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Why Marriage?

Suzanne B. Goldberg

In a well-known *New Yorker* cartoon, a man and a woman sit together on a couch, clearly in the midst of a conversation about marriage for gay and lesbian couples. “Haven’t they suffered enough?” one of them asks. Although the cartoon characters jest, the question of why gay people are fighting so hard for the right to marry is a serious one. After all, marriage rates have been dropping steadily in the United States and in much of the world, and divorce rates remain high. Why, then, are lesbians and gay men fighting so hard to join an institution that appears, by most indicators, to be on the decline?

There is no single answer to this question, of course. Political ideology and social experiences are important determinants of any given person’s position, and individuals’ positions are often complex, with overlapping justifications. From among the many possible reasons, this chapter looks closely at several leading responses to the “Why bother with marriage?” question. Building on these responses, the chapter also offers an analytic framework for understanding contemporary marriage debates and a foundation for thinking about how marriage might fare as we move beyond the current crossroads.

Note that the inquiry here is not about why a particular gay or lesbian couple might want to get married. That question, for most couples, is answered by reference to love rather than rights; by desires for binding familial commitments rather than concerns about the signaling effects of legally recognized marital status. At an individualized level, one could answer the “why bother with marriage” question simply by saying that marriage has traditionally been, and continues to be, what adult couples seek when they want state sanctification of their relationships, and that same-sex couples are simply asking for what different-sex couples already have.

But to accept that as our answer is to stay on the surface of the question. Even assuming that same-sex couples seek marriage because it is still the primary means for couples to announce and protect their relationships, we need to know more about why marriage, as opposed to some other form of relationship recognition,

seems to matter so much. After all, while gay and lesbian individuals and advocacy groups pursue a range of efforts to obtain recognition and protection for their families, marriage remains a prominent and leading priority. Indeed, some marriage equality advocates have gone so far as to reject proposals for quasi-marital statuses such as civil unions, saying they “establish a second-class citizenry” (Goodnough 2011).

One preliminary point about language is in order before turning to our inquiry. I avoid the phrase “gay marriage” in this chapter because, although it is concise and widely used, it is also misleading. When same-sex couples seek marriage rights, they are seeking to marry, not to “gay marry.” Likewise, when different-sex couples marry, they do not have a “straight” marriage; instead, they have a marriage. Therefore, to talk about “gay marriage” plays into the idea, with which I disagree, that marriage for gay people is something different from marriage for nongay people.

INTRODUCING THE THREE INTERESTS IN MARRIAGE

The interests motivating the movement for marriage that I explore in this chapter fall roughly into three sets. The first is an interest in accessing the material protections and benefits accorded to those who are married. These goods are the ones that same-sex couples often cite to courts and legislatures when they claim a right to marriage equality, pointing out, for example, that their married neighbors and coworkers receive valuable tax, employment, and other benefits solely by virtue of being married, and that the absence of marriage renders same-sex couples painfully vulnerable in emergency settings. For purposes here, I describe this as the “tangible goods” interest.

The second grows out of a desire for equal status. By this, I mean the recognition, in both formal and social settings, that the committed partnerships of same- and different-sex couples are on par with one another. While this status interest often dovetails with the interest in tangible goods, in that equal status frequently brings status-related goods along with it, my focus here is on the social and political connotations of marriage equality. That is, the recognition of equal status says something more about same-sex couples than that they are entitled to the goods associated with marriage. It says that same-sex couples are a fully equal part of the citizenry and are as critical to the nation’s present and future as the different-sex married couples, who have long been recognized for their foundational social and political role. Even the U.S. Supreme Court has reinforced this sense of marriage as essential to the state, describing marriage, in 1888, as “the foundation of the family and of society, without which there would be neither civilization nor progress” (*Maynard v. Hill* 1888:205, 211), and again, in 1942, as “fundamental to the very existence and survival of the race” (*Skinner v. Oklahoma ex rel. Williamson* 1942:541).

If the first two interests are in accessing marriage “as is,” the third interest focuses on the transformative potential of including same-sex couples in marriage. The focus

here is less on what marriage equality will do for gay people than on what gay people getting married will do for marriage or for society more generally. To be sure, this is less an “interest” in marriage than a set of observations about the meaning of marriage. Still, the “interest” label aims to capture something more about why, in addition to the equalization of goods and status, gay people are seeking marriage rights and about what will happen when they marry. It focuses on some of the most contentious questions about what agendas might underlie support for, or opposition to, marriage rights for same-sex couples and what consequences those agendas might have as the legal and social terrain shifts. This interest in the transformation of marriage and society is not typically articulated in court filings or in mainstream debates because it does not respond directly to the central legal and social questions presented by same-sex couples’ exclusion from marriage. But, because it implicates primal and often inchoate concerns about the meaning of marriage, it may have the most to tell us about where marriage is likely to head as gay couples’ inclusion in it becomes increasingly accepted.

Arguably woven into all of these interests is a related, often unarticulated desire to break down the sorts of primal or first-degree social hostility that exist toward gay people. To the extent the state recognizes same-sex couples as fully equal civic participants, that hostility becomes harder to maintain. Likewise, those who oppose marriage rights for same-sex couples may also believe that allowing for marriage not only validates same-sex couples’ relationships but also validates being gay as equivalent to being heterosexual. For some, this shift would cut against a deeply held intuition about societal ordering (Goldberg 2010). Although this chapter will not focus distinctly on this interest, its presence must be noted because it surely accounts for at least some of the tension continually sparked by the issue of marriage for same-sex couples.

SOME CONTEXT FOR THE “WHY MARRIAGE?” QUESTION

Before turning to a discussion of these interests and the insights they offer, two points warrant our attention. The first is whether the reasons gay and lesbian couples have for seeking marriage continue to matter. After all, in many quarters, there remains little meaningful debate regarding whether same-sex couples should be granted marriage rights. Instead, at one end of the spectrum, the question of why gay couples should be able to marry is seen as passé; rather, debates concern why marriage equality is taking so long. At the other, debate centers on how best to counter ongoing marriage demands.

In addition, while political campaigns against marriage equality have moved forcefully to oppose recognition of same-sex couples’ relationships, many observers on both sides of the marriage question conclude that it is only a matter of time before the exclusion of same-sex couples from marriage is a thing of the past. Statements from President Obama and Vice President Biden supporting the right

of same-sex couples to marry reinforce this trend, as do supportive positions from prominent conservatives, including former Vice President Dick Cheney and former First Lady Laura Bush (Baker 2012; Baker and Calmes 2012). Demographic data likewise consistently show increasing support among younger people for marriage rights (Newport 2011). Indeed, many people in their twenties, regardless of political affiliation, express befuddlement when trying to understand why marriage for same-sex couples remains such a fraught political and social issue. (To be sure, many others, albeit in smaller numbers, hold strong views in opposition to marriage for same-sex couples.)

Still, the marriage question is far from full resolution. Consequently, the arguments that are made – and not made – by same-sex couples and their allies, and by advocacy organizations that represent lesbian, gay, bisexual, and transgender (LGBT) constituencies, can help us not only understand the shape of the public and legal campaigns but also make informed assessments about marriage’s future.

The second preliminary point concerns the insights we can glean about marriage’s future when we compare the discussion of marriage within LGBT communities historically to today’s conversation. It will not surprise most readers that the arguments that gain traction both within a social movement and more publicly vary over time depending on the surrounding political, legal, and social conditions (Anderson 2005). Still, it may be surprising to some that, for much of the 1980s and beyond, fierce disagreement roiled LGBT communities over whether organizations should dedicate their limited resources to seeking marriage rights for lesbian and gay couples.

A (very) short version of this background is this: During the 1980s, lesbian and gay leaders traveled the country debating the virtues of marriage as a movement goal. “*Gay Marriage: A Must or a Bust?*,” published in *Out/Look* magazine in 1989 (Ettelbrick and Stoddard 1989:8–17),¹ contained two essays capturing the poles in the debate at the time. In one, Thomas Stoddard, then Lambda Legal’s Executive Director, urged aggressive advocacy for marriage rights on the view that marriage would provide practical benefits and political leverage, and that “enlarging the concept to embrace same-sex couples would necessarily transform [marriage] into something new” (Ettelbrick and Stoddard 1989:13). On the spectrum’s other end, and working out of the same organization, was Lambda’s Legal Director, Paula Ettelbrick, who titled her essay “Since When Is Marriage a Path to Liberation?” She offered two arguments. First, she wrote, marriage will “constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation.” And second, she added, “attaining the right to marry will not transform our society from one that makes narrow, but dramatic distinctions between those who are married and those who are not married to one that

¹ The essays have been reprinted in numerous publications, including in Rubenstein, Ball, and Schacter (2008:678) and Eskridge, Jr. and Hunter (2004:1098).

respects and encourages choice of relationships and family” (Ettelbrick and Stoddard 1989:14).²

Informed by this debate and the lack of consensus that marriage would be an unequivocal good, marriage advocacy has been more complicated than recent public discourse might suggest. While many have argued strongly for marriage, others continue to proffer a mixed sense of whether marriage, with all of its benefits, might also have some serious and ultimately overwhelming costs (Polikoff 2008).

To be clear, no one within LGBT communities has argued prominently against the idea that same-sex couples should have the same access to marriage as non-gay couples. Even Ettelbrick acknowledged that “[w]hen analyzed from the standpoint of civil rights, certainly lesbians and gay men should have the right to marry.” Yet, she continued, “obtaining a right does not always result in justice” (Ettelbrick and Stoddard 1989:14). Thus, an interest in obtaining formal equality is not where the conflict lies. Instead, the tension erupted, as in the Stoddard-Ettelbrick debate, over the prioritization of marriage as a movement goal. We can see the residue of this tension in the “why marriage?” conversation today, particularly when we reconsider, later in this chapter, the link between equal marriage rights for same-sex couples and broader social transformation.

Similar strands have emerged in debates among bisexual and transgender rights advocates about marriage, although those debates will not be our focus here (Yoshino 2000; Flynn 2001; Currah 2006; Arkles, Gehi, and Redfield 2009; Leff 2011). Courts, too, have tended to treat marriage litigation involving transgender people as presenting separate issues (Stirnitzke 2011).

With these contextual points in mind, the chapter now turns to an extended discussion of the three sets of reasons why lesbians and gay men continue to invest tremendous energy in securing marriage rights at a time when marriage, by most other measures, seems to be decreasing in social and legal importance.

TANGIBLE GOODS OF MARRIAGE

The first set of reasons behind marriage advocacy, which focuses on tangible goods, is perhaps the most straightforward. Different-sex couples receive goods by virtue of being married, from both the government and the private sector, that same-sex couples do not. This disparity began to receive national attention as far back as 1997, when the then-General Accounting Office (now the Government Accountability Office, or GAO) released a report identifying 1,049 federal statutory references to “marriage,” many of which grant rights, benefits, and privileges wholly or partly based on marriage (General Accounting Office 1997). The research, done prior to

² For related arguments in legal scholarship, see, for example, Duclos (1991), Franke (2006), Hunter (1997), Polikoff (1993), Polikoff (2009), Schacter (2009), and Stein (2009).

Congress's passage of the federal Defense of Marriage Act, highlighted that restricting marriage to male-female couples had substantial material as well as social consequences for same-sex couples. By 2004, when the GAO updated its research in the wake of DOMA's being in effect, the number of marriage-linked references had grown to more than 1,100 (General Accounting Office 2004).

These GAO reports limited their study to federal law, but when state and local rights and benefits are added to the mix, the gap between same-sex and different-sex couples widens even further (Vermont Civil Union Review Commission 2001; New Jersey Civil Union Review Commission 2008; New York Civil Liberties Union 2011; "Tax problems for Illinois civil unions" 2011).

Notably, it is not only the rights of adults vis-à-vis each other or the state that marriage affects. Within state law, whether someone is married can dramatically affect his or her legal recognition as a parent, with married parents typically having a significant advantage over non-married parents when seeking custody of or visitation with a child born during the couple's relationship. In one well-known case, the Supreme Court ruled that a child's biological father had no right to maintain a relationship with the child because the mother was married to another man when the child was born (*Michael H. v. Gerald D.* 1989). Lesbian and gay parents likewise have been denied contact with the children they were raising with a former partner on the ground that they and their former partner were not married (*Jones v. Barlow* 2007).

Of course, there are strong arguments that marriage should not be the trigger for establishing parent-child relationships. And there are other methods, including second-parent adoption, to create a legally recognized parent-child relationship. Still, the fact remains that marriage, for different-sex couples, can be a simple and low-cost way to protect familial rights, one that is not currently available to most same-sex couples.

But the disparity does not end there. Just as governments rely on marriage as a means for allocating benefits, so also do private-sector entities. So, for example, many employers provide family health care coverage to employees with spouses but not to employees with nonmarital partners. Car rental companies likewise frequently provide breaks to married renters that they deny to others. As the Alternatives to Marriage Project (2011) laments, "renting cars is one area where discrimination on the basis of marital status is still alive and well." Even health clubs single out married couples for special memberships that they do not offer to unmarried partners (*Monson v. Rochester Athletic Club* 2009).

Considered in light of these kinds of facts, the argument for marriage rights for same-sex couples seems uncomplicated. In simplest form, it observes that marriage is used as a touchstone for distributing benefits in both the public and private sector. To remedy the inequality that results when same-sex couples cannot access marriage-associated benefits, the argument continues, it is only fair that same-sex couples be able to marry and that their marriages be recognized as equal to different-sex couples'

marriages. Equal marriage rights, in other words, will put an end to the unjustified inequality in distribution of marital goods.

Yet the goods equalization argument cannot be the full force behind the marriage equality claim. After all, a growing number of states have enacted legal frameworks – typically called either “civil union” or “domestic partnership” – that provide same-sex couples with most of the goods enjoyed by married couples. But even if these frameworks were to provide exactly the same rights and benefits, there is something unsatisfying to many marriage equality advocates about an arrangement that reserves marriage for different-sex couples and a marriage-like regime for same-sex couples. In early 2000, just months after Vermont became the first state to offer civil unions to same-sex couples, and well before marriage first became available to same-sex couples in Massachusetts, one scholar and advocate (Barbara Cox 2000) described the state’s new form of relationship recognition as “separate but (un)equal.” Others, more charitably, frame civil unions as a step along the path to marriage. Still, few who desire marriage deem civil unions to be a sufficient substitute status. As the California Supreme Court observed, most heterosexual couples would not be pleased if their marriages were to be converted to civil unions (*In re Marriage Cases* 2008:434–435).

To be sure, not everyone takes such a dismal view of domestic partnerships and civil unions. Indeed, for some, their value arises from their role as *nonmarital* gateways to benefits distribution and status recognition. On this view, by delinking marriage from relationship-related benefits, the status of domestic partnership or civil union has the capacity to expand our recognition of families beyond the borders of marriage. Hawaii, for example, has opened its “reciprocal beneficiaries” status to pairs of adults who are unable to marry (Haw. Rev. Stat. Ann. § 572C 1997). Outside of the United States, France has been a leader in revising adult relationship recognition through its domestic partnership-like status, known as the civil solidarity pact or PACS, which has become a popular alternative to marriage for many different-sex couples (Sayare and De La Baume 2010).

Yet in the United States, in all but a few jurisdictions, these statuses have not lived up to this potential. Instead, they are most commonly offered only to same-sex couples as a substitute for marriage rather than to all couples, including those eligible to marry, as an alternate path to relationship recognition. The private sector has reinforced this view, with many employers and others that previously offered benefits based on nonmarital statuses such as domestic partnership now insisting on marriage in jurisdictions where same-sex couples are eligible to marry (Bernard 2011).

STATUS EQUALITY

This brings us to the second broad motivation behind the marriage equality claim – that excluding same-sex couples from marriage denies access not only to goods

but also to marriage's social and political meaning. This argument has two major strands. The first, tied to the tangible goods argument just discussed, maintains that civil unions provide formal, but not functional, equality. That is, even if civil unions are equal on paper, they do not and cannot achieve equality with marriage in reality. The second is that the state's creation of a separate status for same-sex couples itself causes an injury, even if the two statuses could be made to result in equal treatment.

On the first point, New Jersey's experience helps illustrate the substantial difficulties associated with efforts to create a marriage-like status for same-sex couples. In a 2006 decision, the New Jersey Supreme Court held that denying marriage to same-sex couples violated the state constitution's equality guarantee but then let the legislature decide whether to remedy that constitutional injury by providing marriage or a similar status. After vigorous debate, the legislature opted for civil unions; scores of reports soon followed, however, showing that civil unions were not being recognized on the same basis as marriages. The legislature appointed a Civil Union Review Commission to study how civil unions were faring, and the results were dismal from an equal treatment perspective. Couples reported being denied hospital visitation, financial aid, and other services and resources, with the common response to their civil union being either "what's that?" or "that's not the same as marriage" (New Jersey Civil Union Commission 2008). Indeed, the harms were so egregious that Lambda Legal, the organization that had brought the initial marriage lawsuit in New Jersey, brought a new lawsuit challenging the state's ongoing denial of marriage rights (*Garden State Equality v. Dow* 2011).

Conceivably, if a government was committed to maintaining civil unions as the marriage-alternative for same-sex couples, it might launch a massive public education campaign to help overcome the public's lack of familiarity with the new status. One could imagine a training program for government employees and then, in addition, a campaign to familiarize every person in the state with civil unions so that no one, at any age, could claim that they did not know that a civil union is the functional equivalent of marriage.

Yet even sketching this plan highlights the wastefulness of the state's duplicative relationship recognition systems. Having both to create new forms and office signage (to indicate that civil unions are available where marriage licenses are available) and also to dedicate resources to public education about civil unions seems impossible to justify in the face of budget cuts to public health, education, and welfare programs. But, in keeping with the constitutional mandate, the state would arguably be required to do just that if it is to remedy through civil unions the inequality imposed on same-sex couples by the denial of marriage.

Still, even if the state were to create an effective enough campaign to make civil unions as well known as marriage, the separate status is deficient, from the perspective of those who seek marriage, because by creating civil unions, the government is signaling that gay and non-gay couples do not have the same status in the state's eyes. No amount of public education can remedy this problem because the denigration

of same-sex couples is inherent in the state's act of differentiation. Here is why: Any time the state differentiates between two groups of people, it must, consistent with the U.S. Constitution's equality guarantee, have at least a legitimate explanation for the line it has drawn. It cannot, in other words, distinguish between groups of people for arbitrary reasons or out of hostility.

Applying this basic doctrinal point here enables two related observations. First, the state's act of giving same-sex couples the same rights as different-sex married couples tells us that the state sees no meaningful difference between the couples. And second, because the state values same-sex and different-sex couples identically, its decision to create a distinct status for same-sex couples must either be arbitrary, meaning that there is no rational explanation for the state's line-drawing, or impermissible because it embodies hostility toward or disapproval of same-sex couples (Goldberg 2008).

Some would respond by saying that if gay and lesbian couples experience a sense of inferiority as a result of being offered civil unions but not marriage, it is not the state's problem because the state has done all it can to treat civil unions and marriages equally. In this view, any sense of stigmatization is in the minds of same-sex couples or of other private parties, and is not the state's responsibility or under the state's control.³

Two arguments respond to this point. First, even if the state did not give marriage all of its social meaning, the state does control who is allowed access to this meaning. That is, the state functions as the gatekeeper for marriage. By deciding that some couples cannot get "marriage" and others can, the state is allocating not only government protections and benefits but also access to the social meaning and value of marriage. Therefore, the state can and should be held responsible for injuries experienced by the excluded same-sex couples.

The second point is that the injury inflicted in the exclusion of same-sex couples from marriage does not derive only from lesbian and gay couples' experience of stigmatization. Instead, the problem that needs to be redressed begins at the very moment the state separates its gay and lesbian constituents into a different category for purposes of relationship recognition. Simply put, the state cannot escape responsibility because it is the state's act of line-drawing without a legitimate justification that triggers the injury.

Together with the tangible goods concern, the status equality interest seems to capture all that might motivate same-sex couples to seek marriage. These two interests are certainly the primary reasons articulated in court and in the public debates.

³ This is something like the argument made by the Topeka, Kansas Board of Education in *Brown v. Board of Education* when it maintained that the racial separation of children in public schools was not, in itself, unequal. The Court found that it was the fact of separation that triggered the harm at issue: "To separate the [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (*Brown v. Board of Education* 1954, p. 494).

But there is an additional reason discussed in the next section that, although far less prominent, may be especially useful in thinking about marriage's future.

CAN MARRIAGE BE TRANSFORMED?

The third broad reason why gay and lesbian couples are seeking to marry, or at least why some believe same-sex couples want to marry, is to transform marriage – to change it in some way from what it is as a status shaped by the coupling of a man and a woman. As this interest is more abstract, and perhaps less familiar, than the others, some historical context will be helpful in understanding its potential implications.

Preliminarily, it bears noting that discussion of this interest is more speculative than descriptive of popular claims like those for equality in status and tangible goods. Most same-sex couples who are interested in marrying today would say that their aim is to be within marriage, not to change it. Indeed, many lesbian and gay couples, like many heterosexual couples, hope that marriage will transform their relationships by deepening and solidifying the commitment they have to each other.

In fact, it is most often opponents of extending marriage to same-sex couples who argue that allowing gay couples to marry will transform marriage from the stable institution it has always been into a new and undesirable relationship recognition structure. For some individuals who hold this view, the end of the male-female eligibility rule for marriage also portends a slippery slope that will flow into recognition of plural marriages, animal-human marriages, and more.

Marriage's Evolution over Time

Yet the position that allowing same-sex couples to marry has the potential to transform marriage, though deeply held by its adherents, is more thought experiment than reflection of reality. It is important to remember that marriage has never been the stable, immutable institution described by those who purport to defend it from change (Goldberg 2006). Indeed, marriage today looks little like marriage of 150 years past or even 50 years ago. After all, it was not until 1967 that the U.S. Supreme Court finally invalidated race-based limits on marriage when it held unconstitutional Virginia's ban on interracial marriage (*Loving v. Virginia* 1967).

Likewise, and even more relevant, is the prolonged evolution of sex roles, and rules, in marriage. Through most of marriage's history, the law was quite specific that a married man headed his household not only in name but also in rights. Throughout the nineteenth century, this doctrine, known as coverture, meant that, upon marriage, a woman's legal identity merged into that of her husband. Married women could not enter into binding contracts, earn independent wages, or engage in many economic transactions. In this way, marriage became "the primary means of protecting and providing for the legal and structurally devised dependency of wives" (Fineman 2001:245). Even as coverture began to unravel, many of its rules remained

in place, including restrictions that prevented married women from obtaining credit independent of their husbands or retaining their original surnames (Emens 2007). Notorious, too, were laws that refused to recognize rape if it occurred within marriage (Buckborough 1990). For couples that divorced, the law continued to differentiate between men and women, imposing financial support obligations primarily on men and granting child custody primarily to women (Scott 1992; Selfridge 2007: 174–176).

From a gender perspective, then, marriage today looks like a completely different institution than it did even a few decades ago. Men and women enter as legal individuals, remain that way during marriage, and exit that way as well. While there are some important legal consequences of being married that go beyond the rights and benefits discussed earlier, such as the ability to invoke marital privilege in an evidentiary hearing and to transfer property without tax liability, none of these is tied to gender. Instead, the spouses are treated by law as coequal partners; neither is legally advantaged or disadvantaged by virtue of being male or female.

When considered against this history, the rule that requires marriages to have one male and one female partner arguably made sense in an earlier era; each of the partners had a distinct role and set of responsibilities. Today, however, none of these distinctions exists, and the rule that marriage requires a male and a female is perhaps best understood as an artifact of that earlier time.

Although the demise of race- and sex-based rules are the most widely known changes to marriage over time, the evolution can also be seen in changing eligibility rules regarding age and blood relations (consanguinity). The minimum age at which individuals can marry generally has risen in past decades, and the degree of familial closeness that couples may have before marriage will be permitted has also been altered – to be closer in some jurisdictions and more distant in others. Notably, too, age and consanguinity requirements have always varied across states (Cahill 2005; Cornell Law School Legal Information Institute 2011). In no sense, then, has there been, or is there now, an absolute stability in these marriage rules.

Thus, when we think about transformation of marriage, either as a goal of same-sex couples seeking to enter marriage today or as a reason to oppose those couples' entry into marriage, we cannot take at face value the position that marriage has always been a stable and predictable institution that will be destabilized by abolishing the different-sex eligibility rule. Change, more than stability, is the best way to describe marriage's history, and in that sense, including same-sex couples would be more consistent with marriage's developmental course than maintaining the exclusion that is currently in place in so many jurisdictions.

The Transformation Argument's Evolution

But, some would say, *this* proposed transformation is different. Even if marriage has changed over time, it will still be different to recognize two men or two women as

having the same kind of relationships as the male-female couples that traditionally have been permitted to marry. So, in considering transformation as a possible goal of same-sex couples seeking to marry, we ought to ask how exactly gay and lesbian couples might transform marriage.

Here, it is helpful to refer to Tom Stoddard's claim that gay people marrying would have that transformative effect. He wrote: "Marriage may be unattractive and even oppressive as it is currently structured and practiced, but enlarging the concept to embrace same-sex couples would necessarily transform it into something new." Continuing, he added: "If two women can marry, or two men, marriage – even for heterosexuals – need not be a union of a 'husband' and a 'wife.'" Why? He explained: "Extending the right to marry to gay people . . . can be one of the means, perhaps the principal one, through which the institution divests itself of the sexist trappings of the past" (Ettelbrick and Stoddard 1989:13).

Ettelbrick was dubious. "By looking to our sameness and deemphasizing our differences, we don't even place ourselves in a position of power that would allow us to transform marriage from an institution that emphasizes property and state regulation of relationships to an institution which recognizes [marriage as] one of many types of valid and respected relationships," she wrote (Ettelbrick and Stoddard 1989:15). In other words, if gay people prioritize the fight for marriage in an effort to reinforce and establish this sameness, marriage will remain the primary vehicle for allocating state and private benefits, while many nonmarital relationships warrant similar recognition.

Legal scholars have carried the debate further. Some have made the point, consistent with Stoddard, that inclusion of same-sex couples within marriage will necessarily alter marriage by upending, or at least undermining, the social expectations that women have certain responsibilities within marriage and men have others (Hunter 1991). As one author argued, marriage would become "less sexist" (Wriggins 2000:313). Other scholars have expanded on Ettelbrick's position, arguing that marriage advocacy detracts from efforts to obtain broader recognition of family diversity (Polikoff 1993). From a different angle, some scholars have focused on the potential risks associated with having civil unions replace marriage (Scott 2007), while still others have argued that the focus on adult pairings misses the caregiving relationships that are most in need of (and most deserve) legal protection (Fineman 2005).

Yet despite the early preeminence of arguments about transformation, the goal of changing marriage has dropped almost entirely from contemporary discussions about why lesbian and gay couples want to marry. Several developments help explain this shift.

First, as Ettelbrick observed, to claim a legal right to marry, lesbian and gay couples must show that they are like other couples who already can marry. That is, the U.S. Constitution's equality guarantee is understood to require only that likes be treated alike. If same-sex and different-sex couples are not alike, the inequality claim goes

away. To suggest that same-sex couples have the capacity to make marriage into something different from what different-sex couples have would be to concede that same-sex couples are different from different-sex couples in some material way.

In addition, in the political sphere, an argument favoring transformation of marriage would likely be perceived as an argument for instability – for change to a deeply rooted social institution. Although most people would agree that marriage in practice is far distant from its idealized version, many still consider marriage to be foundational to a strong society and “the most important relation in life” (*Zablocki v. Redhail* 1978:384). Against this backdrop, an open commitment to transforming marriage could be perceived as a direct threat. (A quick empirical observation here: same-sex couples have been marrying in Massachusetts since 2004. There is no evidence to date suggesting that marriage itself has changed or that the rates at which different-sex couples are marrying [or divorcing] has been influenced by the marriages of their gay and lesbian neighbors [Kurtzleben 2011].)

Why then would Stoddard, an astute political and legal advocate, have been so open about his own interest in seeing the sexist underpinnings of marriage transformed? In part, Stoddard was writing in the late 1980s, when the only major Supreme Court pronouncement on lesbian and gay rights had come three years earlier, in *Bowers v. Hardwick*, where the Court upheld Georgia’s sodomy law based on the “presumed moral belief of a majority . . . that homosexual sodomy is immoral and unacceptable” (1986:195). The few lower courts that had taken up the marriage question at that point had similarly hostile responses to the gay rights claim before them, swiftly rejecting arguments that the rights of gay people were violated by their exclusion from marriage.

In other words, Stoddard was not engaged in an external political campaign. He was making an appeal internal to the gay and lesbian community in the context of an intra-community publication. His aim was not to persuade legislators or courts; he sought, instead, to reach those who were committed to gay people’s equality but also deeply uncomfortable with marriage’s legacy as an institution in which women’s interests were subordinated, both legally and socially, to those of men. His point was not that gay people would shake the foundations of marriage, but instead that, by removing the last of the formal gendered restrictions in marriage, lesbian and gay couples would present the next incremental step in marriage’s evolution to a non-gendered institution. Understood in this way, Stoddard was not arguing that the prospect of marriage by same-sex couples would open the doors to other intimate unions. His transformation argument might sound surprising, even radical, to those familiar with tightly crafted equality arguments, but it is actually quite limited. In essence, his claim is that gay couples’ marrying might strengthen ongoing challenges to dominant social presumptions about the roles of men as husbands and women as wives.

Because the law no longer formally enforces those presumptions, his transformation argument is, thus, not relevant to the law. It does not signal that the inclusion of same-sex couples in marriage will mean anything at all for marriage's other eligibility requirements, including age, consanguinity, and the two-person rule. And it likewise does not present any challenge to the state's privileging of marriage over other relationships.

MARRIAGE AT A CROSSROADS

The ultimate question, then, is whether marriage equality advocacy for gay and lesbian couples has actually transformed marriage in any of the ways hoped for or feared. Considering this question in light of the interests discussed here prompts several observations.⁴ First, the two major arguments for marriage – equalization of tangible goods and status – are really much more about bringing gay and lesbian couples into the existing institution of marriage than about changing marriage in any way. Indeed, the very point of these arguments is that same-sex couples want marriage precisely because of what it currently offers rather than for what it might be or offer in the future. Simply put, transformation is not the reason most gay people are seeking marriage.

Second, whatever transformation might occur with the inclusion of same-sex couples is, at most, part of an ongoing shift in the nature of marriage from a deeply gendered institution to one that is no longer that way. Indeed, even if the issue of same-sex couples' marrying had never been raised, it is reasonable to think that the degendering of marriage roles would be continuing apace. As we know, formal legal equality between men and women in marriage is now well settled. The divergent social expectations related to husbands and wives, though still powerful, have likewise dissipated substantially in recent decades and will continue to erode, perhaps even at a heightened speed, given the economic and social conditions that make maintenance of rigid differentiations difficult at best.

Finally, as marriage continues on its own path of transformation, with or without lesbian and gay couples' participation, we are left with the question whether there will be less momentum to recognize nonmarital relationships. Here, my prediction builds on the previous analysis. Just as marriage has continued to evolve, so too has the diversity of American families. Marriage rights for same-sex couples will not change that trend, and the law, however haltingly, will continue to find ways to catch up.

⁴ For a contemporary evaluation of the Ettelbrick/Stoddard debate, which concludes that “going forward . . . the LGBT rights movement does not have to choose between a sustained and vigorous focus on marriage equality for same-sex couples, on the one hand, and a more revisionist and pluralist approach,” see Stein (2009). For a related discussion, see Kim (2011).

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