



We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"

Nancy D. Polikoff

Virginia Law Review, Vol. 79, No. 7, Symposium on Sexual Orientation and the Law. (Oct., 1993), pp. 1535-1550.

Stable URL:

<http://links.jstor.org/sici?sici=0042-6601%28199310%2979%3A7%3C1535%3AWWWA%3E2.0.CO%3B2-6>

Virginia Law Review is currently published by Virginia Law Review.

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/about/terms.html>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/journals/vlr.html>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

The JSTOR Archive is a trusted digital repository providing for long-term preservation and access to leading academic journals and scholarly literature from around the world. The Archive is supported by libraries, scholarly societies, publishers, and foundations. It is an initiative of JSTOR, a not-for-profit organization with a mission to help the scholarly community take advantage of advances in technology. For more information regarding JSTOR, please contact support@jstor.org.

WE WILL GET WHAT WE ASK FOR: WHY LEGALIZING
GAY AND LESBIAN MARRIAGE WILL NOT
“DISMANTLE THE LEGAL STRUCTURE OF
GENDER IN EVERY MARRIAGE”*

Nancy D. Polikoff †

THE arguments for and against making marriage a priority for the lesbian and gay rights movement have been presented extensively. Attorney Tom Stoddard justifies aggressively pursuing same-sex marriage on three bases. First, Stoddard cites practical reasons, including the right to obtain direct economic benefits (e.g., social security benefits, health insurance), the advantages of tax and immigration laws, and protection of the relationship from outside interference.¹ Stoddard next addresses the political justifications, asserting that only by marrying will gay and lesbian couples validate the significance of their relationships. In Stoddard’s estimation, “marriage is . . . the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.”² Finally, Stoddard articulates a number of philosophical arguments to convince skeptics that the desirability of the right to marry does not require that one approve of that institution’s current state. Indeed, Stoddard suggests that legalizing same-sex unions might even transform marriage into a state divested of its sexist base.³

In contrast, Stoddard’s colleague, Paula Ettelbrick, contends that “[m]arriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the

* Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 *Law & Sexuality* 9, 18-19 (1991). This phrase forms the core of Professor Hunter’s argument urging lesbian and gay rights activists to make the legalization of same-sex marriage a priority for the lesbian and gay civil rights movement. See *id.*

† Professor of Law, Washington College of Law, The American University. I would like to thank Meg Ciszek for research assistance and Lauren Taylor for editorial assistance.

¹ Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in *Lesbian and Gay Marriage* 13, 14-16 (Suzanne Sherman ed., 1992).

² *Id.* at 17.

³ *Id.* at 18-19.

validation of many forms of relationships.”⁴ She argues that justice for lesbians and gay men depends upon accepting our differences from mainstream culture and the many choices we make about our relationships. Lesbian and gay marriage would not alter the current system, she maintains, which values marriage above all other relationships, but would instead create a double standard for lesbian and gay sex—accepted if one is married, outlawed if one is not. In addition, Ettelbrick insists that the economic benefits lesbians and gay men would obtain by marrying, such as the ability to be covered by a spouse’s health insurance plan, help primarily those who already enjoy relative economic security: in order for an employee’s partner to claim a right to health benefits, the employee must be working at a job providing those benefits. We should instead focus our efforts, she argues, on obtaining economic security and adequate health care for everyone, regardless of marital status or sexual orientation.

Let me acknowledge my own position in this debate. I “came out” as a lesbian feminist in the early 1970s, and my lesbian identity was intertwined with a radical feminist perspective. At the time, many heterosexual feminists chose not to marry in order to make a statement against marriage, which they believed to be an oppressive, patriarchal institution. I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.

The only argument that has ever tempted me to support efforts to obtain lesbian and gay marriage is the contention that marriages between two men or two women would inherently transform the institution of marriage for all people. Tom Stoddard peripherally alludes to this possibility, as does Professor Eskridge,⁵ but law professor and lesbian and gay rights attorney Nan Hunter, now deputy general counsel at the Department of Health and Human Services, has expanded upon it more fully, identifying it as the major reason she

⁴ Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, in *Lesbian and Gay Marriage*, *supra* note 1, at 20, 21.

⁵ See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 *Va. L. Rev.* 1419, 1487-88 (1993).

supports efforts to obtain the right to marry for lesbians and gay men. She states:

What is most unsettling to the status quo about the legalization of lesbian and gay marriage is its potential to expose and denaturalize the historical construction of gender at the heart of marriage. . . . Certainly marriage is a powerful institution, and the inertial force of tradition should not be underestimated. But it is also a social construct. Powerful social forces have reshaped it before and will continue to do so. . . . [T]he impact [of lesbian and gay marriage] . . . will be to dismantle the legal structure of gender in every marriage.⁶

It is in the context of responding to the view that lesbian and gay marriage will transform the otherwise marred institution of marriage that I examine Professor Eskridge's research on the historical and cross-cultural evidence of socially and/or religiously approved same-sex marriages. Although his study is impressive, its implications for the lesbian and gay rights movement demand closer study. Will lesbian and gay marriage "dismantle the legal structure of gender in every marriage," or does this research instead suggest that the gendered nature of marriage, and indeed of all of society, will survive same-sex unions? After discussing the significance of Professor Eskridge's research, I will explain why I find Professor Hunter's analysis ultimately unpersuasive and remain opposed to making the right to marry a priority for the lesbian and gay rights movement.

Professor Eskridge's research does substantially contribute to the debate on lesbian and gay marriage. The first clue to the significance of his work lies in the context within which it was generated. Professor Eskridge represents two District of Columbia men who were denied a marriage license and are challenging the District's action under the D.C. marriage statute⁷ and the D.C. antidiscrimination ordinance.⁸ The superior court judge, after hearing argument on the claim, requested that both sides research the history of marriage. In meeting this challenge, Professor Eskridge extensively researched scores of historical and anthropological materials. Upon concluding his study, he asserted that marriage has not at all times and for all

⁶ Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 *Law & Sexuality*, 9, 18-19 (1991).

⁷ D.C. Code Ann. §§ 30-101 to -121 (1981).

⁸ D.C. Code Ann. §§ 1-2501 to -2533 (1981).

peoples been a union of a man and a woman, and that same-sex unions have not always been condemned.

In the context of this litigation, the evidence that same-sex marriages have existed and been accepted in numerous communities has a distinctly conservative tone; most of the marriages Eskridge uncovered support rather than subvert hierarchy based upon gender.⁹ His historical and anthropological evidence contradicts any assumption that “gender dissent” is inherent in marriage between two men or two women.¹⁰ Rather, most of the unions reported were in fact gendered. Although both partners were biologically of the same sex, one partner tended to assume the characteristics and responsibilities of the opposite gender, with both partners then acting out their traditional gender roles. Thus, early observers of the Native American *berdache* noticed that some men “marry other men who . . . go around like women, perform their duties and are used as such and who cannot carry or use the bow,”¹¹ and that some women “give up all the duties of women and imitate men, and follow men’s pursuits as if they were not women. . . . [E]ach has a woman to serve her, to whom she says she is married, and they treat each other and speak with each other as man and wife.”¹² Contemporary scholarship on the *berdache*, such as Walter Williams’ acclaimed study, *The Spirit and the Flesh: Sexual Diversity in American Indian Culture*, supports the conclusion that marriages between men and *berdache* followed the gendered division of labor observed in traditional Native American marriages, with the man taking on the role of husband and the *berdache* taking on the role of wife.¹³ Similarly, female *berdache* hunted and headed the household, assuming traditional male responsibilities.¹⁴ Eskridge

⁹ Eskridge notes that his review of the literature includes some relationships that were culturally but not legally recognized and others that attained some form of legal recognition. He refers to only the latter as “marriages,” and in an overwhelming number of these relationships one partner assumed the social role and sex-linked rights and responsibilities of the opposite gender. See Eskridge, *supra* note 5, at Part II.

¹⁰ For a discussion of “gender dissent,” see Hunter, *supra* note 6, at 29-30.

¹¹ Francisco López de Gómara, *Historia General de las Indias* (1552), translated in Francisco Guerra, *The Pre-Columbian Mind* 85 (1971), discussed in Eskridge *supra* note 5, at 1454.

¹² 2 Pero de Magalhães, *The Histories of Brazil* 88-89 (John B. Stetson, Jr. trans., Cortes Soc’y 1922) (1576), discussed in Eskridge, *supra* note 5, at 1454.

¹³ Walter L. Williams, *The Spirit and the Flesh: Sexual Diversity in American Indian Culture* 112 (1986), discussed in Eskridge, *supra* note 5, at 1456-57.

¹⁴ Eskridge, *supra* note 5, at 1457-58.

quotes from a scholar of female *berdache* that “‘the cross-gender female’s partner . . . was always a traditional female; that is, two cross-gender [dominant] females did not marry,’”¹⁵ demonstrating that these same-sex partners assumed the traditional gendered roles of different-sex couples.

Eskridge’s compilation is filled with many similar examples of same-sex relationships whose structure reinforces traditional notions of marriage as gendered and hierarchical. For example, Greek same-sex relationships are described by historian Kenneth Dover as including a courtship by the dominant party, the “husband/man,” towards the receptive party, the “wife/boy,” in which the receptive party responds coyly.¹⁶ “Boy wives” among the Azande (now in the Sudan) were similarly described as performing the services normally rendered by women.¹⁷ Among Eskridge’s examples of traditionally gendered same-sex unions from Asia is the Chuckchee, whose “soft men” married men. While the other men hunted and fished, the “soft men” took care of the house and performed other domestic tasks.¹⁸ Indian *hijras*, emasculated men with female dress and demeanor, likewise married “traditional” men and assumed the historical female role.¹⁹

Female couples likewise assumed conventional gendered roles. For example, marriages between women in Southern China in the nineteenth century resulted in the designation of one partner as “husband” and the other as “wife.”²⁰ Similarly, African “woman-marriage” is an institution in which a woman gives “bridewealth for, and marr[ies], a woman over whom and whose offspring she has full control.”²¹ Eskridge cites one scholar whose assessment of this prac-

¹⁵ Id. (quoting Evelyn Blackwood, *Sexuality and Gender in Certain Native American Tribes: The Case of Cross-Gender Females*, 10 *Signs* 27, 35 (1984)).

¹⁶ See K.J. Dover, *Greek Homosexuality* 81-91 (1978), discussed in Eskridge, *supra* note 5, at 1444.

¹⁷ See E.E. Evans-Pritchard, *Sexual Inversion Among the Azande*, 72 *Am. Anthropologist* 1428, 1429-90 (1970), discussed in Eskridge, *supra* note 5, at 1458-59.

¹⁸ Eskridge, *supra* note 5, at 1463 (quoting 7 Waldemar Bogoras, *The Jessup North Pacific Expedition: The Chukchee* 451 (reprint 1975) (Franz Boas ed., 1904-09)).

¹⁹ Id. at 1463-64 (discussing Serena Nanda, *The Hijras of India: Cultural and Individual Dimensions of an Institutionalized Third Gender Role*, *J. Homosexuality*, Summer 1985, at 35).

²⁰ Id. at 1465-66 (discussing Bret Hinsch, *Passions of the Cut Sleeve: The Male Homosexual Tradition in China 177-78* (1990)).

²¹ Id. at 1460-61 (quoting Eileen J. Krige, *Woman-Marriage, with Special Reference to the Lovedu—Its Significance for the Definition of Marriage*, 44 *Afr. Stud.* 11, 11 (1974)).

tice is that it allows powerful, wealthy women to assume the social roles of men and thus serve as leaders in a male-dominated society.²²

The vision of same-sex marriage presented in the research Professor Eskridge proffers is a profoundly constricted one. In some instances, the relationships he describes do not seem to be same-sex unions at all, as the relevant culture appears to recognize a third gender, such as the *berdache* and the *hijras*. Marriage within each gender did not exist. Furthermore, hierarchy was a component of all such ostensibly same-sex marriages, with the partner embodying the most male characteristics accorded higher status and greater control.²³ Accordingly, an argument based on continuity between lesbian and gay marriage today and same-sex marriages of other eras and cultures is not one that makes deconstruction of gender the core reason to fight for the ability of lesbians and gay men to marry.²⁴

Should public debates arise as to whether to legislate in favor of contemporary lesbian and gay marriage, this type of historical research would probably be used to advance the proposition that there is nothing new or truly unconventional about same-sex marriage. Indeed, that was the precise assertion made by Professor Eskridge in the litigation sparking his research.²⁵ Similarly, the political and public relations campaign to legalize same-sex marriage would likely contend that our relationships are no different from het-

²² See *id.* at 1461-62 & n.155 (discussing Denise O'Brien, *Female Husbands in Southern Bantu Societies*, in *Sexual Stratification: A Cross-Cultural View* 109, 122 (Alice Schlegel ed., 1977)).

²³ I do not intend my criticism of the gendered nature of marriage portrayed in much of the historical and anthropological material to be taken as criticizing the eroticization of difference inherent in, for example, butch-femme lesbian relationships. See generally, Elizabeth L. Kennedy & Madeline D. Davis, *Boots of Leather, Slippers of Gold* (1993) (describing the history of butch-femme culture). In the unions discussed in Professor Eskridge's collection, the more masculine partner was accorded by the larger community the higher social and economic status associated with the male gender. In contrast, the lesbian butch, as described by Kennedy and Davis and others, see, e.g., Leslie Feinberg, *Stone Butch Blues* (1993), paid an enormous social and economic price for displaying her gender-inappropriate demeanor, facing ostracism and violence as a result.

²⁴ In fact, some Greek literature cited by Eskridge as indicative of the Greek view of male same-sex love contains an underlying theme of misogyny. See Eskridge, *supra* note 5, at 1441-44.

²⁵ The Plaintiffs' Memorandum to the Court states on its first page that "there is nothing new in human history about same-sex marriage." Plaintiff's Memorandum on the History of Same-Sex Marriage at 1, *Dean v. District of Columbia*, No. 90-13892 (D.C. Super. Ct., filed Sept. 4, 1991).

erosexual marriages. In other words, the pro-marriage position would accept, rather than challenge, the current institution of marriage. I believe this process would be profoundly destructive to the lesbian and gay community.

Professor Hunter acknowledged this danger in her article advocating same-sex marriage in the hope that it would deconstruct gender. She writes:

The impact of law often lies as much in the body of discourse created in the process of its adoption as in the final legal rule itself. . . . The social meaning of the legalization of lesbian and gay marriage . . . would be enormously different if legalization resulted from political efforts framed as ending gendered roles between spouses rather than if it were the outcome of a campaign valorizing the institution of marriage, even if the ultimate "holding" is the same.²⁶

Everything in our political history suggests that a concerted effort to achieve the legalization of lesbian and gay marriage will valorize the current institution of marriage. Just as Professor Eskridge was propelled towards a litigation strategy that accepted marriage—even grossly hierarchical, gendered marriage—as a good, any effort to legitimize lesbian and gay marriage would work to persuade the heterosexual mainstream that lesbians and gay men seek to emulate heterosexual marriage as currently constituted.²⁷

Demands for social change often have begun with a movement at first articulating the rhetoric of radical transformation and then later discarding that rhetoric to make the demands more socially acceptable. The movement's rhetoric is modified or altered when those opposing reform explore the radical and transformative possibilities of that rhetoric, causing its advocates to issue reassurances promising that such transformation is not what the movement is about at all.

Within the arena of eliminating gender hierarchy, women's access to abortion provides one such example of a movement redefining its goals to make them more politically palatable. Early abortion activists spoke of women's liberation and women's entitlement to sexual fulfillment, viewing access to abortion as part of a larger struggle to end male dominance. As abortion became a major political issue,

²⁶ Hunter, *supra* note 6, at 29.

²⁷ See generally Eskridge, *supra* note 5, at 1488-91 (outlining the argument that the process of seeking legal recognition for same-sex marriage compromises gay radicalism).

however, and with the battle to win public opinion in full gear, the rhetoric changed, adopting its current pro-choice vocabulary. In the judicial arena, the prevailing arguments spoke of privacy. In fact, it became fashionable to say that while one was not in favor of abortion, one was nonetheless in favor of choice,²⁸ to imply—if not to state—that abortion was an evil but a necessary one. In the face of conservative voices decrying abortion as a facilitator of unchecked sexual freedom, “pro-choice” voices denied or downplayed the relationship between women’s access to abortion and women’s ability to enjoy guilt-free sexual pleasure.²⁹

By shifting their strategy, abortion rights activists lost the transformative potential of women’s ready access to abortion. Supporters of abortion rights no longer link it to ending male supremacy or to affirming sexual pleasure for women. Indeed, “abortion on demand” is no longer the call of abortion supporters but the specter brought forth by antiabortion voices.³⁰

²⁸ For example, in his acceptance speech before the Democratic National Convention, Bill Clinton emphasized that he was pro-choice, not pro-abortion. See Bill Clinton, Speech Accepting the Democratic Presidential Nomination (July 16, 1992), in *N.Y. Times*, July 17, 1992, at A14, A15.

²⁹ This position is explored in several essays in *From Abortion to Reproductive Freedom* (Marlene G. Fried ed., 1990). Marlene Fried summarizes as follows:

The abortion rights movement essentially folded after abortion became legal. While more radical segments of the movement mobilized in 1977 after the Hyde Amendment prohibited federal Medicaid funding of abortion, it was not until the threat of a constitutional amendment that would ban all U.S. abortions was posed in 1981 that a visible mainstream abortion rights movement re-emerged.

The 1980s movement formed as a reaction to the backlash, and was shaped by the need to respond to an all-out anti-choice campaign, one with initiatives in legislatures, in the courts, and in the streets. In an effort to hold the line, the new abortion rights movement rarely dared talk about abortion or women’s rights, preferring instead to focus on the intolerance and extremism of the other side. The pro-choice movement attempted to sanitize its own demands. Insisting on abortion rights as a necessary condition of all women’s sexual freedom continues to be seen as too threatening, too risky, too selfish. Instead, the movement turned to the more innocuous and ambiguous language of “choice” and “personal freedom.” The women’s movement fought to bring women’s reproductive lives out of the private sphere, arguing that our personal choices were political. How ironic that the pro-choice movement now argues that abortion is private and personal, not political.

Marlene G. Fried, *Transforming the Reproductive Rights Movement: The Post-Webster Agenda*, in *From Abortion to Reproductive Freedom*, supra, at 5-6.

³⁰ Thus, we see the concept of “good” and “bad” abortions: “A ‘good’ or acceptable abortion is the result of circumstances outside the pregnant woman’s control: her health, rape, or incest. A ‘bad’ or unacceptable abortion is one which results from her trying to take control

A reform movement's choice to change rhetoric is not costless. Abortion activists' continuing decision to portray abortion as an agonizing personal decision affects both how women who have abortions experience their decision and how abortion advocates and counselors respond to those decisions once made. With the moral legitimacy of abortion questioned, women who have abortions often feel secretive, shameful, and stigmatized.³¹ Those who work in clinics performing abortions assume clients must be feeling something negative about their decision to abort, believing that there must be something terribly wrong with a woman who does not express grief, guilt, or both.³²

By critiquing the strategic change in rhetoric of mainstream abortion rights organizations, I do not imply that the fight for legal and safe abortion should be abandoned. I do suggest, however, that the most radical bases of this fight—ending gender hierarchy and the sexual double standard—have been lost precisely because they are no longer articulated. Thus, if we are successful in maintaining the availability of abortion, we will have achieved what we asked for—the ability of a woman to make a difficult, even morally ambiguous, personal choice to abort as a matter of last resort. If the only alternative to this accomplishment is a return to the days of illegal abortion, such an achievement is preferable, but it is not transformative.

Similar analyses apply to the lesbian and gay rights movement. Specifically, the current rhetoric voiced in the campaign to end the military's practice of excluding lesbians and gay men is useful in imagining how a campaign to end the exclusion of lesbians and gay men from marriage would be shaped. Those challenging the military exclusion neither critique the military as an institution nor acknowledge the transformative potential of allowing lesbians and gay men to serve openly. I believe those campaigning for lesbian and gay marriage would adopt a similar strategy, neither critiquing the institution of marriage nor acknowledging the transformative potential of allowing lesbians and gay men to enter into state-sanctioned unions.

of her life, expressing a preference." Sara Buttenweiser & Reva Levine, *Breaking Silences: A Post-Abortion Support Model*, in *From Abortion to Reproductive Freedom*, supra note 29, at 121, 122.

³¹ See Lynn S. Chauncer, *Abortion Without Apology*, in *From Abortion to Reproductive Freedom*, supra note 29, at 113, 115.

³² *Id.*

The vehemence of military and congressional opposition to President Clinton's proposal to lift the ban caught most of the lesbian and gay rights lobby by surprise. In response, an ad hoc organization was formed to work exclusively on this issue on behalf of the lesbian and gay community. The name adopted by the organization, the Campaign for Military Service, was not an arbitrary or random choice. At the meeting at which the name was selected, a public relations professional cautioned the group that the words "justice" and "equality" should be avoided. Interestingly enough, the words "lesbian," "gay," "homosexual," "discrimination," and "rights" were also omitted. Instead, the emphasis is on military service, the willingness to enter the revered institution that is charged with this country's defense. It is a campaign that meets and embraces the military on its own terms, the implicit message being that the military is accepted as it now exists. The name serves to assure military leaders and mainstream society that there will be nothing transformative about allowing lesbians and gay men to serve their country openly.

The strategy that lesbian and gay rights activists have pursued in their quest to eliminate the military exclusion is filled with rhetoric professing respect for the armed services. Although the decision to employ troops in connection with Operation Desert Storm divided the gay community,³³ those lesbian and gay service members who performed in the operation are publicly paraded as heroes by lesbian and gay rights organizations.³⁴ Indeed, the campaign to lift the military ban would experience tremendous difficulty without the stories of the many lesbian and gay veterans whose ranks, honors, awards, and statures belie the notion that their presence could harm the military in any way. Lesbian and gay rights advocates proclaim that these ser-

³³ See Lou Chibbarro, Jr., *NGLTF's Stand on Gulf War Expected to Spark Debate*, *Wash. Blade*, Jan. 11, 1991, at 3.

³⁴ On the weekend of April 24-25, 1993, during the March on Washington for Lesbian and Gay Rights, one of the "heroes" honored at an event sponsored by the National Gay and Lesbian Task Force was Sgt. Joe Zuniga, decorated as a result of his participation in the Gulf War and subsequently named the Sixth U.S. Army's soldier of the year. See John Gallagher, *Dream On*, *Advoc.*, July 27, 1993, at 32, 33.

It was widely publicized during Operation Desert Storm that discharge proceedings against lesbian and gay service personnel were held up to allow them to serve in the Persian Gulf. See Nick Bartolomeo, *Military Sends a Dozen Gays to the Gulf*, *Wash. Blade*, February 1, 1991, at 1. Thus, such service members now epitomize military hypocrisy, their continued deployment demonstrating that when morale and unit cohesion must be at their highest, i.e., in times of battle, the services chose to retain, rather than discharge, lesbians and gay men.

vice members, including those decorated in Vietnam³⁵ and ranked at the top of their service academy classes,³⁶ could not possibly impair unit cohesion or military morale.

Although several individuals working with the Campaign for Military Service are themselves antimilitarist,³⁷ those sentiments are subjugated to the imperative of ending the military exclusion. There is no way to publicly critique the military and simultaneously ask to be let into it, as such criticism would undermine the credibility of the dominant message: that the presence of openly lesbian and gay service members would not harm military effectiveness and, by implication, the United States' position as the world's foremost military power.³⁸

There is no room in this campaign for the community's internal debate about the military's proper role. Suppressing this discussion reflects a value judgment on the part of lesbian and gay leaders, a conscious ranking of issues. Gay journalist Tommi Avicolli Mecca, while acknowledging that allowing lesbians and gay men to serve openly may legitimate us and may help break down negative views held by heterosexual soldiers,³⁹ nevertheless concludes that the advantages of a campaign for military inclusion do not outweigh the disadvantages:

Asking for admission into the military . . . aligns us with regressive forces, those that refuse to see [that] . . . the military is part of America's problem right now.

. . . .

Instead of wanting in on the military, we should be advocating for non-military jobs that promote peace and train people to overcome

³⁵ Margarethe Cammermeyer, for example, was a decorated army nurse forced out of the military because of her lesbian identity. See David S. Jackson, "I Just Don't Want to Go," *Time*, July 6, 1992, at 62 (interview with Margarethe Cammermeyer).

³⁶ See Jeffrey Schmalz, *On the Front Lines with Joseph Steffan*; From a by-the-Book Midshipman to *Gay Advocate*, *N.Y. Times*, Feb. 4, 1993, at C1 (noting that Steffan had ranked in the top ten of his class at the Naval Academy).

³⁷ Telephone Interview with Chai Feldblum, Legal Director, Campaign for Military Service (Feb. 1993).

³⁸ Literature produced by the Human Rights Campaign Fund (HRCF) as part of its "Operation Lift the Ban" asks readers to write to their representatives and senators in Congress. The first two points that HRCF suggests using in the letters are that "The Current Policy of Excluding Gay Men, Lesbians and Bisexuals from Service Hurts the Armed Forces" and "Ending the Discrimination Would Benefit the Military." *Momentum*, Special Edition, Spring 1993, at 4.

³⁹ Tommi A. Mecca, *Between Little Rock and a Hard Place* 125-26 (1993).

poverty and despair. Why not put people to work in this country helping to rebuild our cities and feed the hungry? Channel some of that defense budget into social welfare programs that can be staffed by the same young men [and women] who now pursue Uncle Sam for a job. This is where queers should align themselves.

Instead, we're stuck arguing with the Neanderthals in the Department of Defense and the religious right that queers will make good soldiers. We look to the studies, done by the military itself, that prove how obedient and loyal we can be. Look, queers can kill, too; look, queers can defend oil interests. Look, queers can be fodder.⁴⁰

By the same token, I believe that an effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible. Long-term, monogamous couples would almost certainly be the exemplars of the movement, sharing stories of adversity resulting from their unmarried status: a partner who lacked health care because he was not eligible for spousal employee benefits, or who was denied hospital visitation rights because she was not family, or who was unable to make burial arrangements after her partner's death. Marriage would be touted as the solution to these couples' problems; the limitations of marriage, and of a social system valuing one form of human relationship above all others, would be downplayed.

It is impossible to imagine arguing that lesbians and gay men should be permitted to serve in the military in order to transform that institution, either in the macro sense—its mission—or in the micro sense—its daily reinforcement of hierarchy, submission, and discipline. Indeed, the argument that the military's socialization process would shift to accommodate the presence of acknowledged lesbians and gay men is currently being made by those who *oppose* lifting the ban. Ironically, it is they who, by arguing that unit cohesion and morale will be affected by accepting openly gay men and women, employ persuasively the possibility of a transformative effect, one that they do not at all like.

The political leaders and lobbyists of the movement to allow gays to serve openly reject such arguments. They believe that conduct can and should be regulated, with parity between heterosexual and homosexual conduct, and that absent conduct there is no effect on unit

⁴⁰ Id. at 126-27.

cohesion or morale that cannot be overcome by antiprejudice training similar to that used to surmount white racism when the armed forces were integrated.

Yet the potential for transformation does exist if the ban is lifted. Frank Browning described it in his recent book, *The Culture of Desire: Paradox and Perversity in Gay Lives Today*,⁴¹ and in a *Washington Post* opinion piece.⁴² Rather than accept the dominant “nothing will change” line used to sway public opinion and win votes, Browning embraces the possibilities for change inherent in admitting openly lesbian and gay service members. He states:

[T]he commander who comes out of the closet will challenge the society's most primal understanding of what it means to be an “authentic” male. If a real authentic hero is revealed not to be conventionally authentic, i.e., straight, what becomes of the hero's subordinates? Won't the young privates, sergeants and ensigns who serve under him question their own authenticity, their own ideas of what it means to be male? Such questions are a test of our most conventional notions of how men wield power in daily life What is threatened is the integrity of the heterosexual male's comprehension of himself. What is being revealed is how frail that self-comprehension really is.

. . . Ending the gay ban will change men's lives in America—change our lives with each other and with women.

As we enter this most hierarchically ordered institution of American life, where sublimation of desire is critical to the authority of command, we will most certainly disorder and reorder what the generals revere as “military culture.”⁴³

Thus, Browning says that the presence of openly gay men in the military will disrupt gender roles. The relationship between the military's exclusion of lesbians and gay men and the social construction of gender has been addressed before. Professor Kenneth Karst's brilliant article⁴⁴ identifies society's desire to maintain the ideology of masculinity as the principal reason behind perpetuating the military exclusion:

⁴¹ Frank Browning, *The Culture of Desire: Paradox and Perversity in Gay Lives Today* (1993).

⁴² Frank Browning, From ‘Poof’ to ‘Predator,’ *Wash. Post*, Mar. 28, 1993, at C4.

⁴³ *Id.*

⁴⁴ Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. Rev.* 499 (1991).

For those who want to keep the public's gaze fixed on "the manliness of war," the tensions of male bonding demand a clear expression of the services' rejection of homosexuality. This expression is not just a by-product of the policy that purports to exclude gay men and lesbians from the armed forces; it is the policy's main function. When a gay soldier comes to the Army's official attention, the real threat is not the hindrance of day-to-day operations, but rather the tarnishing of the Army's traditionally masculine image.⁴⁵

Michelle Benecke, who worked for the Campaign for Military Service, and Kirsten Dodge have described how the military exclusion facilitates lesbian-baiting, a practice that allows traditional constructions of gender to flourish in the services:

The entry of women into nontraditional job fields makes it difficult for men to maintain masculinity in traditional terms. . . . [C]alling servicewomen "lesbians" is one way for servicemen to maintain their sense of masculinity when traditional gender distinctions based on job field begin to break down.

. . . .
 [One way] to avoid demasculinization when a woman does a "man's job" is to make her *not* a woman. Women who perform "men's jobs" are "classed as deviants," "man-women," and lesbians.⁴⁶

Francisco Valdes' study of sexual orientation and gender concludes that "the exclusion of sexual minorities from service in the armed forces, ostensibly a 'sexual orientation' issue, in fact implicates 'gender' issues as well."⁴⁷

Although they are undoubtedly aware of the potential for transforming gender within the military by ending the military exclusion of lesbians and gay men, the Campaign for Military Service and other groups actively working to end the ban never make this argument. Rather, the implicit, if not explicit, message offered to sway public and political opinion is that everything will remain the same, that mil-

⁴⁵ Id. at 545-46.

⁴⁶ Michelle Benecke & Kirstin Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 Harv. Women's L.J. 215, 234, 237 (1990) (footnotes omitted).

⁴⁷ Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society* 122 (unpublished manuscript, on file with the Virginia Law Review Association).

itary culture will be unaffected; open lesbians and gay men will blend in, not transform, the institution. Neither is the argument being made, as part of the political process, that the military exclusion should end because the presence of lesbians and gay men would transform social attitudes towards homosexuality as a result of the close contact between heterosexual and homosexual service personnel. Rather, the implication is that attaining societal approval of homosexuality and permitting military service by lesbians and gay men are two completely different things.⁴⁸

Just as transforming gender roles and achieving increased acceptance of lesbians and gay men are not politically viable reasons to advocate ending the military ban, so are they unlikely grounds around which to build support for legalizing lesbian and gay marriage. The danger in both instances is that the underlying critique of the institution, be it the military or marriage, becomes not only secondary but marginalized, even silenced.

If my hypothesis about the process of change is correct, then we must measure the value of the work it will take to legalize lesbian and gay marriage by how closely the arguments we make in advocating this change match what we really believe about and want for our relationships and our community. For those who support lesbian and gay marriage because it would allow us access to the package of benefits now associated with heterosexual marriage, or because it would demonstrate that our relationships are as valuable as their heterosexual counterparts, advocating lesbian and gay marriage is an obvious choice. I do not share that vision. Advocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all. It will also require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people. I fear that the very process of employing that rhetorical strategy for the years it

⁴⁸ The Secretary of Veterans Affairs, Jesse Brown, captured this distinction in his characterization of President Clinton's position as follows: "What the president is basically saying is this: 'I'm not trying to legitimize behavior, I'm trying to give people who want an opportunity to serve their country an opportunity to do so.'" Bill McAllister, VA's Brown Sidesteps Endorsing Gays Plan, Wash. Post, May 14, 1993, at A29.

will take to achieve its objective will lead our movement's public representatives, and the countless lesbians and gay men who hear us, to believe exactly what we say.