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Fear of the Wandering Gay: some reflections on citizenship, nationalism and recognition in same-sex relationships

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Abstract

Throughout the history of the modern state, homosexuality has been a legal category, and not simply a medical or a psychiatric one. Fear of that legal subject manifests itself in law and policy not only about 'the family' but also about nationhood and citizenship. This is an article about this fear of the 'Wandering Gay', about the ways in which this fear has influenced domestic and international law regarding recognition in same-sex relationships, and about ways in which it can be overcome. I begin by introducing the Wandering Gay as a hidden driving cultural concept behind a state's reluctance (and in some places, outright objection) to recognise same-sex relationships. I then compare American and Israeli immigration policies concerning immigrants' sexuality, and discuss the different focuses of each system: while American policy (prior to its reform) was mainly concerned with 'sexual deviancy', Israeli policy was concerned with otherness, particularly non-Jewishness, in general. However, as I argue, homosexuality is one way in which individuals are 'othered' by Israeli immigration policy, since they cannot acquire legal status based on their marital status. I then contend that marriage is being used as a weapon against LGBT individuals, and that this is done from within a discourse that elevates marriage to a right that only heterosexual citizens are entitled to. I argue that marriage is used as a means of discrimination against minorities, and I question whether the proper solution to this violation of human rights is indeed to add more and more minorities to the privileged class of those who can marry, thus equipping them with the weapon of marriage to use against others.

I. Introduction

On Saturday night, 1 August 2009, 26-year-old Nir Katz, a volunteer counsellor at the community centre for gay youth in Tel Aviv, was murdered by a masked gunman who entered the centre during a meeting of his group.[1] His partner, Thomas Schmidt, a German citizen, was in the process of gaining permanent residency in Israel based on his relationship with Katz. However, on 15 September 2009, forty-five days after his partner's murder, Schmidt's request to carry on with this process was denied by the Israeli authorities: 'According to procedure, because of the cessation of the process (despite the unfortunate circumstances), you should leave the country.' Mr Schmidt was given fourteen days to leave, and was notified that failure to do so may lead to

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1 Liz Trobishi, aged 16, was also killed in the attack, and fifteen others were injured.

deportation. Following the intervention of the Association for Civil Rights in Israel (ACRI), Mr Schmidt's permit was extended, and his request for permanent residency remains pending.[2]

This is an article about fear of the Wandering Gay, about ways in which this fear has influenced domestic and international law regarding recognition of same-sex relationships, and about the ways this fear can be overcome. Throughout history one can identify an 'impulse to intolerance' towards minorities, running through lines of race, ethnicity, gender and sexuality (Herring, 2003, p. 121). As a result of this impulse, lesbian, gay, bisexual and transgendered (LGBT) individuals have been the targets in many states of violence (p. 122) such that they are forced to seek asylum in other, more tolerant countries (Livnat and Ben-Dor, 2010).[3]

The impulse to intolerance can also take more benign and less bloody forms, such as discriminatory legislation that, at least on the face of it, has nothing to do with physical violence. Such are the cases of legislative measures designed to nullify anti-discrimination provisions meant to protect LGBT individuals from discrimination in employment and housing (Herring, 2003, pp. 83–84), or the more overt American Defense of Marriage Act of 1996 (hereinafter DOMA), declaring that '[n]o state (or other political subdivision within the United States) needs to treat a relationship between persons of the same sex as a marriage, even if the relationship is considered a marriage in another state' (p. 92).[4] Most recently, DOMA was utilised to deny immigration benefits to a married gay couple from San Francisco. The US Citizenship and Immigration Services denied Anthony John Makk's application for permanent residency as a spouse of an American citizen. Makk, an Australian citizen, is the primary caregiver of his AIDS-afflicted husband, Bradford Wells (Lochhead, 2011). As I elaborate below, DOMA is perhaps the purest embodiment of the cultural fear of the Wandering Gay. Yet, '[o]ne might then wonder', writes Nussbaum, 'why homosexuality is singled out for special attention … We can also see that people are far more eager to target others, especially a relatively powerless minority, than they are to work on their own sins and errors …' (Nussbaum, 2008, p. 336).

Mobile populations and globalisation raise the question of recognition of a same-sex relationship legally sanctioned in one country, by a country which does not allow such marriage within its own legal system.[5] Consequently, variations of the impulse to intolerance might collide as LGBT individuals move from country to country, and as a result add the component of migrant to their identities. People migrate for a variety of reasons. Some of them do so voluntarily and others are forced out of their countries due to economic hardship or persecution. Others do not migrate but relocate only temporarily because of their employers' demands. Although forced migration of the poor or the persecuted and middle-class immigration or tourism are, of course, materially different, many of the problems faced by migrating LGBT individuals are similar. This article focuses, however, on instances of the enforced dislocation of gay men.

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2 This description is based on a High Court of Justice petition filed by ACRI concerning the Ministry of Interior Affairs' policy regarding the status of non-Israeli, unmarried partners of both same- and different-sex relationships. The petition was denied because of what the Israeli High Court of Justice deemed problems of standing. HCJ 9600/09 *The Association for Civil Rights in Israel v. Minister of Interior Affairs*, filed 30 November 2009, denied 2 February 2010 (unpublished decision, on file with author).

3 For example, criminalisation of male homosexual acts was in force in Northern Ireland as late as 1982, *Dudgeon v. United Kingdom* 4 (1981) EHRR 149. The criminal ban was removed in Israel only in 1988, and in some states in the US it was not removed until 2003; *Lawrence v. Texas*, 539 U.S. 558 (2003).

4 Section 1 of Public Law No. 104–199, 110 Stat. 2419, 1 U.S.C. § 7, 28 U.S.C. §1738C. Section 2 provides that '[t]he federal government defines marriage as a legal union exclusively between one man and one woman'. Recently, Massachusetts has challenged the constitutionality of DOMA, arguing that regulation of marital status should be left to the states, without federal intervention (Associated Press, 2010).

5 This applies for Americans in non-immigration contexts, because not all states recognise same-sex marriage.

The article proceeds as follows: In Section II I introduce the Wandering Gay as a hidden driving cultural concept behind a state's reluctance (and in some places, outright objection) to recognise fully same-sex relationships. In Section III I compare American and Israeli immigration policies concerning immigrants' sexuality, and discuss the different focuses of each system: while American policy (prior to its reform) was mainly concerned with sexual 'deviancy', Israeli policy has been concerned with 'otherness', particularly non-Jewishness, in general. However, as I argue, homosexuality is one way in which individuals are 'othered' by Israeli immigration policy, since same-sex partners cannot acquire legal status based on their marital status.

Finally, in Section IV I argue that marriage thus becomes a weapon to be used against LGBT individuals, and that this is done from within a discourse that elevates marriage to a right to which only heterosexual citizens are entitled. I argue that marriage is used as a means of discrimination against minorities and I question whether the proper solution is to add more and more minorities to the privileged 'marriageable' class or whether equipping more people with the weapon of marriage will only increase the suffering of others.

II. Introducing the Wandering Gay

According to medieval Christian folklore, on his way to the Crucifixion, a Jewish shoemaker named Ahasver mocked Jesus. As a result, Ahasver was punished by being forced to wander: he was to wander until the Second Coming (Anderson, 1991). In resonance with this legend, and whether imposed from the outside or self-imposed, many Jews have felt homeless and rootless in their own countries. They were persecuted, alienated and humiliated, regardless of their social and cultural standing. Gustav Mahler, for example, portrayed himself as homeless (Beit-Hallahmi, 2002, p. 6).

Drawing on the legend of the Wandering Jew, I would like to suggest that there is another cultural archetype that is punished by forced wandering: the Wandering Gay. He is forced out of his home when his sexual orientation is exposed and he is forced out of his country by social and legal persecution. But he is also forced to wander the periphery of law and society. 'Forced outside of society's bounds by a society hoping to protect itself', writes Marc Spindelman (2011, p. 192), 'homosexuality is cast as sexuality that's insatiable, indiscriminate, violent, wild, untamable, and untamed.' Since antiquity, the homosexual's place in society is 'outside' (Hay, 1996, pp. 164–65). Although he has been less visible as such in Western culture than his elder brother the Wandering Jew, fear of his presence haunts both law and culture. That fear is closely related to antisemitism; indeed, homophobia and antisemitism can join together to form the ultimate predator (Triger, 2004, pp. 77–138). In 1936, for example, the French satirical journal *Le Charivari* published a caricature depicting the French Jewish socialist Prime Minister Léon Blum as a transsexual Wandering Jew (Mosse, 1996, pp. 68–69). Marcel Proust saw both Jews and homosexuals as 'the accused race'. For him, both were sources of 'incurable diseases' and of 'guilt' (Proust, 1993, p. 22; Hassine, 1994, pp. 147–53). Proust developed his antisemitic discourse in *In Search of Lost Time* in order to expose antisemitism's falseness (Hassine, 1994, p. 197), while pointing to the common fate of both Jews and homosexuals: to live among the nations and give up separatist aspirations (Beit-Hallahmi, 2002, p. 18).

Scholars of anti-Judaism in Christianity showed that one of the reasons for hatred of Jews was their refusal to convert, thus nurturing doubt in the hearts of Christians who believed in redemption through conversion (Tal, 1975). The Wandering Jew, despite his terrible punishment, resolutely remained a Jew. Could it be that for heterosexual society the Wandering Gay raises similar fears? He also refuses to 'convert' and thus remains a live, wilful reminder of an alternative sexual order.

Like the Wandering Jew, the Wandering Gay also crosses borders, both literally and metaphorically. LGBT people have escaped persecution in their homelands, toured other countries

and cultures known to be more favourable and tolerant, and fallen in love with locals or with other tourists. 'The connection between homosexuality and geographic mobility is actually much less arbitrary as well as much more complex [than the traditional depiction of gay travel as "escapist"]', as Bleys observes (1993, p. 166). He argues that 'the experience of homosocial or homosexual sensibility' is closely linked to travelling, and it stems not only from social or legal persecution in the country of origin (although this is undeniably a key motive).

In addition, contemporary cultural events such as the Eurovision Song Contest have demonstrated the existence of cross-cultural and cross-national solidarity between gays and lesbians throughout Europe in showing how political voting patterns have been breached and replaced by other forms of affiliation, such as sexuality (Gross, 2003; Tobin, 2007; Lemish, 2007). The Wandering Gay has thus become international in more ways than one, and his presence can increasingly be felt as it becomes inter- and transnational.

When he travels or immigrates, the Wandering Gay often faces anti-homosexual discourse similar to the discourse justifying racial segregation in the United States or antisemitic persecution in Europe. He becomes an outsider, perceived as a significant and urgent threat to the family and thus to the nation. Both sexual and racial minorities were characterised as hypersexual and sexually corrupt (Richards, 1998, p. 210; Stychin, 1998, p. 148). Further, Gilligan and Richards (2008, pp. 231–32) have shown that patriarchy is also invested in the sexualised perception of the racial other.

Turn-of-the-century European psychologists claimed that 'primitive' cultures are predisposed to sexual corruption, and more specifically, to homosexuality. In their eyes, such a cultural tendency signified cultural underdevelopment, and placed these 'primitive' cultures lower on the evolutionary scale. Semites, according to these theories, were particularly inclined to homosexuality. Indeed, on both sides of the ocean, Western culture merged racial outcasts with sexual outsiders, viewing racial outsiders (blacks, Jews, Chinese and others) as hypersexual as well as effeminate (Bleys, 1993, pp. 169–75). As Nussbaum observes, '[s]ocieties have felt strong disgust toward many people and practices, including members of lower castes and classes, foreigners, people with disabilities, people with physical deformities, Jews, and people who contract interracial marriages' (Nussbaum, 2010, p. 11).

More than this, however, national identity was perceived to be threatened, then, by the racial and the sexual other. Although different in many respects, immigration policies based on racial and sexual profiling have similar properties and recurrent patterns. From constitutional democracies such as the United States, Australia (Stychin, 1998, p. 148) and Israel (Triger, 2009), to racist and totalitarian regimes such as apartheid South Africa (Stychin, 1998, pp. 68–69; Yuval-Davis, 2003, p. 24) and, perhaps most notoriously, Nazi Germany and its allies, sexual 'deviancy' was connected with racial otherness and then with sex/marriage to justify the persecution, discrimination and exclusion of racial and sexual minorities. This comparison is not meant to compare legitimate regimes with Nazi Germany nor to essentialise the concept of the nation, but rather to point out the similarities between an array of political ideologies and regimes when it comes to immigration policy.

It has been said that Afrikaner nationalism, for example, appointed White women as keepers of the (White) nation by their giving birth to as many 'pure' White babies as possible, while White homosexual men threatened the survival of the nation, because they would not propagate and they undermined sexual mores (Stychin, 1998, p. 69). The idea of common destiny (future oriented), and not only common past, is crucial to the construction of 'nation' (Yuval-Davis, 1997, p. 19), and to how homosexuals become perceived as significant threats to it.[6]

6 This fits also within the framework of 'masculinist protection' that Iris Marion Young (2003, p. 3) has developed to explain the relationship between the state and its citizens.

On the democratic end of the spectrum, in Australia, for example, the nation was constructed in gendered and raced terms as well, in which White women had a central place in the 'construction of racialized sexual politics in familiar colonial terms' (Pettman, 1995, p. 72). As Pettman observed, Australian nationalism

> '. . . calls up a fraternal contract – no longer rule of the fathers, including over the sons, but rule of the adult men . . . Its public persona is a brotherhood summed up as mateship, an ideological representation of rough egalitarianism and "innocent male virtue" that disguises the class-ridden and homophobic nature of Australian society. It is a fraternity which excludes Aboriginal men and male migrants from non-English-speaking backgrounds, and women from all backgrounds.' (Pettman, 1995, p. 67)

The Wandering Gay thus threatens the linked concepts of 'family' and 'nation'. Many countries responded to this perceived threat by promulgating exclusionary immigration laws and policies. In the next section I discuss such policies and their connection to the Wandering Gay, focusing on American and Israeli immigration laws.[7]

III. Recognition in same-sex relationships, immigration and the war against the Wandering Gay

Different countries have taken different approaches to LGBT immigration. In this section I focus on two case-studies: the United States and Israel. While US policy concerning LGBT immigration was focused on the individual, attempting to classify and expose homosexuals before they entered the country, Israeli policy focused on religious and familial status, and thus on the face of it did not ban homosexuals per se.

American immigration policy and the Wandering Gay

During the first three decades of the twentieth century, US immigration authorities were concerned about the growing number of European 'pederasts' and male prostitutes 'flocking' to the United States. Immigrant Inspector Marcus Braun noted in his 1909 report the emergence of 'a lively and frequent intercourse between the American and European male prostitutes, as well as among the Pederasts of the two hemispheres' (Canaday 2009, p. 19). This happened because of two phenomena: male prostitutes who were being paid off by their wealthy European male clients to immigrate to the US so that they would not be able to blackmail them in their home countries, and American tourists, who had love affairs while in Europe with local 'pederasts', and wanted their male lovers to return with them to the US (pp. 19–20).[8] Inspector Braun, who studied the problem, advocated citizenship annulment whenever the authorities discovered that male or female prostitutes had been able to become citizens of the US. He also recommended that the authorities invalidate the citizenship of immigrants proved to be 'pederasts or sodomites', and have them deported (p. 20).

7 Here it is worth mentioning the absence from the immigration policies surveyed above of a parallel fear of the Wandering Lesbian. For more on the historic invisibility/absence of lesbians from public policy, law and public life generally, see, e.g, Cantarella, (1994, pp. 3–5).

8 Interestingly, this was not the first time Americans were concerned about the sexual purity of immigrants. The immigrant – heterosexual or homosexual – was considered hypersexual and a threat to morality. For example, mid- to late-nineteenth-century Americans regarded Irish and German immigrants as 'simian', 'savage' and 'sensual'. Some native-born Americans launched purity movements, believing that Irish women would be most prone to mingle sexually with Black men (Eskridge, 2008). For further elaboration on homosexual tourism, its origins and unique features, see Bleys (1993).

The development of the law in the latter part of the twentieth century is a fascinating exemplar of the crossroads of citizenship, sexuality, marriage, race and class: the rise of the bureaucratic state, with its development of intricate administrative apparatus intended to screen out undesirable immigrants based on physical as well as psychological traits, arose around the same time as federal authorities in the United States began to monitor homosexuals (Canaday, 2009, pp. 20–21). Although originally designed to screen immigrants to the United States, this logic and these methods were applied later in the military and by the welfare bureaucracy, with the authorities' belief that proper screening and classification methods could identify, remove and sanction perversions (p. 21). Explicit regulations banning homosexual immigrants were applied by American immigration authorities only in the early 1950s, but exclusion and deportation were commonplace from the 1920s, despite the absence of official guidelines (p. 21). Further, Eskridge (1999, pp. 35–36) reveals that while working-class immigrants would be deported if engaged in homosexual sex with male prostitutes, well-to-do immigrants were not.

During the first half of the twentieth century, homosexual immigrants were usually referred to by immigration authorities as 'degenerates', grouped with the poor and people who had anatomical defects (Canaday, 2009, p. 22). Regarded as degeneracy and sexual 'perversion', homosexuality was also associated with racial inferiority and primitivism. Battling these phenomena resonated also with eugenic principles which were on the rise during the first three decades of the twentieth century (Canaday, 2009, p. 29; Chauncey, 1989, p. 100). Believing homosexuality to be hereditary, sexual 'perverts' needed to be barred from entering the country, so that its carriers would not pass it on to their descendants (Canaday, 2009, p. 30).

In 1952, the American Congress enacted the McCarran-Walter Act, overtly targeting homosexual aliens in a provision dealing with 'persons afflicted with psychopathic personality'.[9] American immigration authorities understood this section as excluding all '"homosexuals and sex perverts" as per se psychopaths' (Eskridge, 2008, pp. 156–57; 1999, p. 69).[10] While removing racial restrictions on naturalisation, this new Cold War era law explicitly excluded homosexuals from entering the country or staying within its borders. 'Immigration law', writes Canaday (2009, p. 217), '... targeted the homosexual as an excluded figure against which a citizenry supposedly unified along racial and class lines could define itself.' Interestingly enough, although the law upheld the national origins quota system according to which immigrants from northern and western Europe were preferred, it also, for the first time, allowed for broader, quota-free husbands and wives reunifications (pp. 217–18). In other words, while for the first time in American immigration legislation (as opposed to de facto policy) the homosexual was barred from entrance, the heterosexual couple enjoyed unprecedented increased recognition and protection. According to unofficial estimates, during the 1970s about 2,000 people per year were excluded from the United States for homosexuality (pp. 222–23). Most of the excluded were intimidated into 'voluntary' departure, and thus were not classified as deportations (Anon., 1959, pp. 931–32; Canaday, 2009, p. 223). It is also interesting to note that the vast majority of the excluded homosexuals under the McCarran-Walter Act were men (Canaday, 2009, p. 232). Note that although the McCarran-Walter Act excluded LGBT immigrants whether single or partnered, its underlying rationales were deeply rooted in the concern about (real or perceived) intercourse between citizens and LGBT immigrants.

American immigration authorities refused to allow homosexuals into the country even after the removal of homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in

9 McCarran-Walter Act (1952), s. 212(a)(4), quoted in Eskridge (2008, pp. 101–102).

10 Interestingly, late-nineteenth-century American sexology defined homosexuals as suffering from a 'general mental state' of 'the opposite sex' and not as people who are attracted to or have sex with people of the same sex (Kiernan, 1892, quoted in Katz, 1995, pp. 19–20).

1973 (Canaday, 2009, pp. 249–52; Eskridge, 1999, p. 133). They even, as late as 1979, detained a man wearing a gay pride button at the San Francisco port of entry (Canaday, 2009, p. 250). In 1980, the Immigration and Naturalisation Service adopted a policy similar to the military's 'don't ask, don't tell, don't pursue' policy (pp. 252–54) and only in 1990 did Congress repeal this immigration exclusion (Eskridge, 1999, p. 134; Yoshino, 2006, p. 41).[11]

Israeli immigration policy and the Wandering Gay

In contrast with American immigration policy, Israeli immigration policy has been focused on the non-Jew rather than on the Wandering Gay. Homosexuals are not banned from immigrating to Israel for being homosexuals, so long as they are Jewish. Israeli immigration law automatically gives Jews and their relatives (up to a specified degree) the right to Israeli citizenship, based on the principle of Israel serving as a safe harbour for all Jews, in the wake of the Holocaust.[12] Therefore any discussion of LGBT immigration under Israeli law is anecdotal, but there are some consequences for LGBT individuals that are not coincidental.

For the most part, for Jews and their non-Jewish partners, discrimination in Israel is based on marital status rather than on sexual orientation or other traits; acquisition of legal status in Israel is much easier when the couple is married and both spouses are Jews (Triger, 2009). Israel has recognised both non-marital and same-sex relationships, provided both partners are Jewish (Gross, 2001), as well as registration of same-sex marriages performed abroad.[13]

However, immigration policy discriminates against unmarried mixed couples, whether gay or straight: if the Israeli partner dies, the non-Israeli partner can be deported.[14] Since same-sex couples cannot marry in Israel, this discriminatory policy targets them, among all groups of those who cannot marry under Israeli law (such as spouses of different religions). By linking marital status, religion and immigration, Israel has in this way broadened the class of people who cannot become legal residents or citizens (Triger, 2009), and revealed that the attempt to deport Thomas Schmidt discussed above is part of a broader picture.

Immigration policy and marital status recently collided when a family court judge refused to grant permission to perform tissue typing tests for twins born to a gay father in a surrogacy process in India.[15] Stating that the petitioning father could be a paedophile or a serial killer, Judge Marcus, an Ultra-Orthodox immigrant from England, effectively banned the father and his two-month-old twins from entering Israel because, without the test, the father's paternity could not be established and the twins could not become Israeli citizens. Only after appeal to the Jerusalem District Court and as a result of a public outcry against the judge's outright homophobia, did he award, in May 2010, the requested injunction.[16] It should be noted that, in previous cases, other judges have approved tissue typing tests, and that this is probably the first time a judge denied such a request. However, it shows the inconsistency of Israeli policy regarding recognition in same-sex families and their immigration status: Israeli Family Court decisions are not binding precedents; only Supreme Court decisions are binding. Therefore, LGBT individuals under Family

11 The McCarran-Walter Act remains in force today, albeit without its sexual orientation-based discriminatory provisions.

12 Declaration of the Establishment of the State of Israel, 1 Official Gazette, Iyar 5, 5708 (14 May 1948); *Law of Return*, 1950, 4 Laws of the State of Israel 114 (1949–1950).

13 HCJ 3045/05 *Ben Ari v. The Population Administration* (November 2006).

14 HCJ 9600/09 *The Association for Civil Rights in Israel v. Minister of Interior Affairs, supra* note 2. This is true also regarding couples who have been married for less than three years.

15 Family Court Case 28240/09 *D.G. v. Attorney General* (March 2010).

16 Family Court Appeal 14816-04-10 *John Doe v. Israel* (May 2010).

Court jurisdiction are dependent upon the presiding judge's personal convictions concerning the recognition in LGBT relationships. Israeli legal policy concerning LGBT persons in general is characterised by a contest between a homophobic monopoly and pockets of liberalism. Sometimes liberal views break through, but in many cases this progress is unstable and unsustainable because of the religious monopoly over much Israeli family law (Raday, this volume).

IV. Marriage as a weapon: citizenship, gender and sexuality

The countries that currently allow same-sex marriage are the Netherlands, Belgium, Canada, Spain, South Africa, Norway and Sweden. Several states in the US allow same-sex marriage as well: Massachusetts, Connecticut, Iowa, Vermont, Maine, New Hampshire, New York and the District of Columbia.[17] France and Israel[18] recognise, to various degrees, same-sex marriages that were performed abroad while not allowing domestic same-sex marriages. Other countries have chosen a different path, creating special institutions for same-sex couples such as 'civil union', 'civil partnership' or 'registered partnership', some of which are equal to civil marriage while others award the partners fewer rights and benefits (Wintemute, 2005, p. 205).

In this section, I do not intend to systematically discuss the connection between citizenship, gender and sexuality, but rather to focus on one part in the link: marriage. I will also not examine here arguments for and against same-sex marriage. Countless scholars and activists have already done so in recent years (Sullivan, 1997; Lehr, 1999, pp. 14–44; Wintemute and Andenaes, 2001; Josephson, 2005, pp. 271–74). Instead, I would like to offer another way to look at the issue of same-sex marriage (and recognition in same-sex relationships in general), and that is through the lens of citizenship and the way it interacts with the concept of the nation-state.

The weapon of marriage

Marriage has always been perceived by conservatives as a national interest: therefore in most countries naturalisation does not come automatically with marriage. Couples made of a citizen and a non-citizen must first prove that the marriage is not fictitious. Moreover, countries that apply religious marriage law, such as Israel, effectively restrict marriage of citizens and non-citizens only to intra-faith marriages. Intermarriage is possible (in Israel, for example – only if performed abroad), but it is much more difficult for the couple then to prove that their marriage is genuine. Israeli authorities presume that if a Jewish citizen of Israel marries a non-Jew non-citizen, then the marriage is most likely fictitious (Triger, 2009).

Controversies over the legal regulation of marriage are not new. Anti-miscegenation laws existed in the US for decades and were the last of the Jim Crow laws to be struck down by the US Supreme Court in 1967 (Cooper Davis, 1997, p. 66; Wintemute, 2005, p. 203). In doing so, the *Loving* Court stated that 'the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men'.[19] The Court noted that the only

17 Proposition 8 initiative passed in California on 4 November 2008 struck down the 15 May 2008 Supreme Court of California ruling that state law banning same-sex marriage was illegal discrimination. The Supreme Court ruled that domestic partnerships were not a good enough substitute, and for almost six months Californian same-sex couples could get married. See *In re* Marriage Cases, 43 Cal.4th 757, 183 P.3d 384, 76 Cal.Rptr.3d 683 (2008). For the language of the constitutional amendment known as Proposition 8, see CAL. CONST. art. 1, §7.5 ('Only marriage between a man and a woman is valid or recognized in California.'). The constitutionality of Proposition 8 is currently being challenged by proponents of same-sex marriage at a federal court. See Complaint, *Perry v. Schwarzenegger*, 3:2009cv02292 (N.D. Calif., filed 22 May 2009).

18 HCJ 3045/05 *Ben Ari v. The Population Administration* (November 2006).

19 *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

purpose of anti-miscegenation law was to perpetuate 'white supremacy', and that was irreconcilable with democratic values.

Koppelman (1988; 1996; 2001), a critic of the ban on same-sex marriage, has argued that such bans are an offence to the 'core' of human rights in general. They ignored, he wrote, not only the historical baggage of American racial segregation and slavery, but also Nazi Nuremberg laws that prohibited extramarital relations as well as marriage between Jews and non-Jews. From this point of view, the ban on same-sex marriage is unacceptable in a liberal democracy; it is designed to unjustly uphold 'heterosexual supremacy' that discriminates against people based on their intimate choices (Nussbaum, 2004, p. 266; Koppelman, 2006; Richards, 1999; 2005).[20] Kennedy (2004, p. 279) believes that the achievements in the struggles concerning race relations set the ground for full recognition in the right to marry, 'regardless of the genders of the parties involved', and that this struggle will be won 'in the not so distant future'.

One of the important characteristics of both Nazism and American slavery was the use of marriage as a weapon to protect the state and the nation from perceived harms that would be caused by assimilation of 'undesireables' into (White/Aryan) society through marriage. These regimes viewed marriage as a vehicle to social, cultural and political assimilation, and it was therefore applied as a weapon in the racial war against Jews (in Nazi Germany) and Blacks (in the US) (Triger, 2009). Nazi Law for the Protection of German Blood and Honour of 1935 (one of the Nuremberg laws) criminalised and voided both non-marital sexual relations as well as marriages 'between Jews and nationals of German or kindred blood . . .' (Koppelman, 2001, p. 627).

Based on this disturbing heritage, human rights instruments have addressed the use of marriage as a weapon by racist regimes, and have secured the right to marry and found a family in international law. The preamble of the Universal Declaration of Human Rights (UDHR) states that one of its rationales is the 'disregard and contempt for human rights' that 'have resulted in barbarous acts which have outraged the conscience of mankind . . .'.[21] Article 16(1) of the 1948 UDHR stipulates that '[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family . . .'; Article 16(3) declares that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[22] Other international documents that recognise to varying degrees the right to found a family and its protection are the International Covenant on Civil and Political Rights of 1966 (Articles 17 and 23)[23] and the International Covenant on Economic, Social and Cultural Rights of 1966 (Article 10(1)).[24] The European Convention on Human Rights and Fundamental Freedoms, adopted in 1950, also recognises a 'right to respect for private and family life' (Article 8) and a right to marry (Article 12).[25]

20 It should be noted that Nussbaum also criticises the emphasis put on marriage, and its privileged status in matters of immigration, inheritance, medical care, adoption and other legal rights and argues that the focus on same-sex marriage 'inhibits' the larger debate concerning end of discrimination against lesbians and gays (Nussbaum, 2004, p. 267).

21 Universal Declaration of Human Rights, G.A. res. 217A(III), U.N. Cov A/810 (1948) 71. Full text available at: www.un.org/en/documents/udhr/.

22 Universal Declaration of Human Rights, G.A. res. 217A(III), U.N. Cov A/810 (1948) 71. Full text available at: www.un.org/en/documents/udhr/. Other Declaration Articles that protect the family are 12 (in the context of privacy) and 25 (ensuring social protection of mothers and children, as well as securing the welfare of people and their family members).

23 Covenant on Civil and Political Rights (1966). Full text available at: www.hrcr.org/docs/Civil&Political/intlcivpol.html.

24 International Covenant on Economic, Social and Cultural Rights. Full text available at: http://www2.ohchr.org/english/law/cescr.htm.

25 European Convention on Human Rights and Fundamental Freedoms. Full text available at: www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/o/englishanglais.pdf.

Despite these internationally recognised rights, marriage is still used as a weapon against sexual minorities (among others), particularly as a means of excluding them from membership in 'the nation'. Although in Europe there is a growing recognition of the right to free movement for gay families (Faucette, 2009), American law still does not allow Americans to sponsor their non-citizen same-sex partners; an estimated 36,000 bi-national same-sex couples suffer from this policy (Simon, 2009).

Citizenship, gender and sexuality

Despite its appearance as gender-neutral, citizenship is a deeply gendered concept (Lister, 2003, p.1). It is also a deeply nationalistic concept, and therefore it provides us with a rich ground for exploring the intersection between gender, sexuality and nationalism.

Stychin (2001, p. 286) argues that citizenship is based 'on a series of exclusions made possible through a number of binary constructs', such as private/public and active/passive. These dichotomies are highly gendered and sexualised (Stychin, 2001, p. 286; Jones, 1990, pp. 782–84). Women, according to this worldview, belong in the private sphere; they are passive and weak, and represent nature, while men are the embodiment of culture and civilisation (Jones, 1990, pp. 782–90). Gay men are equivalent, according to this logic, to women: they are perceived by patriarchal culture as lacking 'bodily discipline' and therefore are incapable of overcoming their desires and impulses (Stychin, 2001, p. 288). Christian rights discourse has justified partial citizenship for homosexuals by using these dichotomies, and arguing that gays are narcissistic, over-concerned with their own good rather with the general, and lacking the self-discipline and selflessness required to found a family (Stychin, 2001, p. 289; Spindelman, 2011, p. 192).

Feminist scholars of citizenship have called women's citizenship a 'partial citizenship', because of their inferior status under marriage and divorce laws, and labour laws, as well as other areas of law (Lister, 2003, p. vii). Within this context, Cott (1998, p. 1441) observed that citizenship 'can be delivered in different degrees of permanence or strength'. Some have observed that 'constructions of nationhood usually involve specific notions of both "manhood" and "womanhood"' (Yuval-Davis, 1997, p. 1). Others have pointed to the normalising and disciplining aspects of citizenship, drawing on Foucault's analysis (Brown, 1995, pp. 16–19; Stychin, 2001, p. 290).

Canaday (2009, p. 9) argues that in the wake of legal reforms meant to dismantle gender- and race-based discrimination, sexuality is what disturbs the full citizenship of homosexuals. Substituting women and Blacks, the homosexual has become the anti-citizen, remaining the last to suffer from various forms of discrimination that were abolished, at least formally, for others. Marriage, military service, access to state benefits and immigration are some of the areas which Canaday identifies as the core of state discrimination against homosexuals. Although I believe that Canaday's focus on formal discrimination paints an overoptimistic picture as regards discrimination against women and racial minorities, it is true that sexuality-based discrimination remains the last politically correct form of discrimination in many jurisdictions. The United States, for example, repealed its 'don't ask, don't tell, don't pursue' policy only in 2011 (Bumiller, 2011), and in Israel, gender- and race/religion-based discrimination is still state-sanctioned through marriage and divorce laws, among other laws (Triger, 2009; Raday, Tagari; this volume).

The same-sex marriage debate reframed

Advocates of same-sex marriage have argued that LGBT people are second-class citizens because of the ban on same-sex marriage (Merin, 2002). According to this view, full accessibility to marriage is what distinguishes the citizen from the non- or part-citizen.[26] Queer critics of same-sex marriage

26 Interestingly, as research shows, many who demand the right to same-sex marriage do not intend to get married; it is the lack of the right to marriage that upsets them (Josephson, 2005, p. 273).

also place marriage centrally within the conceptualisation of citizenship. They argue that same-sex marriage would imperil the equal rights of those who do not wish to or cannot marry (Josephson, 2005, p. 274). Both approaches, then, view marriage as a key concept in one's citizenship.

The questions of same-sex marriage and the appropriateness of the struggles to achieve it have been widely debated within the LGBT community. Supporters of this battle have argued that the right to marry is one of the most important qualities of full citizenship,[27] as well as a manifestation of one's autonomy and freedom to choose one's form of intimate association (Richards, 2001, p. 25; Bamforth, 2001, p. 31; Merin, 2002). Denial of the right to marry is, according to this approach, dehumanising, and any recognition in same-sex partnerships that does not amount to fully recognised marriage resembles the infamous 'separate but equal' American doctrine which facilitated racial segregation (Merin, 2002, pp. 278–307). Others have argued that same-sex marriage has the potential of challenging and transforming the traditional patriarchal division of labour within the family (Hunter, 1991, p. 11).

On the other hand, critics of the struggle to achieve state-recognised same-sex marriage as well as of its discourse have argued that by joining a patriarchal institution, LGBT people who get married would participate in the perpetuation of the patriarchal social order and hierarchy (Ettelbrick, 1997; Polikoff, 2008), as well as in the exclusion of LGBT (and other) people whose intimate choices do not conform with the monogamous model of heterosexual marriage (Gross, 2008). Other critics of same-sex marriage have pointed out the disciplinary and normalising properties of marriage as an institution (Warner, 1999, p. 96; Halley, 2001).[28] Some of them point to the price of such achievements that would be based on 'we are like heterosexuals' type of claims (Gross, 2001, pp. 411–14). Some critics from within the LGBT community have argued that there are far more urgent goals that the LGBT community should be promoting, such as working to raise consciousness of discrimination in the workplace, hate crimes, state persecution in some countries, and other more burning issues; to some of them, recognition in same-sex marriage, given the current state of discrimination against LGBT people, will not achieve full justice for and social acceptance of LGBT people (Ettelbrick, 1997, p. 120).

And, of course, there is the opposition to same-sex marriage from outside the LGBT community. This opposition, mostly based on religious and natural law arguments, views same-sex marriage as an illogical, offensive, provocative and immoral legalisation of an abomination and unnatural desires and acts.[29] In sum, the struggle for same-sex marriage enjoys a somewhat sad fate: critics from within the LGBT community view it as a hopeless effort to assimilate within straight culture, while critics from the outside view it as a provocation, 'an act of flaunting', as Yoshino (2002, p. 848) has observed.[30]

As mentioned above, this article is not meant to survey the arguments for and against the struggle for same-sex marriage,[31] but rather to discuss this issue from the very distinct and narrow angle of the

27 As Whittle (2001, p. 694) has observed, '[m]arriage confers an enhanced form of citizenship; in United States federal law, there are an estimated 1049 legal rights and responsibilities associated with civil marriage'.

28 For a response to the normalisation and exclusion critiques, see Eskridge (2001, pp. 118–22).

29 The school of thought called 'new natural law' has advanced conservative moral views on gender and sexuality from an allegedly secular direction. John Finnis and Robert George, two prominent members of this school, have argued fiercely against gay rights. For a thorough and critical discussion of this school of thought, see Bamforth and Richards (2008). For a critical analysis of the objection to same-sex relationships from within Jewish law and tradition, see Gross (2001, pp. 404–406).

30 Yoshino (2002, p. 848) notes that same-sex marriage could be regarded as an act of covering. According to his theory of assimilation, '[c]overing occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation' (p. 772). In a later work, Yoshino (2006, p. 19) noted that heterosexual resistance to same-sex marriage can also be viewed as a demand to cover.

31 For such comprehensive discussion see, for example, Eskridge and Spedale (2006, pp. 11–41, 43–89).

historical meaning of the right to family, and its links with citizenship, in national and international law in the aftermath of World War II. I argue that we should look at the connection between marriage and full citizenship not only from the inside, asking ourselves whether marriage is or should be a key to full citizenship, but rather from the outside, asking ourselves how marriage has been abused in recent history – both American and European, in both democratic and totalitarian countries – and, through its link to immigration, to how it has also become linked to otherness, exclusion and the denial of human rights and citizenship.

V. Conclusion

Throughout the history of the modern state, homosexuality has been a legal category, and not just a medical or a psychiatric one (Canaday, 2009, p. 4). Fear of the homosexual legal subject manifests itself in law and policy about 'the family' and also about immigration, nationhood and citizenship. It may be true, then, that fear of the Wandering Gay lies beneath legislation about marriage such as DOMA,[32] and beneath policy about immigration such as the one that demanded Thomas Schmidt leave Israel only forty-five days after his partner, Nir Katz, was murdered in a homophobic attack, and that this fear becomes manifest in debates over same-sex marriage. Although DOMA's future has been recently challenged by some American senators (Rosenthal, 2011), instances of enforced dislocation of gays still occur. Official America is emerging from institutionalised homophobia and Official Israel has come a long way as well. But marriage remains a major obstacle, perhaps precisely because of its pivotal position in the nexus of family, patriarchy, immigration, citizenship and nationhood and to the equally crucial position in that nexus occupied by the Wandering Gay.

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32 On the moral panic concerning recognition in same-sex marriage in the United States, see Nussbaum (2004, pp. 256–67). Analysing the debates in the US Congress over DOMA, Nussbaum speculates that 'a good deal in the aggressive public campaign against same-sex marriage and nondiscrimination laws for gays and lesbians is not about religion at all, but contains elements of a primitive narcissistic type of aggression, desirous of reasserting control over family and sex by stigmatizing gays and lesbians' (p. 262).

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