

**WHY MARRIAGE STILL MATTERS: A RESPONSE TO
PROFESSOR GREG JOHNSON'S ESSAY, *CIVIL UNION, A
REAPPRAISAL***

Susan B. Apel*

As I understand Professor Johnson's Essay, the question he seeks to answer is what is the place of civil union in a culture where, according to Evan Wolfson, Director of Freedom to Marry and long-time-same-sex marriage-advocate,

[t]he country right now is divided roughly in[to] thirds. One third supports equality for gay people, including the freedom to marry. Another third is not just adamantly against marriage for same-sex couples, but, indeed, opposes gay people and homosexuality, period. . . .

But then there is the 'middle' third These Americans are genuinely wrestling with this civil rights question and have divided impulses and feelings to sort through.¹

Professor Johnson believes that civil union is a useful stepping-stone as we move through a period in history where sentiments about same-sex marriage are both diffuse and volatile. Incrementalism is a time-honored and well-documented description as well as strategy for all groups seeking equality, whether they be persons of color, women, or immigrants in the United States.² It would be surprising if the move to gain civil rights for homosexual persons followed any other course. And I agree with Professor Johnson that the Vermont civil union legislation is a good thing. In fact, I recently bragged about it at an international conference on family law to make sure that everyone there knew that Vermont was the first state to take this important and courageous step.

The Vermont civil union law gives legal rights to same-sex couples that are identical to those of traditional marriage.³ These rights are important and all the more significant since they are rights newly extended, that is, previously denied to same-sex unions. It is no small thing that

* Professor of Law, Vermont Law School; J.D. 1977, Northeastern University School of Law; B.A. 1974, Pennsylvania State University, University Park.

1. Evan Wolfson, *Marriage Equality and Some Lessons for the Scary Work of Winning*, 14 *LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES* 135, 143 (2005).

2. See James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights Is Not a Defensible Strategy*, 38 *CAL. W. L. REV.* 1, 2-3 (2001) (discussing how incrementalism has been a strategy used by minority groups to attain equality in the past but arguing that an all-out approach for equal rights should instead be used from the outset).

3. VT. STAT. ANN. tit. 15, § 1204(a) (2002).

same-sex couples can now have a civil union ceremony and enjoy spouse-like rights of financial support, inheritance, and access to the courts for dissolution of their unions.⁴

Beyond its stepping-stone existence, should civil union remain either as a permanent substitute for marriage or as one of several options? My own thinking about this takes the form of further question and observation that seeks not to discredit civil unions but to point out some problems inherent in withholding marriage from same-sex couples.

To start, one has to consider the phenomenon of lack of contentment by some with the civil union alternative. Professor Johnson says that “[i]n the legal realm, rights matter, and in this regard the civil union law scores a perfect ten.”⁵ Since civil union conveys all of the rights and responsibilities of marriage, why the discontent? One reason is that people do not view marriage as solely a legal institution. I offer two examples of this. As a professor of family law, I often ask many of my students (most of them younger and single) if they plan to marry. A majority of hands go up. I then ask them what they know about the legal consequences of marriage. Few are able to answer. I then ask them if they believe that when their own marriage becomes imminent and more concrete, most of them will make it a point to examine the legal consequences of marriage as a way to help them decide whether or not they want to proceed. Most admit that they will not. Why? While marriage does in fact have multitudinous legal consequences, that is not why most people marry. The term and the concept of marriage are a cultural as well as a legal phenomenon, and it is the cultural aspects of marriage that attract most people.⁶ Another example: while the Vermont legislature was crafting the legislation that ultimately became the civil union bill, I had the opportunity to appear on a panel at a conference at Dartmouth College to talk about what legal recognition of same-sex unions would mean.⁷ As I recall, a philosopher spoke first about philosophical theory and marriage. I followed, with a cafeteria list of all of the legal rights and responsibilities that same-sex couples might expect from marriage or a marriage-like relationship. The final speaker was Stan Baker, named plaintiff in *Baker v. Vermont*, who said something like “I began this

4. *Id.* § 1204.

5. Greg Johnson, *Civil Union, a Reappraisal*, 30 VT. L. REV. 881, 885 (2006).

6. See David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL’Y REV. 73, 77–79 (2005) (arguing, using testimony from same-sex partners, that civil unions are inferior because people look down on those with civil unions but hold those with marriages in higher regard, and that this is the reason why same-sex partners seek marriage rather than civil unions).

7. See generally Kascha Semon, *Panel Discusses Same-Sex Marriage Laws*, DARTMOUTH, Oct. 21, 1999, available at <http://digbig.com/4gpyk> (summarizing the panel’s discussion).

process of challenging the marriage laws because I love Peter.” It was not the right to sue for wrongful death, or to be included in a partner’s health insurance, or to have the option of an official process for dissolution. It was not about the law but rather about love.

Clearly people in civil unions may be motivated by love as well. The point, however, is that *marriage* has a special place in our cultural, as well as our legal landscape. As lawyers, our focus is sometimes a narrow one that asks: “if all of the rights are basically the same, what difference does it make if marriage remains—for some time or forever—beyond the reach of same-sex couples?” This question ignores the nonlegal aspects of an institution that rightly or wrongly has assumed a central place in cultural and emotional lives. That is why something short of marriage will not do or will not do for long.

A second point involves the right to choose. Professor Johnson is correct when he asserts that the institution of marriage is fraught with imperfection and was in fact founded on patriarchal values and inequality.⁸ Civil union, or something else, might be a better alternative all-around. The problem is who gets to decide what legal form a relationship might take and for what reasons. Assuming the existence of many alternatives—domestic partnership, civil union, traditional marriage, or covenant marriage—a same-sex couple’s “choice” of a civil union is no choice at all unless all forms of relationship are available to the couple. While the state may recognize partnerships in various ways, it is the partners, not the state, who must be able to define themselves and choose the legal framework that best befits their union.

Even assuming that a state could, and would, be the arbiter of which couples are fit for a domestic partnership, civil union, marriage, or covenant marriage, the *reasons* for the choice matter. And while I agree with Professor Johnson that the civil union law can be distinguished from the Jim Crow laws in recent American history, there is a common element. The rationale for confining some people to the choice of a civil union has nothing to do with judgments about them as individuals (i.e., too much commitment for a mere domestic partnership but not enough for a traditional marriage, or so committed that only covenant marriage will do). Rather, the reasons for the “choice” of civil unions for some people are

8. Johnson, *supra* note 5, at 896; see also Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage”*, 79 VA. L. REV. 1535, 1540 (1993) (discussing research conducted by Professor Eskridge that supports a finding that hierarchy based on male characteristics was a component of most marriages and led to unequal status and control between the two marriage participants).

based on an immutable characteristic—that of their homosexuality.⁹ That smacks of discrimination of a kind that many Americans find intolerable. Not only is the rationale anathema to many in the gay community, it might also be viewed as a way to control the choices of heterosexual people as well. Thus far, civil union has been offered by both Vermont and Connecticut solely to same-sex couples and not to heterosexuals, even if they themselves might prefer it.¹⁰ Categorizing and segregating based upon one's sexual orientation, then, is itself a legal and moral wrong even if the alternatives are benign or even—as Professor Johnson has argued in the case of civil union—positive. A gilded cage is a cage nonetheless.

Moreover, many view the refusal of the state to extend marriage to same-sex couples to be based not upon the couples' sexual orientation but rather upon their sex, and they therefore view the refusal as a cause for heightened scrutiny in the courts. Justice Johnson's example in support of her contention of sex discrimination is this:

Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The [marriage] statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. This is sex discrimination.”¹¹

When the denial of marriage to same-sex couples is seen as a form of sex discrimination, feminists—homosexual and heterosexual alike—find that we have our own dog in this fight. The road to full sexual equality is, like that of most civil rights movements, a continuing one. We would like to see discrimination in choice of marital partner eliminated as yet another stepping-stone—and a powerful one—in our quest for sexual equality.

A final observation is one on which Professor Johnson has not commented but is connected to the issue of same-sex marriage. In prohibiting marriage to same-sex couples and, in at least two states, allowing civil union to same-sex couples but not to opposite-sex couples,

9. I am aware that some argue that homosexuality is a “lifestyle choice” and not an immutable characteristic. I do not believe that to be the case, but even for those who do, the discrimination based upon sexual orientation could be compared to that based on religion, which is freely chosen.

10. An Act Concerning Civil Unions, P.A. No. 05-10, sec. 2, 2005 Conn. Legis. Serv. 11, 11 (West) (to be codified at Conn. Gen. Stat. § 46b-38bb); VT. STAT. ANN. tit. 15, § 1202(a) (2002).

11. *Baker v. State*, 170 Vt. 194, 253–54, 744 A.2d 864, 906 (1999) (Johnson, J., dissenting).

the law assumes that the question of one's sex is easily determinable.¹² Yet there is a category of persons for whom this is not the case. Transgendered/transsexual people¹³ have a particular stake in eliminating the consideration of sex in eligibility for marriage or for civil union. A full treatment of the rights of transgendered/transsexual people is beyond the scope of this commentary. But the idea that one's sex must be determined before the law can pass on the legality of a marriage or civil union affects transsexuals in at least two ways.

The first problem involves access to marriage. A recent case from the State of Ohio is illustrative. Jacob Nash, a male, and Erin Barr, a female, applied for a marriage license in Trumbull County, Ohio.¹⁴ Jacob Nash had been born as female in Massachusetts, had gone through gender-reassignment surgery, and had even, consonant with the law of Massachusetts, had his birth certificate changed to reflect that he was now a male individual.¹⁵ Nonetheless, the court upheld the administrative refusal of the marriage license, finding that despite the documented surgery and the change of birth certificate, Jacob Nash was in fact a female attempting to marry another female.¹⁶ Since Ohio did not permit same-sex marriage, Nash could not legally marry Barr.¹⁷ Other cases in the United States have reached similar results.¹⁸

12. 2005 Conn. Legis. Serv. at 11; tit. 15, § 1202.

13. "By some estimates, five million people in the United States are transgendered . . ." Julie A. Greenberg, *When Is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289, 291 (2005).

14. *In re the Application for a Marriage License for Nash*, No. 2002-T-0149, slip op. at ¶ 1 (Ohio Ct. App. Dec. 31, 2003).

15. *Id.* ¶¶ 2, 4.

16. *See id.* ¶¶ 31, 33 (stating that even if Ohio allowed a person to change their sex on their birth certificate that public policy would still not allow a post-operative transsexual "to marry someone who has the same biological sex as the transsexual").

17. *Id.* ¶¶ 33, 46.

18. *E.g.*, *In re Estate of Gardiner*, 42 P.3d 120, 123, 136–37 (Kan. 2002) (invalidating a marriage between a transsexual and male at the time of probate of the deceased spouse's estate because it was against the public policy of the state); *Littleton v. Prange*, 9 S.W.3d 223, 224–25, 231 (Tex. App. 1999) (invalidating a marriage between a transsexual and male when the transsexual tried to bring an action for wrongful death). *But see In Re Heilig*, 816 A.2d 68, 69–70, 84 (Md. 2003) (finding that a court does have the authority to change a person's gender on that person's birth certificate); *M.T. v. J.T.*, 355 A.2d 204, 208, 211 (N.J. Super. Ct. App. Div. 1976) (recognizing as valid a marriage involving a postoperative transsexual). Transsexual persons fare better in Australia and New Zealand, where marriages involving persons who have undergone gender reassignment surgery are permitted. Michael L. Rosin, *Intersexuality and Universal Marriage*, 14 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 51, 63 (2005). In *Goodwin v. United Kingdom*, the European Court of Human Rights noted a report that claimed that twenty European countries permitted a postoperative transsexual to marry a person of his original sex and concluded that Great Britain's refusal to recognize such marriages violated the Convention for Protection of Human Rights and Fundamental Freedoms. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, paras. 57, 98, 100, 104.

In addition to making it harder, or impossible, for the transgendered to enter marriage, the question of whether the proposed marriage is same-sex (and therefore prohibited) or opposite-sex (and therefore allowed) involves heinous intrusions into an individual's privacy. If the question of one's sex is germane to eligibility for marriage, the transgendered individual is of necessity subject to detailed questioning of a highly personal nature, such as the appearance and functioning of his/her genitalia.¹⁹ Thus the *process* by which sex is determined can be intrusive and demeaning.

Moreover, this uncertainty of "marriageability" to anyone remains. Once Nash had been denied the right to marry Erin Barr because he was born female, one commentator "wonders what the outcome would be if Nash breaks up with Erin Barr and falls in love with a man. . . . [Would Ohio] permit Nash to marry a man since Nash's birth gender is female?"²⁰ Or maybe, the same commentator asks, might the state forbid "Nash from marrying at all?"²¹

There is a second problem for transgendered individuals. Some have been able to marry because at the time of marriage no questions were raised about whether the transgendered party was male or female. These marriages roll happily along until something happens that causes a third party to question the validity of the marriage based upon the sex of the individuals involved. In *Gardiner* and *Littleton*, the parties believed themselves to be legally married for years, only to have their marriages nullified after the deaths of their spouses when issues of probate or right to bring a wrongful death action ensued.²² In another case, a trial court's award of child custody to a father in a divorce proceeding was overturned by a Florida appellate court because the father was a postoperative transsexual.²³ The appellate court stated that the award of custody was premised upon the validity of the marriage and that the marriage was not in fact valid since it was between persons of the same sex.²⁴ Clearly, the withholding of marriage from same-sex individuals subjects those transgendered people who have already married to eternal uncertainty regarding their marital status.

19. See, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155, 156–57 (Fla. Dist. Ct. App. 2004) (discussing which reproductive organs were absent from the appellee and which male reproductive organs the appellee now had); *In re Estate of Gardiner*, 42 P.3d at 122–23 (describing the procedures that the doctor performed on the appellant during gender reassignment surgery).

20. Andy Leger, Case Note, *When I Grow Up to Be a Man*: In re Marriage Application for Nash, 6 J.L. & FAM. STUD. 323, 329 (2004).

21. *Id.*

22. *In re Estate of Gardiner*, 42 P.3d at 122–23, 136; *Littleton*, 9 S.W.3d at 225, 231.

23. *Kantaras*, 884 So. 2d at 155–56, 161.

24. *Id.* at 161.

CONCLUSION

Civil union is an enormously important step for all of us. It is possible to both honor the importance of civil union while also advocating free choice for all, including same-sex couples who want to choose marriage. Beyond the homosexual community, the elimination of the bar to same-sex marriage would advance the cause of women as it would strike down yet another instance of sex discrimination. Finally, the insistence of linking gender to marriage validity poses particular problems for the transgendered community.