

Same-Sex Unions and the Spectacles of Recognition

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Evan Gerstmann, *Same-Sex Marriage and the Constitution*. Cambridge: Cambridge University Press, 2004. xii+222 pp. \$60.00 cloth; \$21.99 paper.

Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights*. Ann Arbor: University of Michigan Press, 2002. x+290 pp. \$60.00 cloth.

Yuval Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States*. Chicago: University of Chicago Press, 2002. xvi+397 pp. \$66.00 cloth; \$25.00 paper.

The boundary between homo- and heterosexuality once stood solidly in our cultural imagination, marked off by a set of assumed differences that were purportedly made manifest in real, material ways. Gays and lesbians, so the story went, were verifiably different from straight people, but gradually, the perceived boundary between the two sexualities has eroded. It has been 30 years since the American Psychological Association cured us of our homosexuality with the stroke of a pen. Despite the enthusiastic application of scientific and statistical technologies, the efforts of researchers such as Dean Hamer, Peter Copeland, and Simon LeVay (just to name a few), have failed to show conclusively that our ears, fingers, brains, or genes actually reveal anything concrete about our choices of sexual partners. *Lawrence v. Texas* (2003) has knocked down *Bowers v. Hardwick* (1986) as well as the remaining

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sodomy laws, expanded the right of privacy to include same-sex sex, and in the wake of *Goodridge v. Dept. of Public Health* (2003) Massachusetts has begun allowing same-sex couples to marry. In contrast to many European nations, gay and lesbian parents in the United States are winning legal victories with increasing frequency, gaining greater access to adoption and child custody despite jurisdictional variation. For that diminishing segment of the population that still desperately wants a clear marker of its sexual superiority the news is not good. Fortunately for them, heterosexuals still have one clearly identifiable social sanctuary where they can remind themselves that they have something that non-heterosexuals do not: marriage. With a minimum of effort and expense, one man and one woman can enter into a relationship with the state that brings about numerous legal benefits, obligations, and privileges. Despite some advances, marriage thus stands as one of the last clearly exclusive, forcefully bounded, brightly illuminated enclaves where gays and lesbians may not tread; it remains for heterosexuals only (or at least, for those who want to appear that way).

The books reviewed in this essay all engage the same-sex marriage debate, but each approaches the subject from a slightly different point of entry. Jonathan Goldberg-Hiller's *The Limits to Union* maps the political aftermath of the 1993 Hawaiian Supreme Court case that nearly allowed same-sex unions in that state. His analysis emphasizes the discourses of civil rights and sovereignty, and he artfully demonstrates that civil rights advances by gays and lesbians are seen as a threat to sovereignty. Specifically, he shows how the possibility of same-sex marriage was successfully depicted as a portent of economic damage, a threat to Hawaiian ethnic identity, and contrary to the goals of labor unions and other organized groups. In *Same-Sex Marriage and the Constitution*, Evan Gerstmann mines the Supreme Court's jurisprudence in order to develop a constitutional framework that would require same-sex marriage. He relies primarily on the Fourteenth Amendment—although the First and Ninth Amendments also figure prominently—to argue that marriage, including same-sex marriage, is a fundamental liberty interest. Yuval Merin's *Equality for Same-Sex Couples* focuses on statutory protections offered to same-sex couples and surveys the different legal forms offered in jurisdictions across the United States and Europe.

Despite varied foci, all three books are methodologically related by an emphasis on the language of law, especially the discourse of rights. In addition, all serve as evidence for a larger argument: Political debates about same-sex marriage rely literally on the rhetoric of sovereignty, civil rights, constitutionality, reproduction, gender, and statutory law, but figuratively they signal a much more potent epistemological change. How we know gender, how we

think the family into existence, and how we maintain a hierarchy of sexual value (Rubin 1984) are changing in fundamental ways. Evidence for this claim is seen in the narrative instability of the debate as a whole. Each advance made by proponents of same-sex marriage is countered with an array of arguments that range from the practical to the hysterical and apocalyptic. As the impracticality and lunacy of these arguments is exposed, opponents grasp for another. The debate as a whole has begun to assume the character of a carnivalesque political spectacle (Bakhtin 1968). Proponents minimize the imagined differences between gay and straight couples, opponents are striving to render an image of same-sex marriage as a cultural and political monstrosity, and the critically inclined worry that we are making a Faustian bargain.

The contortions of this spectacle reveal a reallocation of the building blocks through which we know some fundamental things about our selves and the world. As Foucault makes clear, silences and narrative instability are constitutive components of our sexual epistemology (Foucault 1978; see also Rollins 2004; Sedgwick 1990; Umphrey 1999), and in this instance, the silences and instabilities are unusually virulent. As opponents of same-sex marriage are loudly trumpeting the horrors that might result when two men or two women marry, we are being distracted from the many silences and disjunctures that are constitutive of the mythically natural, heterosexual, family unit.

But how might we make audible what is silenced in such cacophony? Ewick and Silbey offer some assistance: “[t]hrough its organization, society provides us with specific opportunities for thought and action. Through language, society furnishes images of what those opportunities and resources are: how the world works, what is possible and what is not” (1998:39). This language, or more accurately, these schemas—i.e., cultural codes, vocabularies, systems of logic, hierarchies, value structures—provide the materials with which we make sense of our world and of our places in it. Pro-marriage gays and lesbians are working “with the law” and understand “legality as available and multipurpose” (Ewick & Silbey 1998:131; Hull 2003), putting law to use for their own ends and working to narrow the epistemological gap between same- and dual-gender relationships.¹ Many of the arguments advanced by pro-same-sex advocates attempt to clothe gay and lesbian couples with the mantle of legal legitimacy that marriage affords heterosexuals. Same-sex marriage opponents are also working “with the law” to stifle this schematic adjustment, to expand the perceived

¹ I do not mean to suggest, however, that these stories do not also run “before the law,” or “against the law.” Both possibilities are present but work differently and seem less influential.

analogic differences between gay and straight, and to maintain crumbling associations between homosexuality and sexual chaos (Rubin 1984). Importantly, however, these debates require that certain components of our sexual and familial epistemologies remain unknowable. The arguments presented by opponents to same-sex marriage rely on a host of silences that, when broken, reveal the shakiness of their position.

How we *know* marriage reassures us of fundamental things we like to *believe* are uniformly solid—gender and sexual identities, intimate associations with others, relationships to the state and to the production of families and citizens. Across the course of the twentieth century, marriage survived multiple episodes of instability as anti-miscegenation statutes, expanding access to divorce, and increasing levels of reproductive choice were interpreted as threats to the family. In addition to these legal alterations, the symbolic content of marriage has also changed, and yet, because we are willing to overlook so much, the institution is imagined to be static.

In a characteristically elegant moment, Sedgwick contemplates the utility of stating the obvious:

Anyone working in gay and lesbian studies, in a culture where same-sex desire is still structured by its distinctive public/private status, at once marginal and central, as *the* open secret, discovers that the line between straining at truths that prove to be imbecilically self-evident, on the one hand, and on the other hand tossing off commonplaces that turn out to retain their power to galvanize and divide, is weirdly unpredictable. In dealing with an open-secret structure, it's only by being shameless about risking the obvious that we happen into the vicinity of the transformative. . . . These nails, these scraps of wiring: will they bore or will they shock? (1990:22)

At the risk of imbecility, shock, or boredom, it may be transformative to recall a few seldom-articulated points about marriage—points that are too frequently silenced. Indeed, these ideas are woven through the books here reviewed, but are seldom contemplated at any length. Borrowing Sedgwick's format, I propose that we attend the following:

Axiom 1: Marriages survive despite the absence of love and commitment. People have long, miserable, adulterous marriages with partners they detest, and the state does not care if married people love each other or not.

Axiom 2: Same-sex couples can and do publicly express love and commitment to one another. Those affectionate relationships often endure and are respected by our families, friends, peers, and colleagues despite the lack of state recognition.

Axiom 3: Gays and lesbians are no more interested in incest, polygamy, or bestiality than heterosexuals. Neither group has a monopoly on sexual purity or deviance, and the state punishes both types of people for their transgressions.

Axiom 4: Gays and lesbians are capable of having, and often do have, children—it just takes more planning and deliberation, we are less likely to do it inadvertently, and the resulting familial structure is not necessarily dyadic, but then again, neither are many heterosexual families that the state protects.

Axiom 5: Of all the analogies we might draw in this moment of uncertainty, the one that is the most accurate and powerful yet least frequently made is this: In all important respects, gay and lesbian couples are *more* like heterosexual couples than they are like any other sexual/familial grouping.

Silences maintained around these fragments of knowledge organize the political debate about same-sex marriage. There may be others, but in the essay that follows, we can see how these realities are overlooked and ignored in the larger legal tussle taking place. Indeed, I would argue that it is the accuracy and precision of this final axiom that inspires such vitriolic and hysterical debate. If same-sex unions were truly and apparently so different from heterosexual ones, the issue would have died long ago and we would be spared this entertaining period of legal apoplexy.

The narratives chosen to structure this debate vary according to who is involved and where the argument is taking place, but inevitably, opponents of same-sex unions push us onto steep and icy terrain. As Wolfson puts it, “Slippery-slope diversions are what opponents of equality try when they don’t have a good reason to justify ongoing discrimination, the equivalent of a lawyer with no arguments and no evidence pounding on the table” (2004:71). At least three schematic clusters are apparent amid this chaos, each identifiable not only in the world at large, but also in the books here under review: (1) legal discourse and constructions of the state; (2) constructions of the family as a natural and fundamental social institution; and (3) love, romance, and the possibility of cultural imperialism. Inasmuch as these books succeed at mapping order amid chaos, each also serves as evidence for the mapping project I wish to impose. Most apparently, these books rely on and reflect the primacy of legal schemas: Civil rights, sovereignty, constitutionality, and statutes construct the nation, establish its boundaries, and allocate the privileges of citizenship (see Cott 2000; Stychin 1998). A second schematic cluster draws analogies on different terrain, trumpeting the dyadic family relationship, the infertility of

same-sex unions, the sanctity of tradition, and aligning homosexuality with abominations such as incest, bestiality, and polygamy. In these moments, opponents of same-sex marriage portray our unions as unnatural, monstrous, a threat to nature, while heterosexuality is understood as natural, productive, and necessary to human survival. Despite the often cartoonish quality of such assertions, we can see in the books reviewed here that pro-gay forces are (sadly, ridiculously, yet regularly) required to debase themselves and engage with loony arguments.² Finally, the mythic, romantic idealism attendant to marriage is also present. Curiously, while the authors of these books all recognize and reference the love and commitment of same-sex unions, debates within the gay and lesbian community are often more practical. Indeed, some of the most vociferous opponents of same-sex marriage are gay or lesbian, and some of the most prominent figures in our community are, at best, ambivalent about what same-sex marriage may achieve or represent (a position shared by the author of this essay). While straight America may need to be reminded of our humanity, romanticism, commitment, and contributions to society, we frequently do not. Ergo, our debates assume a different tone and tempo. Many of us worry that the price for assimilation is too high and wonder what we might lose in the compromise.

Constructing the Heterosexual State

Jonathan Goldberg-Hiller's *The Limits to Union* germinated from the Hawaii same-sex marriage case, *Baehr v. Miike* (1993), but the author expands and enriches our understanding of that litigation by placing it within a larger analytic frame. Goldberg-Hiller pushes us beyond the anticipated doctrinal, legal analysis by focusing his attention on materials taken from legislative debates, interviews with activists and policy makers, and comparative treatments of similar arguments in other jurisdictions. The book is theoretically sophisticated and focuses on the tensions between sovereignty and the social. His argument is stated neatly at the outset: "I argue in this book that the political majorities aligned against same-sex marriage should be understood as a consequence

² At first glance, it seems idiotic when opponents of same-sex marriage, such as Senator Rick Santorum (R-PA), wonder if allowing same-sex couples to wed will ultimately lead to marriages between people and their dogs, because, after all, animals cannot form legal contracts. For much of American history, however, women were denied the status necessary to form legal contracts, yet they were allowed (indeed, required) to marry. Today, prisoners are denied many of the rights of citizenship but are often allowed to marry. Because logic is not an essential ingredient in this debate, we should not dismiss too quickly the beastly assertions of our opponents. As Justice Byron White showed in *Bowers v. Hardwick* (1986), there can be a great deal of legal power in being facetious.

of two interlocking movements that together reveal the changing character of rights discourse” (p. 7). These movements involve “a reaction against the fast-growing visibility of gays and lesbians and the forms of knowledge and political presentation of the self under which the demand for civil rights has been made,” as well as the combination of “formerly diverse, contradictory, and sometimes dormant American discourses into mutual coherence” (p. 7). As he proceeds to show, the hybrid result unites strange bedfellows, aligning new (heterosexual) majorities who come together in defense of a sovereignty, citizenship, and nation that are imagined as heterosexual, and in opposition to what are seen as undemocratic courts and the too-costly and illegitimate rights claims of an undeserving minority group.

Substantive chapters of the book examine the ways that same-sex marriage debates invoke both sovereign and social discourses. Goldberg-Hiller carefully maps the tactics by which civil rights claims made by gays and lesbians have been depicted by opponents as claims for “special rights” to which we are not entitled, but more important, he shows how extension of those “special rights” has been cast as a threat to other interests. In short, the same-sex marriage debate has become a spectacle whereby a purportedly undeserving political minority has come to be seen as making costly and damaging claims on the polity. When gays and lesbians make rights claims in court, it seems as if civil rights butt up against the privileges of sovereignty and the economic costs fall on society as a whole. When we ask for recognition and protection in the workplace, the costs of our goals purportedly outweigh the benefits for employers and labor unions. When Hawaiian courts threatened to make Hawaii the same-sex marriage capital of the United States, damage to the state’s economic backbone—tourism—was predicted. These rhetorical moves, as Goldberg-Hiller demonstrates, allow the universal promise of civil rights for all citizens to be viewed as an economic drag on society. Formerly disparate groups such as labor unions, Hawaiian nationalists, and religious organizations, were thus drawn together to oppose the possibility of Hawaii becoming the first state to allow same-sex marriages. What Goldberg-Hiller provides here, in the voices of people opposed to same-sex marriage and domestic partnership legislation, is abundant evidence for Duggan’s observation that it is heterosexuals who possess “special rights” (Duggan 1994). Marriage is the special right that heterosexuals do not have to defend, and as Goldberg-Hiller puts it, “the reestablishment of privilege is best obtained by restoring the ontological comforts of silence” (p. 90). The materials examined by the author show how these groups are fighting to maintain a heterosexual identity. The possibility that gays and lesbians occupy and contribute to these political and social spaces is

not only overlooked, but depicted as an encroachment on the fragile privileges of the majority.

It is appropriate that *The Limits to Union* focuses on these tensions, because their salience is rapidly increasing. In the conclusion, the author determines that alternative legal arrangements such as domestic partnerships and civil unions are an attempt to “reduce the power and context of state action, to decrease the political ambit in which citizenship is imagined, and to pull out of the political caldron the atavistic rabbit of separate-but-equal social policy” (p. 222). In sum, the book shows how the possibility of same-sex marriage has had ironic consequences for the discourses of citizenship, sovereignty, and political economy. Discursively, it seems, the state accomplishes more when it does less, and civil rights and social justice are advanced when majority rule (i.e., legislative action) supersedes the costly, disruptive, and dangerous rights claims protected by “activist” judges. Moreover, the work shows “how neoliberal and neocolonial discourses have been deployed to impede political association among lesbians and gays, labor, indigenous, and corporate groups by weakening the appeal of civil rights and social justice” (p. 232). Goldberg-Hiller shows how sovereignty, particularly our conceptions of the nation and the citizen, is imagined as a heterosexual construct, and through his exposition we can see how same-sex unions are discursively enlisted as a threat to the nation, state, citizenship, and sovereignty, all of which are imagined as heterosexual.

Evan Gerstmann’s *Same-Sex Marriage and the Constitution* is tightly organized, and the book is separated into four parts. In Part I, “The Challenge of Same-Sex Marriage,” he considers whether the ban on same-sex marriage would survive a constitutional test of rationality and determines that it would. In Part II, “Marriage as a Fundamental Constitutional Right,” Gerstmann advances the key element of his thesis: “*The Constitution guarantees every person the right to marry the person of his or her choice*” (p. 67, emphasis in original). Chapter 4 traces the constitutional history of marriage and argues that it was one of the first fundamental rights articulated by the Supreme Court. Chapter 5 considers the three main arguments against same-sex marriage: that it is the predicate of the right to procreate and raise children in a traditional family setting; that the ability to have children is the necessary core of marriage; and that marriage is dual-gendered by definition (p. 85). Gerstmann artfully refutes each of these propositions in turn. In Part III, he sets out to argue that legal equality requires some substantive content, and while judges must be cautious about creating new constitutional rights, the right to marry, he avers, is well-established. Moreover, the argument that gays and lesbians are seeking “special rights” fails on his account because, “in seeking to marry, they are seeking

to exercise a right that others enjoy” (p. 128). In Chapter 7, he intends to “lay down the gauntlet to critics of same-sex marriage” (p. 135), asserting that when we apply established criteria for identifying fundamental constitutional rights, the right to marry is clearly among them and should include same-sex couples. Here he outlines four standards for determining whether a right is fundamental: whether it squares with precedent, whether it is inherently connected to other rights, whether government exercises a monopoly power over it, and whether it runs afoul of the political question doctrine (p. 141).

Gerstmann finds that same-sex marriage fits within established precedents; that it is connected to other rights, most important, the right of same-sex couples to protect their children; that the government monopolizes the right to marry; and that it is not a political question. If, as Gerstmann argues, same-sex marriage should be constitutionally protected, it remains problematic to suggest that it should be judicially imposed on a democratic polity unwilling to accept it. He takes up this problem in Part IV. In sum, same-sex marriage truly tests America’s commitment to legal equality and, drawing on the Supreme Court’s attempts to articulate principles in its approach to the First Amendment, Gerstmann asserts that the Court should also find a fundamental right to marry and to extend that right to same-sex couples. “This means that the Court should protect same-sex marriage unless it can articulate a principle that explains the Court’s prior holdings but does not extend to same-sex marriage” (p. 192). Gerstmann’s rebuttal to opponents of same-sex marriage draws liberally from Ninth Amendment privacy precedents and the principles of the First Amendment. In his view, the Supreme Court’s First Amendment jurisprudence is “far from perfect,” but “is a model of clarity compared with the Fourteenth Amendment” (p. 209).

Like Goldberg-Hiller, Gerstmann positions the same-sex marriage debates within a discourse of rights, but here rights-based claims of legitimacy are made against a sovereignty rendered in the language of constitutional doctrine and jurisprudence. Constructing the nation and theoretical sovereignty are less-visible components of the author’s argument, but his focus on constitutional protections for gays and lesbians would lead to the same result: if marriage were a fundamental right for same-sex couples, we too would gain full citizenship, and the heterosexuality of American sovereignty and citizenship would be compromised. Gerstmann critiques both the reasons offered for the marriage ban and also the arguments made by marriage proponents, notably those analogizing the jurisprudence of race and gender to homosexuality. His suspicions regarding the likely success of analogies to gender and race are appropriate and convincingly drawn. How and whether

Supreme Court precedents in these areas might extend to same-sex unions is indeed a dubious matter.

It is curious, however, that in his turn to the First Amendment and the principled jurisprudence he sees there, he is silent on a potentially useful analogy. The First Amendment's protection of religious belief is important because debates about faith are ultimately irresolvable. Religious and sexual identities are more alike than many would care to admit; we might essentialize either, find it located in some segment of our brains or our genes, but the key element of the Constitution's religious protections lies in the constructed nature of religion, a matter of belief beyond empirical demonstration. Like all social constructs, the fact of construction must be perpetually hidden from view at the same time that it is perpetually reified. The state must not express a preference or disproportionately burden one religious creed at the expense of another. Nonetheless, when Gerstmann considers the rationality test for the ban on same-sex marriages, he concludes that "[u]nless we truly believe that no reasonable person could interpret the legalization of same-sex marriage as a positive endorsement of same-sex relationships, there is indeed a rational basis for the same-sex marriage ban" (p. 39). If allowing gays and lesbians to marry is a positive endorsement, then allowing straight couples to marry must also stand as a positive endorsement of heterosexuality.

Gerstmann recognizes that there is a debate afoot regarding the morality of homosexuality, and he quite correctly recognizes that a majoritarian morality would maintain the status quo. The oddity, however, lies with his willingness to accept the substance of the debate as a rational reason to maintain the ban. If we extend the First Amendment analogy to the same-sex marriage debate, the substance of the unresolved questions and the majority/minority distinction should matter less than the fact of the debate's existence. We do not know, and are unlikely to discover, any essential superiority among religions or sexual orientations, but because both are fundamental identity categories, the First Amendment analogy should work by extension of non-preferentialism. The existence of the debate and the numerical supremacy of one group are not rational reasons to maintain the ban, but are instead *the* reason to enforce state neutrality. The state should not, therefore, prefer heterosexuals over homosexuals and offer to them the "special rights" afforded by the marriage contract when those rights are denied to same-sex couples. It would have been interesting to see Gerstmann return to the insights of his own argument, to develop this non-preferentialist position, and to acknowledge that the First Amendment protects not only acts of expression and behavior—which is where homosexuality is often constitutionally

positioned—but also the right to maintain fundamental beliefs about one’s identity, beliefs that cannot and will not likely be resolved in debate (see also Wolfson 2004:172). The terms of the debate and the possibility of democratic resolution are ultimately unimportant. Gerstmann’s reliance on existing regimes of rationality, that is to say established constitutional doctrine, is practical, appropriate, and necessary if achieving same-sex marriage is to become a political reality. We should not ignore, however, the need for first shifting to a less sexist and heterosexist regime of rationality, one wherein the absurdity of the ban is immediately apparent and axiomatic. *Lawrence* may signal new privacy protections for same-sex couples, but the Court’s First Amendment jurisprudence suggests that public displays of our identity are still subject to the whims of a heterosexist majority. If the First Amendment does not protect our right to show ourselves in parades or the Boy Scouts—public spaces that are perhaps marginal to the construction of heterosexual identity—it seems extremely unlikely that the Court will protect our right to associate with and express ourselves in that most sanctified ritual of heterosexual identity performance, the legal wedding.³

In *Equality for Same-Sex Couples*, Yuval Merin surveys laws that regulate same-sex relationships in the United States and Europe. The treatment here is less theoretical than in either of the above, yet the book serves as additional evidence for the arguments of both the other authors. Merin catalogues statutory protections offered to same-sex couples, showing once again how, to borrow Goldberg-Hiller’s words, atavistic attempts to produce separate-but-equal social policy are excluding gays and lesbians from the possibility of full citizenship. These policy strategies he separates into four categories: same-sex marriage, registered partnership, domestic partnership, and cohabitation (p. 2). Same-sex marriage he describes as the most expansive of the four, and it includes the same rights and obligations that come with marriage. This possibility exists only in the Netherlands (and, since the book was published, Canada and Massachusetts, albeit with some legal restriction). Registered partnerships are perhaps the next best thing to marriage, he notes, and are based on the model that marriage provides. These policies offer almost all of the same rights and obligations, but with notable exceptions, such as the

³ See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group* 515 U.S. 557 (1995) and *Boy Scouts of America v. Dale* 530 U.S. 640 (2000). Ironically, the Third Circuit has recently applied this same First Amendment logic to gay-affirmative ends. In *Forum for Academic & Institutional Rights v. Rumsfeld* (2004), the Third Circuit allowed law schools to limit the activities of on-campus military recruiters because the military, as an employer, discriminates against people on the basis of sexual orientation.

denial of access to parental rights and church weddings. Merin describes domestic partnerships as not based on the same model as marriage, since they confer only a few of the benefits and obligations of marriage. Not only are they limited in scope, but they are also often confined to within small geographic boundaries. Cohabitation models are equally limited in both their content and their geographic application and attempt to place cohabiting same-sex couples on the same legal footing as cohabiting opposite-sex couples.

Equality for Same-Sex Couples is at its best in Chapters 2 and 10–12, when the author surveys relevant literatures pertaining to same-sex marriage, considers various theoretical perspectives on its desirability and political feasibility, and articulates the potential barriers to its attainment. In these moments, readers catch glimpses of interesting arguments about the politics of sexuality and the history of marriage. Usefully, he documents prominent changes in the ways we think about the institution: the diminishing view that marriage is about property and procreation, changes in gender roles and the decrease in arranged or forced marriages, and the introduction of the concept of romantic love (pp. 25–6). As these changes have occurred, he argues, same-sex marriage could be viewed as a “natural development, as part of the transformation in Western conceptions of love and marriage. . . .” (p. 30). In sum, same-sex marriage has become politically and socially viable because marriage is no longer viewed as primarily about property, procreation, and gender roles, but instead is about romantic love.

Merin argues that the logic of *Loving v. Virginia* (1967) and *Brown v. Board of Education* (1954) should cause us to reject alternatives to marriage for same-sex couples and to mandate the inclusion of same-sex couples in marriage. Although he admits that neither analogy is new or perfect, he believes that *Brown* is the better analogy because the current state of segregation locks same-sex and opposite-sex couples into “separate but equal” institutions. *Loving*, he thinks, is less useful because it did not lock interracial couples into legal arrangements that were unequal to marriage but excluded them from marrying altogether. His worries about *Loving* echo a position shared by Gerstmann, who argues that *Loving* “is not a good analogy at all,” because it ignores the crucial question of context (p. 47). In short, anti-miscegenation statutes were not stand-alone laws but were key features of a widespread system of racial oppression. On this point, all three authors agree: marriage alternatives are markers of a separate-but-equal social policy that privileges heterosexuals and locks same-sex couples and their children into second-class status. For Merin, *Brown* is more applicable because it dealt with a set of circumstances whereby black children

were relegated to positions of social inferiority when there was no reason for doing so. He writes,

Brown should be interpreted broadly as standing for the tenet that segregation based on an intent to discriminate against an unprivileged group out of prejudice or animus is not only unconstitutional but is also socially and morally objectionable. For the purposes of marriage, there is no relevant distinction between same- and opposite-sex couples; both are similarly situated, just as blacks and whites were similarly situated for purposes of education. (p. 290)

Rather than focusing on the analogy between race and sexuality and developing the argument that both are characteristics unrelated to a person's social status or ability to contribute to society, Merin assumes the point as a premise and shifts emphasis to an analogy between education and marriage. By his reading, these are two social goods provided by the state that should be allocated equally to all persons.

All of these books contemplate the literal arguments being made in the same-sex marriage debate. And as each author shows, there are paradoxical and ironic consequences in these discussions of civil rights, sovereignty, constitutionality, and statutory law. Our conclusion, however, should not rest there; paradox and irony are indeed in evidence, but the fact of such rhetorical inconsistencies should prompt further contemplation. Indeed, as I argue below, these legal discourses are unstable and contradictory precisely because they are merely surface representations of a deeper epistemological battle. It *seems* paradoxical that labor unions and Hawaiian nationalists should oppose the civil rights advances of a minority group; it *seems* contradictory for staunch judicial conservatives to abandon long-held states' rights arguments; it *appears* ironic that same-sex couples may marry in some jurisdictions but may not become parents, while in other places we may become parents but not marry. These apparent instabilities are explained and made coherent, however, when we acknowledge that the animating force behind them all is a desire to maintain the construction of heterosexual sovereignty. Goldberg-Hiller is quite right to locate the debate precisely where he has: civil rights, the constitution, statutory protections—all the legal rhetoric we see surveyed in these books—are being used to construct a heterosexual sovereignty to the exclusion of a homosexual Other. If same-sex marriage becomes a possibility in the United States, the last cultural fortress at which heterosexuals know the superiority of their sexual identity will have fallen. This literally legal discourse is merely a symptom of a fight that is more fundamentally constitutive of how we know our sexual identities and the relevance of gender difference.

Heterosexual Nature: Reproduction, Perversion, and the Promises of Monsters

The rights discourse structuring these books allows us to see how the reallocation of one set of schematic resources operates. Viewed from this angle, gays and lesbians will achieve legitimacy when we gain full admission to sovereignty; we will become citizens of a sexually diverse state. But the legitimacy conferred by the state also draws heavily from and is bound up with a lexicon of the natural: marriage is figured as the natural, heterosexual, site for the production of citizens (see Cott 1998, 2000). These discussions display varied worries about the destruction of marriage and ruination of the family and rely on declension narratives and slippery slopes to render a very limited and specific image of the family as a traditional, historically approved, and natural way of life. Rights discourse constructs citizenship and sovereignty, but these schematic resources also construct nature itself. The family, gender relationships, marriage, and parenting are changing both normatively and descriptively, and the emergent meanings of the new terms are contentious (see Richman 2002). Changes in the family and gender relationships have been alternately described in various circles as evidence of social progress or decline; often it is the fact of change itself that inspires scholarly investigation (see Hacker 2003). Debates about same-sex unions become political spectacles that distract us from the realities of compulsory heterosexuality, and anxiety about social change is then displaced onto gays and lesbians, allowing us to overlook the dangers of heterosexual rape, domestic violence, unplanned pregnancy, and a host of other heterosexually linked problems. Same-sex marriage is depicted as so dangerously contrary to the natural order of things that even nature itself might be undone by the possibility.

It is easy to forget that nature is a social construct and that the discursive tactics deployed to fortify the naturalness of marriage and family are neither necessary nor sufficient to exclude gays and lesbians. As Haraway so elegantly demonstrates, many of the binary divisions we accept as real (human versus nature; nature versus nurture; nature versus the artificial) are inadequate and deceptive. They allow us to imagine that nature is some other place, one into which we humans might drive our SUVs to escape the unnatural spaces of urban life. But the nature to which such arguments hearken is not so much elsewhere as nowhere; truly a different matter altogether (Haraway 1992:295). In her travelogue, Haraway invokes the very potent image of Earth as seen from space. This image of the world in its entirety printed on a T-shirt with the caption "Love Your Mother" reminds the reader that we are all on this planet together (1992:317), that it is one unitary place, yet our

construction of nature is not even knowable without the technology of the satellite with which we might simultaneously destroy our environment and recognize the possibilities for curing the damage. Perhaps the most potent image Haraway invokes is this: We are gestating in the womb of a pregnant monster. The same-sex marriage debates echo the logical tactics that Haraway has identified: the natural sexual being is not so much elsewhere as nowhere, and the gestating debate implicates us all.

We are witnessing a spectacle, a freak show, a fantastic theatrical production through which nature is naturalized, culture is cultivated, and heterosexuality reified at the expense of nonheterosexual citizens: same-sex marriage is the pregnant monster, or perhaps, the pregnant hag (Bakhtin 1968; Pitts 2003). The pregnant monster invokes for us images of the womb, gestation, safety, and the potential for joyous birth; equality, social justice, cultural growth. At the same time, it forces us to notice that both the mother and her offspring are dangerous grotesqueries capable of mass destruction; gender and the family as we currently think them will never be the same again. Marriage itself, and how we know what that means, is changing because this debate exists; marriage is already fundamentally altered whether same-sex couples are allowed in or not. While the political right is committing its energies to making sure that same-sex unions are denied legitimacy and understood as the destruction of the family—i.e., transmogrified—the left is running from the monster (perhaps in stiletto heels). Butler describes this situation with characteristic aplomb: “Over and against this life-giving heterosexuality at the foundation of culture is the specter of homosexual parenting, a practice that not only departs from nature and from culture, but centers on the dangerous and artificial fabrication of the human and is figured as a kind of violence or destruction” (2002:244).

At the same time that these books show us how rights discourse constructs nations, citizenship, and sovereignty as heterosexual, they also provide evidence for another argument: the rhetoric of family and heterosexual reproduction constructs nature. Here, the schematic reallocation under way threatens to make audible the processes by which sexual excess, perversity, and immorality are purged from a symbolically pure heterosexuality. When nature is reconstructed, the natural purity of heterosexuality may get lost in the same way that sovereignty ceases to be exclusively heterosexual when gays and lesbians gain rights and access to citizenship. But perhaps nature is not heterosexual either (see Roughgarden 2004).

Each of these books shows us how our ideas about nature are bound up with conceptions of the family and race. Goldberg-Hiller has captured multiple examples of this phenomenon. Specifically, he documents the ways that rights discourse has been marshaled

in defense of the traditional family that is purportedly being threatened in this moment. “The conservative politics of family values entails a particular forgetting of the wild diversity of forms in which familial relations have been lived and sanctioned in the past in order to create the image of a stable, naturalized, and timeless social institution” (p. 12). This organized forgetfulness facilitates imagining sovereignty in terms that mirror our conception of the family, “a form of order in which social differences have their place” (p. 12). Evidence of this natural hierarchy is woven throughout the book but appears most clearly in two places: in a section of Chapter 2 strikingly subtitled “Lord of the Flies—A Note on Children”; and through Chapter 5, “Hawaiian Wedding Song.”

As his subtitle suggests, the innocence and vulnerability of children are often invoked by opponents of same-sex unions. Because children are denied the right to consent to their own sexuality or to marry, they stand as symbols of proper limitations on citizenship. Moreover, they “serve as surrogates for an embattled majority that has lost its voice in the tactical maneuverings of the legal process” (p. 70). Ergo, children do double duty as signs of the vulnerability felt by same-sex marriage opponents, but they also remind us that there are limited brands of citizenship that might be outgrown—advice opponents like to offer gays and lesbians. Furthermore, these mythological children invoke the fiction that the (heterosexual) family is a safe, desexualized, space, inviting us once again to overlook the myriad ways that such a construction is false (see, e.g., Fineman 1995) and also inviting us to forget that gays and lesbians are, too, family members with parents, siblings, and children whose interests are being squashed by the stronger players on our sovereign, parent-free, deserted island.

In Chapter 5 of *Same-Sex Marriage and the Constitution*, Gerstmann explores three related arguments for maintaining the prohibition on same-sex marriage: (1) the right to marry is a predicate of procreation and child-rearing; (2) childbearing is the core of marriage; and (3) marriage is by definition dual-gendered. Gerstmann considers each of these points in turn by reviewing relevant Supreme Court cases; none of them, he finds, should stand as an argument for maintaining the ban. To summarize, the right to marry is not solely for the benefit of child-rearing, children are not the only reason people marry, and defining marriage as dual-gendered is a tautological, dictionary exercise with little constitutional merit. Gerstmann then turns his attention to the naturalness of heterosexual marriage and opines that “[I]ntuitions about what God or nature intended can be very powerful for us, although they can also be disastrously misleading, and we should be skeptical of them, even when they are our own” (p. 98). Drawing the analogy to miscegenation, he posits that the majority always sees its own status

as natural and deviation as unnatural, and he then turns his attention to the red-herring specters of polygamy and incest. He asks, "If there is a fundamental right to marry that is not confined by tradition, nature, and so forth, what is the logical stopping point? Will society go down the slippery slope to marital anarchy, in which the public will be forced to accept marriages to many spouses or to one's brother or sister?" (p. 99).

Several aspects of this passage merit discussion. First, it so accurately displays Rubin's (1984) domino theory of sexual peril. As she recognized, marital, monogamous, private, reproductive, heterosexual sex occupies the ultimate position atop our hierarchy of sexual value, and any deviation from that norm is fallaciously perceived as a threat to the entire system. Moreover, while we might concede that the fundamental right to marry is grounded in tradition, the inclusion of nature in this list of marital confines suggests that homosexuality is unnatural. When the discussion turns to polygamy and incest, Gerstmann accurately notes that there are significant differences between marrying the partner of one's choice and marrying however many people one might choose. Despite his momentary foray into the genetic risks of incestuous reproduction (which, by the way, implicates heterosexuality and not homosexuality), he concludes that the real reason for maintaining legal prohibitions on incest is to protect children from predatory adults (p. 106). It is strange yet accurate, as Gerstmann shows, that same-sex marriage proponents are called upon to explain why their goals would not open the institution to sexual chaos. What this configuration silences, or distracts us from, is the fact that heterosexual marriage is also a chaotic mess littered with sexual horrors.

Although the family seems to be the primary site for natural schematic readjustment, race and ethnicity also appear threatened. In Goldberg-Hiller's Chapter 5, "Hawaiian Wedding Song," Goldberg-Hiller considers how the family "has an important connection to conceiving the nation, since genealogical reproduction is critical to the reproduction of race and ethnicity in which the colonial nation is conceived" (p. 165). When the heterosexuality of the state conflicts with its racial construction, yet another division appears between groups of citizens. By this logic, a potentially homosexual Hawaii threatens again an already-embattled indigenous people. This imagined destruction is also in evidence in the restrictions European states impose on same-sex couples as parents. Merin observes that while European countries are, in general, more supportive of providing benefits and recognition to same-sex couples, parenting and adoption rights are much more restrictive on that side of the Atlantic. The policy arguments advanced in favor of such restrictions purportedly promote adoption in a multi-

ethnic market. Supposedly, Eastern European countries produce more adoptable infants but are less supportive of same-sex couples, and thus restricting adoption to dual-gendered couples supposedly insures greater access to both infants and adoptive couples. Unconvinced, Merin concludes that “[o]nly prejudice against homosexuals as parents may account for both the ban on adoption *and* the other restrictions on gay and lesbian parenthood in European Countries” (p. 257, emphasis in original). In much the same way that *Brown* undid the legal construction of a naturally superior white race, same-sex marriage carries the potential to undo the legal construction of a legally superior sexual orientation, one that in turn will then produce an appropriately raced population. A sexually inclusive state is instead imagined as a site for producing, in Haraway’s terms (1992), sexually and racially inappropriate/d Others, i.e., monsters.

The Charmed Inner Circle and Cultural Imperialism

Feminist scholarship is marked by a long and well-developed suspicion of heterosexual marriage and recently, similar critiques have been directed at same-sex marriage. Many thinkers are investigating whether the institution is a panacea for any number of social problems, an extension and exacerbation of others, or whether proliferating the available forms of familial definition might be more productive (e.g., Ettelbrick 1996; Fineman 1995; Polikoff 1993). Some queer scholars, many associated with sexual libertarianism, argue that same-sex marriage is necessary for full inclusion in civic life (Goldstein 2003; Kaplan 1997), suggesting that the state is the proper site from which social, political, and cultural legitimacy should emerge. Other queer thinkers are more cautious, if not downright suspicious, about what such institutionalization might portend (Butler 2002; Warner 1999). These authors recognize the potential for damage and oppression that inevitably results from the assimilationist move to position law and the state as the ultimate repositories of legitimacy. More peculiar are policy-driven arguments that assert that same-sex marriage is a necessary form of social validation that will curtail the culture of “multipartnerism” among gay men and thus reduce the incidence of AIDS in that group (Burris 1998; Rotello 1997).⁴ Frighteningly,

⁴ Three sentences, albeit separated by hundreds of words, from the Burris article display a curious inconsistency in logic:

Both deaths and the incidence of new AIDS cases declined overall for the first time in 1996, but not among Black men, women and people infected through heterosexual contact. . . . I suggest that a fundamental cause of HIV among gay men is limited access to social validation of their relationships. . . . I

some of these arguments resemble too closely those made about newly freed slaves after passage of the Reconstruction Amendments: marriage could help tame and civilize a wild and vulgar segment of the population (Franke 1999). Although it is difficult to deny that there are legal benefits attendant to marriage, it is also possible to see it as a form of cultural imperialism: You (straights) want us (queers) to want to be like you, thereby shoring up your belief that your lifestyle choices are right and good; reassurance happens through mimetic flattery.

As Rubin (1984) describes our culture's hierarchy of sexual value, the "charmed inner circle" of acceptable sexual expression is specifically limited. It is: heterosexual, married, monogamous, procreative, noncommercial, paired, relationship-oriented, between persons of the same generation, private, pornography-free, uses only bodies (no toys), and is vanilla (1984:13). These requirements have long been held in place at multiple social locations, "religious, psychiatric, and popular" and, on the whole, such restrictions "function in much the same ways as do ideological systems of racism, ethnocentrism, and religious chauvinism. They rationalize the well-being of the sexually privileged and the adversity of the sexual rabble" (1984:108). Marriage is one of the main techniques by which straight people can reassure themselves that their sexuality and their sex are "good." Same-sex marriage unravels a key component of that identity privilege.

Some of the more curious and fascinating variations among these books is the extent to which the authors do or do not bother to define what marriage actually is, what policy goals it fulfills, and why those goals do or do not require marriages to comprise people from two different genders. Goldberg-Hiller, Gerstmann, and Merin have all written books directed at an audience of legal scholars and yet only Merin attempts to catalogue the legal benefits and burdens attendant to the marriage contract. According to him, states provide several hundred rights and benefits to married couples and the federal government provides 1,049 more (p. 33), and he directs readers to a Web site for a complete listing and cites multiple examples in his appendices. In addition, he states three

nevertheless assume that a rise in committed relationships among gay men will lead to a decline in the number of sexual partners and risky behavior. (1998:417, 423, 425)

Marriage and the social validation it confers are readily available to most women infected with HIV (most of whom were infected through heterosexual sex, although it is impossible to know for sure, given the meager scientific attention given to lesbians with HIV), as well as the other people infected heterosexually. We should wonder, therefore, how the availability of such validation could help decrease new AIDS cases among gay men when the availability of such validation remains correlated with increases in AIDS cases among heterosexuals.

policy goals attendant to marriage: furthering emotional and affective bonds between spouses, facilitating economic sharing, and supporting child-rearing (pp. 33–4). Goldberg-Hiller and Gerstmann mention specific rights and benefits when appropriate to their argument, but neither attempts a complete listing or evaluates the policy goals attendant to the marital contract. Notably, however, the state's interest in child-rearing emerges as important for all three authors. Gerstmann does not position child-rearing specifically as a policy objective of the state, but he considers it as an argument for maintaining the ban on same-sex marriages. After surveying various positions on the matter, he quite accurately concludes that “the real effect of the ban is to prevent children already being raised in same-sex households from the protection afforded by the benefits of marriage, which has the irrational effect of punishing children for the ‘sins’ of their parents” (p. 34).

It would be unfair to fault Goldberg-Hiller and Gerstmann for failing to catalogue the rights and benefits of marriage, or for failing to define it on some epistemological level; neither author sets out to do so. It is telling to note, however, that two of these three authors embark upon analyses of the same-sex marriage debate without articulating exactly what the subject of that discussion is. Is their silence a return to a space of ontological privilege? Obviously not. More likely, their silence is yet another scrap of evidence for my argument: This is a political spectacle wherein fundamental social institutions are being redefined through silence. In sum, we cannot now articulate what marriage is because that is precisely what this larger debate is attempting to determine. All of our discussions about nation and state, reproduction and nature, love and commitment provide us with clues, but ultimately, the conflict lies at a deeper level. This is a debate about the hierarchy of sexuality and the central place that gender difference holds there. All three authors show us how same-sex marriage proponents rely on the language of love to humanize gays and lesbians and to show that we, too, are entitled to the same rights and responsibilities as the other (heterosexual) humans. Oddly, this rhetorical move implies a very particular set of relationships between writer and audience; queers writing for queers need not make such assertions—we know they are axiomatic. The language of love is useful when we assume a heterosexual and oppositional reader. There are important links between the rhetoric of romanticism and the extent to which writers engage debates about same-sex marriage that are taking place within gay/lesbian/queer communities: Love-based arguments take on an assimilationist gloss; liberationists accept romance as a premise and emphasize the benefits and burdens of state regulation and the perils of cultural imperialism.

Clearly, marriage is a social institution that exists at the intersection of the state, citizens, and gender, but if we put love into that equation, it is at best included in the error term. Gerstmann writes, "A major aspect of marriage is its expressive component of love and public commitment. . . . By banning same-sex marriage, the government is prohibiting gays and lesbians from publicly expressing their love and life-long commitment for one another" (p. 146). In fact, love surfaces as a component of Gerstmann's analysis on several occasions: he considers whether Ninia Baehr should have been able to marry the woman she loves (p. 45); that gays and lesbians are being told that our love and commitment are unworthy (p. 59); and that we will come forward as equal citizens when we can marry the persons we love (p. 72). Goldberg-Hiller makes similar references: Michael Hardwick's arrest is attributed to him "making love" to another man (p. 21); domestic partnership statutes broaden "modalities in which individuals find love and meaning" in their lives (p. 79). To his credit, Merin notes that only recently was love added to the stew of marriage: "One of the major changes has been the shift from an understanding of marriage as mainly a relational, unitive, and companionate institution. This is a relatively recent shift, which began in the late nineteenth century and was not articulated by the courts until the past few decades" (p. 30).

My point here is not to criticize either author for the schematic contests they have engaged. Rather, it is to note that each of these books engages and critiques dominant schemas and thus tells us a great deal about the contours of the debate in wider domains than the authors set out to explore. What seems peculiar is that the most obvious rhetorical possibilities remain absent not only from the debate as a whole, but also from these scholarly analyses of it, and that the language of love, however unnecessary, is apparent throughout. When love and romance are imported into the debate, they move us onto potent emotional territory that may convince opponents of our humanity, but legally they are little more than rhetorical flourishes, unrelated to the interests of the state. At best they might buy political ground among swing voters in Ohio. Whether gays and lesbians should work toward marriage at all is a debate that has not been settled within our own community, and the ways that that debate is positioned in these texts illuminates another very important but frequently ignored issue: the degree to which we (queers) should or should not want to be like you (straights) and what that means about the relative social, political, and cultural value and legitimacy of sexual difference. If we obtain access to your most cherished institution, what changes: you, us, or the institution? If we get it, do we have to live it according to your standards, or will you begin to live it according to ours? Are the two really so different?

Of these authors, only Merin discusses in detail the fact that same-sex marriage is not a political goal unanimously supported by the gay/lesbian/queer community. The debate here is about the relationship between sexuality and legitimacy. As Butler quite accurately describes, “[s]exuality is already thought in terms of marriage and marriage is already thought as the purchase on legitimacy” (2002:232). Running through each of these terms—sexuality, marriage, and legitimacy—is a particular conception of privacy that is partially legal, social, spatial, and reproductive, resulting in a closed, circular system, a tautological definition. Butler’s configuration recognizes the complexity and ambivalence of such a process, and its relationship to a potentially damaging state power. She writes, “I want to maintain that legitimation is double edged: it is crucial that, politically, we lay claim to intelligibility and recognizability; and it is crucial, politically, that we maintain a critical and transformative relation to the norms that govern what will and will not count as intelligible and recognizable alliance and kinship” (2002:243). Such ambivalence toward the desirability of marriage as a social institution cuts in more than one direction. If gays and lesbians strive for marriage as it exists now, we simultaneously reify sexist and heterosexist privilege and the charmed inner circle but may also undo the heterosexuality of the state. If we fail to gain the right to marry, we retain our ability to refuse what Warner (1999) calls the politics of sexual shame and also our status as second-class citizens.

Neither Goldberg-Hiller nor Gerstmann spends much time considering this intracommunity debate. Merin does, however, and although his approach has potential, the argument it foreshadows and the assumptions upon which it relies are not quite as clear as they could be and, unfortunately, lapse into the background at just the wrong moment. He forcefully takes on the ideas of feminists and queer thinkers who are less sanguine about the benefits of marriage and the relationship between citizens and the state. Because he sees legal alternatives to marriage as a marker of second-class citizenship, he concludes that arguments in their favor are misguided. Merin references Thomas’s (1992) argument about sodomy laws to underscore the point. Thomas shows with finesse that sodomy laws instantiate a sexual caste system, but there are important differences between sodomy laws and domestic partnerships: the former threatened and punished people (hence Thomas’s argument), while the latter offer at least some benefits to the people who choose to use them (undermining Merin’s point). Ironically, when Merin takes on the arguments of Michael Warner, Nancy Polikoff, and Charles Pouncy—scholars who think critically about same-sex marriage—he asserts that their arguments are “unpersuasive, flawed, and incoherent” (pp. 300–1). But when

feminist and queer thinkers challenge the political movement toward same-sex marriage, they are not questioning whether or not we are capable of forming loving, committed relationships. They are instead questioning the assumption that state sanctioning should be the ultimate reservoir of the social, political, or cultural status afforded to any type of intimate relationship; they are questioning extant allocations of social and political power; they worry about the oppressively sexist nature of marriage throughout history; and they wonder if the move toward marriage further entrenches heterosexuality—its customs and practices—as *the* righteous and true cultural standard. Same-sex marriage may indeed turn out to be a Faustian bargain. Merin does not approach these concerns. For him, it seems, difference is never innocuous but is always a stamp of second-class status for those in the minority.⁵

Merin does not address the subtle nuances of these arguments. He does, however, pepper the reader with questions that are neither simply rhetorical nor answered:

What is unique about being second-class citizens? What are those unique characteristics of the gay culture that same-sex marriage would eradicate? Is it not the case that most same-sex couples, in a world of no state recognition, are treating their partnerships in a manner similar to that of heterosexuals? How, by being outside the institution of marriage, do we “challenge tradition” in a way that is both constructive and advantageous to our community or to society at large? Indeed, some of our relationships may be different from those of opposite-sex couples—differences that are, in my view, irrelevant as far as the freedom to marry is concerned—but does it follow that we should remain legally inferior just for the sake of challenging the norms of the majority or, as Pouncy seems to suggest, just for the sake of being different? (p. 302)

Merin does not really answer these questions, and his use of them indicates that, in his opinion, legal recognition by the state is and should be the gold standard for evaluating the status of intimate relationships. At the center of queer arguments opposed to same-sex marriage are often more fundamental reconfigurations of the family, intimacy, and gender relationships, not to mention suspicion of the state. Why, many ask, should the sexualized dyad

⁵ The value and meaning of sexual difference is always at the heart of the same-sex marriage debate. Although I find it worrisome when people assume or imply that difference and minority status are necessarily badges of inferiority, I find it pitiable when writers state it bluntly. In his book *Gay Marriage*, Rauch writes, “As it happens, I experience my own homosexuality as a (mild) disability” (2004:100). For the record, I usually experience my own homosexuality as a marker without meaning—like being left-handed or tall. On some days, however, I experience it as a gift, a mark of grace that sets me among a very special and talented group of people.

at the center of the dominant conception of marriage remain the only point of entry into state protection? This central point is one that Merin never fully addresses and, in fact, seems to want to avoid, particularly for the ways that it allocates social and political power.

Indicative of this avoidance is the sudden and unexpected appearance in his argument of the notion of choice. In one moment, queer thinkers are scolded because they “ignore the fact that domestic partnership is a product of political compromise envisioned and created by the heterosexual majority for the purpose of maintaining the segregation of homosexuals and warding off an ultimate ruling by a court in favor of equal marriage rights” (p. 301). Here, same-sex couples have limited choices imposed by a heterosexual majority. One page later, after he has denounced the queer perspective, Merin informs us that, “segments in the gay community who oppose same-sex marriage would not be forced to join the institution; they would have a choice. . . . Why should those of us within the gay community who are in favor of same-sex marriage be forced by intracommunity opponents not to have this choice?” (p. 302). Curiously, the social power to deny choices to gay and lesbian citizens seeking marriage seems here to reside with queer marriage opponents. Merin is asking interesting and important questions, and his position is quite clear; what is less satisfying, however, are his assumptions about social power, the value of a queer critique, and the oblique relationship between his opinions and those of scholars whose concerns differ from his.

Conclusion

Of these three authors, Goldberg-Hiller is least apparently committed to the specific policy goals of one side or the other. Because his project was to analyze the debate as a whole, the appearance of advocacy would seem out of place. Nonetheless, readers will catch glimpses of pro-gay sympathies in his elegant prose, as when he describes marriage alternatives as atavistic, as well as in the works that frame his thinking and give weight to his endnotes and bibliography. Gerstmann and Merin present clear arguments in favor of same-sex marriage, and their advocacy is unmistakable. All three authors have succeeded at the tasks to which they set themselves, and, at the end of the day, each provides important insights into how this debate is taking shape in legal discourse.

In conclusion, however, I would like to return to the axiomatic statements presented above and to contemplate how each book provides evidence for, but ultimately dances around, the possibility that this debate is less about rights, constitutional principles,

statutory protections, constructions of the state, or the value and composition of same-sex relationships, than about the meaning and value of even more deeply entrenched identity categories—partially gender, but largely heterosexuality and the privileges attendant thereto. The process at work mirrors the acts of ritual purification sociologists identified generations ago (see, e.g., McIntosh 1968). Heterosexuality remains pure only insofar as homosexuality retains its place as an unnatural threat to the family and the state, an option to be tolerated, but not legitimated, celebrated, or promoted. It is the importance of heterosexuality that is at stake.

Goldberg-Hiller makes an especially potent observation when he notes that this debate has undone the privilege of silence surrounding heterosexual marriage. Ample evidence exists to show that heterosexual marriage is not living up to the mythical levels of love and commitment so central to existing constructions of that institution. Half of all marriages end in divorce; adultery is becoming as common among women as it is among men; violence, abuse, and accidental pregnancies continue. Thus, when same-sex unions are positioned as more threatening to marriage than these deeply entrenched problems, the claim sounds distinctly disingenuous. Moreover, despite the fact that our marriages are not recognized on a national level, same-sex couples regularly take steps necessary to protect our financial interests and our custodial relationships with our children, and we achieve far greater levels of recognition among our own communities and social networks than opponents would like to believe. Gerstmann is especially insightful when he points out the sad fact that our children are treated as second-class members of society because we are gay or lesbian. Finally, the analogic shuffling of this debate becomes truly spectacular when proponents of same-sex marriage are forced into the absurd position of having to show that our unions are not the threshold of a slippery slope littered with incest, bestiality, bigamy, or any number of other sexual atrocities. On the one hand, such an alignment silences the fact that these issues are just as likely and common among heterosexuals, but worse, it squelches the more accurate observation that our unions operate most similarly to heterosexual ones. As Yngvesson (1997) observes, adoption, kinship, parenting, and our conception of the family are regulated in significant part through silences, disjunctures, and contradictions. What we do not talk about and what we refuse to know are crucial to maintaining our conception of the natural, heterosexual, family. The marriages of same-sex partners schematically disconnect these terms, and while it may not signal the death knell of heterosexuality, the privileged position of that identity construct is undoubtedly at risk. Discussing same-sex marriage in the discourses of law,

constitutionality, and statute is necessary, but the real battle being fought is epistemological, and as these books together show once again, the terms of the debate are labile, unstable, and volatile, and they simultaneously construct a homosexual other as well as a very specific form of heterosexuality (see Halley 1993). How we know some very important things about ourselves is changing at a deep, symbolic level, whatever the legal outcome of these debates. Gerstmann and Merin have provided useful analyses of how change is taking place in the practical rhetorics of the law, but Goldberg-Hiller shows how these discourses are only one part of the matter. The deeper schematic changes taking place are reconstructing sovereignty, and also gender, the family, and nature itself.

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