

"The Writer & The Photographer" by David Alexander



"Marriage may be unattractive in its present form, but enlarging it to embrace same-sex couples would transform it into something new."

THE MARRIAGE DEBATE:

"Marriage runs contrary to primary goals of the lesbian and gay movement—the affirmation of gay identity and culture and the validation of many forms of relationships."

Most of us have probably shouted, "But gay people can't get married!" while explaining why we were less than thrilled to have to attend a cousin's wedding. Lesbians and gay men can't get married; 57 percent of straight people in the US disapprove of two people of the same sex living together as a married couple (according to a recent poll conducted by the San Francisco Examiner); and until recently, the odds of winning the right to marry have seemed impossible.

But slowly, the prospect of legal lesbian and gay marriages have become less of a fairytale. This year, Denmark changed its laws to allow them. And in the US, the Board of Directors of the Bar Association in San Francisco called for a change in the California laws that make marriage the sole province of heterosexuals. Legislation that extends minimal benefits to unmarried "domestic

Photography
by Isa Massu



A Must

GAY MARRIAGE:

Or A Bust?

partners" recently was enacted in San Francisco and West Hollywood, which now join the ranks of Berkeley and Santa Cruz, California and Madison, Wisconsin where domestic partners have been granted even more partial benefits.

If the popularity of "The Wedding" (the event at the 1987 March on Washington for Lesbian and Gay Rights at which thousands of men and women "married" their partners of the same sex) is any indication of popular sentiment in our communities, many lesbians and gay men across the country would get hitched in a second, if we actually could.

But how big of a priority should the lesbian and gay movement place on seeking that right? While few would begrudge any couple the right to publicly celebrate their relationship, there is less consensus about how much energy we should expend to get the government to sanction those same relationships.

Lesbian and gay civil rights organizations across the country, including the New York-based Lambda Legal Defense and Education Fund, have been debating this question. In the pages that follow, two Lambda staffmembers share some of the arguments that have surfaced as their organization has evaluated what kinds of precedent-setting cases it should take on.

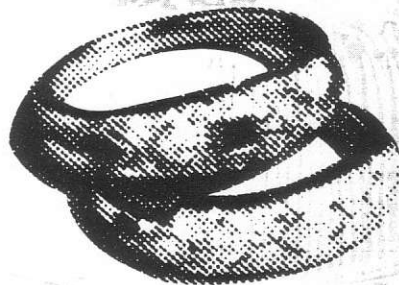
EVEN THOUGH, these days, few lesbians and gay men enter into marriages recognized by law, absolutely every gay person has an opinion on marriage as an "institution." (The word "institution" brings to mind, perhaps appropriately, museums.) After all, we all know quite a bit about the subject. Most of 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
(Continued next page)

Why Gay People Should Seek the Right to Marry

THOMAS B. STODDARD



"MARRIAGE IS a great institution...if you like living in institutions," according to a bit of T-shirt philosophy I saw recently. Certainly, marriage is an institution. It is one of the most venerable, impenetrable institutions in modern society. Marriage provides the ultimate form of acceptance for personal intimate relationships in our society, and gives those who marry an insider status of the most powerful kind.

Steeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis, the institution of marriage long has been the focus of radical feminist revulsion. Marriage defines certain relationships as more valid than all others. Lesbian and gay relationships, being neither legally sanctioned or commingled by blood, are always at the bottom of the heap of social

acceptance and importance.

Given the imprimatur of social and personal approval which marriage provides, it is not surprising that some lesbians and gay men among us would look to legal marriage for self-affirmation. After all, those who marry can be instantaneously transformed from "outsiders" to "insiders," and we have a desperate need to become insiders.

It could make us feel OK about ourselves, perhaps even relieve some of the internalized homophobia that we all know so well. Society will then
(Continued on page 14)

PAULA L. ETTLEBRICK

Since When Is Marriage a Path To Liberation?

S T O D D A R D , C O N T .

unlucky, but I have seen precious few marriages over the course 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. Indeed, 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 wasn't 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!)

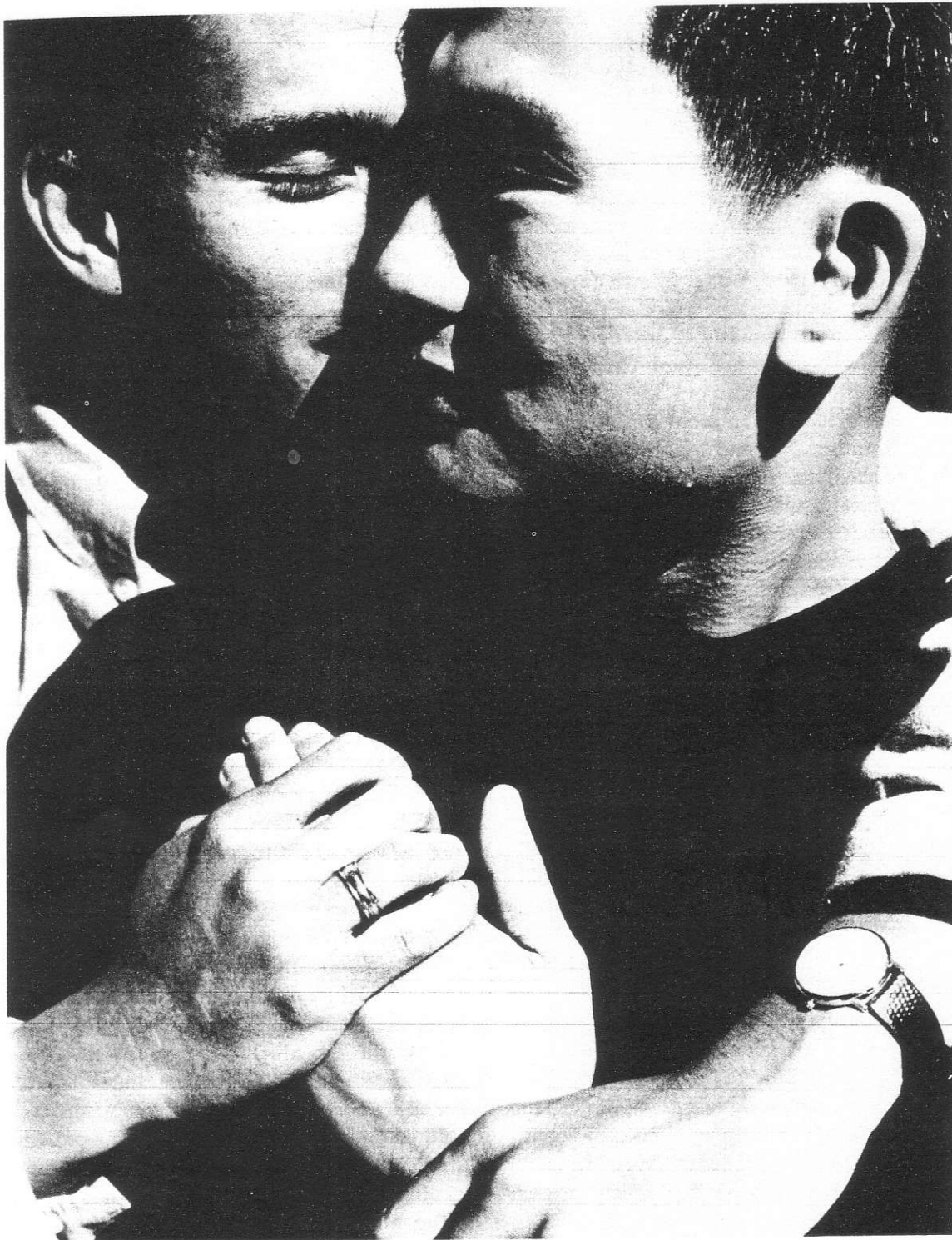
Nevertheless, despite the oppressive nature of marriage historically, and in spite of the general absence of edifying examples of modern heterosexual marriage, I believe very strongly that every lesbian and gay man should have the right to marry the same-sex partner of his or her choice, and that the 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 17 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 (as I suspect will come as no surprise to the readers of this journal) 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 property 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. (Astonishingly, until the mid-seventies, 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

Marriage is the political issue that most fully tests the dedication of people who are not gay to full equality for gay people.

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 importantly—money. No money, no lawyer. And no lawyer, no protection. Those who lack the sophistication or 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 seventies, 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 earlier this year, 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 naive 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 (although that judgment is hardly mine alone).

Why give it such prominence? Why devote resources to such a distant goal? Because marriage is, I believe, the political issue that most fully tests the dedication of people who are *not* gay to full equality for gay people, and 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 anti-contraception 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 to 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. (The recently enacted San Francisco “domestic partnership” ordinance, for example, will have practical value only for gay people who happen to be employed by the City of San Francisco and want to include their non-marital spouses in part of the city’s fringe benefit package; the vast majority of gay San Franciscans—those employed by someone other than the city—have only a symbolic victory to savor.) 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 avatar rather, well, unattractive. Nonetheless, even from a philosophical perspective, I believe the right to marry should become a stated 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 enti-

tled to a marriage license does not mean that I think all gay people should find appropriate partners and exercise the right, should it eventually exist. I actually rather doubt that I, myself, would want to marry, even though I share a household with another man who is exceedingly dear to me. There are others who feel differently, for economic, symbolic, or romantic reasons. They should, to my mind, unquestionably have the opportunity to marry if they wish and otherwise meet the requirements of the state (like being old enough).

Furthermore, 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. If two women can marry, or two men, marriage—even for heterosexuals—need not be a union of a “husband” and a “wife.” Extending the right to marry to gay people—that is, abolishing the traditional gender requirements of marriage—can be one of the means, perhaps the principal one, through which the institution divests itself of the sexist trappings of the past.

Some of my colleagues disagree with me. I welcome their thoughts and the debates and discussions our different perspectives will trigger. The movement for equality for lesbians and gay men can only be enriched through this collective exploration of the question of marriage. But I do believe many thousands of gay people want the right to marry. And I think, too, they will earn that right for themselves sooner than most of us imagine. ▼

Thomas B. Stoddard is the Executive Director of the Lambda Legal Defense and Education Fund. He is a lawyer, serves on the adjunct faculty of the New York University School of Law, and is the co-author of The Rights of Gay People (Bantam).

About the artist: Isa Massu is a French photographer who currently lives and works in San Francisco.

No gay organization of any size, local or national, has yet declared the right to marry as one of its goals.

E T T E L B R I C K , C O N T .

celebrate the birth of our children and mourn the death of our spouses. It would be easier to get health insurance for our spouses, family memberships to the local museum, and a right to inherit our spouse's cherished collection of lesbian mystery novels even if she failed to draft a will. Never again would we have to go to a family reunion and debate about the correct term for introducing our lover/partner/significant other to Aunt Flora. Everything would be quite easy and very nice.

So why does this unlikely event so deeply disturb me? For two major reasons. First, marriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation. Second, 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 respects and encourages choice of relationships and family diversity. Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture; and the validation of many forms of relationships.

When analyzed from the standpoint of civil rights, certainly lesbians and gay men should have a right to marry. But obtaining a right does not always result in justice. White male firefighters in Birmingham, Alabama have been fighting for their "rights" to retain their jobs by overturning the city's affirmative action guidelines. If their "rights" prevail, the courts will have failed in rendering justice. The "right" fought for by the white male firefighters, as well as those who advocate strongly for the "rights" to legal marriage for gay people, will result, at best, in limited or narrowed "justice" for those closest to power at the expense of those who have been historically marginalized.

The fight for justice has as its goal the realignment of power imbalances among

individuals and classes of people in society. A pure "rights" analysis often fails to incorporate a broader understanding of the underlying inequities that operate to deny justice to a fuller range of people and groups. In setting our priorities as a community, we must combine the concept of both rights and justice. At this point in time, making legal marriage for lesbian and gay couples a priority would set an agenda of gaining rights for a few, but would do nothing to correct the power imbalances between those who are married (whether gay or straight) and those who are not. Thus, justice would not be gained.

JUSTICE FOR GAY men and lesbians will be achieved only when we are accepted and supported in this society *despite* our differences from the dominant culture and the choices we make regarding our relationships. Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so. It is an identity, a culture with many variations. It is a way of dealing with the world by diminishing the constraints of gender roles which have for so long kept women and gay people oppressed and invisible. Being queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society. Gay liberation is inexorably linked to women's liberation. Each is essential to the other.

The moment we argue, as some among us insist on doing, that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices. As a lesbian, I am fundamentally different from non-lesbian women. That's the point. Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice. I do not want to be known as "Mrs. Attached-To-Somebody-Else." Nor do I want to give the state the power to regulate my primary relationship.

Yet, the concept of equality in our legal system does not support differences, it only supports sameness. The very standard for equal protection is that people who are similarly situated must be treated equally. To make an argument for equal protection, we will be required to claim that gay and lesbian relationships are the same as straight relationships. To gain the right, we must compare ourselves to married couples. The law looks to the insiders as the norm, regardless of how flawed or unjust their institutions, and requires that those seeking the law's equal protection situate themselves in a similar posture to those who are already protected. In arguing for the right to legal marriage, lesbians and gay men would be forced to claim that we are just like heterosexual couples, have the same goals and purposes, and vow

to structure our lives similarly. The law provides no room to argue that we are different, but are nonetheless entitled to equal protection.

The thought of emphasizing our sameness to married heterosexuals in order to obtain this "right" terrifies me. It rips away the very heart and soul of what I believe it is to be a lesbian in this world. It robs me of the opportunity to make a difference. We end up mimicking all that is bad about the institution of marriage in our effort to appear to be the same as straight couples.

By looking to our sameness and de-emphasizing 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 institu-



Gay marriage would further outlaw all gay and lesbian sex that is not performed in a marital context.

tion which recognizes one of many types of valid and respected relationships. Until the constitution is interpreted to respect and encourage differences, pursuing the legalization of same-sex marriage would be leading our movement into a trap; we would be demanding access to the very institution which, in its current form, would undermine *our* movement to recognize many different kinds of relationships. We would be perpetuating the elevation of married relationships and of "couples" in general, and further eclipsing other relationships of choice.

Ironically, gay marriage, instead of liberating gay sex and sexuality, would further outlaw all gay and lesbian sex which is not performed in a marital context. Just as sexually active non-married women face stigma and double standards around sex and sexual activity, so too would non-married gay people. The only legitimate gay sex would be that which is cloaked in and regulated by marriage. Its legitimacy would stem not from an acceptance of gay sexuality, but because the Supreme Court and society in general fiercely protect the privacy of marital relationships. Lesbians and gay men who do not seek the state's stamp of approval would clearly face increased sexual oppression.

UNDoubtedly, whether we admit it or not, we all need to be accepted by the broader society. That motivation fuels our work to eliminate discrimination in the workplace and elsewhere, fight for custody of our children, create our own families, and so on. The growing discussion about the right to marry may be explained in part by this need for acceptance. Those closer to the norm or to power in this country are more likely to see marriage as a principle of freedom and equality. Those who are more acceptable to the mainstream because of race, gender, and economic status are more likely to want the right to marry. It is the final acceptance, the ultimate affirmation of identity.

On the other hand, more marginal members of the lesbian and gay community (women, people of color, working class and

poor) are less likely to see marriage as having relevance to our struggles for survival. After all, what good is the affirmation of our relationships (that is, marital relationships) if we are rejected as women, black, or working class?

The path to acceptance is much more complicated for many of us. For instance, if we choose legal marriage, we may enjoy the right to add our spouse to our health insurance policy at work, since most employment policies are defined by one's marital status, not family relationship. However, that choice assumes that we have a job *and* that our employer provides us with health benefits. For women, particularly women of color who tend to occupy the low-paying jobs that do not provide healthcare benefits at all, it will not matter one bit if they are able to marry their woman partners. The opportunity to marry will neither get them the health benefits nor transform them from outsider to insider.

Of course, a white man who marries another white man who has a full-time job with benefits will certainly be able to share in those benefits and overcome the only obstacle left to full societal assimilation—the goal of many in his class. In other words, gay marriage will not topple the system that allows only the privileged few to obtain decent health care. Nor will it close the privilege gap between those who are married and those who are not.

Marriage creates a two-tier system that allows the state to regulate relationships. It has become a facile mechanism for employers to dole out benefits, for businesses to provide special deals and incentives, and for the law to make distinctions in distributing meager public funds. None of these entities bothers to consider the relationship among people; the love, respect, and need to protect that exists among all kinds of family members. Rather, a simple certificate of the state, regardless of whether the spouses love, respect, or even see each other on a regular basis, dominates and is supported. None of this dynamic will change if gay men and lesbians are given the option of marriage.

Gay marriage will not help us address the systemic abuses inherent in a society that does not provide decent health care to all of its citizens, a right that should not depend on whether the individual 1) has sufficient resources to afford health care or health insurance, 2) is working and receives health insurance as part of compensation, or 3) is married to a partner who is working and has health coverage which is extended to spouses. It will not address the underlying unfairness that allows businesses to provide discounted services or goods to families and couples—who are defined to include straight, married people and their children, but not domestic partners.

Nor will it address the pain and anguish of the unmarried lesbian who receives word of her partner's accident, rushes to the hospital and is prohibited from entering the intensive care unit or obtaining information about her condition solely because she is not a spouse or family member. Likewise, marriage will not help the gay victim of domestic violence who, because he chose not to marry, finds no protection under the law to keep his violent lover away.

IF THE LAWS CHANGE tomorrow and lesbians and gay men were allowed to marry, where would we find the incentive to continue the progressive movement we have started that is pushing for societal and legal recognition of all kinds of family relationships? To create other options and alternatives? To find a place in the law for the elderly couple who, for companionship and economic reasons, live together but do not marry? To recognize the right of a long-time, but unmarried, gay partner to stay in his rent-controlled apartment after the death of his lover, the only named tenant on the lease? To recognize the family relationship of the lesbian couple and the two gay men who are jointly sharing child-raising responsibilities? To get the law to acknowledge that we may have more than one relationship worthy of legal protection?

Marriage for lesbians and gay men still will not provide a real choice unless we con-

tinue the work our community has begun to spread the privilege around to other relationships. We must first break the tradition of piling benefits and privileges on to those who are married, while ignoring the real life needs of those who are not. Only when we de-institutionalize marriage and bridge the economic and privilege gap between the married and the unmarried will each of us have a true choice. Otherwise, our choice not to marry will continue to lack legal protection and societal respect.

The lesbian and gay community has laid the groundwork for revolutionizing society's views of family. The domestic partnership movement has been an important part of this progress insofar as it validates non-marital relationships. Because it is not limited to sexual or romantic relationships, domestic partnership provides an important opportunity for many who are not related by blood or marriage to claim certain minimal protections.

It is crucial, though, that we avoid the pitfall of framing the push for legal recognition of domestic partners (those who share a primary residence and financial responsibilities for each other) as a stepping stone to marriage. We must keep our eyes on the goals of providing true alternatives to marriage and of radically reordering society's view of family.

The goals of lesbian and gay liberation must simply be broader than the right to marry. Gay and lesbian marriages may minimally transform the institution of marriage by diluting its traditional patriarchal dynamic, but they will not transform society. They will not demolish the two-tier system of the "haves" and the "have nots." We must not fool ourselves into believing that marriage will make it acceptable to be gay or lesbian. We will be liberated only when we are respected and accepted for our differences and the diversity we provide to this society. Marriage is not a path to that liberation. ▼

Paula L. Ettelbrick is the Legal Director of the Lambda Legal Defense and Education Fund. She is the National Vice President of the National Lawyers Guild.

Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so.
