred assumed this status. Except among groups limiting the status to women, female berdaches tended to be much rarer than their male counterparts.¹²⁰

Even if we were to accept Eskridge’s proposition that the berdache was mostly a homosexual phenomenon, he nonetheless fails to offer a convincing case for the acceptance of same-sex “marriage” among American Indians. That the berdache was socially acceptable in a few tribes is clear. That some berdaches entered into a union that may have involved sexual relations with others of the same sex is also clear. Yet, there is no evidence that the tribe considered this “union” to be fully legitimized as the same kind of union, with the same dignity, as that between a man and woman. Since Eskridge never defines what that would be in the American Indian context, nor how it is solemnized or otherwise recognized, one cannot disprove what he does not even attempt to prove.

116. Callender & Kochems, *supra* note 33, at 443.

117. See ESKRIDGE, *supra* note 9, at 15, 27-30, 45.

118. See *id.* at 27-30.

119. See Callender & Kochems, *supra* note 32, at 444-45.

120. *Id.* at 443 (internal citations omitted).

Eskridge's discussion of female berdacherie also is unpersuasive. He relies heavily, in part, on Evelyn Blackwood's study of "cross-gender females" in the Mohave tribe.¹²¹ Blackwood concluded that in these tribes, "[s]exual behavior was part of the relationship between cross-gender females and the women they married [The cross-gender female's] sexual behavior was recognized as lesbian—that is, as female homosexuality."¹²² Limited in its scope and in the available evidence, the study is mostly an analysis of its own limitations. Blackwood questions why there is so little recorded information about female berdaches among the Plains Indians, concluding that "[n]ineteenth century observers rarely recorded information on Plains Indian women, 'considering them too insignificant to merit special treatment.'"¹²³ Moreover, Blackwood explains that "[t]he last cross-gender females seem to have disappeared among Plains tribes by the mid-nineteenth century."¹²⁴ According to Blackwood, the absence of recorded information also was attributed to societal denial, explaining that: "The Kutenai denied the existence of cross-gender females among them The Arapaho told Alfred Kroeber that the Lakota had female berdache, but there is no corroborating evidence from the Lakota themselves. Informants were clearly reticent or unwilling to discuss cross-gender women."¹²⁵

Apparently, Blackwood did not consider an alternate explanation, that is, that the phenomenon really was not so widespread, and perhaps the Lakota did not offer corroborating evidence because there was none to offer. How does Blackwood explain the paucity of evidence? According to her, the phenomenon must have diminished, if not died out, because of the "dominant ideology of Western culture,"¹²⁶ maintaining that:

The record of Plains cross-gender females remains limited By the late nineteenth century the female cross-gender role had all but disappeared among Native Americans. Its final demise was related to a change in the construction of sexuality and gender in these tribes. The dominant ideology of Western culture, with its belief in the inferior nature of the female role and its insistence on heterosexuality, began to replace traditional Native American gender systems.

Ideological pressures of white culture encouraged Native

121. See Evelyn Blackwood, *Sexuality and Gender in Certain Native American Tribes: The Case of Cross-Gender Females*, in 10 SIGNS 27, 35 (1984).

122. *Id.*

123. *Id.* at 38.

124. *Id.*

125. *Id.* at 38-39 (footnotes omitted).

126. *Id.* at 39.

American peoples to reject the validity of the cross-gender role and to invoke notions of "proper" sexuality that supported men's possession of sexual rights to women.¹²⁷

Blackwood continually attributes the lack of evidence for what she wishes to show not to the paucity of such evidence, but rather to misreporting, or to underreporting, or to overlooking, by Western anthropologists, of the phenomenon, or to the embarrassed silence of Indian informants, or to changes wrought by contact with Christian sexual morality.¹²⁸ Although Blackwood's explanation may be accurate, it also could be incorrect; Blackwood's principal shortcoming is her insistence, without hard evidence, of widespread institutionalized homosexuality among the American Indians.¹²⁹

Eskridge is unconcerned about the lack of such evidence. For him, the berdache phenomenon is a given for both sexes:

Although they have received less academic attention, female *berdaches* represented 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.¹³⁰

Not one of Eskridge's sources supports the assertion that "female *berdaches* represented an important cultural institution in most Native American communities."¹³¹ Nor is there evidence that the female berdache "would commonly marry another woman."¹³² In fact, Blackwood has attempted to make the best possible case for the existence of the female berdache. Her article appeared in *Signs: Journal of Women in Culture and Society*, which is not a journal of anthropology. Blackwood fails to show that the female berdache was "an important cultural institution in most Native American communities."¹³³ She limits her study to the female cross-gender role "as it existed historically in several Native American tribes, primarily in western North America and the Plains. It focuses on western tribes that shared a basically egalitarian mode of production in precolonial times, and for which sufficient data on the female

127. *Id.* at 39-40.

128. *See id.* at 36-39.

129. *See id.* at 28-29, 35.

130. ESKRIDGE, *supra* note 9, at 29.

131. *Id.*

132. *Id.*

133. *Id.*

role exist.”¹³⁴ Far from being a widespread phenomenon, there are only five tribes out of several hundred in which Blackwood found certain evidence for the existence of the female berdache.¹³⁵ These are the Kaska, the Klamath, the Mohave, the Maricopa, and the Cocopa.¹³⁶ Among the Plains Indians, Blackwood found them “noteworthy for the relative absence of the female cross-gender role.”¹³⁷ In other words, she has found evidence for the female berdache in fewer than one percent of the Native American tribes. Inexplicably, Eskridge concludes from Blackwood’s study that most Native American communities had female berdaches, and describes this as “an important cultural institution.”¹³⁸ That conclusion is without foundation.

Again, Eskridge offers no evidence for the existence of same-sex marriages within the context of the berdache phenomenon. It is illegitimate to make a case for same-sex marriage by an appeal to history that never distinguishes between a “union” and a “marriage,” a distinction which would involve further research into Indian mores. Every assumption made by Eskridge—the magnitude of the berdache phenomenon, the supposed necessary connection of the berdache and homosexuality, and the existence of sanctioned marriages that would be recognized by the tribe as equivalent to heterosexual marriages, is undercut by his own sources.¹³⁹ Moreover, Eskridge refuses to entertain the idea that the berdache phenomenon may represent another human possibility, namely a defined social role for the effeminate or the transvestite, not by way of social approval, but as Devereux suggested, by channeling the impulse, isolating it, and holding it as an admonition to the larger society of heterosexuals.¹⁴⁰

In the importance he gives to the berdache, Eskridge participates in a recent effort to reduce or even efface sexual categories, sex and gender alike being seen merely a matter of “social construction.” Under this argument, these categories are fluid in their boundaries, reflecting not immoveable natural distinctions but culturally inflicted ones. Books by John Boswell and Eskridge provide examples of what might be called the argument for situational sexuality. Whatever the argument is dubbed, it is Eskridge’s failure to accurately portray his own cited sources that is

134. Blackwood, *supra* note 121, at 28 (footnote omitted).

135. *See id.*

136. *See id.*

137. *Id.*

138. ESKRIDGE, *supra* note 9, at 29.

139. *See id.* at 224.

140. *See id.* at 28-30; *see also* Devereux, *supra* note 102.

most troubling to the critical reader. Moreover, Eskridge does not provide evidence for his conclusion that “*berdaches* (like We’wha) married individuals of the same sex, and those marriages were recognized by Native American laws and cultures.”¹⁴¹ Ultimately, it is not true that “[m]arriages between men and male *berdaches* were widespread among Native American cultures.”¹⁴² Likewise, it is not true that “[a]s a general matter, same-sex marriages tended to conform to traditional Native American marriage patterns . . . [and that] [f]emale *berdaches* and woman-woman marriages were integral to women’s ability to achieve a higher status in most Native American cultures.”¹⁴³

VII. MULTICULTURALISM, OR THE PERSISTENCE OF ROUSSEAU

If his use of sources on African “female husbands” and Native American *berdaches* are both troublesome, Eskridge also reflects one of the worst penchants of modern “multiculturalism.” To Eskridge, the world’s major civilizations seem minor, and vice-versa. He hopes that the Western civilization will learn from its primitive betters:

According to an authoritative survey of sexual practices around the world in 1951: 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. Anthropological fieldwork since 1951 has not only confirmed but deeply elaborated on this observation. Particular attention has been paid to the *mugawe* of the Kenyan Meru, the Siberian Chuckchee, Tahitian *mahus*, and the Indian *hijras*. 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.¹⁴⁴

The following outlines the Eskridgean method. The first step is the appeal to statistics: “In 49 (64 percent) of the 76 societies other than our own for which information is available, homosexual activities . . . are considered normal and socially acceptable for certain members of the com-

141. ESKRIDGE, *supra* note 9, at 28.

142. *Id.* at 29.

143. *Id.*

144. *Id.* at 29-30 (footnotes omitted).

munity.”¹⁴⁵ And what are these forty-nine societies? To wit: Aranda, Aymara, Azande, Chamorro, Chuckchee, Creek, Crow, Dahomeans, Easter Islanders, Hidatsa, Hopi, Ila, Keraki, Kiwai, Koniag, Koryak, Lango, Mandan, Maricopa, Menomini, Nama, Naskapi, Natchez, Navaho, Omaha, Oto, Palauans, Papago, Ponca, Pukapukans, Quinault, Reddi, Samoans, Seminole, Siwans, Tanala, Thonga, Tinguian, Tswana (females only), Tubatulabal, Tupinamba, Witoto, Wogeo, Wolof, Yakut, Yuma, Yungar, Yurok, Zuni.¹⁴⁶

These are the societies “other than our own” to which Eskridge alludes, but does not list, possibly hoping the reader will not inquire too closely. However, even in these societies, homosexual activities are “normal and socially acceptable” not for all, but “for certain members” of the community.¹⁴⁷ And in these forty-nine societies, the authors of the study never argue that homosexuals are bound in “culturally and legally recognized marriages.”¹⁴⁸

Most telling is that a list of essentially primitive tribes, demurely described as societies “other than our own,” is offered as if those tribes’ practices are worthy of emulation. Eskridge’s article expresses the complete collapse of self-confidence on the part of the Western world, or at least, of an influential stratum of that world.

It should be pointed out that a great many of the primitive societies deemed by Eskridge to be tolerant of homosexuality (and hence, by extension, part of an argument for same-sex marriage), and therefore worthy of emulation by our benighted civilization, have also been known to engage in other practices, such as cannibalism, female genital mutilation (infibulation), massacre or enslavement of enemies taken in war, and other practices which it was once held to be the duty of the civilized to extirpate. The slave trade in Africa was stamped out by the British even though today it continues among some of the tribes of the Arabian peninsula. Given that homosexual behavior is observed in less than five percent of the population, why is that more “normal” than, say, slavery? Perhaps it is our society, the society of the civilized, that has something to teach the Siwans, the Lango, the Chuckchee, and the Naskapi.

Most of those forty-nine societies probably number only a few hundred members. Yet Eskridge mentions by name only four societies,¹⁴⁹ being

145. *Id.* at 29 (citation omitted).

146. See CLELLAN S. FORD & FRANK A. BEACH, PATTERNS OF SEXUAL BEHAVIOR 130 n.2 (1951).

147. ESKRIDGE, *supra* note 9, at 29.

148. *Id.* at 30.

149. See *id.* at 29.

four where not only is homosexuality to some extent accepted, but where he believes unions between homosexuals "have been treated by their indigenous cultures as culturally and legally recognized marriages."¹⁵⁰ These are: 1) the Kenyan Meru, 2) the Siberian Chuckchee, 3) the Tahitian *mahus*, and 4) the Indian *hirjas*.¹⁵¹

VIII. TALES OF THE SOUTH PACIFIC

Eskridge's treatment of the Tahitian *mahu* is revealing. In a previously published article, Eskridge described Robert I. Levy, the author of numerous studies of Polynesian culture, as "[t]he best source for the *mahu* tradition."¹⁵² Levy's study of the *mahu*, entitled *The Community Function of Tahitian Male Transvestitism: A Hypothesis*,¹⁵³ was based on a stay in Tahiti. But Levy's study comes to conclusions that are quite different from those Eskridge transmitted:

Someone would say, "I don't know who the *mahu* is in X village." When asked, "Then how do you know there is one?" the answer would be something like, "There always is one," or "That's the way things are." When asked if there were ever two *mahus* in a village, the common answer was, "No, only one." One informant pressed on this said, "When one dies, another replaces him. God arranges it like that. It isn't the nature of things, two *mahus* in one place. Only one . . . and when that one dies, he is replaced."¹⁵⁴

If there is only one *mahu* in each village, and there are never two together, it is improbable that Tahitian culture "culturally and legally recognized" the marriage of two *mahus*.¹⁵⁵ Furthermore, some *mahus* are "recruited for the role."¹⁵⁶ In other words, this is not simply a channeling of homosexuals into a culturally recognized role, but the fulfilling of a social role that may determine the sexual behavior of the incumbent. Levy recounts that he had:

[s]een in other Tahitian communities very young boys apparently being coaxed into the role where I had the impression that the clues, if any, to which the coaxers were responding were at most related to the possibility of the child playing a transvestite

150. *Id.* at 30.

151. *See id.*

152. ESKRIDGE, *supra* note 18, at 1463 n.159.

153. *See Levy, supra* note 104, at 13 (noting that Levy spent twenty-six months studying the Tahitian-speaking communities in French Polynesia).

154. *Id.* at 14.

155. ESKRIDGE, *supra* 9, at 30.

156. *See Levy, supra* note 104, at 17.

role and not to any strong inclination [F]or most people the essence of the *mahu* was his highly visible “doing woman’s work” in its public aspects; the private and generally secret sexual acts were considered by some as a perverse aspect of this otherwise acceptable behavior.¹⁵⁷

According to Levy, Tahitian society shows an:

absence of strong internal shaping towards the self definition of manhood in its sense of contrast and complementarity to womanhood [and] that [consequently] there have been developed various external marks or signs which function to clarify that definition

I believe that the *mahu* role, with its clear cut rules, its high visibility, its strictly limited incumbency, and its pre-empting of homosexual behavior, also has a message function. It says “there, clearly, out in the open, is the *mahu*, the one man who has taken a female role. I am a non-*mahu*. Whatever feelings I have about men are no threat to me and to my eventual role as family head. I can see exactly what *he* is, and I am clear about myself in that I am not *he*.”

I suggest that the *mahu* is a carefully maintained role, building on pre-existing possibilities for a supply of candidates, which carefully presents a behavior complex that serves the important function, among other subsidiary ones, sidelining and stabilizing a precarious aspect of identity by a clear negative image—that which I am not, and cannot be.¹⁵⁸

Far from representing the acceptance by Tahitian society of homosexual marriages, the *mahu* serves as a marker of behavior that is not culturally or legally sanctioned, the carefully selected embodiment of the male who is non-male.¹⁵⁹ He possesses the qualities that are to be avoided by men and is in no sense an example of the approval of homosexuality, and still less of same-sex marriage.¹⁶⁰ Although Eskridge describes Levy’s article as the latest and fullest treatment of the Tahitian *mahu*, it is difficult to believe that he read it thoroughly. If he had, he would not have described their putative unions as marriage “to people of the same sex.”¹⁶¹ While there is some furtive and transgressive sex between ordinary males and the *mahu*, there is no evidence of a marriage-like union as “hav[ing] been treated by their indigenous cultures as culturally and legally recog-

157. *Id.*

158. *Id.* at 18-19.

159. *See id.* at 17.

160. *See id.*

161. *See* ESKRIDGE, *supra* note 9, at 30.

nized marriages."¹⁶²

IX. WARRIOR LOVE

Eskridge's writing suffers from a hypertrophied sense of the omnipresence and indispensability of sex. For him, the bonds between warriors in ancient Greece, or Tokugawa Japan, necessarily have a homosexual aspect.¹⁶³ He writes of the samurai:

The samurai warriors of feudal and Tokugawa Japan went to battle accompanied by apprentice warrior-lovers. Literary sources, such as *The Great Mirror of Male Love* by Ihara Saikaku, depict these relationships as highly choreographed and romantic, with strong loyalty on each side. The beginning of a relationship between an apprentice (*wakashu*) and a 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.¹⁶⁴

When a writer inserts the phrase "such as" before the only work he cites, thus implying that there is a wealth of other similar evidence he could supply, readers should be wary. Eskridge refers to sources, "such as the *Great Mirror of Male Love*," without ever referring to any other literary source about the samurai culture. He hedges a bit, noting that "sex was only one element of the samurai relationship,"¹⁶⁵ but the actual nature of the relationship is not as certain as he implies.¹⁶⁶ The "formal exchange of written and spoken vows" is an attribute that would apply equally to many situations.¹⁶⁷ For example, consider the vows of vassal and lord in feudalism, or the mutual promises of master and apprentice.¹⁶⁸ Although these examples involve mutual affirmation of a human relationship, neither rises to the level of a "marriage-like status." Esk-

162. *Id.*

163. *See id.* at 30-31 (noting that "[a]s in marriage, sex was only one element of the samurai relationship").

164. *Id.* (footnotes omitted).

165. *Id.*

166. *See id.*

167. *See id.* at 30.

168. *See id.*

ridge adopts some of the text, almost verbatim, from the introduction by Paul Gordon Schalow to his translation of *The Great Mirror of Male Love*;¹⁶⁹ from Eskridge's presentation, however, the evidence of a sexual component in the relationship of a samurai to his apprentice warrior is far from certain. Even a "marriage-like status" is not a marriage, any more than a "death-like trance" is the same thing as death. The phrase insidiously stakes a claim even as it allows for a face-saving denial: we are still not certain as to whether the samurai does or does not enter into a recognized marriage.

X. THE ANCIENT NEAR EAST

To some extent, Eskridge is reckless in dealing with cultures remote from those of the West. In analyzing cultures in Africa, among the American Indians, in Tahiti, and in medieval Japan, Eskridge should be more cautious in drawing comparisons with the West. But his treatment of the ancient Near East, the precursor to ancient Israel, and hence to the West itself, does not inspire greater confidence. Discussing the Mesopotamian statutes, Eskridge writes that:

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.¹⁷⁰

Yet prohibition or disapproval of same-sex marriage simply may have been unnecessary. To support his proposition, Eskridge relies upon *Law Collections from Mesopotamia and Asia Minor*,¹⁷¹ which contains many other examples of Near Eastern legal codes that do explicitly prohibit homosexual activities. Yet, Eskridge carefully named only those which are silent on the matter.¹⁷² He also notes that the Hittite laws contain a provision that, he says, according to one translation may allow for a slave to buy a "free youth" as his "spouse."¹⁷³ Neither of Eskridge's sources on the Hittite laws—not the 1951 compilation by Neufeld, nor the larger 1995 compilation by Martha Roth which contains the Hittite laws—ac-

169. See Paul Gordon Schalow, *Introduction*, in IHARA SAIKAKU, *THE GREAT MIRROR OF MALE LOVE*, (Paul Gordon Schalow Trans., 1990).

170. ESKRIDGE, *supra* note 9, at 20.

171. MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* (1995).

172. See ESKRIDGE, *supra* note 9, at 20 n.9.

173. *Id.* at 20.

cept this extraordinary translation.¹⁷⁴ Roth, agreeing essentially with Neufeld, translates the same provision differently: "If a slave pays a brideprice for a free young man and acquires him as a son-in-law, no one shall free him from slavery."¹⁷⁵ The critical difference is that between a "spouse" and a "son-in-law." On what basis does Eskridge challenge the translation offered by two specialist scholars of ancient legal codes? Whose translation did Eskridge adopt? None other than John Boswell who, according to Eskridge, "disputes the reading preferred by Neufeld."¹⁷⁶ Neufeld wrote this: "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."¹⁷⁷ Eskridge's comment on Neufeld's version is telling: "The bracketed portion is an interpolation by Neufeld, who admits as much. Neufeld also reports that earlier scholars had interpreted [the provision] as a state sanction for 'homosexual' relations among slaves and that 'such a relationship among free men did not require any special legal provisions.'"¹⁷⁸ Actually, Neufeld's interpolation

174. See E. NEUFELD, *THE HITTITE LAWS 10-11* (1951) (translating Section 36 of the Hittite laws as mandating that "[i]f a slave gives the brideprice to a free youth and takes him to dwell in his household as husband (*of his daughter*), no-one shall surrender him") (footnote omitted, emphasis added); see also ROTH, *supra* note 171, at 160 (translating a passage of Middle Assyrian Law which provides that "[i]f a man sodomizes his comrade and they . . . find him guilty, they shall sodomize him and they shall turn him into a eunuch"). (footnote omitted).

175. ROTH, *supra* note 171, at 222.

176. ESKRIDGE, *supra* note 9, at 20 n.11.

177. See NEUFELD, *supra* note 174, at 10-11 (providing the English translation of Section 36 of the Hittite Law); see also ROTH, *supra* note 171, at 222 (same).

178. ESKRIDGE, *supra* note 9, at 20 n.11 (citations omitted); see also NEUFELD, *supra* note 174, at 151 (noting that many different "interpretations have been propounded on the actual meaning and legal implications of § 36"). It is instructive to compare the sobriety and scrupulosity of Ephraim Neufeld's comment on Section 36 with the manner in which Eskridge uses Boswell to blandly dismiss Neufeld. Neufeld notes that

[A]ccording to Friedrich and Zimmern, Witzel, Goetze, Struve and Korosec—the idea of paederasty is incorporated here; it would seem that such a relationship among free men did not require any special legal provisions. This interpretation was never regarded as certain. On the other hand the interpretation suggested by Hrozný and followed by Walther and Sturtevant, implies that the free youth is taken as a husband by the slave for his daughter. Bechtel suggests the following rendering: "If a slave provides the bride-price for a free son (i.e. the slave's son) and (the girl) takes him as her husband, no one releases her (from the contract)." Bechtel explains his suggested translation—which sounds rather strange—with a comment. He says "perhaps the girl's parents tried to annul the marriage on the ground that the young man was the son of the slave. The difficulty is that the girl's father would have to accept the bride-price and the bridegroom, and it would be too violent a treatment of the text to understand that he is the subject of *epzi*."

Id. (footnotes omitted).

was hardly unique because there are many lacunae in the remaining texts; Neufeld merely offers suggestions as to the missing words. He does not deliberately make an unwarranted interpolation. Further, Neufeld himself acknowledged the possibility, though remote, that the provision sanctioned homosexual marriage.¹⁷⁹ Taken as a whole, however, the scholarly tradition overwhelmingly supports the addition of the phrase "of his daughter" after the word "spouse" as the proper interpolation of the provision.¹⁸⁰ Roth rejected Boswell's effort, realizing that it was actually he, not Neufeld, who was guilty of what Eskridge calls a "strained effort by a modern historian to read his own prejudices into another culture's text."¹⁸¹

XI. EMPERORS AND CATAMITES IN CATHAY

There is one civilization that rivals the Christian West in its size, coherence, and achievements: China. Professor Eskridge's account of the vast and venerable Chinese civilization consumes less space, only two paragraphs, than that devoted to the berdache of a few North American Indian tribes or to the "female husband" of certain tribes in West Africa.¹⁸² Eskridge explains that "[m]arriage-like same-sex unions have been documented in China during the Yuan and Ming dynasties."¹⁸³ The main source for his assertion is Bret Hinsch's *Passions of the Cut Sleeve*.¹⁸⁴ Out of four footnotes devoted to the discussion of Chinese culture, three cite to Bret Hinsch's book.¹⁸⁵ Several questions need to be asked. Why is Hinsch's book, written by a homosexual activist, preferred

179. See NEUFELD, *supra* note 174, at 151.

180. See ESKRIDGE, *supra* note 9, at 20 n.11.

181. *Id.* The full sentence shows how Eskridge hides behind Boswell here, quoting—and failing to take issue with—him thus: "Boswell rejects Neufeld's speculations as a strained effort by a modern historian to read his own prejudices into another culture's text." *Id.* (internal citation omitted).

182. See *id.* at 31-32.

183. *Id.* at 31.

184. See BRET HINSCH, *PASSIONS OF THE CUT SLEEVE: THE MALE HOMOSEXUAL TRADITION IN CHINA 176-77* (1990) (explaining that woman/woman unions were akin to marriage in that both involved a ceremonial initiation and included a division of labor within the family); see also WOLFRAM EBERHARD, *GUILT AND SIN IN TRADITIONAL CHINA* (1967); R.H. VAN GULIK, *SEXUAL LIFE IN ANCIENT CHINA* (1961); JONATHAN D. SPENCE, *THE MEMORY PALACE OF MATTEO RICCI* (1984); James P. McGough, *Deviant Marriage Patterns in Chinese Society*, in *NORMAL AND ABNORMAL BEHAVIOR IN CHINESE CULTURE* (Arthur Kleinman and Tsung-Yi Lin eds., 1981); Vivien W. Ng, *Homosexuality and the State in Late Imperial China*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 76 (Martin Bauml Duberman et al. eds., 1989).

185. See ESKRIDGE, *supra* note 9, at 225 nn.50, 51, 53.

to the scholarly studies of the Dutch Sinologist van Gulik, or the more recent Wolfram Eberhard?¹⁸⁶ Why does Eskridge not rely on the views of leading Chinese Sinologists, who are only an e-mail away?¹⁸⁷

Already we are made wary by such phrases as “marriage-like . . . unions” because these merely describe non-sanctified couplings that are “marriage-like” only because the participants chose to call their relationship a marriage. A careful reading of Hinsch’s book turns up no evidence for the conclusion that Chinese civilization actually recognized same-sex “marriages.” Instead, the reader is presented only with the usual examples of libidinous license that typically was permitted to this or that emperor.¹⁸⁸ The flimsiness of the evidence is transparent, for Eskridge immediately alludes, not to history, but to fiction, to the “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 relates 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 (bride-price, 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 same] social forms connected with ‘regular’ marriage.”¹⁸⁹

Upon a closer examination of the underlying source material, it appears that the story of Li Yu is a fantastic tale, a kind of science-fiction, that centers on the union of Jifang with a fourteen-year-old boy, Ruiji.¹⁹⁰ According to the story, the two apparently “marry,” that is, Jifang paid a

186. See *id.* at 31 n.50 (citing Hinsch to support the proposition that “[m]arriage-like same-sex unions have been documented in China during the Yuan and Ming dynasties”); *id.* at 32 n.53 (citing Hinsch to support the proposition that some “scholars believe sisterhood relationships [between Chinese women] shared many attributes of marriage”).

187. Suimin Pan, professor and director of the Institute for Research in Sexuality and Gender at the Renmin University of China, one of the leading Chinese sexologists, was contacted by e-mail and responded to our inquiries within 24 hours. Eskridge relies almost entirely on a single work, a slender, tendentious monograph by Brad Hinsch.

188. See HINSCH, *supra* note 184, at 34-54.

189. ESKRIDGE, *supra* note 9, at 31-32.

190. See HINSCH, *supra* note 184, at 121-36.

bride-price to the father of Ruiji.¹⁹¹ Although the word “marriage” is used, there is no mention or suggestion that this “marriage” was recognized by society.¹⁹² Yet a cloud remains over this otherwise happy marriage, because both men know that the day of separation will arrive when Ruiji inevitably leaves to marry a woman.¹⁹³ At most, the tale implies that the coupling of Ruiji and Jifang is both temporary, and not a part of recognized marriage;¹⁹⁴ for if it were, the narrator would not so blandly describe the concern that the younger one inevitably would have to leave to marry a woman.¹⁹⁵ If it were a recognized marriage, no leave-taking would be necessary, for even a polygamous Zinjang could keep his boy-bride and take a female bride as well. But it is clear that Ruiji will have to leave Jifang because he is not in a recognized marriage.¹⁹⁶

According to the story, Li Yu engages in a fantasy:

In gratitude for all of the love and devotion showered on him by his lover, Ruiji castrates himself so that he can avoid heterosexual marriage and remain with Jifang forever. Remarkably, the scar heals into the shape of a vagina. From this time forward Ruiji binds his feet, dresses as a woman, and remains indoors like a virtuous wife.¹⁹⁷

This story is hardly persuasive evidence of “male marriage.” According to Hinsch, “Li Yu portrays male marriage in idealistic terms. . . . Nevertheless, the bizarre circumstances surrounding Ruiji’s castration suggest that the particulars of gender transformation in this case owe more to Li Yu’s fertile imagination than to social reality.”¹⁹⁸ This quotation happens to be taken from the very page in Hinsch’s book that is specifically cited by Eskridge.¹⁹⁹ Because the story is merely a homosexual fantasy, it is worthless in terms of its historical evidentiary value. Nonetheless, Hinsch persists in trying to extract from this tale something about “same-sex marriage”:

Even more important within the story [more important than what, one wishes to ask] are references to an actual marriage ceremony. This ritual was not simply the product of Li Yu’s wild imaginings: men apparently found it desirable to construct

191. *See id.* at 126.

192. *See id.*

193. HINSCH, *supra* note 184, at 128.

194. *See id.*

195. *See id.*

196. *See id.* at 129.

197. *Id.* at 128.

198. *Id.* at 129.

199. *See* ESKRIDGE, *supra* note 9, at 31.

homosexual relationships along the lines of heterosexual marriage. The greatest advantage to be gained was the legitimation of the union according to a recognized convention.²⁰⁰

This homosexual man “apparently found it desirable” to mimic heterosexual marriage.²⁰¹ What does this mean? If it does not mean that there was an actual ceremony of the kind that would make a same-sex marriage acquire a formal status equivalent to the accepted heterosexual variety, then it means nothing, as part of an argument based on the “history of same-sex marriage.”

Eskridge claims that “Li Yu goes out of his way to emphasize that the couple adhered to the formal requisites of marriage (bride-price, the various wedding rituals), giving some indication that similar same-sex marriages were common in southern China and perhaps elsewhere in the region.”²⁰² Given the absence of any citations to support this last assertion, Eskridge is apparently speculating. A reader should ask why a fantasy-fiction detailing a fictional couple’s adherence to “formal requisites of marriage” offers evidence that real “same-sex marriages” were ever performed. Inexplicably, Eskridge posits that this fiction gives “some indication” that same-sex marriages “were common in southern China” and “perhaps elsewhere in the region.”²⁰³ The use of the term “perhaps” does not make the phrase any less outrageous. Once all scholarly standards have been jettisoned, the reader—unless endowed with terrific mental stamina—may find it difficult to disagree or question each misstatement. Rather, the reader is likely to accept each exaggeration, falsification, or illogical leap, simply because to do otherwise is too exhausting.

Even more disturbing is Eskridge’s claim that “[i]t 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 same] social forms connected with ‘regular’ marriage.’”²⁰⁴ To support his claim, Eskridge cites several sources, attributing the other evidence to the works of Hinsch and Jonathan Spence.²⁰⁵ Jonathan Spence is recognized as a serious scholar; the cited source, *The Memory Palace of Matteo*

200. HINSCH, *supra* note 184, at 129.

201. *See id.*

202. ESKRIDGE, *supra* note 9, at 31.

203. *Id.*

204. *See id.* at 31-32.

205. *See id.* at 31 n.50, 32 n.51.

Ricci,²⁰⁶ is not a work of special pleading. But in his study, Spence merely notes the prevalence of homosexuality in the Ming dynasty, reporting that the Ming scholar Shen Defu wrote that “in Fujian province homosexual males often lived together conventionally in households, the elder partner being treated by the younger one’s parents as their son-in-law and supported with the money they had laid aside for his marriage portion.”²⁰⁷ This is the closest Spence comes to presenting any evidence that would sustain Eskridge’s claim. When Eskridge writes that “these (homosexual) relationships were often expressed in terms of marriage,” he can only be referring to this passage from “Shen Defu.”²⁰⁸ The “terms of marriage,” then, are not an official ceremony, nor some general recognition by society of something that can be called “marriage.” Rather, the “terms of marriage” refer to the fact that homosexual couples could live together conventionally, and that the parents of the younger partner could treat the older partner as a son-in-law, who might then receive the sums set aside as the younger’s marriage portion.

At best, Spence’s study suggests, apropos of homosexuality, first that it existed, and second, that it attracted the alarmed attention of such resident Jesuits as Matteo Ricci.²⁰⁹ Ricci was quick to denounce the homosexuality, noting that: “In China there are those who reject normal sex and indulge in depravity, they abandon sex with women and instead they corrupt young males. This kind of filthiness is not even discussed by wise men in the West, for fear of defiling their own mouths.”²¹⁰ Surely the sensible question is this: if there had been the slightest evidence of any societal acceptance in China of same-sex marriage, would Ricci not have denounced it in even stronger terms? Yet there is no evidence that he, or any other scandalized Jesuit commenting on the fact of homosexuality, ever hinted at the possibility that the Chinese tolerated same-sex marriage.²¹¹ Given the desire of the Jesuits to expose what they saw as the most “decadent” features of Chinese society (which, of course, could only be saved by the widespread adoption of the Christian creed they were attempting to spread), if there had been such evidence of socially accepted same-sex marriages, Ricci would surely have noted it.

Serious scholars of Chinese civilization, even connoisseurs of its varieties of sin, have never found any acceptance of same-sex marriage by

206. SPENCE, *supra* note 184.

207. *Id.* at 227.

208. ESKRIDGE, *supra* note 9, at 31.

209. *See* SPENCE, *supra* note 184, at 226-31.

210. *Id.* at 229.

211. *See id.* at 226-31.

China. So distant and different in so many ways from the West, Chinese civilization shares with the West a refusal to contemplate such a practice. In fact, homosexual activity itself is condemned in the ancient Chinese religious texts. Wolfgang Eberhard, a scholar overlooked by Eskridge, notes that the *Cheng-fa*, the oldest of the religious (Buddhist) texts, unhesitatingly regards homosexuality as a sin, and that more modern texts, *Li Yu* and *Tung-ming*, mention homosexuality briefly but continue to condemn it.²¹² According to Eberhard, in general, “[i]t is clear . . . that the modern Chinese feel strongly that . . . especially sexual acts are unclean and should be hidden, a trait which began to appear already in the tenth century text.”²¹³

Throughout Eskridge’s brief discussion on China is an unstated premise of a different kind: that China is far more relaxed and tolerant than the West. But Eberhard, whose *Guilt and Sin in Traditional China* is the most recent scholarly study of the matter, believes many in the West have allowed themselves to overlook the Chinese reality, which is far more repressive than that of the West.²¹⁴ Eberhard criticizes Westerners who look to China for lessons for their own societies, writing that:

This [condemnatory] aspect should be stressed especially because many books on China try to give the impression that sex is something “quite natural” and unproblematic among the Chinese, as long as it is “normal” and occurs among persons who are not forbidden by law or taboo to have sexual relations.²¹⁵

Given China’s importance, it is strange that Eskridge gives no evidence of having contacted any Chinese sexologists. In contrast, the authors of this article did contact, by e-mail, one of China’s leading sexologists, Professor Suimin Pan.²¹⁶ Undoubtedly, Professor Suimin Pan’s summary of the Chinese view of same-sex marriage is more authoritative than that of Bret Hinsch, or any of the handful of other authorities relied upon by Professor Eskridge.

Professor Suimin Pan agrees that there had been some toleration of homosexual behavior in China.²¹⁷ According to his account of the Chinese view of same-sex marriage, “[T]he same-sex marriage had been

212. EBERHARD, *supra* note 184, at 64.

213. *Id.*

214. *See id.* at 64-65.

215. *Id.*

216. E-mail from Suimin Pan, Professor and Director of the Institute for Research in Sexuality and Gender at the Renmin University of China, to Peter Lubin (Jul. 29, 1997) (on file with author).

217. *See id.*

never allowed by any Chinese person (not only the people, but also the persons) in the history. Chinese culture considered children-birth as the first goal of any marriage. This was the so-called 'Chinese religion': (worship of ancestry)."²¹⁸

What is most objectionable about Eskridge's work is his refusal to weigh the sources. In dealing with China, as with other societies, the works of the engaged and the tendentious are deliberately relied on, and many of the sources that might have been consulted directly—such as the books of van Gulik or Eberhard or Professor Pan—are willfully ignored. These are among the silences in Eskridge's text, the grand omissions that continually give pause and should trouble those for whom history matters.

XII. THE ROMAN EMPIRE AND SAME-SEX MARRIAGE

With regard to classical antiquity, the reader might expect Eskridge, as he approaches the foundations of Western civilization, to be as scrupulous as he can with his sources. After all, most readers likely will not question his writing about the Nanda, the Nuer, or the Hittites. But quite a number of his likely readers will have some acquaintance with Roman history and literature. Yet here, too, Eskridge offers an astonishing series of misreadings. First, he assures the reader "how common same-sex unions and even marriages have been in other times and other cultures."²¹⁹ Eskridge insists that "same-sex marriages are a commonplace in human history" and attempts to "put to rest the argument that same-sex marriage is somehow so unnatural or dysfunctional as to be unheard of."²²⁰ Among these, Eskridge argues that same-sex unions have "at least been tolerated" in pre-modern Western cultures, such as the Roman Empire, both pagan and Christian.²²¹

In this endeavor, he is largely retailing for a legal audience arguments made by the Yale historian John Boswell in his books *Christianity, Social Tolerance, and Homosexuality* and *Same-Sex Unions in Premodern Europe*. Oddly, in a footnote Eskridge agrees that in the latter book, "Boswell overreads or misreads some or many of his sources It is a charge that has been repeatedly and persuasively made against Boswell's earlier work."²²² One example of this tendentious reading, which Esk-

218. *Id.*

219. ESKRIDGE, *supra* note 9, at 16.

220. *Id.*

221. *Id.*

222. *Id.* at 27 n.37.

ridge wisely omits, is Boswell's citation of the classical Roman law definition of marriage as "a partnership for life."²²³ The problem is that the definition of the classical jurist Modestinus specified that marriage was "the union of male and female and a partnership for life."²²⁴ Boswell's omissions are crucial to his subject: same-sex unions. The classical definition of marriage indicated that they were different-sex unions. Nor was Modestinus an anomaly. The writings of his teacher, Ulpian, in the very first provision in the Digest, state that:

Jus naturale is that which nature has taught to all animals; for it is not a law specific to mankind but it is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing.²²⁵

Yet, for Boswell, this "heterosexual" definition of marriage is the "[l]ove that dares not speak its name."²²⁶

Thus, Eskridge was on notice to check the primary sources before repeating the characterizations of Boswell. Careful examination of those sources is sufficient to conclude that, far from being "commonplace" in the Roman Empire, same-sex marriage was viewed as a contradiction in terms, an object of ridicule and indignation by all the pagan authors, even prior to the prevalence of Christian ideas of marriage. While it would be overstating the evidence to say that the idea was "unheard of," it was certainly viewed as unnatural and dysfunctional.

Take the "same-sex marriages" of Rome's emperors, which Eskridge calls the "best documented" historical instances of the phenomenon.²²⁷ "The marriages of emperors such as Nero stand as examples of publicly celebrated same-sex marriages in [imperial Rome]."²²⁸ The following passage constitutes his entire discussion of the three historical instances of same-sex marriages by Roman emperors, two by Nero and one by Elagabalus:

Roman historian Suetonius reported, disapprovingly, 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

223. 2 THE DIGEST OF JUSTINIAN 23.2.1, cited in BOSWELL, *supra* note 10, at 49 n.88.

224. See *id.*

225. 1 THE DIGEST OF JUSTINIAN 1.1.1 (Alan Watson ed. & trans., 1985) [hereinafter 1 DIGEST OF JUSTINIAN].

226. THE THREE TRIALS OF OSCAR WILDE 236 (H. Montgomery Hyde ed., 1956).

227. See ESKRIDGE, *supra* note 9, at 22.

228. *Id.* at 23.

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 the screams and moans of a girl being deflowered.” Dio Cassius, a historian and contemporary of Suetonius, confirmed Nero’s marriages to these men and also provided a reliable account of the same-sex and opposite-sex marriages of third-century emperor Elagabalus. Indeed, it was said that men seeking advancement in Elagabalus’s imperial court rushed to marry other men to curry favor with the emperor.²²⁹

This matter-of-fact narrative notes only that Suetonius disapproved of the same-sex marriages of Nero. Perhaps it is instructive to quote directly in full the primary sources cited by Eskridge to understand the full context and flavor of how these imperial ceremonies were viewed in pagan antiquity.

Suetonius, in his *The Lives of the Twelve Caesars*, deals with Nero’s same-sex marriages in the section dealing with his “shameful and criminal deeds.” Writing that “[l]ittle by little, however, as his vices grew stronger, he dropped jesting and secrecy and with no attempt at disguise openly broke out into worse crime.”²³⁰ Suetonius explained that:

Besides abusing freeborn boys and seducing married women, he debauched the Vestal Virgin Rubria. The freedwoman Acte he all but made his lawful wife, after bribing some ex-consuls to perjure themselves by swearing that she was of royal birth. He castrated the boy Sporus and actually tried to make a woman of him. He married him with all the usual ceremonies, including a dowry and a bridal veil, took him to his house attended by a great throng, and treated him as his wife. And the witty jest that some one made is still current, that it would have been well for the world if Nero’s father Domitius had had that kind of wife. This Sporus, decked out with the finery of the Empresses and riding in a litter, he took with him to the assizes and marts of Greece, and later at Rome through the Street of the Images, fondly kissing him from time to time. That he even desired illicit relations with his own mother, and was kept from it by her enemies, who feared that such a relationship might give the reckless and insolent woman too great influence, was notorious,

229. *Id.* at 22 (footnotes omitted).

230. Suetonius, *THE LIVES OF THE TWELVE CAESARS* 258 (Joseph Gavorse ed. & trans., 1931).

especially after he added to his concubines a courtesan who was said to look very like Agrippina. Even before that, so they say, whenever he rode in a litter with his mother, he had incestuous relations with her, which were betrayed by the stains on his clothing.

He so prostituted his own chastity that after defiling almost every part of his body, he at last devised a kind of game, in which, covered with the skin of some wild animal, he was let loose from a cage and attacked the private parts of men and women, who were bound to stakes, and when he had sated his mad lust, was dispatched by his freedman Doryphorus. For he was even married to this man in the same way that he himself had married Sporus, going so far as to imitate the cries and lamentations of a maiden being deflowered.²³¹

Using such a monstrous figure as a poster-boy for same-sex marriage is ridiculous. According to the leading commentator, K.R. Bradley, in *Suetonius' Life of Nero: An Historical Commentary*,²³² “[m]ention of specific elements of a normal marriage ceremony is certainly intended by Suetonius to heighten the outrageousness of Neronian *libido* in general and the present episode in particular.”²³³ Bradley also indicates that “[i]t appears probable . . . that Suetonius has confused Doryphorus and Pythagoras,”²³⁴ who was correctly identified in the account of Tacitus:

Nero, who polluted himself by every lawful or lawless indulgence, had not omitted a single abomination which could heighten his depravity, till a few days afterwards he stooped to marry himself to one of that filthy herd, by name Pythagoras, with all the forms of regular wedlock. The bridal veil was put over the emperor; people saw the witnesses of the ceremony, the wedding dower, the couch and the nuptial torches; everything in a word was plainly visible, which, even when a woman weds darkness hides.²³⁵

So Tacitus was as “disapproving” as Suetonius. He continues: “A disaster followed,” and goes on to describe the burning of Rome.²³⁶ Do these historians think that Nero’s same-sex weddings were “common-place”? What about Dio Cassius?

231. *Id.* at 258-59 (footnote omitted).

232. K.R. BRADLEY, *SUETONIUS' LIFE OF NERO: AN HISTORICAL COMMENTARY* (1978).

233. *Id.* at 161-62.

234. *Id.* at 165.

235. *THE COMPLETE WORKS OF TACITUS* 376 (Alfred John Church & William Jackson Brodrigg trans. and Moses Hadas ed., 1942).

236. *Id.*

[L]ater he caused a boy of the freedmen, whom he used to call Sporus, to be castrated, since he, too, resembled Sabina and he used him in every way like a wife. In due time, though already "married" to Pythagoras, a freedman, he formally "married" Sporus, and assigned the boy a regular dowry according to contract; and the Romans as well as others publicly celebrated their wedding.

While Nero had Sporus, the eunuch, as a wife, one of his associates in Rome, who had made a study of philosophy, on being asked whether the marriage and cohabitation in question met with his approval, replied: "You do well, Caesar, to seek the company of such wives. Would that your father had had the same ambition and had lived with a similar consort!"—indicating that if this had been the case, Nero would not have been born, and the state would now be free of great evils.²³⁷

Later on, Dio Cassius continues:

Now Nero called Sporus "Sabina" not merely because, owing to his resemblance to her he had been made a eunuch, but because the boy, like the mistress, had been solemnly married to him in Greece, Tigellinus giving the bride away, as the law ordained. All the Greeks held a celebration in honour of their marriage, uttering all the customary good wishes, even to the extent of praying that legitimate children might be born to them.²³⁸

Eskridge comments in a footnote: "Dio was not amused."²³⁹ The Roman historian furthered explained:

After that Nero had two bedfellows at once, Pythagoras to play the rôle of husband to him, and Sporus that of wife. The latter, in addition to other forms of address, was termed "lady," "queen," and "mistress." Yet why should one wonder at this, seeing that Nero would fasten naked boys and girls to stakes, and then putting on the hide of a wild beast would attack them and satisfy his brutal lust under the appearance of devouring parts of their bodies? Such were the indecencies of Nero.

When he received the senators, he wore a short flowered tunic and a muslin neck-cloth; for in matters of dress, also he was already transgressing custom, even going so far as to wear ungirded tunics in public.²⁴⁰

237. 8 DIO'S ROMAN HISTORY 135, 137 (Earnest Cary trans., 1968).

238. *Id.* at 159.

239. ESKRIDGE, *supra* note 9, at 22 n.19.

240. 8 DIO'S ROMAN HISTORY, *supra* note 237, at 159.

Whatever his sense of humor, Dio Cassius certainly did not find such behavior “commonplace.”

Professor Eskridge vouches for Dio Cassius’s account of “the same-sex and opposite-sex marriages of third-century emperor Elagabalus.”²⁴¹ He finds it “reliable.”²⁴² Dio Cassius’s account is introduced by explaining that Elagabalus:

who saw fit to make even the gods cohabit under due form of marriage, lived most licentiously himself from first to last. He married many women, and had intercourse with even more without any legal sanction; yet it was not that he had any need of them himself, but simply that he wanted to imitate their actions when he should lie with his lovers and wanted to get accomplices in his wantonness by associating with them indiscriminately. He used his body both for doing and allowing many strange things, which no one could endure to tell or hear of.²⁴³

The ultimate illustration of this turns out to be the same-sex marriage of Elagabalus:

And finally . . . he was bestowed in marriage and was termed wife, mistress, and queen. He worked with wool, sometimes wore a hair-net, and painted his eyes, daubing them with white lead and alkanet. Once, indeed, he shaved his chin and held a festival to mark the event; but after that he had the hairs plucked out, so as to look more like a woman. And he often reclined while receiving the salutations of the senators. The husband of this woman was Hierocles, a Carian slave, once the favourite of Gordius, from whom he had learned to drive a chariot.²⁴⁴

Decency suggests that the catalog of Elagabalus’s sexual sins be summarized. Edward Gibbon, the famous chronicler of Rome’s decline, puts it as follows:

A long train of concubines, and a rapid succession of wives, among whom was a vestal virgin, ravished by force from her sacred asylum, were insufficient to satisfy the impotence of [Elagabalus’s] passions. The master of the Roman world affected to copy the dress and manners of the female sex, preferred the distaff to the sceptre, and dishonoured the principal dignities of the empire by distributing them among his numerous lovers;

241. ESKRIDGE, *supra* note 9, at 22.

242. *Id.*

243. 9 DIO’S ROMAN HISTORY 461 (Earnest Cary trans., 1961).

244. *Id.* at 465, 467.

one of whom was publicly invested with the title and authority of the emperor's, or, as he more properly styled himself, of the empress's husband.²⁴⁵

Gibbon also explained that “[a] dancer was made praefect of the city, a charioteer praefect of the watch, a barber praefect of the provisions. These three ministers, with many inferior officers, were all recommended, *enormitate membrorum*.”²⁴⁶ Gibbons also noted: “It may seem probable, the vices and follies of Elagabalus have been adorned by fancy, and blackened by prejudice. Yet confining ourselves to the public scenes displayed before the Roman people, and attested by grave and contemporary historians, their inexpressible infamy surpasses that of any other age or country.”²⁴⁷ Needless to say, if one were searching for arguments in support of same-sex marriage, perhaps one could look better elsewhere.

Professor Eskridge cites the *Historiae Augustae* for the proposition that “[i]ndeed, it was said that men seeking advancement in Elagabalus's imperial court rushed to marry other men to curry favor with the emperor.”²⁴⁸ What the primary source actually states, however, is this:

His courtiers, moreover, were men of depraved life, some of them old men looking like philosophers, who would do up their hair in nets, declare that they were living a life of depravity, and boast that they had husbands. Some say, however, that they only made a pretence of this in order that by counterfeiting the Emperor's vices they might stand higher in his favour.²⁴⁹

Not only does the author of the *Historiae Augustae* express strong disapproval, but he pointedly questions whether such “marriages” actually occurred.²⁵⁰ The skeptical, critical note in the source is completely missing from Eskridge's recounting.

Lampridius introduces his life of Elagabalus by saying: “I should never have put [it] in writing—hoping that it might not be known that he was emperor of the Romans—were it not that before him this same imperial office had had a Caligula, a Nero, and a Vitellius,” and then goes on to record that these emperors “were murdered, dragged through the streets, officially called tyrants, and no man wishes to mention even their

245. EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 168 (David Womersley ed., 1994) (footnotes omitted).

246. *Id.* at 168 n.59.

247. *Id.* at 168.

248. ESKRIDGE, *supra* note 9, at 22 n.21 (citing 2 *THE SCRIPTORES HISTORIAE AUGUSTAE* 129, 131 (London: W. Heinemann, 1922-1932)).

249. 2 *THE SCRIPTORES HISTORIAE AUGUSTAE* 129, 131 (David Magie, trans. 1924).

250. *See id.*

names.”²⁵¹ No one, that is, except Boswell and Eskridge.

There is a better reason, however, why evidence regarding the practice of Roman emperors cannot be used as legal precedent. Roman law was quite clear that the emperor was above the law. *Princeps legibus solutus est*. “The emperor is not bound by statutes.”²⁵² Whether the subject is adultery, incest, polygamy, or parricide, emperors often circumvented the general law.

Eskridge then widens his scope outside the imperial household.²⁵³ He notes that “[o]ther evidence indicates that same-sex marriages were not limited to Rome’s emperors. The satirists Martial and Juvenal sarcastically noted the casual way in which men married other men by the end of the first century.”²⁵⁴ Boswell too characterizes Juvenal as establishing that same-sex marriage ceremonies had become “absolutely commonplace.”²⁵⁵ Same-sex marriage achieved “casual and accepting reception by [Juvenal’s] contemporaries.”²⁵⁶ Indeed, Eskridge claims that Juvenal, Martial, and the romantic novel *Babylonica* “do not exclude the possibility that same-sex marriages were culturally or legally distinct from different-sex marriages, but they confirm the acceptance of same-sex unions in imperial Rome.”²⁵⁷ This is an astonishing claim, since these very sources, particularly Juvenal, establish that the idea of same-sex marriage was viewed as ludicrous by contemporary Romans: “‘I have a ceremony to attend tomorrow morning in the Quirinal valley,’ says the interlocutor in Juvenal’s *Satires*. ‘What sort of ceremony?’ he is asked. The reply: ‘Nothing special: a friend is marrying another man and a small group is attending.’”²⁵⁸

These lines from a satire establish the “casual” acceptance of same-sex marriage only when the genre and the lines that come both before and after are ignored. The humor here depends upon the “casual” reference to same-sex marriage, since the very notion is viewed as outrageous. As

251. *Id.* at 105.

252. 1 THE DIGEST OF JUSTINIAN, *supra* note 225, at 1.3.31; *see also* 3 THE DIGEST OF JUSTINIAN (Alan Watson ed. & trans., 1985), at 32.1.23 (“[I]t is proper that so great a majesty should observe the laws from which he is deemed to be himself exempt.”); KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 78 (1993) (noting that a Roman prince was not subject to legal mandates).

253. *See* ESKRIDGE, *supra* note 9, at 31.

254. *Id.* at 22-23.

255. *See* BOSWELL, *supra* note 10, at 81.

256. *Id.* at 82.

257. ESKRIDGE, *supra* note 9, at 23.

258. *Id.* at 23.

one recent commentator notes, “the casualness of the question (no more emphatic than Eng. ‘Oh, . . .’) suggests that what follows will be run-of-the-mill, ordinary, conventional. What follows is therefore the more shocking.”²⁵⁹

What precedes is also shocking:

Four hundred thousand is the size of the dowry given by Gracchus to a cornet player (or perhaps his horn was the straight variety). The contract is signed, the blessing pronounced, a numerous party is waiting; the newly-wed ‘bride’ reclines in the lap of her husband. Shades of our forefathers! Is it a censor we need, or an augur? Would you feel more horror, or think it more appalling a portent, if a woman dropped a calf, or a cow gave birth to a lamb? A long dress with veil and flounces is worn by a man who carried a sacred shield of Mars by its mystic thong, sweating beneath the swaying burden. Father of our city, from where did such evil come to your Latin shepherds? From where did this itch arise, o Lord of War, to plague your descendants? Look—a man of family and fortune—being wed to a man! Do you not shake your helmet or bang the ground with your spear, or complain to your father? Away, then; quit the strenuous acres of that great Park which you have forgotten.²⁶⁰

Only at that point does Juvenal provide the passage that Eskridge quotes.²⁶¹ The most recent scholarly commentary indicates that “A *monstrum* is an unnatural thing or event: hence a portent, prodigy, freak, horror, atrocity.”²⁶² So much for the notion of casual acceptance of same-sex marriage. After Eskridge’s quoted passage, Juvenal continues:

Such things, before we’re very much older, will be done in public—in *public*, and will want to appear in the papers! These brides, however, are racked by one intractable problem: they cannot conceive, and hold their husbands by having a baby. It is well that Nature has given no power to their twisted emotions over their bodies. They die without issue. For them no assistance can be had from the bloated Lyde with her box of fertility drugs, nor does it help to proffer their hands to the running Luperca.²⁶³

This language does not evince casual acceptance, or even toleration.

259. 1 JUVENAL: SATIRES 157 (Susanna Morton Braund ed., 1996).

260. JUVENAL: THE SATIRES 13 (Niall Rudd trans., 1992).

261. See ESKRIDGE, *supra* note 9, at 23.

262. 1 JUVENAL: SATIRES, *supra* note 259, at 155.

263. JUVENAL: THE SATIRES, *supra* note 260, at 13.

The language does, however, resemble that used by Martial, another contemporary Roman satirist, in language also omitted by Eskridge.²⁶⁴ Eskridge says, "Martial described the marriage of 'bearded Callistratus' to the 'brawny Afer,' complete with torches, wedding veil, songs, and dower."²⁶⁵ Boswell gives the full text:

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?²⁶⁶

In other words, Eskridge missed the point. The humor of the epigram lies in the question at the end about the barrenness of same-sex marriages.

Does the *Babylonica* "confirm the acceptance of same-sex marriages in imperial Rome"?²⁶⁷ Hardly. It is a novel set in Egypt. The paraphrase by the patriarch Photius in the ninth century, which is our only source since the original is lost,²⁶⁸ says that it has "a digression about Berenice, the daughter of the king of Egypt, and her wild and inordinate passions, and how she slept with Mesopotamia . . . Berenice married Mesopotamia, and there was war between Garmos and Berenice on account of Mesopotamia."²⁶⁹ Eskridge omits the reference to Berenice's "wild and inordinate passions." Even Boswell admits that "Roman and Greek writers appear to have found lesbianism peculiar, even when they accepted male homosexuality as ordinary."²⁷⁰ Indeed, it turns out the French editor and translator of Photius translates the Greek word which Boswell terms "inordinate" as "contre nature" or "unnatural."²⁷¹ Indeed, there is a similar dispute between Henry, the French translator, and Boswell, the historian, about whether the Greek means that Berenice married Mesopotamia, or, more literally, celebrated the marriage of Mesopotamia (to someone else?).²⁷² In any case, the focus is on fiction,

264. See ESKRIDGE, *supra* note 9, at 23.

265. *Id.*

266. BOSWELL, *supra* note 8, at 80 (quoting Martial 12.42) (footnotes omitted).

267. ESKRIDGE, *supra* note 9, at 23.

268. See BOSWELL, *supra* note 8, at 84.

269. BOSWELL, *supra* note 8, at 82; see also BOSWELL, *supra* note 10, at 84 (quoting the same text but with a slightly altered translation).

270. BOSWELL, *supra* note 10, at 82 n.150.

271. BOSWELL, *supra* note 8, at 84 n.113.

272. See *id.* at 84 n.114.

not history.

Ovid, in his *Metamorphoses*, tells the tale of Iphis, a young girl who was raised as a boy because her father wanted a son.²⁷³ Her true sex was concealed from her father, who engaged her at age thirteen to a girl of equal age.²⁷⁴ Ovid writes that:

But what of Iphis? She, with heartache sore,
 Despairing love's fulfillment, loved the more;
 And, doting so, a maiden on a maid,
 Could scarce refrain from weeping, as she said:
 ". . . Surely the gods, if 'twas their true intent
 To spare me, should have spared this chastisement;
 Or else have given me, if they wished to kill,
 At least some known disease, some natural ill.
 Does mare love mare, does heifer heifer woo?
 Hind goes with hart, and with the ram the ewe.
 So mate the birds, and nowhere will you find
 The female loves the female of her kind.
 Would I had not been born! But doubtless Crete
 Which breeds perversions, wants the list complete. . . .
 Seek what is lawful! love as woman may! . . .
 Nature forbids the love for which you sigh, . . .
 For vainly Juno o'er a rite presides,
 Which lacks a bridegroom—where we both are brides."²⁷⁵

The tale has a happy ending, when Iphis is miraculously metamorphized into a male.²⁷⁶ Contrary to Eskridge, the pagan Roman sources demonstrate in abundance that same-sex marriage, far from being viewed as commonplace or casually accepted, was actually viewed as unnatural and dysfunctional.

XIII. EVERY MAN HIS OWN BOSWELL

Professor Eskridge's attempt to enroll history in his brief for same-sex marriage is hardly unusual. It is one more worrisome example of the

273. THE METAMORPHOSES OF OVID 213-15 (A.E. Watts trans., 1954); see also 6-10 OVID'S METAMORPHOSES 124-27 (William S. Anderson ed., 1972) (providing the original Latin text).

274. See THE METAMORPHOSES OF OVID, *supra* note 273, at 213.

275. See *id.* at 213-15.

276. See *id.* at 215.

misuse of history in order to achieve a desired result. Ignorance of, and indifference to, history are not limited to the young. Once a concern in the high schools, and then in colleges, it is now in graduate schools, and in graduates themselves, that both such ignorance and such indifference are displayed.

Professor Eskridge distances himself from John Boswell and that late author's distressing display, by now too well known to be overlooked, of vulgar and other errors.²⁷⁷ But the motto of the moment apparently remains, among many advocates of same-sex marriage: Every Man His Own Boswell. The omissions, distortions, misstatements in his second "historical" chapter in *The Case for Same Sex Marriage* are presented in so ostentiously dispassionate a manner that the unwary reader is likely to be led astray. And even if that reader feels that something is amiss, it is unlikely that he will take upon himself the task of checking virtually every authority cited by Eskridge, from the Hittites onward. The understandable human reaction is simply to accept most of it, possibly with a vague feeling of unease, but otherwise to be helplessly susceptible to their falsifications. A professor of law, an authority on statutory interpretation—might he, could he, would he, amidst all the paraphrenalia of scrupulosity (those footnotes, those rhetorical acts of modifying nuance), misinterpret history?

Though here we feel compelled to borrow Molly Bloom's celebrated three yesses, such an answer can be delivered with full-throated ease only after one has taken on the task of running each of Eskridge's authorities to ground, a task both tiresome and pedestrian. This article attempts to perform this task in the belief that this particular case is a representative one, that in many areas of controversy this kind of thing goes on, unchecked, and that it is always worthwhile to make playing fast and loose with history just a bit harder than it might otherwise be.

Furthermore, one would have thought that readers of Eskridge's summary of history, though they might not have detected every error, would have been hesitant to endorse it after the Boswellian embarrassment. Not true. Judge Posner, for example, who likes to think of himself as both skeptical and hard to please, has described *The Case for Same-Sex Marriage* as "a work of deep and scrupulous . . . scholarship," its tone "unstrident" and "unpolemical," a "model of advocacy scholarship" by "a careful scholar" whose "canvass of historical materials is impressively

277. See ESKRIDGE, *supra* note 9, at 223 n.37 ("[I]ts main charge, that Boswell overreads or misreads some or many of his sources, strikes me as just. It is a charge that has been repeatedly and persuasively made against Boswell's earlier work.").

thorough” despite a few “mistakes of detail.”²⁷⁸ If Judge Posner can be so taken in, what hope is there for the common reader to withstand the self-assurance, the feigned modesty, the rhetorical blandishments, and the slyness of Eskridge’s version of history?

The question is not academic. Eskridge’s historical abuses have had consequences. His first foray into the field was his work on the Appellants’ Brief in the case of *Dean v. District of Columbia* in 1992.²⁷⁹ It was Eskridge who supplied the “Plaintiffs History of Same-Sex Marriage,” which is summarized in the Appellant’s Brief:

There is nothing new about same-sex marriage. Throughout human history—in ancient Egypt and Babylonia, Plaintiffs History of Same-Sex Marriage at 3-6; in the Hittite Laws, *id.* at 6-8; in classical Greece, *id.* at 8-12; in Republican and Imperial Rome, *id.* at 13-15; in the overwhelming majority of the Native cultures of the Americas and Australia, *id.* at 18-24; in most African and Asian cultures; *id.* at 24-35; and in the Western Christian tradition, *id.* at 38-42, 46-53—marriage has included same-sex relationships.

We realize that the rich history of same-sex marriage that we have uncovered may be surprising to some, but that is only because the tradition of same-sex marriage has been suppressed in recent Western history, and is only now coming to light. Another lesson of our history of same-sex marriage is that the resistance of Western culture to same-sex marriage in recent centuries rests upon anti-homosexual bigotry.²⁸⁰

Nothing asserted here is accurate. There is no “rich history of same-sex marriage” that he has “uncovered,” that was “suppressed in recent Western history, and is only now coming to light.” The “resistance” to same-sex marriage is not limited to “Western culture” with its age-old “anti-homosexual hysteria and bigotry,” but extends to almost every culture throughout the world, including even those, such as Tahiti, that provide an officially sanctioned social role for homosexuals, but do not extend society’s official approval to same-sex marriages. Yet in an important case in 1992, Eskridge’s “history” made, in a potted form, its first blithe appearance. Having acquired a baseless plausibility, it continues to be referred to, and to be employed to the same effect, in propagandistic journalism, and in cases before the courts. If you seek Esk-

278. Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?* 95 MICH. L. REV. 1578 (1997).

279. See Brief for Appellants, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995) (No. 92 Civ. 737).

280. *Id.* at 32-33.

ridge's monument, look around.²⁸¹

281. See *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995). The latest such example involves three similar cases currently before the Vermont Supreme Court: *Baker v. Vermont*; *Beck v. Vermont*; *Farnham v. Vermont*. These cases have been consolidated. See *Baker v. Vermont*, No. S1009-97CNC (Vt. filed Nov. 25, 1997). In the Plaintiffs' Memorandum of Law, the section entitled "Historical and Sociological Research Belie the Claim that Tradition Unequivocally Favors Heterosexual-Only Marriage" asserts that "recently published historical materials demonstrate that marriages, or marriage-like relationships, have been recognized and supported between people of the same gender throughout human history." These materials include one *Virginia Law Review* article and a book that contains a chapter on the "history" of same-sex marriage. Both are by William J. Eskridge, Jr.

