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Should Heterosexuals Boycott Marriage?

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Should Heterosexuals Boycott Marriage?*

Ian Ayres and Jennifer Gerarda Brown

Abstract

This essay asks a seemingly simple question: Can it ever be ethical to take a benefit that is invidiously denied others? Posed in such stark terms, the question seems to admit only one answer: “no.” But many, many heterosexuals voluntarily accept the benefits of marriage that are invidiously denied to their gay friends and family. This essay is an attempt to reconcile this conflict. The reconciliation we propose avoids total renunciation. Instead, we suggest a theory of limited disgorgement, a pragmatic formula to determine how much privileged people should give up if they decide to accept benefits invidiously denied to others.

KEYWORDS: gay rights, marriage rights, civil rights, heterosexuals

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This essay¹ asks a seemingly simple question: Can it ever be ethical to take a benefit that is invidiously denied others? Posed in such stark terms, the question seems to admit of only one answer: “no.” Few of us would advise a friend (or a child) to accept a scholarship offered only to whites. If you are white, would you drink from a whites-only water fountain? Of course not. But at the same time, many of us take benefits that are unfairly denied others. Bill Clinton took a Rhodes Scholarship that was only offered to men. In 1982 Ian accepted a Yale scholarship that was only available to males from Jackson County, Missouri. And many, many heterosexuals voluntarily accept the benefits of marriage that are invidiously denied to their gay friends and family. We have ourselves. This essay is an attempt to reconcile this conflict.

The reconciliation we propose does not come in a totalizing strategy of renunciation. Instead, we suggest a theory of limited disgorgement, a pragmatic formula to determine how much privileged people should give up if they decide to accept benefits invidiously denied to others. Although gay rights activists have explored the possibility of a heterosexual marriage boycott before this, we believe we are the first to suggest an intermediate strategy that works toward a less discriminatory system.

As is so often the case, information spurs action. Alcoholics Anonymous and other twelve step programs counsel that one must first acknowledge a problem, and we agree. Though difficult, it is important to admit to yourself this truth: “I am knowingly and voluntarily choosing to associate with an institution that discriminates.” But there are a variety of ways that people might respond to this knowledge. Some might cut their ties (refuse figuratively or literally to acknowledge their association with discrimination); others might work for change within the institution (calling for apologies, compensation and ultimately non-discrimination). This is the classic dichotomy between what Hirschman called strategies of “exit” and “voice.”²

¹This essay is based upon a chapter in our forthcoming book, *STRAIGHTFORWARD: MOBILIZING HETEROSEXUAL SUPPORT FOR GAY RIGHTS* (forthcoming Princeton University Press 2005). In addition to “exit” strategies, exemplified by the sort of boycott discussed in this essay, our book emphasizes strategies of “voice,” proposing actions non-gay allies can take to show their support for gay rights in a variety of contexts: families, schools, houses of worship, places of employment, and in the broader commercial marketplace.

²ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINES IN FIRMS, ORGANIZATIONS, AND STATES* (1972).

This essay will suggest factors that might lead toward a strategy of voice instead of exit (or vice versa).³ That is, we'll suggest a way of thinking about how much of your time and money should be devoted to the cause of change. Our take-home message is that beneficiaries of discrimination (people who do not exit but retain the benefits of continued association) owe a qualified duty of what we'll call pro-rata disgorgement.

The voice versus exit conundrum that we tackle here arises in virtually every context of discrimination. Is it moral:

- to join the boy scouts when they refuse to appoint gay scout masters;
- to join the military when they refuse to allow openly gay soldiers;
- to attend a church that refuses to ordain gay priests;
- to take a job from an employer that refuses to give equal employment benefits;
- to adopt a child in a state that bars same-sex parents from adopting; or
- to join a club that refuses to admit gay members?⁴

We will apply our rather abstract theory to the concrete question of whether it is moral for heterosexuals to marry in a world that denies equal recognition to same-sex couples. Alternatively, should heterosexuals feel free to marry, but disgorge some of the benefits – by devoting some of their time and money to the cause of change? In the end, we will conclude that reasonable people may differ as to which is the better course. And indeed, the movement for equality may best be served by people adopting a mixture of “voice” and “exit” strategies. But one thing is crystal clear: Silent acceptance of discriminatory benefits is not a morally acceptable alternative.

Responding to Inequity: Two Ethical Approaches

Over millennia, moral philosophers have developed frameworks to guide decision making in situations like this one. Although important themes distinguish one

³In a forthcoming book, we suggest *how* heterosexual allies should give voice. One core idea of this work is a theory of qualified deference to the victims of discrimination. See JENNIFER GERARDA BROWN & IAN AYRES-BROWN, *STRAIGHTFORWARD: MOBILIZING HETEROSEXUAL SUPPORT FOR GAY RIGHTS* (forthcoming Princeton University Press 2005). But this essay will focus on *how much* of your “voice” is owed.

⁴Our discussion emphasizes de jure discrimination but we should be clear that analogous ethical concerns can be raised by both de facto discrimination and unjustified disparate impact. Being the recipient of an undeserved benefit is problematic. But there is a clarity and transparency to outright exclusion that causes an independent expressive harm and simply as an evidentiary matter demands a response.

approach from another, one can crudely divide these ethical standards into two categories, based upon the extent to which they highlight the importance of the consequences or result flowing from the action in question. Deontological theories of ethics focus on the moral rightness of action as an end in itself.⁵ This approach would tend to counsel toward exit.⁶ There is something aesthetically abhorrent in accepting the benefits invidiously denied others, regardless of whether declining the benefit makes a difference in real-world conditions. We wouldn't drink at a whites-only fountain even if no one else was around to see.

In contrast, consequentialist rationales attend to the consequences that flow from action. This is sometimes categorized as a "teleological" (or end-driven) mode of assessment. Teleological views could also encompass – but need not be limited to – utilitarianism, where the desired end is creating a better state of the world or achieving human happiness. Here, cost/benefit analysis of the effects of a decision would be the central concern.⁷

Consequentialism could militate, in particular settings, toward the strategy of either voice or exit. Individual or group boycotts might put pressure on organizations to end a policy of discrimination. But giving voice to your concerns might also be effective. Explaining to others in the organization why the discrimination is wrong and why it has hurtful consequences can powerfully persuade. From a

⁵Kant, for example, argues that even good character traits can be exploited for evil. He thus rejects the notion that there is any "end" to achieve beyond good action itself. Good action must be justified in its own right, not by the ends it achieves. As Professor Linda Meyer cautions, however: [T]hat is not to say that cost/benefit analysis may never be used. Indeed, one has duties of prudence and foresight. But the action is never justified only because it produced or could produce good results. It is justified because it was taken for *all* the right reasons (even if the results expected don't pan out), and always with respect for others.

E-mail from Linda Meyer, Professor of Law, Quinnipiac University, to Jennifer Brown, Professor of Law, Quinnipiac University (Sept. 19, 2001) (on file with author).

⁶We can imagine deontological arguments for voice over exit. Some might argue that there is a moral imperative not to waste resources and it is better to take the benefit and redistribute the rightful part to the victims while simultaneously working for an end to the discrimination. Or there may be contexts in which one owes a duty of loyalty to an institution that counter balances the duty to oppose discrimination. Imagine, for example, that you learn that your spouse somehow profits from making discriminatory hiring decisions.

⁷Aristotle, for example, thought that ethics – the development of "excellent" character -- can be formed not by utilitarian (or cost-benefit) thinking, but by acting courageously, generously, etc., regardless of the costs and benefits of each decision. ARISTOTLE, *THE NICOMACHEAN ETHICS*, BOOK III: MORAL VIRTUE, ch. 6; *see also* ARISTOTLE, *THE NICOMACHEAN ETHICS*, BOOK IV: MORAL VIRTUE, ch. 1. Utilitarianism encompasses diverse approaches.

consequentialist perspective, there will often be a horse race as to which will be the more effective strategy.

The consequentialist would likely want to take into account the impact of a particular action on both the likelihood of causing an end to discrimination and on social welfare with and without change. The idea is that particular action – voice versus exit – is likely to be favored the greater the chance of change, the greater the benefits of change, and the greater the costs of non-change. Thus you will hear some consequentialists rail against exit strategies arguing that they have no impact on the probability of change and only work a needless sacrifice on the people who exit. But thorough-going consequentialism should also take into account the potential distaste that people experience in associating with discriminatory organizations, the happiness of excluded people who see others standing in solidarity, and the possible sense of loss of non-exiters when they see their friends exit.

Thorough-going consequentialism is often a difficult task because it is hard to weigh these cross-cutting effects and because it is difficult to assess the impact of action on change. From one perspective, individual action in large groups is rarely likely to affect change. This is the lesson of the voter's paradox. But individuals' voices can persuade others and individuals' exiting can lead to cascade effects of exodus (thus the "tipping" effect). To assess the efficacy of voice, it is also crucial to realistically evaluate how much time you are likely to give to the cause of change. Discrimination against gays may be invidious, but it is unrealistic to spend all of your time working on change. A totalizing commitment might be very effective, but most of us are only going to spend a small part of our lives on this issue. A consequentialist should compare the impact of exit versus the impact of *realistic* voice.

Pro-rata Disgorgement

But how much time or money should you spend? Silence is immoral. Devoting your entire life is impractical. So how much voice is enough? Here we can help. We propose that people who choose not to exit and instead accept the benefits of associating with a discriminatory organization should be guided by a principle of *partial* or *pro-rata* disgorgement. For example, if a person takes a \$100,000 college scholarship that is invidiously denied to 20% of qualified beneficiaries, we believe that at a minimum the person should disgorge 20% of the scholarship.

In essence, we are arguing that if you take a benefit that is invidiously denied others, you are duty-bound to disgorge part of the benefit. You might at first think that full disgorgement is required – and indeed a person who was poised toward the strategy of exit might be disinclined to retain any of the benefits of discrimination. But pro-rata disgorgement if adopted by all beneficiaries would (at least conceptually)

extinguish the monetary discrepancies wrought by discrimination. If all the beneficiaries disgorge this pro-rated amount, their retained benefit would equal the disgorged moneys made available to the victims of discrimination. In the scholarship example, there are four beneficiaries for every victim. If the four beneficiaries each disgorge \$20,000, then both the beneficiaries and the victim end up with a non-discriminatory allocation of \$80,000.

Pro-rata disgorgement is also an attractive moral precept because it makes the moral duty literally proportional to the magnitude of the harm. It would be bizarre to require people to disgorge all the benefits of a scholarship, regardless of whether 1% or 90% of the qualified beneficiaries are unfairly excluded. The pro-rata disgorgement principle also resonates with a kind of Rawlsianism.⁸ With regard to the distribution of this benefit, it raises the minimum allocation among qualified beneficiaries. While Rawls was more interested in *social* systems of justice, the idea of pro-rata disgorgement attempts to imagine what duties *individuals* behind a veil of ignorance would agree was owed to each other. Pro-rata disgorgement represents a kind of individualized insurance against social discrimination.

Of course, in the real world, many beneficiaries will not disgorge any part of their benefit. A Rawlsian kind of reaction to this shirking of others might be to disgorge up to the point where your net benefit is the same as the worst-off victim of discrimination. In many contexts, this will lead to disgorging virtually all of one's benefits. But there is an argument for sticking with the initial pro-rata formula. Pro-rata disgorgement makes up for your individual contribution to inequity. If other individuals fail to make up for their own contribution to inequity, that might be seen as their problem, not yours. This is especially so if the pro-rata disgorgement idea is viewed merely as a minimum requirement. Even people who exit (shunning the benefits of association) may still feel called to give their time and money to the cause of equality. But for present purposes, we view these additional efforts as superogatory.

There seems to be an important slippage here. While we began by talking about "voice" and "working for change," the principal of pro-rata disgorgement seems to be focused on money and redistributing benefits to the victims of discrimination. But this slippage is not as great as it first appears. As a conceptual matter, your time and your money can both help bring about change. Sometimes writing a check to Lambda or the Human Rights Campaign can be just as efficacious as speaking up and literally exercising your voice.⁹ Campaign finance law teaches

⁸JOHN RAWLS, A THEORY OF JUSTICE (1972).

⁹Make a one time or monthly contribution at the following websites:
<https://www.digitopia.com/lambda/membership.html> <http://www.lmfamily.org/about/donate.html>

us that there is a close connection between money and speech.¹⁰ The disgorgement principal gives you a way to start thinking about how much you owe in total. It becomes a subsidiary question whether you payoff this moral duty via expenditures of your time, contributions to advocacy organizations, or compensation to victims. Indeed, our general theory is that allies should be guided by (actually or hypothetically) asking discrimination victims how *they* think the disgorgement sums would best serve. If you have a disgorgement duty of \$1000 and your leisure time is worth \$50 an hour, let a representative of the victims' group decide whether they would prefer 20 hours of your time or a \$1000 contribution (or some combination thereof).

This principal of disgorgement is a natural follow on to a sort of personal inventory, a process of discernment that challenges people to come to terms with the ways they benefit from associating with discriminatory organizations. Disgorgement then requires people to monetize those benefits – to assign dollar values even to intangible advantages. What would you be willing to pay to retain the right to marry the person you love, if someone threatened to deprive you of it? How do you value the ability to hold hands or kiss on the street without threat of being beaten (or fired from your job)? If 3% of the people who are otherwise qualified for these benefits are invidiously denied them,¹¹ you should think about disgorging at a minimum 3% of this value in some form of advocacy or compensation.

The principal of pro-rata disgorgement is far from self-actuating. One needs to answer a host of questions – identifying the arenas where one is a beneficiary; determining how much one is benefitting; learning the percentage of otherwise qualified beneficiaries who are being invidiously excluded; and finally choosing the form that disgorgement should take. But even if it is impossible to apply precisely, the idea of pro-rata disgorgement is attractive. It calls for intermediate sacrifice on the part of the beneficiaries of discrimination instead of the all or nothing demands of the unrealistic or the uninterested.

¹⁰ BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

¹¹Estimates vary regarding the proportion of the population that is not heterosexual. *See, e.g.*, RICHARD A. POSNER, SEX & REASON 293 (1992); Emilio Guerra, *2000 Census Information on Gay and Lesbian Couples: Total GLBT Population*, at http://www.gaydemographics.org/USA/2000_Census_Total.htm (last visited June 28, 2004). A conservative number supports a minimum characterization of the duty to disgorge – and even this might seem excessive to some allies.

“Is It Moral to Marry in a World that Prohibits Gays and Lesbians from Marrying?”

This is a question that until recently was almost never asked. While people saw the problem of accepting other types of discriminatory benefits, few people who married before 1990 wondered whether it might be immoral to marry when gays and lesbians could not. Indeed, Ian remembers putting this precise question into an anonymous question box at an “Engaged Encounter” seminar he endured in 1993 as a prerequisite to marrying Jennifer in the Roman Catholic Church. When the question was later read to the group of engaged couples, it was met by prolonged silence. Finally, a septuagenarian Jesuit priest responded, “The church doesn’t prohibit gays and lesbians from marrying.” (He meant lesbians can marry men, and gay men can marry women.) He and others at this Silicon Valley event could not conceive of this even being a moral question.

Fortunately, things have changed. In April of 2004, Randy Cohen, “The Ethicist” for the *NEW YORK TIMES MAGAZINE*, fielded the same basic question:

My partner and I have discussed marriage . . . (we are heterosexual). We believe that gays and lesbians should have the same rights as heterosexuals. Why should we be privileged with the rights and protections of marriage when others are being denied? Is it ethical for us to walk down the aisle?¹²

The fact that couples are increasingly recognizing and publicly worrying about the problem may be the most critical precursor to action. Just identifying the problem clearly creates an impetus for the person asking the question.

Cohen’s response was reasonable, but far too one-sided. He unequivocally rejected the strategy of exit for the following reasons:

I share your opinion of the marriage laws but not your conclusion that you must defer your wedding until utopia arrives. Many who sincerely denounce the inequities of our society inevitably profit from them. If you're a man who works at a job where the lack of flex time or on-site day care disadvantages women who do the bulk of child care, you benefit from sexism. If you're a middle-class white person who attended a decent high school and then applied to college, you had a huge advantage over a poor kid or an African-American from an inferior high school. It is impossible to lead an immaculate life in an imperfect world. The task is not merely to insulate yourself from being a beneficiary of injustice -- even if that were possible -- but to combat injustice.

¹²Randy Cohen, *Speaking in Codes*, *N. Y. TIMES*, April 25, 2004 (Magazine), at 26 .

Were there an organized boycott of marriage as a way to reform the law, you should observe it. But without that, I see no point in your becoming refuseniks. Doing so would not influence the marriage laws. You would do better to lobby your state and federal representatives and contribute money to freedomtomarry.org or similar organizations. You should seek ways to bring about change, not just to make self-comforting gestures.

Cohen's response is certainly pragmatic, and suggests helpful steps supporters can take while the world persists in its "imperfect" stage. But is this enough? The flaw in Cohen's response is that it ignores non-consequential approaches. Wouldn't *The Ethicist* refuse to drink at a "whites only" drinking fountain? Or would he also reject this act of denial as merely a "self-comforting gesture?"

The salience of the deontological concern can be heard explicitly in a growing number of what Eric Baard in the *Village Voice* has termed "hetero holdouts" – different-sexed partners who refuse to marry in a world where same-sex marriages are forbidden.¹³ For example, Andrea Ayvazian, the female dean of religious life at Mount Holyoke College, and her male partner, Michael Klare, have chosen not to marry because they "don't want to be part of an institution that's actively discriminatory."¹⁴ Similarly, Mame McCutchin, a female technology professional in a relationship with male artist/webbie Kyril Mossin, draws more contemporary parallels to explain why she and her partner are not marrying: "I wouldn't join a country club that excluded blacks or Jews."¹⁵

Some people might reject the country club analogy because there are many clubs, but only one institution of marriage for non-discriminators to join. But increasingly this is not the case. People desiring a religious ceremony could join the Unitarian Universalist marriage club, which, unlike the Roman Catholic club, does not discriminate. On the civil side, heterosexual allies can now join the Massachusetts marriage club, which unlike the Connecticut or Utah clubs, does not discriminate (not, at least, in the Summer of 2004). Even better, they can marry in

¹³Erik Baard, *Standing on Ceremony: A Rites Issue: Straight Couples Who Refuse to Marry Because Gays Can't*, VILLAGE VOICE, Dec. 10 - 16, 2003, at 283, available at <http://www.villagevoice.com/issues/0350/baard2.php> (last visited July 20, 2004).

¹⁴*Id.*

¹⁵*Id.*

Ontario, Canada, which (unlike Massachusetts) will marry same-sex couples, even if the couples' home states would consider their marriages "void."¹⁶

In a country where most states have unequal marriage laws, Massachusetts's reform creates new choices – for both the victims and the beneficiaries of discrimination. Now that it is possible to marry in a jurisdiction that does not discriminate on the basis of its citizens' sexual orientation, the question isn't whether it is moral to marry at all, but rather whether it is moral for heterosexuals to marry in discriminatory states.

Cast your mind back a few decades. Suppose you were living in Virginia when the state still prohibited interracial marriage. Even if you wanted to marry someone of the same race, wouldn't you consider traveling to a neighboring state that did not discriminate? Now every heterosexual couple that wants to marry must face the same question. In fact, heterosexuals (unlike same-sex couples) can marry in a non-discriminatory jurisdiction without risking non-recognition back in their home state.

Indulge us as we revert to an old law professor trick: let us start with the smallest question. Wouldn't you at least be willing to cross the street to avoid marrying in a discriminatory jurisdiction? This hypothetical may not be so unworldly. It is not unfathomable that some states will adopt "home rule" on the question of same-sex marriage. Just as with other contentious social issues in the past (divorce, gambling, drinking), a state may see fit to give individual counties the authority to decide whether to be "wet" or "dry."¹⁷ In a state that has a checker-board pattern, heterosexuals may literally have a choice of crossing the street to avoid discriminatory jurisdictions.

Or even without crossing the street, it may become possible for heterosexuals to take the benefits of marriage without participating in discrimination. Imagine a state that had civil unions as an alternative to marriage for both same-sex and different-sex couples and conferred on these unions the same rights and

¹⁶In Massachusetts, some county clerks are turning away out-of-state same-sex couples on the basis of a 1913 "reverse evasion" statute, which prevents non-resident couples from marrying in Massachusetts if the marriages would be "void" in their home states. *See* MASS. GEN. LAWS ch. 207, § 11 (2004). It is not clear that marriages between people of the same sex would be "void" in all states (leading some state attorneys general to refuse to answer Massachusetts governor Mitt Romney's request for a declaration to this effect). Still, clerks in only a few Massachusetts counties are marrying out of state same-sex couples without searching inquiry. Ontario has no such "reverse evasion" statute.

¹⁷Indeed, home rule may be another incremental strategy toward legalization that could garner support from legislators who don't want same-sex marriage in their back yard but don't want to stop other parts of the state from opting for it.

responsibilities given to marriages.¹⁸ What possible excuse could a heterosexual couple give for *not* entering a civil union rather than a civil marriage?¹⁹ Would the word “marriage” be so important that the ally would by-pass the non-discriminatory equivalent? The case for boycotting civil marriage would grow even stronger.²⁰

The determination not to participate in discrimination as a categorical imperative has also had increasing salience for celebrants. The person who performs weddings – the priest, the rabbi or the city official – might also “refuse to marry.” And some have. About a dozen clergy from Connecticut and Massachusetts in 2003 refused to sign marriage licenses for heterosexual couples until unions between same-sex couples are legally recognized.²¹ As explained by Reverend Fred Small of the First Church Unitarian in Littleton, Massachusetts, “We continue to marry people, joyfully, in a religious ceremony, but heterosexual couples must have someone else sign the license.”²² Here the motive is not to insulate oneself from the tainted benefits of discrimination, but to avoid facilitating the discrimination itself. There are always two ways to end disparate treatment; in a world where same-sex couples can’t marry, refusing to legally marry everyone does the trick.

The non-marriage movement is not limited to lefty UU ministers. In March 2004, Benton County, Oregon stopped issuing licenses to everyone. The county had earlier planned to start issuing marriage licenses to same-sex couples (another way to end discrimination), but reversed its earlier decision and decided instead to refuse

¹⁸Currently Vermont civil union is only available to same-sex couples (as civil unions would be in Massachusetts’ proposed constitutional amendment). Vt. Stat. Ann. Tit. 15 § 1202 (2000).

¹⁹Couples might still want marriage ceremonies for religious purposes, but this sacramental layer is separate from the couple’s legal status, and could easily rest on a civil union rather a civil marriage.

²⁰Even today gay and non-gay couples can recreate many of the legal benefits of marriage via private contracts. *Living Together Contracts*, Legal Encyclopedia: Marriage and Living Together: Lesbian and Gay Couples, at <http://www.nolo.com/lawcenter/ency/index.cfm> (last visited June 28, 2004). But this contractual simulacrum still falls short with respect to governmental recognition, e.g., taxes, social security, and immigration.

²¹*Conn., Mass. Clergy Refuse to Sign Marriage Licenses in Pro-gay Protest*, WASH. BLADE, Oct. 24, 2003, available at <http://www.washblade.com/2003/10-24/news/>; see also *Local Briefs: Northampton Minister Won’t Sign Marriage Licenses*, BAY WINDOWS, Feb. 27, 2003, available at <http://www.baywindows.com/main.cfm?include=detail&storyid=381524> (last visited July 20, 2004).

²²Baard, *supra* note 15.

to issue marriage licenses to any couples -- gay or nongay -- until state courts decide the issue.²³

But Will It Ultimately Lead To Equal Marriage Rights?

None of these deontological impulses, on their face, respond to *The Ethicist's* concerns. Cohen's exclusive focus on consequentialism parallels the thinking of Representative Barney Frank: "Too often people on the left want what they call 'direct action' because it's more satisfying to them in some way. . . It's well-intentioned but not helpful. When two very good heterosexual people refuse to get married, I don't see how that puts pressure on politicians."²⁴

Yet even from a consequential perspective, a stronger case can be made for the strategy of individually boycotting marriage. Even if it doesn't put pressure on politicians to change the law, the act of refusing to marry might have positive effects. Refusing to marry can dramatically signal your solidarity with gay men and lesbians – showing your friends and acquaintances that you are willing to absorb some of the same costs and inconveniences that same-sex couples must bear outside legal marriage.

Another benefit is that heterosexual people at times can promote gay rights by ambiguation – by resisting the urge always and everywhere to distinguish themselves from gay men and lesbians.²⁵ Refusing to marry can be ambiguation because it rejects a marker of heterosexuality. When people who identify as heterosexual are willing to be “mistaken” as gay or lesbian, and have created this possibility by giving up some of the privileges and institutions that serve to distinguish gay from straight, the cause of gay rights is in some ways promoted.²⁶

²³*Ore. County Halts Issuance of all Marriage Licenses*, BP News, at <http://www.bpnews.net/bpnews.asp?ID=17916> (Mar. 24, 2004) (last visited July 20, 2004).

²⁴*Id.*

²⁵For a fuller discussion of ambiguation, see BROWN & AYRES, *supra* note 3, ch. 5. See also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1010 (1995) (arguing that ambiguation is a rhetorical device that can change a society's shared understanding of the meaning conveyed by a given word or action; ambiguation gives “a particular act, the meaning of which is to be regulated, a second meaning as well, one that acts to undermine the negative effects of the first”).

²⁶Judith Butler has described the “queering” effect of resisting marriage, and her discussion seems applicable to different-sex couples who eschew marriage as well as same-sex couples:

To what extent, then, has the performative “queer” operated alongside, as a deformation of, the “I pronounce you ...” of the marriage ceremony? If the performative [“I pronounce you...”] operates as the sanction that performs the

Conceptually, the refusal of heterosexuals to marry also could, contrary to Frank's assertion, put pressure on politicians to legalize same-sex marriage. Refusing to marry might put "an economic dent in the wedding industry" reducing expenditures not just on marriage licenses, but on wedding receptions, bridal dresses, photographers, and honeymoon excursions.²⁷ A movement of heterosexual holdouts could incentivize the wedding industry to embrace equality as a mechanism to revitalize sales.

This is especially true if *heterosexuals who marry* respond to a state's legalization of same-sex marriages. Mitt Romney said he did not want Massachusetts to become the Las Vegas of "gay marriages." But legalizing same-sex marriages could also make Massachusetts the Las Vegas of straight ally marriages – as "hetero holdouts" travel to the Commonwealth to avoid marrying in a discriminatory jurisdiction.

Refusals to marry by heterosexuals may even create a non-economic motive for legislators who think that marriage is an essential social institution. Legislators who genuinely want to promote marriage because of the stability they believe it brings to family life should be troubled by heterosexual couples' refusal to participate in marriage. If the group of refuseniks became too large, even legislators who initially opposed same-sex marriage as undermining heterosexual marriage might begrudgingly support legalization as a way to bring heterosexuals back to the institution. Thus, while Representative Frank and others view a marriage boycott as pointless, a mass refusal like the civil rights boycotts of the past might in fact highlight the political and non-political factors supporting equality.

This is not without risk, however. If heterosexual marriage rates in the U.S. were to drop noticeably just as proponents of equal marriage rights begin to gain ground, this could play into the arguments of those who assert that the inclusion of same-sex couples causes (or at least correlates with) a general decline in marriage by heterosexual couples.²⁸ At the moment, however, it seems inconceivable that a mass

heterosexualization of the social bond, perhaps it also comes into play as the shaming taboo which "queers" those who resist or oppose that social form as well as those who occupy it without hegemonic social sanction."

JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 226 (1993).

²⁷Eric Rofes, *Life After Knight: A Call for Direct Action and Civil Disobedience*, <http://www.bandia.net/moonstone/Marriage.html> (last visited July 14, 2004).

²⁸Stanley Kurtz, *The End of Marriage in Scandinavia: The "Conservative Case" for Same-Sex Marriage Collapses*, WKLY. STANDARD, Feb. 2, 2004; but see William N. Eskridge, Jr., Darren Spedale, Hans Ytterberg, *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, this symposium.

boycott movement will arise. On the ground, we agree that refusing to marry is not strongly supported as a method to bring about law reform.

But what seems implausible today may not seem so implausible tomorrow. Few people in 2003 would have predicted the dizzying pace of positive decentralized change that has already taken place on the marriage front – from San Francisco to New Paltz, from Massachusetts to Oregon. Most heterosexuals weren't even spotting the ethical concerns 5 years ago. Now there is a blossoming – dare we say – movement of refusals. Individual actions especially early on can sometimes create ripple effects and cascades. We shouldn't be over confident in predicting the impact of these individual acts or how far this nascent movement will evolve.

To be candid, some heterosexuals may have ignored the deontological impulse – the abhorrence of taking a benefit that is unfairly denied others – because they don't consider discrimination against gays and lesbians to be as serious a concern as more traditional forms of discrimination based on race or sex. Other heterosexuals feel that they don't have to make this sacrifice because the gay rights movement hasn't asked them to. Remember, even the reassuring *Ethicist* column advised, “Were there an organized boycott of marriage as a way to reform the law, you should observe it.”

But as it turns out, there already are gay activists who are calling on heterosexuals to boycott marriage. In 2000 after California's Proposition 22 against gay marriage was adopted, Eric Rofes, a professor of education at Humboldt State University, expressly called upon justice-minded heterosexual couples to boycott marriage until the institution is democratized. His manifesto pulls no punches:

During a period when same-sex couples cannot marry, the taking of such vows by mixed-sex couples will increasingly be named for what it is: an act of willful participation in an institution that is neither democratic nor open to all. In the year 2000, heterosexuals getting married parallels Christians joining a club that excludes Jews, men working as partners in a law firm that has no female partners, or whites supporting the flying of the Confederate flag over public buildings intended to serve people of all races. No matter how one wishes to frame them, such choices are inherently ethical choices: participation in rituals and institutions that exclude sectors of society puts you on the side of discrimination and oppression. [It may be time] for true heterosexual allies to say NO to marriage until all people have equal access. . .²⁹

²⁹*Id.*

Consistent with the meta-thesis of this book, Rofes advises: "Progressive heterosexual couples need to be organized by the queer community or by themselves."³⁰

Rofes is not alone in demanding more from heterosexual allies. In his *Village Voice* article extolling the sacrifice of "heterosexual holdouts," Eric Baard also openly ridicules heterosexual celebrities who talk the talk of supporting gay rights but nonetheless get married:

Can you really claim to support the rights of gays while you're buying into the institution that most painfully marginalizes gay couples? Recently married gay-icons Margaret Cho, Megan Mullally, and Madonna apparently see no hypocrisy in this. Celebrity heterosexual spokespeople for gay rights are happy to join gay marches but happier still to do the wedding march straight into government benefits and legitimization of their relationships.³¹

It seems both possible and reasonable that an increasing number of gay men and lesbians will feel some insult and hurt when heterosexual friends marry into a club that blatantly excludes them.

Indeed, a central moment for insult is the wedding invitation. If even 3% of the invitation list is gay or lesbian, and 40 people attend the average wedding, then the majority of weddings are attended by at least one gay or lesbian person. Imagine how gay people feel being invited to celebrate this event.

Does Anyone Here Know of a Reason Why These Two Should Not Be Married?:

A friend of ours who is a lesbian once confided:

You know, it's not always easy for me to sit through the weddings of my college classmates. [My partner] and I have been together longer than some of these couples, and we're committing to each other for life, too. But do we get to celebrate it in this public way? Do we get support from our families and friends for our relationship? [My partner] often hasn't even been invited along with me. Sometimes, I don't know....it just hurts, you know?

Even though this woman, like many other gay men and lesbian women, would never think of raising the issue with her marrying heterosexual friends, she privately harbored feelings of disquiet and pain.

³⁰Baard, *supra* note 15.

³¹*Id.*

For others, the feelings take a decidedly more negative turn. Professor Rofes, for example, with characteristic bluntness opines:

These days, when I receive an invitation to the marriage of heterosexual friends, family members, or students, I am filled with outrage. What nerve! Sending an invitation to me (and, often, my lover) with no reference to the fact that I am being asked to participate as an observer in an event in which I legally am not permitted to be a central participant! No note acknowledging the disparity and injustice, no sheepish apology for participating in an institution of segregation, no phone call checking-in about the politics of it all.³²

Here we see the victim's perspective on marriage discrimination. Professor Rofes wants invitations to acknowledge the discrimination, acknowledgment that could lead naturally to apology as well.

Indeed, Professor Rofes goes still further and calls on gays and straight allies to boycott *attending* discriminatory weddings:

It may be time for queers to stop letting heterosexuals off the hook! They embrace marriage uncritically only because we let them! And they will continue to be blind to the politics of engagements, marriage, and weddings until they are forced to see them as segregated rituals and institutions that must be challenged, undermined, and transformed. Lesbian, gay, bisexual, and transgender (LGBT) people and our allies may be ready to take direct action by refusing wedding invitations and articulating our reasons loudly....³³

Marriage is a decision people make only once in their lifetimes (if they are lucky), but choosing whether or not to attend is something that we face repeatedly throughout our lives. Seen from this perspective, the strategy of renouncing marriage is not just a choice about whether heterosexuals themselves marry, it is a choice about whether they will participate in other people's marriages as well.

One might think that the legalization of same-sex marriage in some jurisdictions would reduce the pain and resentment that gays and lesbians feel about being invited to heterosexual marriages. But a heterosexual's choice to marry in a discriminatory state even as non-discriminatory options become more readily available may exacerbate the negative feelings.

Of course, not all gays and lesbians harbor ambivalent feelings about heterosexual marriages. The story of Esera Tuaolo, "a 6-foot-3, 300-pound Samoan-Hawaiian former NFL defensive tackle who played for the Packers and Vikings, and

³²Rofes, *supra* note 29.

³³*Id.*

ultimately played in the Super Bowl for the Falcons” is particularly poignant.³⁴ In his rookie season, this youngest of eight children of an impoverished family of banana-plantation workers took his new-found cash and bought his widowed mother something she'd never had: a wedding ring. He, like Cohen and Frank, expressly rejected the idea of calling upon heterosexuals not to marry. When told about examples of heterosexual couples who have declined to marry in this era of de jure discrimination, Tuaolo responded:

That is one of the sweetest sacrifices I've ever heard of, but to ask someone to do that for you is asking too much. I wouldn't shun it away if someone came up to me and said that's what they're doing. [But we] have other ways to fight the fight and create a better world for us and everybody. I wouldn't go and ask my niece not to get married because of this.³⁵

Even though Tuaolo parts company with Rofes in calling for an ally boycott, he certainly isn't offended by the idea.

The take away point for heterosexuals is one of simple sensitivity. Gay and lesbian friends may not express them, but they will almost surely harbor a mixture of emotions – ranging from joy to deep ambivalence to pain and outright anger – when invited to a wedding. We can't imagine a priest's semi-rhetorical question, “does anyone know a reason why these two may not be married?” actually eliciting this response: “because this rite is invidiously denied same-sex couples.” When asked to “speak now or forever hold your peace,” most hold their peace. But that doesn't mean they aren't thinking about discrimination.

Renunciation Alternatives

The foregoing discussion and the examples of actual refusals to marry by heterosexual couples, ministers, and government officials show that there are stronger arguments for the exit strategy than acknowledged in the “go ahead and marry” conclusions of Representative Frank and *Ethicist* Cohen. But these stronger arguments may still not carry the day.

It needs to be emphasized that strategies of renunciation can be very counterproductive. Trying to promote tolerance and understanding with negative and divisive tactics can backfire. Refusing to attend a wedding can make the bride and groom intransigent. If you ask too much from your allies, they may turn on you. If

³⁴Baard, *supra* note 15.

³⁵*Id.*.

the gay rights movement is going to play the “which side are you on” game, it needs to be careful that it doesn’t draw a line at a place that will cause mass defection. If marrying means “you’re not with us,” then the movement will have precious few allies.

There are some types of renunciation that no one supports. Perhaps boycotting marriage and weddings is not enough; why not also call on allies not to associate with people who are married? The renunciation strategy taken to the extreme tends toward a kind of ethical solipsism. Even Professor Rofes does not go this far.

So what, short of renouncing marriage and rejecting the wedding invitations of your friends and family, can serve as a guide to action? Our basic answer is to embrace the prior strategies of voice and disgorgement. Participants in marriages during this age of discrimination – whether they be the heterosexual couples, the celebrants, or the attendees – should begin by acknowledging to themselves and others that they are choosing to participate in an institution that is invidiously closed to others. We recommend that you be particularly attuned to the personal here. If you are heterosexual and deciding to marry, consider adding a personal note to the invitation of your gay and lesbian friends. What should be in the note? Perhaps an apology – for marrying, when they cannot. An apology for marrying in a discriminatory church or discriminatory state, when you might have chosen non-discriminating alternatives. Maybe an explanation as well (“We have decided to legally marry in Missouri, despite the fact that it discriminates, because we want to marry in the bedroom of Ian’s bedridden mom;” or “We’ve decided to marry in the Catholic church, because we want to be married by Jennifer’s uncle who is a priest.”)

Or heterosexual couples could consider making a public statement of support for marriage equality, either as part of the service or as part of the surrounding festivities. One might include a prayer or toast specifically acknowledging the love and commitment of gay and lesbian couples who cannot marry. Imagine the power of giving your wedding attendants, “I support same-sex marriage” t-shirts. We know where you can buy some, cheap.³⁶

You should also take the duty of disgorgement seriously. If you marry, you are duty bound to devote some combination of your time and money to work for change and compensate the victims of discrimination. As outlined above, the duty is not boundless. But at a minimum the value of your efforts should be no less than a pro-rata share of your benefit. As Representative Frank suggested, you can begin by voting your preference. You can call or write to federal and state representatives. You can lobby your house of worship for change.

And as Cohen suggested, you can give money. As newly-weds, you might

³⁶<http://www.yale.edu/lgblsa/>

choose to honeymoon in whichever state is currently leading the legislative race for equality (we found that Vermont is particularly lovely in the spring).³⁷ Indeed, simply asking that attendees consider making contributions to freedomtomarry.org sends a powerful positive message of support. Shouldn't at least 3% of wedding presents be channeled to the gay rights cause? Wedding guests can make such gifts on their own initiative, even if the bride and groom don't ask. Instead of boycotting the wedding nuptials, an invited guest might make a small contribution to the Human Rights Campaign in the couple's honor. You can still buy the couple a toaster, but it is appropriate to buy a slightly smaller gift and redistribute part of the money in the interest of people who are unfairly prohibited from marrying.

Conclusion

What started as a dichotomy, "to marry or not to marry," has become an array of choices. Renunciation might mean refusing to marry or refusing to attend the marriages of others (or refusing to marry in discriminatory jurisdictions or houses of worship). Voice might mean acknowledgment, explanation, or apology. Disgorgement might mean contributing time and money to the cause of equality. Attendees or the marrying couple might consider charitable contributions in lieu of presents.

There are so many choices. So which is the best? As we have suggested, supporters of gay rights should generally defer to the victims of discrimination in deciding between tactics. But sometimes representatives speak with different voices. Frank advised marriage; Rofes advised boycott. Connie Ress, executive director of Marriage Equality, an equal marriage rights group based in New York, promotes strategic diversity: "I think that sometimes it's good for people to use a variety of strategies to get a point across."³⁸ There may be no single best strategy. Instead, the cause of equality may be best served by different people doing different things. A movement that is relentlessly confrontational may be counterproductive, but there may be a useful role for both "bad cops" and "good cops," for Malcolm as well as Martin.

How have we personally answered these questions? We have opted for a

³⁷With the publication of our forthcoming book, we will launch a web site where supporters of marriage equality can pledge to vacation in the first state that votes democratically to create or preserve marriage rights for same-sex couples. Massachusetts could achieve this status if the electorate rejects the proposed amendment to the state constitution, because this vote would ratify the Supreme Judicial Court's decision in *Goodridge*. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309 (2003).

³⁸Baard, *supra* note 15.

combination of voice and disgorgement, rather than renunciation. After much discussion about the morality of participating in discrimination, we chose to marry in 1993. In our Catholic church service, we prayed publicly for a time when marriage would be more inclusive. We have, throughout our marriage, donated money to various equal marriage rights organizations. We have been actively lobbying our parish to include same-sex couples in the marriage rite, and we have testified or submitted written materials to state legislatures asking for equal marriage rights.

But the question of renunciation is still very present in our lives. We are considering switching (one of us would say “poised to switch”) to an Episcopal parish that has already joined two same-sex couples in marriage. But maybe we should go further. Stephen Spielberg resigned from the board of the Boy Scouts of America because of its discrimination; former CBS chief executive Thomas H. Wyman resigned from Augusta National because of its discrimination. We should at least consider whether we should resign from this discriminatory club. Professor Rofes paints a colorful picture when he writes, “Imagine if heterosexual allies publicly burned their marriage certificates?”³⁹ To many readers this will again seem beyond the pale. But if President George W. Bush’s discriminatory preferences are written into our country’s constitution, remaining married could send an increasingly strong – and untenable – signal.

³⁹*Id.*