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## **Rights, Freedom, and the Limits of Inclusion**

Two strands of political theorizing have been common elements in gay theory and politics. One is identity-based, liberationist politics. The other—gay rights in relation to family—is the focus of this chapter. Gay and lesbian rights organizations such as the Human Rights Campaign (HRC) and the National Gay and Lesbian Task Force (NGLTF) privilege fighting for rights over working for a more general transformation of both discourse and institutional structures.<sup>1</sup> The liberal democratic discourse dominant in U.S. politics heavily influences these organizations. This political theory also informs their discussion of marriage rights. Within political theory, however, there are significant critiques of liberalism, in particular critiques arguing that liberal solutions are inadequate for addressing the complex problems that the United States and other post-industrial democracies face as nations. Central to my critique is the argument that the extension of rights depoliticizes issues that need to be subject to public debate and discussion. To foreclose such controversies through the extension of rights is not to resolve them; it is to deny the full significance of such questions for society by containing debate. The extension of marriage and family rights to gays and lesbians would serve to foreclose serious questioning of the values embedded within current understandings of marriage and family.

Such foreclosure would mean that the extension of rights will have taken away the possibility of enhancing freedom.

The relationship between rights and freedom, assumed so often within American political discourse, keeps us from asking what "freedom" means. We assume that it means individuals have rights in order to allow them to act on their own desires free from outside interference.<sup>2</sup> As feminist political theorist Wendy Brown (1995) discusses, this formulation of freedom is not the only one that has been present in American politics, but it has gained a significant renaissance since the mid 1970s. It is this understanding of freedom and the role of rights that the Right embraced. As a result, a political discourse that defines freedom as free enterprise and that understands individuals as rightly having the power to make decisions for themselves, without the interference of a state mandating social goods such as equality or ending oppression, now dominates. Brown suggests that although this liberal understanding of freedom assumes that we are free when we do not feel power operating, we need to understand that power is always operating. Total freedom is not a feasible goal, but as citizens we can engage in struggles with the potential to decrease domination and increase freedom.

The Right is not the only segment of society to believe that decreased social regulation is equivalent to increased freedom. Many lesbian and gay leaders and civil rights organizations suggest that the ideal rhetorical justification for extending marriage rights is one that makes clear the denial of individual choice currently existing for lesbians and gays. The Human Rights Campaign makes this connection explicit in a publication that advocates marriage rights. In the organization's "marriage organizing booklet," produced to help lesbian and gay activists counter antimarriage rights arguments, the organization suggests that those who argue for marriage should construct their argument using the following key terms: "basic human right," "personal decision," and "individuals, not government, should decide" (Birch 1997). Together these three terms indicate that the Human Rights Campaign believes people can be persuaded that marriage rights should be extended to gays and lesbians because these are a basic human right, and that without this right individuals cannot exercise choice because the government has infringed upon their realm of personal decision making.

When proponents of gay marriage argue that marriage is a basic

human right, the denial of which means that an individual cannot really be free, they are drawing on an understanding of marriage common in our society. William Eskridge argues that the marital family is critical for civilizing humans—a task, he states, that would be more successful with the extension of marriage rights to gays and lesbians. Gays and lesbians would be civilized because we would build more stable (monogamous) partnerships with legal recognition. At the same time, the institution of marriage would be civilized because gays and lesbians would create more egalitarian relationships, thus providing models for heterosexuals (1996, 118). Eskridge builds his understanding of marriage as a civilizing institution on the assumption that marriage is so intrinsic to human desire that it is a basic human right. In making this argument, Eskridge draws on the dominant understanding of marriage within American society and the law. He approvingly quotes Justice Douglas's opinion in *Griswold v. Connecticut*:<sup>3</sup>

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together, for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. (1996, 126)

Marriage, according to Douglas and Eskridge, is such a basic component of human relationships that to deny someone the ability to marry is to deny their freedom. Chief Justice Earl Warren's majority opinion in *Loving v. Virginia* expressed this connection between choice and freedom in relation to marriage:<sup>4</sup>

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. . . . To deny this fundamental freedom on so insupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. (qtd. in Rubenstein 1993, 396)

Andrew Sullivan, in staking out what he identifies as a liberal/conservative position on gay equality, asserts that rights such as marriage—that is, rights that he believes do not assert causes, political faiths, or social projects—are all that liberal democratic society can legitimately grant. When we demand more, such as antidiscrimination policies or right-to-rent legislation, we have crossed the boundary between public

life and civil society that defines liberal democracies. To Sullivan, crossing this boundary limits the ability that people have to choose. The position that Sullivan sets forth draws on and attempts to reinforce a traditional liberal political perspective, one that understands civil society (which includes the economic realm) as the domain of freedom because it is a domain in which individuals are not interfered with by the state. “There is a line,” he tells us, “over which liberal citizens will not cross; he or she refuses to see the state as a way to inculcate virtue or to promote one way of living over another; the state has no role in promoting understanding, or compassion, or tolerance, as opposed to toleration, or indeed to celebrate one set of ‘values’ over another; and where the state and the individual conflict, the liberal will almost always side with the individual” (1996, 139). The idea that individuals should be privileged when their choices conflict with the values of others is also present in HRC’s language. HRC found in focus group research that this language is most likely to appeal to average Americans. It should not be surprising that this formulation is most likely to persuade the American public; it is very much the language of liberalism. Yet putting the advocacy of marriage into this language—a language used to argue for many things, including some of the Right’s primary political goals<sup>5</sup>—should serve as a warning that perhaps we need to examine in greater depth the issues involved. The following questions can guide our exploration of these issues: Is marriage really such a basic human right that entering into the institution of marriage enhances human freedom? What does “choice” mean in liberal democracy if we can choose to marry but possible employers can limit our choice in employment by legal discrimination? How is choice related to freedom?

### **Liberalism and Individual Freedom**

Liberals assert that individuals are most appropriately able to define for themselves the meaning of the “good,” and that government works best when it removes obstacles from the path of those who wish to further their own interests, as long as they do not violate the basic rights of others. The distinction between the state and civil society (the realm in which people define and act on their own definitions of the good) is basic to liberalism. Within this framework, as both Andrew Sullivan and William Eskridge argue, it may well be difficult to defend a position that denies gays and lesbians marriage rights. As adults, if we wish to