
DEBATE

THE ARGUMENT FOR SAME-SEX MARRIAGE

Perry v. Schwarzenegger, in which a federal district court held California's ban on same-sex marriages unconstitutional, is set for expedited review in the Ninth Circuit; many argue that the case will ultimately be decided by the Supreme Court. The arguments for and against the constitutionality of such statutes are thus at a fever pitch. In an article published earlier this year, Professors Nelson Tebbe and Deborah Widiss argued that marriage rights are best conceived of as an issue of equal access, rather than one of equal protection or substantive due process. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1377 (2010).

In *The Argument for Same-Sex Marriage*, Professors Tebbe and Widiss revisit the arguments they made in *Equal Access and the Right to Marry* and emphasize their belief that distinguishing between different-sex marriage and same-sex marriage is inappropriate. They lament the sustained emphasis on the equal-protection and substantive-due-process challenges in the *Perry* litigation and suggest that an equal-access approach is more likely to be successful on appeal.

Professor Shannon Gilreath questions some of the fundamental premises for same-sex marriage in *Arguing Against Arguing for Marriage*. He challenges proponents to truly reflect on "what there is to commend marriage to Gay people," and points to his own reversal on the question as evidence. Though he stands fully in opposition to critics of same-sex marriage who use the stance to veil attacks on equality generally, Gilreath argues that marriage can be seen as a further institutionalization of gays and lesbians that risks "assimilationist erasure of Gay identity." Gilreath concludes by noting that to the extent that marriage is assumed to be normatively good, the Tebbe-Widiss equal access approach to same-sex marriage recognition may be the most successful; still, he invites those on all sides of the debate to vigorously challenge that assumption.

OPENING STATEMENT

*The Right Way to Argue for the Right to Marry*Nelson Tebbe[†] and Deborah A. Widiss^{††}

How should courts think about the right to marry? This is a question of principle, of course, but it is also a key question of litigation strategy. In August, district court Judge Vaughn Walker held California's ban on same-sex marriage unconstitutional. *Perry v. Schwarzenegger*, No. 09-2292, 2010 U.S. Dist. LEXIS 78817, at *217 (N.D. Cal. Aug. 4, 2010). The Ninth Circuit has announced that it will hear the appeal on an expedited basis; it is widely expected that the Supreme Court will ultimately decide the case. It is therefore especially important right now to craft arguments that can appeal to moderate judges.

David Boies and Ted Olsen, who surprised the legal world when they teamed up to bring the case, are extremely skilled lawyers. They built a very strong factual record in *Perry*, and they deserve credit for winning a big victory in the trial court. But we believe that the legal arguments they have been emphasizing, and which serve as the basis for the trial court decision, are vulnerable on appeal. In an article published earlier this year in the *University of Pennsylvania Law Review*, we argued the right to marry is best conceived as a matter of "equal access" to government support and recognition, and that the best doctrinal vehicle for that conception is the fundamental-interest branch of equal protection law. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1377 (2010). Our approach offers a sensible, moderate way for judges to strike down bans on same-sex couples' marriage rights and a more satisfying way to conceptualize the right to marriage generally.

I. CIVIL MARRIAGE AND DUE PROCESS

Two other arguments have been the focus of the California litigation, as well as prior challenges of other state provisions limiting marriage to different-sex couples. The first is that everyone has a due process right to get married in a state-recognized ceremony. This claim relies on precedents, like *Loving v. Virginia*, 318 U.S. 1 (1967), in

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which the Supreme Court has referred to marriage as “fundamental.” Judge Walker found a due process violation in the California case, but almost every other federal and state court addressing the issue has rejected this claim. Those courts have concluded that “marriage” is “deeply rooted” in American “history and traditions” under the traditional due process test, but that “same-sex marriage” is not. *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997)).

We disagree with the line that courts draw between “marriage” and “same-sex marriage.” If there is a due process right to marriage, it should be understood as a fundamental right to choose one’s spouse—a freedom that same-sex couples should share. But we see a deeper flaw with this argument: there may be no due process right to civil marriage at all, even for different-sex couples. The cases typically cited to support a due process-protected right to marry link marriage to a due process-protected interest in procreation. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942)). While this link may have made some sense in an earlier era when many state laws made marriage a prerequisite to legal childbearing, today having children outside marriage is accepted, both socially and legally.

In fact, civil marriage—that is, a marriage that meets state law requirements and thus is recognized by the state—is different from other family-related rights, such as the right to make choices regarding child rearing, sexual intimacy, contraceptive use, or termination of a pregnancy. These other rights can be exercised without any state involvement, and due process protects against burdensome government regulations that could unduly limit individual choices. Civil marriage, by contrast, is a government program that provides both material and expressive benefits and imposes certain obligations. In this respect, civil marriage is also different from private or religious marriage. Civil marriage requires government sanction—a marriage license—while private or religious marriage does not.

To see this more clearly, imagine a state that chose to abolish civil marriage altogether, leaving marriage to religious groups or other private organizations. Although state and federal courts assert that marriage is “unquestionably” a fundamental right, they also sometimes suggest that states could simply stop performing marriages. Commentators sometimes propose this as a “solution” to the same-sex marriage debate. Dorian Solot & Marshall Miller, *Taking Government*

Out of the Marriage Business, in MARRIAGE PROPOSALS 70, 71 (Anita Bernstein ed., 2006); Edward A. Zelinsky, *Deregulating Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006). Such a state could decide to offer civil unions or domestic partnerships. Or it could designate some other form of family relationship, such as the parent-child relationship, as the basis for government benefits or recognition. While these reforms are probably not politically viable, we agree with other scholars who have concluded that they would not violate any constitutional rights. See, e.g., Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 40-43 (1996); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2083 (2005). Yet getting out of the marriage business would impose the maximum possible burden on access to civil marriage. If the Due Process Clause really *did* guarantee a right to marry civilly, a law ending civil marriage would almost certainly be unconstitutional. This helps illustrate the weakness in the due process argument: a right to enter a private or religious marriage may indeed be protected by due process, but a right to civil marriage is likely not.

II. CLASSIFICATION-BASED EQUAL PROTECTION

The second argument emphasized in the California litigation, and other similar challenges, is that all government distinctions on the basis of sexual orientation should be subject to heightened scrutiny under the Equal Protection Clause. This approach has had some success. Several state supreme courts have held that classifications on the basis of sexual orientation are presumptively unconstitutional and have, under this more rigorous standard, struck down state laws that exclude same-sex couples from civil marriage. Moreover, in the *Perry* case, the trial court held that the proponents of Proposition 8 had failed to establish that there was even a rational basis for the law. This was likewise true in Massachusetts. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003). However, courts in several states have held that classifications on the basis of sexual orientation do not raise special concerns and therefore do not prompt any presumption of invalidity. Courts in New York, Washington, Maryland, Indiana, and Arizona have all upheld different-sex marriage laws under ordinary scrutiny, as have several lower federal courts.

We agree that there is probably not even a rational basis for bans on same-sex marriage. The primary justification offered in litigation today—that legislatures may limit marriage to different-sex couples

because they are the only ones who may accidentally procreate and thus need to be encouraged to form stable families—strikes us, and many others, as far-fetched. We also agree that classifications on the basis of sexual orientation should be presumptively suspect. But there is a widespread sense that the Supreme Court is unlikely to announce a new suspect class comprised of gay men and lesbians. Indeed, the Court may be moving away from the tiers of scrutiny framework altogether. And while there are instances in which the Supreme Court has been willing to strike down laws even under the rational basis standard, see, for example, *Romer v. Evans*, 517 U.S. 620, 635 (1996), courts generally are quite deferential to legislative judgments. As a practical matter, therefore, a classification-based equal protection argument may be unlikely to succeed in higher federal court or in many state courts.

III. EQUAL ACCESS

Equal access holds that, *once conferred*, the right to marry in a legally recognized ceremony is fundamental. In other words, if a government decides to recognize and support civil marriage, it cannot exclude same-sex couples without providing an adequate justification. There is a particular harm when the material and expressive benefits of a fundamentally important government institution, such as civil marriage, are not extended evenhandedly. This approach differs from both the due process theory and the classification-based equal protection theory. It recognizes a harm may exist even if the relevant conduct is not protected by due process and even if the exclusion is not based on a suspect classification. Independent analysis is required to determine whether a different-sex marriage requirement violates equal access.

Even though our approach has been sidelined in same-sex marriage cases, equal access is well grounded in longstanding case law. In fact, the Supreme Court has already applied this reasoning to marriage itself. In an important decision, the Court struck down a Wisconsin law that prohibited parents who owed child support from marrying. *Zablocki v. Redhail*, 434 U.S. 374, 389-91 (1978). It concluded that access to civil marriage was too important to exclude people simply because they couldn't pay. Although the Court referred to the full range of precedents that spoke to the fundamental importance of marriage, the decision was ultimately grounded squarely in equal protection. *Id.* Strict scrutiny was applied not because singling out scofflaw fathers was particularly suspect, nor even

because the law placed a particularly heavy burden on poor people, but instead because the government differentiation impacted a fundamentally important institution, civil marriage.

The Court has applied similar reasoning in other areas of law as well. For example, the Justices struck down the poll tax on an equal access theory. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966). States are not constitutionally required to establish elections at all—but if they decide to do so, voters cannot be turned away simply because they are poor. *Id.* Another example concerns access to courts. The Constitution does not require states to administer appeals from criminal convictions—but if they decide to do so, they generally must ensure that poor defendants are not shut out because of court costs. *Douglas v. California*, 372 U.S. 353, 355-57 (1963). Neither due process nor equal protection alone can wholly explain the result in these cases—instead, the overlapping interests at play deserve special consideration. See Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) (proposing that looking “stereoscopically” through the lenses of equal protection and due process can have synergistic effects). Civil marriage is similar: because of its fundamental importance, selective exclusion from legal marriage should be unconstitutional in most situations.

This equal access theory captures the most important constitutional considerations surrounding same-sex marriage. It recognizes that access to civil marriage is partly about liberty—here, the ability of individuals to choose a spouse and to form a legally recognized family—and that it is partly about a type of equality—namely, the right to be free from governmental discrimination. It combines considerations of liberty and equality in a way that matches the harm that many couples feel. Moreover, equal access is both backward- and forward-looking. On the one hand, it recognizes that civil marriage has played an important role in American history and traditions. On the other hand, however, it challenges the way that many officials have drawn lines around that institution—and in that way it looks to the future, like the best of American equal protection laws.

Importantly, a decision on equal access grounds would only concern *civil* marriage. Religious congregations would remain free to determine who could marry in accordance with their own precepts. Nor would it commit the Court to a rule that the government could not differentiate on the basis of sexual orientation in other contexts,

such as the military's "Don't Ask, Don't Tell" policy. And finally, under our approach, states could also decide to simply stop providing civil marriages at all—moving instead, for example, to a system of civil unions for all couples, gay and straight. Constitutional problems arise only when states *selectively* deny access to marriage.

In short, equal access offers real, practical advantages over the arguments that have dominated earlier litigation. It stands a better chance of success in the Ninth Circuit and in the Supreme Court—and it better reflects our longstanding commitment to ensuring equal access to fundamentally important government programs.

REBUTTAL

*Arguing Against Arguing for Marriage*Shannon Gilreath[†]

In an earlier, well-written article, Professors Nelson Tebbe and Deborah Widiss urged Gay advocates to pursue an “equal access” argument, which they believe could be effective in securing marriage for Gays and Lesbians.* Tebbe & Widiss, *supra*, at 1377. In the Opening Statement of this Debate, they reiterate their argument in light of the recent decision in *Perry v. Schwarzenegger*, which declared unconstitutional California’s ban on same-sex marriage. No. 09-2292, 2010 U.S. Dist. LEXIS 78817, at *217 (N.D. Cal. Aug. 4, 2010). Tebbe and Widiss do not wish to quibble with Judge Walker’s conclusions in *Perry* that marriage is a fundamental right and that a differentiated system of partnership recognition for Gays and straights violates equal protection. Instead, taking issue with the durability of Judge Walker’s analysis on appeal, they offer an eminently practical, alternative analysis they believe would be more likely to survive legal challenge. Their approach is not grounded in equal protection, thus not engaging the problematic classification-based framework at the core of the Supreme Court’s current (and flawed) conceptualization of equality. Nevertheless, their equal access approach advances equality (at least by the formal definition). Their contribution to the conversation on litigation strategy, therefore, is one to which pro-marriage advocates might do well to listen. Surely, it fits nicely within the current liberal discourse on same-sex marriage, assuming as it does that marriage is normatively good, and strategizing ways to get Gays into it.

But for me to participate in this Debate on my own terms, I have to begin at a prior point in the discourse altogether, asking what there is to commend marriage to Gay people. In other words, I’m asking to what are we trying to get “equal access,” exactly. Those readers

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* As is my convention, I capitalize Gay and Lesbian to emphasize the social and political identities the terms connote. For the sake of brevity, unless otherwise specified, the term “Gay” used alone is meant to be inclusive of Gay men and Lesbians.

familiar with my previous work bearing on the marriage controversy may receive this announcement with some surprise. See SHANNON GILREATH, *SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY* 139-40 (2006) (identifying Gay marriage as a “way to advance gay rights in a way no other action can”). Some of the “sweetness” (for lack of a better descriptor) of my discussion of marriage there has been replaced by a deeper understanding of the reality of Gay people’s lives. But I believe the following is entirely consistent with my prior work to the extent that my criticism of the Gay rights movement’s current obsessive focus on marriage is not a criticism of the pursuit of equal rights.

I still believe that Gays are entitled to the same rights as straights when it comes to tax treatment, rights of access to children, or access to one’s partner in times of ill health or other crises. The impulse towards these legal rights is completely understandable. This is also not an attack on the argument that the Constitution guarantees marriage for Gays in every sense, including, probably, the word “marriage.” Thus, the reader should not confuse my argument here as commensurate with the current religionist assault on Gay equality in the name of marriage. I stand firmly against it. Shannon Gilreath, *Not a Moral Issue: Same Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 209-214 (2010). Nevertheless, I think the millions of dollars (not to mention the emotional cost) invested in the ongoing fight over the word “marriage” in California is a tragic waste. And I think the general shift in strategy from the pursuit of equal legal rights and status to litigation over a word is liberalism run amok.

I would also like to note that the utter practicality of the Tebbe and Widiss analysis leaves me nonplussed. Their equal access argument short-circuits the larger equality question. I have been saying for some time that Gays would be better off if equal protection were reconceptualized. Shannon Gilreath, *Some Penetrating Observations on the Fifth Anniversary of Lawrence v. Texas: Privacy, Dominance, and Substantive Equality Theory*, 30 WOMEN’S RTS. L. REP. 442, 459 (2009) [hereinafter *Substantive Equality*]. But this discussion cannot be had if Gay advocates abandon the equality dialogue, in the way that Tebbe and Widiss do, in favor of the path of least resistance to marriage. This strategy privileges marriage over everything else and discriminates against those among us who, for whatever reason, are not rushing to the altar.

But because the *Perry* decision and Tebbe and Widiss focus on marriage per se, I will bracket that discussion and concentrate instead

on a Gay liberation analysis of marriage as an end goal. I elaborate two major points about marriage and the Gay rights movement's pursuit of it: (1) marriage is dangerous for Gays conceptually, in its patriarchal and heteroarchival foundations, and as a furtherance of an alarming movement toward assimilationist erasure of Gay identity and community; and (2) marriage is dangerous to Gays physically. As will become clear, my ground for this critique is not liberalism, but Gay liberationism—much influenced by the liberationist understandings that emerged in the 1960s and 1970s, which were linked to women's liberation and to the early Gay movement's acknowledgement of the importance of destroying gender conventions and disestablishing the family.

I. MARRIAGE AND HETERONORMATIVITY AS ERASURE (CONCEPTUAL/EXISTENTIAL VIOLENCE)

In 2004, Professor Katherine Franke presciently warned of an increasing domestication of Gay rights in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003), with a view toward the normative project *Lawrence* galvanized, namely marriage. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1407-09 (2004). Like Franke, I am alarmed by *Lawrence's* removal of the Gay litigants into the heteronormative project of monogamous, familial coupling. This follows the "like-straight" logic of the Gay groups that intervened in the case as amici, principally asking the Court to extend the presumptive value of heterosexual sexual relationships to Gay sexual relationships that, according to the Gay amici, are like straight relationships in every way. See Gilreath, *Substantive Equality*, *supra*, at 448-58 (noting that the *Lawrence* Court and Gay amici advocated an assimilationist approach in which "equality is defined in terms of equivalence to the heteronormative standard").

The *Lawrence* majority thus transformed what, for all we really know, was sex between friends or simply no-strings-attached sex into a relationship in the romanticized, straight tradition, which made the sex acceptable. In other words, the domesticity of the sex involved—indeed, the *Lawrence* majority's compulsory domestication of *Lawrence* and *Garner*—sufficiently inoculated the Gay-ness of *Lawrence* and *Garner's* claim to sexual liberty by replacing it with a claim for relationship-based intimacy. What is most important here is that by domesticating the sex in *Lawrence*, indeed one might say by disappearing it, the majority accomplished the domestication and

disappearance of the Gay men involved, assimilating them into the relationship-oriented model on which patriarchy rests. Having established this as the normative framework for arguing for Gay rights, *Lawrence* thus catalyzed the marriage craze. *Lawrence* dangled the bait, signaling that marriage was the door to acceptance and legal protection through heteronormative assimilation (while explicitly disavowing it as such), and Gays swallowed it. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), followed, and ultimately, so did *Perry*.

The result of *Lawrence* and the marriage model has been the transfiguration of Gay liberation into the universalities of “Gay Rights.” The metaphysics of formal equality transfigures marriage, the institution, into the gateway to ontic happiness and freedom. This is paradoxical considering that the history of Gay identity is one of institutionalization as a means to essentialize and ultimately erase us. Our first institution was the psychiatric ward, where we, medicalized as psychotics, were electroshocked, lobotomized, and murdered. See generally SHANNON GILREATH, *SEXUAL IDENTITY LAW IN CONTEXT: CASES AND MATERIALS* 141-48 (2007). Then we were criminalized and institutionalized in the prison. Having only recently emerged, we rush to marriage for its value as an institution. This is what, according to Judge Walker, equality demands; it is what Tebbe and Widiss say we are entitled to access; and it is a reversal that perhaps only Foucault could really appreciate.

Consider the politics of marriage expounded by Marriage Equality California and Lambda:

[There] is no other way for gay people to be fully equal to non-gay people—both in the eyes of the law, and in the eyes of the larger community—than to participate in the same legal institution using the same language. . . . Any alternative to marriage is not marriage. Anything less, is less than equal!

Franke, *supra*, at 1415 (quoting Marriage Equality California & Lambda Legal Defense and Education Fund, *Roadmap to Equality: A Freedom to Marry Educational Guide* (2002) (no longer available online)) (emphasis omitted). We see that, unlike the first two phases of institutionalization, in which Gays who were demonstratively non-normative (either because they were caught, self-identified, or could not otherwise hide their sexual orientation) were medicalized and criminalized, it is non-normative Gays—those who do not acquiesce in patriarchal notions of monogamous coupling and childrearing—who are said to fail to appreciate the good of institutionalization in the

form of marriage. It is also the non-normative Gays who, by virtue of their dissent, are pushed outside the ever-shrinking Gay political universe. This is the political project that finds its voice in cultural criticism from the likes of Bruce Bawer and Andrew Sullivan, *see* BRUCE BAWER, *A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY* (1993); ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995), and in law from neo-con-liberals like William Eskridge. *See* WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996). Indeed, the politics and law of the Gay movement have become univocal in their supplication to straight power: Look at me! I'm like you! Having thus set the parameters of Gay rights organizing, the leadership has narrowed the focus of community resources nearly exclusively to marriage.

Relatedly, there is something even more disturbing about the case for marriage reflected in its propaganda. Consider, again, the admonition that “[there] is no other way for gay people to be fully equal to non-gay people . . . than to participate in the same legal institution.” Franke, *supra*, at 1415. This reveals marriage as a safety strategy. In other words, marriage is a way to legitimate behaviors otherwise illegitimate, a way of avoiding discrimination and second-class citizenship and of achieving civic safety. If Gay marriage boils down to a desperate attempt at assimilation in an effort to avoid the lethal attentions of heterosexuals, can we honestly talk about Gays entering marriage in anything resembling a condition of freedom? In this realization, same-sex marriage—supposedly this new and game-changing thing—looks a lot like old patriarchal marriage in which women “consented” to marriage as a way to achieve safety in a world that was nothing short of murderous for a woman without the “bonds of matrimony” as her shield. When William Eskridge argues that marriage is a way for Gays to become “civilized,” I wonder if he wants Gays to be “civilized” in the same ways that women have been “civilized” by marriage. ESKRIDGE, *supra*, at 8-13. Institutionalization out of desperation hardly seems much like freedom to me. Neither does becoming heterosexualized ghosts of ourselves.

II. MARRIAGE AND PHYSICAL VIOLENCE

It is often noted that approximately fifty percent of heterosexual marriages end in divorce. THE NAT'L MARRIAGE PROJECT AT THE UNIV. OF VA. & THE INST. FOR AM. VALUES, *THE STATE OF OUR UNIONS*,

MARRIAGE IN AMERICA, 2009: MONEY & MARRIAGE 77 (2009), <http://www.virginia.edu/marriageproject/annualreports.html>. It is less frequently remarked, certainly, that the other fifty percent probably should. But despite the existence of no-fault divorce, the legal entanglement that is marriage is still difficult to escape. Economic dependence (which marriage encourages on the part of one spouse—most often the woman) and the presence of children, coupled with legal strictures that make exit difficult, often keep bad marriages intact. This is most alarming because, for women, the marital home is often violent. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at iii (2000), *available at* <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm> (noting that twenty-five percent of women were raped or physically assaulted by a current or former spouse or cohabitating partner).

There is strong evidence suggesting that Gay relationships mirror the violence of their heterosexual counterparts. Gay relationships are violent precisely because the only model Gays have for what a relationship should look like is the straight model. The dominant structure of sexual inequality inherent in heterosexual marriages bleeds over into the Gay model, so that Gay relationships reaffirm those social conditions to the detriment of the people involved. Some reports speculate that domestic violence among Gay men may occur at rates greater than those of domestic violence in the straight community. One study indicated that 23.1% of cohabiting Gay men said they were raped or physically battered by a spouse or cohabiting partner at some time in their lives, compared to 7.7% of men cohabiting with opposite-sex partners. L. KEVIN HAMBERGER & MARY BETH PHELAN, DOMESTIC VIOLENCE SCREENING AND INTERVENTION IN MEDICAL AND MENTAL HEALTHCARE SETTINGS 301 (2004). Another study showed that men who have sex with men are six times more likely to suffer an assault as an adult. GILLIAN C. MEZEY & MICHAEL B. KING, MALE VICTIMS OF SEXUAL ASSAULT 9 (2d ed. 2000). I think there are very important sociological reasons for this. We inevitably strike out against the thing we are conditioned to hate. In the case of cohabiting Gay men, that target is readily accessible in the home. It is a form of internalized and then externalized queer bashing in the most intimate dimensions of the Gay community itself.

Knowing what we know, do we really want to make our relationships harder to exit than we need to? There is certainly no reason to believe that the legal entanglements of marriage would

affect battered Gays differently than they have affected battered women. Recall that when one of Jeffery Dahmer's victims escaped—dazed, nearly naked, and understanding nearly no English—and made it to police, those police returned him to Dahmer, despite the fact that his head was obviously bleeding from Dahmer's attempts to drill holes in his skull. Reportedly, the officers joked that it was a lover's spat. *Milwaukee Panel Finds Discrimination by Police*, N.Y. TIMES, Oct. 16, 1991, at B8, available at 1991 WLNR 3035625. The obvious violence was somehow rendered consensual in the minds of these (ostensibly heterosexual) officers because it took place within the parameters of an assumed relationship. Interesting how the officers made basically the same reductionistic assumptions about Gay men that the majority did in *Lawrence*.

The anticomunitarian nature of marriage puts Gays at risk of violence from outside of our relationships, too. One of the preconditions to violence is that the victim is usually alone and cut off from systems of support. This is one reason that marriage has been so dangerous for women. But the anticomunitarian nature of marriage may be even more dangerous for Gays because, historically, a woman has traded (sometimes violent) bondage to one man in marriage for safety from the danger of violence from many men if she were not married. The respect of patriarchs for one another has generally meant some safety for women in marriage relative to the rest of the patriarchal world. Not so for Gays. Marriage, because it privatizes energies into the family unit, results in the dismantling of support systems found in the community. When Gays recognize other Gays, we often say they are "family." The Gay liberation movement has abandoned this communitarian conception of family in favor of the heterosexualized, privatized, monogamous family model found in marriage.

The marriage craze is also driven in large part by an emerging obsession by Gays with procreation—an enterprise that further privatizes energies. Arguably, this retreat into the nuclear family unit leaves us even more vulnerable to outside attack, as political consciousness recedes in favor of the romanticized family ideal. Monogamy, definitionally, is the anticomunitarian privatization of sexual energies, and with those energies comes the privatization of the very sexual politics of community building. Richard Mohr, notably, has argued that marriage ought to be reformed to allow for the often open, communitarian nature of Gay multipartner relationships.

Richard D. Mohr, Essay, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 233 (1995). But there seems to be no interest on the part of the Gay leadership in pursuing this path instead of the fetishized, heterosexual ideal. In the closed, like-straight liberal universe, anything not approximating the (fictionally) monogamous heterosexual union is valueless. Consequently, since there is no special safety in Gay marriage in the same way that it is built into the heterosexual marriage racket for the preservation of patriarchy, marriage leaves us more vulnerable to outside violence.

CONCLUSION

I have likely taken the question presented by the “right way to argue for the right to marry” in an unexpected and unwanted direction. Most liberals are not interested in a discussion of marriage that does not make that most-heterosexual of presumptions that marriage is a priori good. I was struck recently when rereading “The Speech of Aristophanes” from Plato’s *Symposium*—that antique defense of same-sex love still widely regarded as the best exposition of the self-actualizing and legitimating power of Gay relationships—that marriage nowhere figured. PLATO, THE SYMPOSIUM 22-27 (M.C. Howatson & Frisbee C.C. Sheffield, eds., M.C. Howatson, trans., Cambridge Univ. Press 2008). Maybe the Gay rights movement’s leadership and the lawyers who theorize to support them could use a refresher course in the classics. Otherwise, I fear that when the history of the Gay movement itself is written it will read more as epitaph than epilogue: Once upon a time there was a Movement . . . then there was Marriage.

CLOSING STATEMENT

Nelson Tebbe and Deborah A. Widiss

On the whole, Professor Gilreath does not take issue with our argument that, given existing law and the full range of practical contingencies, equal access presents the best approach for securing access to civil marriage for gay and lesbian couples. He tells pro-marriage advocates that our proposal is worth heeding.

Instead of directly engaging with our project, he uses the occasion of this Debate to argue that advocates for gay and lesbian rights have erred in deciding to pursue (or go along with) a campaign for marriage equality. Professor Gilreath claims that marriage is unattractive conceptually because it has unavoidable heteronormative implications, and that it is a troubling goal practically because it brings an increased risk of trapping gay men and lesbian women in physically abusive relationships.

Professor Gilreath is not alone in questioning whether gays and lesbians should seek the right to marry. Rather, as Nancy Polikoff explores in detail in a recent book, this has long been a point of debate within the gay and lesbian community. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 28 (2008). Some commentators and advocates, like Professor Gilreath, have been concerned that seeking marriage is harmful because it accepts the status quo privilege awarded to marriage and could undermine more egalitarian aspects of gay and lesbian relationships. Paula L. Ettelbrick, *Since When Is Marriage the Path to Liberation?*, in *LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES* 20-21 (Suzanne Sherman ed., 1992); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549 (1993). Other prominent voices within the gay and lesbian community have argued, by contrast, that permitting same-sex couples to marry is not only a necessary component of achieving true equality and securing important practical benefits, but would also have the separate advantage of helping undermine gender norms within marriage more generally. Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIAN AND GAY MARRIAGE*, *supra*, at 13, 19; Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991).

Our reply is simply that we have not taken a position on the broad

question of whether marriage, either private or civil, is a worthy goal for advocates of gay and lesbian rights. Tebbe & Widiss, *supra*, at 1405 n.134. We have our own reactions to Professor Gilreath's points, of course, but they are generally irrelevant to our equal access proposal. We take as a given that at least *some* members of the gay and lesbian community would like to marry in a civil ceremony and that they have decided to bring litigation designed to win them that right. Our argument addresses those individuals, the lawyers and organizations that represent and support them, and the judges who may decide their cases. We believe that equal access offers the best pathway to legal success.

Professor Gilreath's Rebuttal may have one challenging implication for our argument, although he does not fully develop it. If civil marriage is not an institution that is or should be important to gay and lesbian couples, then our claim that civil marriage is "fundamental," as that term is used in cases within the fundamental interest branch of equal protection law, could seem weaker. Three responses occur to us. First, whether an institution or activity is fundamentally important is a matter of social meaning, not individual perspective or opinion. And as a matter of social meaning, it seems to us that civil marriage is indeed central to American law and society. *Id.* at 1415-16. Second, the Supreme Court itself has often said that marriage is "fundamental," albeit sometimes in passing or in dicta. *See id.* at 1388-91. Finally, members of the gay and lesbian community who are advocating for equal access to civil marriage have imbued their own arguments with the force of passionate conviction. One need only recall the moving scenes that have unfolded on courthouse steps or outside legislative chambers in states where couples have won official recognition of their commitment.

We do disagree with a couple of minor points that Professor Gilreath makes about our proposal. First, we do not believe that we have abandoned equality arguments. As we make clear in our print article, one of the most attractive features of equal access is that it combines liberty concerns with a strong commitment to evenhandedness. *Id.* at 1421-24. Moreover, we do not think our argument privileges marriage—it simply offers a strong argument for couples that wish to pursue access to civil marriage, possibly in combination with other goals that may be given higher priority. In fact, one benefit of our approach is that a state could decide to abolish civil marriage for all couples, gay and straight, without violating constitutional principles. *Id.* at 1405-06.

A day may come when advocates for gay and lesbian rights abandon the fight for marriage equality and move on to other goals. If that happens, our argument would lose some of its relevance, a development that would cause us no distress. Until that time, however, we believe that our equal access approach has a valuable role to play in the ongoing debate.

CLOSING STATEMENT

Shannon Gilreath

As Professors Tebbe and Widiss emphasize, I do not have a technical quarrel with their equal access strategy for litigating marriage. They are, I suspect, right in suggesting that their proposal would make it easier for judges to decide in favor of Gay marriage (or to uphold it on appeal) than would asking them to engage equal protection squarely. In my experience, if you give judges an opportunity to avoid making a legal decision based on equality—or the lack of it—they will take it, especially when Gay people are concerned.

It is this overwhelming conceptual flaw in Tebbe and Widiss's argument that makes it unnecessary for me to tinker with its technicalities. Given the potential result of the argument's application, its mechanics don't much concern me. What does concern me is what we might get if Tebbe and Widiss were to be successful: marriage in its unaltered heteronormativity. Tebbe and Widiss evidently consider my concerns in this regard to be something other than "directly engaging with [their] project." But any legal proposal that purports to advance a Gay cause—like the quest for marriage—is an invitation to think about the role the law plays in the future of Gay rights. Thus, I think it is important to ask whether the result Tebbe and Widiss say they can produce via "equal access"—that is, access to marriage—is a good thing for Gay liberation.

Tebbe and Widiss say they take no position on the good or ill of marriage; rather they offer a strategy of access for those who want it. In this announcement they both miss my point and inadvertently reinforce it. The Gay movement's posture of not evaluating critically the meaning of marriage as a social institution and yet strategizing to access it is what I think makes the movement's emphasis on marriage so frightening.* Demanding that we engage in the kind of critical inquiry about marriage that I sketch in my Rebuttal is a big part of the

* Tebbe and Widiss point out that some such evaluation has taken place in the context of the debate over same-sex marriage, generally among academics. I agree that the union of two people of the same sex, for whom, from the straight perspective, no gender inequity could be presumed, might do something to destabilize gender. I'm all for that. But I think the costs of marriage, as explained in my Rebuttal, outweigh the likely benefits. And, anyway, the same destabilizing effects on gender in coupling could be had via Gays coupling in visible ways that do not insist upon patriarchal constructions or labels. Perhaps even greater destabilization could be achieved in this way.

social and legal project that is Gay liberation. Gay liberation, by definition, is the effort to empower Gay people on Gay people's terms. Thus a demand for access to marriage (such as the demand Tebbe and Widiss make) without a concomitant demand for change is of limited utility—and indeed may be dangerous—to Gay liberation. Straight society's existing attitudes about what constitutes personhood, including marriage as a precondition to self-fulfillment, have never encompassed Gay experience. We have never had access to *their* definitions on *our* terms. Seeking access to marriage is the quintessence of seeking affirmation by straight people *on their terms*. And it is important for Gay people—after all, this is our legal and political struggle—to remember that Gay liberation never aspired to this kind of access. If the movement, its leadership, and its lawyers have changed the mission in this very costly way, I think they owe it to the rest of us to explain why they think access to marriage is a good idea—not just how they plan on getting it.

In closing, let me clarify my criticisms of the equal access argument that Tebbe and Widiss believe are direct but based on misapprehensions. In their Closing Statement, Tebbe and Widiss say that their proposal has not “abandoned equality arguments.” Indeed, the professors explain that, “one of the most attractive features of equal access is that it combines liberty arguments with a strong commitment to evenhandedness.” But evenhandedness is not equality, except by the most formal definition. Access to marriage advances equality to a degree, but it does not engage the more meaningful, substantive question of equality in terms of dominance and caste. See Gilreath, *Substantive Equality*, *supra*, at 460 (proposing a substantive equality approach in which courts ask “whether the law promoted the dominance of one group with the consequence of subordination of the target group”).

Tebbe and Widdis confessedly write for the many Gay rights advocates who seem to believe that marriage is a panacea. It isn't. In fact, granting access to marriage based on arguments other than substantive equality may create a roadblock to future legal and social gains. If we get marriage, the likely result will be that straight people will say: “Look what we gave you. What more do you want?” My fear is that the Gay leadership, having demonstrated a myopic obsession with marriage at the expense of nearly everything else, might respond: “Very little.” In any event, the refusal to engage class-based equality theory at every opportunity now may haunt us if we decide to press a

more expansive rights campaign in the future.

Tebbe and Widiss's argument also privileges marriage without regard to equality because it purports to craft a way of accessing marriage without asking judges (and the general public) to engage directly the class- and caste-based theory of straight dominance or the reality of Gay life lived under this dominance. Thus, those Gays who are most likely to benefit from an equal access argument are the few Gays who already live in relative social and legal security. Litigating in order to gain access to a word—"marriage" as a term—as opposed to the bundle of rights associated with state subsidized coupling (which is what was at stake in the California cases since Gay couples already had the rights) is the indulgence of litigants who have already escaped the caste system to some degree. See *In Re Marriage Cases*, 183 P.3d 384, 397-98 (Cal. 2008) *superseded by constitutional amendment*, CAL. CONST. art 1, § 7.5 (noting that California's domestic partnership legislation "affords . . . virtually all of the same substantive legal benefits and privileges . . . that California law affords to . . . a married couple"). A focus on accessing marriage in this way means that one takes public, straight acknowledgment of a relationship between Gay people as an affirmation, not a threat; and that worldview classifies one, in Gay terms, as part of the privileged few. The politics that benefits from this type of litigation is thus the politics of those at the top—those who can afford to fantasize about marriage per se and who can afford to devise legal stratagems to get marriage at any and all cost. Indeed, they may feel that such stratagems are highly desirable. I don't.

No movement for real social change can be successful if it is not based on empowering the most powerless. I'm worried about the many Gay Americans who cannot yet afford to daydream about marriage and its romance because they can't even be out on an individual basis—let alone as a couple—because they fear reprisal at work, worry about being rejected by their families, or dread being stalked by the law. For these Gays, any legal argument that purports to show the route to victory without squarely confronting the monstrous legal caste system in this country (a system largely buttressed by formal conceptions of equality and based on class distinctions justified as such) is, in a word, dangerous. An argument that gives conservative judges (usually code-worded as "moderates") an opportunity to afford some few Gays some rights piecemeal may well be taken by these same judges to the long-term detriment of Gays who have less security and who generally ask for less in terms of equal rights. Tebbe and Widiss's argument, admittedly, provides judges with

just such an opportunity; indeed, they believe this is one of their argument's greatest strengths.

In sum, Tebbe and Widiss's equal access strategy is simply an unsettling continuation of the Gay movement's rush to marriage over the increasingly marginalized warnings of Gay liberationists.** See generally Ettelbrick, *supra*. In keeping with the endgame of this heteronormative project, equal access gives courts a way to rule in favor of marriage without facing equality in any material way. Thus, while, as I said, some Gay advocates might find it fruitful to listen to Tebbe and Widiss, I hope they won't.

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** As for the unlikely outcome that Tebbe and Widiss say their scholarship supports—that states could abolish marriage—I certainly wouldn't get in the way of trying.