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## *Why Gay People Should Seek the Right to Marry*

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Thomas B. Stoddard

 Even though, these days, lesbians and gay men cannot enter into marriages recognized by law, absolutely every gay person has an opinion on marriage as an "institution." (The word "institution" brings to mind, perhaps appropriately, museums.) After all, we all know quite a bit about the subject. Most of us grew up in marital households. Virtually all of us, regardless of race, creed, gender, and culture, have received lectures on the propriety, if not the sanctity, of marriage—which usually suggests that those who choose not to marry are both unhappy and unhealthy. We all have been witnesses, willing or not, to a lifelong parade of other people's marriages, from Uncle Harry and Aunt Bernice to the Prince and Princess of Wales. And at one point or another, some nosy relative has inevitably inquired of every gay person when he or she will finally "tie the knot" (an intriguing and probably apt cliché).

I must confess at the outset that I am no fan of the "institution" of marriage as currently constructed and practiced. I may simply be unlucky, but I have seen precious few marriages over the course

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of my forty years that invite admiration and emulation. All too often, marriage appears to petrify rather than satisfy and enrich, even for couples in their twenties and thirties who have had a chance to learn the lessons of feminism. Almost inevitably, the partners seem to fall into a "husband" role and a "wife" role, with such latter-day modifications as the wife who works in addition to raising the children and managing the household.

Let me be blunt: in its traditional form, marriage has been oppressive, especially (although not entirely) to women. Until the middle of the last century, marriage was, at its legal and social essence, an extension of the husband and his paternal family. Under the English common law, wives were among the husband's "chattel"—personal property—and could not, among other things, hold property in their own names. The common-law crime of adultery demonstrates the unequal treatment accorded to husbands and wives: while a woman who slept with a man who was not her husband committed adultery, a man who slept with a woman not his wife committed fornication. A man was legally incapable of committing adultery, except as an accomplice to an errant wife. The underlying offense of adultery was not the sexual betrayal of one partner by the other, but the wife's engaging in conduct capable of tainting the husband's bloodlines. (I swear on my *Black's Law Dictionary* that I have not made this up!)

Nevertheless, despite the oppressive nature of marriage historically, and in spite of the general absence of edifying examples of modern heterosexual marriage, I believe very strongly that every lesbian and gay man should have the right to marry the same-sex partner of his or her choice, and that the gay-rights movement should aggressively seek full legal recognition for same-sex marriages. To those who might not agree, I respectfully offer three explanations, one practical, one political, and one philosophical.

### The Practical Explanation

The legal status of marriage rewards the two individuals who travel to the altar (or its secular equivalent) with substantial economic

and practical advantages. Married couples may reduce their tax liability by filing a joint return. They are entitled to special government benefits, such as those given surviving spouses and dependents through the Social Security program. They can inherit from one another even when there is no will. They are immune from subpoenas requiring testimony against the other spouse. And marriage to an American citizen gives a foreigner a right to residency in the United States.

Other advantages have arisen not by law but by custom. Most employers offer health insurance to their employees, and many will include an employee's spouse in the benefits package, usually at the employer's expense. Virtually no employer will include a partner who is not married to an employee, whether of the same sex or not. Indeed, very few insurance companies even offer the possibility of a group health plan covering "domestic partners" who are not married to one another. Two years ago, I tried to find such a policy for Lambda, and discovered that not one insurance company authorized to do business in New York—the second-largest state in the country, with more than seventeen million residents—would accommodate us. (Lambda has tried to make do by paying for individual insurance policies for the same-sex partners of its employees who otherwise would go uninsured, but these individual policies are usually narrower in scope than group policies, often require applicants to furnish individual medical information not required under most group plans, and are typically much more expensive per person.)

In short, the law generally presumes in favor of every marital relationship, and acts to preserve and foster it, and to enhance the rights of the individuals who enter into it. It is usually possible, with enough money and the right advice, to replicate some of the benefits conferred by the legal status of marriage through the use of documents like wills and power-of-attorney forms, but that protection will inevitably, under current circumstances, be incomplete.

The law still looks upon lesbians and gay men with suspicion, and this suspicion casts a shadow over the documents they execute in recognition of a same-sex relationship. If a lesbian leaves prop-

erty to her lover, her will may be invalidated on the grounds that it was executed under the "undue influence" of the would-be beneficiary. A property agreement may be denied validity because the underlying relationship is "meretricious"—akin to prostitution. (Astoundingly, until the mid-1970s, the law throughout the United States deemed "meretricious" virtually any formal economic arrangement between two people not married to one another, on the theory that an exchange of property between them was probably payment for sexual services; the Supreme Court of California helped unravel this quaint legal fantasy in its 1976 ruling in the first famous "palimony" case, *Marvin v. Marvin*.) The law has progressed considerably beyond the uniformly oppressive state of affairs before 1969, but it is still far from enthusiastic about gay people and their relationships—to put it mildly.

Moreover, there are some barriers one simply cannot transcend outside of a formal marriage. When the Internal Revenue Code or the Immigration and Naturalization Act say "married," they mean "married" by definition of state statute. When the employer's group health plan says "spouse," it means "spouse" in the eyes of the law, not the eyes of the loving couple.

But there is another drawback. Couples seeking to protect their relationship through wills and other documents need knowledge, determination, and—most important—money. No money, no lawyer. And no lawyer, no protection. Those who lack the wherewithal to retain a lawyer are simply stuck in most circumstances. Extending the right to marry to gay couples would assure that those at the bottom of the economic ladder have a chance to secure their relationship rights, too.

### The Political Explanation

The claim that gay couples ought to be able to marry is not a new one. In the 1970s, same-sex couples in three states—Minnesota, Kentucky, and Washington—brought constitutional challenges to the marriage statutes, and in all three instances they failed. In each

of the three, the court offered two basic justifications for limiting marriage to male-female couples: history and procreation. Witness this passage from the Supreme Court of Minnesota's 1971 opinion in *Baker v. Nelson*: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend."

Today, no American jurisdiction recognizes the right of two women or two men to marry one another, although several nations in northern Europe do. Even more telling, until recently, there was little discussion within the gay-rights movement about whether such a right should exist. As far as I can tell, no gay organization of any size, local or national, has yet declared the right to marry as one of its goals.

With all due respect to my colleagues and friends who take a different view, I believe it is time to renew the effort to overturn the existing marriage laws, and to do so in earnest, with a commitment of money and energy, through both the courts and the state legislatures. I am not naïve about the likelihood of imminent victory. There is none. Nonetheless—and here I will not mince words—I would like to see the issue rise to the top of the agenda of every gay organization, including my own.

Why give it such prominence? Why devote resources to such a distant goal? Because marriage is the political issue that most fully tests the dedication of people who are not gay to full equality for gay people, and it is also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.

Marriage is much more than a relationship sanctioned by law. It is the centerpiece of our entire social structure, the core of the traditional notion of "family." Even in its present tarnished state, the marital relationship inspires sentiments suggesting that it is something almost suprahuman. The Supreme Court, in striking down an anticontraception statute in 1965, called marriage "noble" and "intimate to the degree of being sacred." The Roman Catholic church



and the Moral Majority would go — and have gone — considerably further.

Lesbians and gay men are now denied entry to this “noble” and “sacred” institution. The implicit message is this: two men or two women are incapable of achieving such an exalted domestic state. Gay relationships are somehow less significant, less valuable. Such relationships may, from time to time and from couple to couple, give the appearance of a marriage, but they can never be of the same quality or importance.

I resent — indeed, I loathe — that conception of same-sex relationships. And I am convinced that ultimately the only way to overturn it is to remove the barrier to marriage that now limits the freedom of every gay man and lesbian.

That is not to deny the value of domestic-partnership ordinances, statutes that prohibit discrimination based on marital status, and other legal advances that can enhance the rights (as well as the dignity) of gay couples. Without question, such advances move us further along the path to equality. But their value can only be partial. Measures of this kind can never assure full equality. Gay relationships will continue to be accorded a subsidiary status until the day that gay couples have exactly the same rights as their heterosexual counterparts. To my mind, that means either that the right to marry be extended to us, or that marriage be abolished in its present form for all couples, presumably to be replaced by some new legal entity — an unlikely alternative.

### **The Philosophical Explanation**

I confessed at the outset that I personally found marriage in its present state rather unattractive. Nonetheless, even from a philosophical perspective, I believe the right to marry should become a goal of the gay-rights movement.

First, and most basically, the issue is not the desirability of marriage, but rather the desirability of the right to marry. That I think two lesbians or two gay men should be entitled to a marriage li-