Restoring That 'Loving' Feeling

By Gloria Allred
and Michael Maroko

On May 2, Mildred Loving died. Mrs. Loving and Richard Loving (an inter-racial couple) were married in 1958 and subsequently were arrested and plead guilty to violating Virginia's Racial Integrity Act (an anti-miscegenation law). Their case ultimately was decided by the U.S. Supreme Court (*Loving v. the Commonwealth of Virginia*). That court struck down Virginia's law as unconstitutional and violative of the 14th Amendment.

Similarly, we believe that it is time for the California Supreme Court to strike down California's ban on same-gender marriage as violative of the California Constitution.

We represent two couples who have been in long-term, stable relationships. Robin Tyler and Diane Olson have been in a committed relationship for 14 years and are presently registered domestic partners. Reverend Troy Perry and his partner Philip DeBlieck have been in a committed relationship for 23 years. Our clients' relationships have lasted longer than many, if not most, heterosexual marriages in California. Our four clients and most same-gender couples desperately seek equality and an end to discrimination and second-class status, and want to solemnize their relationship with their partners just as heterosexual couples do when they decide to get married.

The California Supreme Court in *Perez v. Sharp* stated "marriage is something more than a civil contract subject to regulation by the state, it is a fundamental right of free men. There can be no prohibition of marriage except for an important social object and by reasonable means." *Perez v. Sharp*, 32 Cal.2d, 711, 715 (1948). "The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. Marriage involves one of the basic civil rights of man. The right to marry is the right to join in marriage with the person of one's choice."

The attorney general, on behalf of the state, argues that the creation of the Domestic Partner Registration Act (DPRA) embodied in Family Code Section 297 through 299, which only applies to same-gender couples, and which cannot be used by heterosexual couples, satisfies the constitutional prohibition against impinging on one's right to marry. However, there is no sacredness. There is no nobility to this. The only thing that is required for a Domestic Partnership Registration is the completion of a form from the clerk's office and mailing the form back, to be registered in the central registry. That's it. No separate solemnization of the relationship is required. No priest, rabbi, pastor, judge, justice of the peace is needed or allowed. It's a business partnership with defined rights, duties and responsibilities.

The authors of this article have been law partners for 32 years. We are a partnership of professional corporations and we are required to register with the Department of Corporations and with the State Bar. Although we are partners and have equal shares in our practice with resultant equal rights and obligations, even with all the benefits and headaches one finds in our relationship, we are not married.

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Words and labels *do* matter. Even if a registered domestic partnership had each and every financial benefit of a marriage, it would not and cannot be equal to a marriage. "Marriage is the coming together, for better or for worse, hopefully enduring, and intimate to the degree of being sacred. [It is an association that promotes a way of life, not causes, in harmony and living, not political faith, a bilateral loyalty, not commercial or social projects,] marriage is an association as noble as any" *Ortiz v L.A. Police Relief Association*, 98 Cal.App.4, 1288, 1303 (2002), citing *Griswold v. Connecticut*, 381 U.S. 479, 485,486 (1965).

When a child of a same gender couple looks up at her same-gender parents, and asks why her friends' parents are married, yet her parents are not, how should they answer them? Isn't it the strong public policy of the state of California to promote marriage? Scores of reported cases have said so. We are unaware of any authority standing for the proposition that the state of California has as strong a public policy to promote registered domestic partnerships.

Perry and DeBlieck are religious and spiritual people. They both believe that marriage is the moral thing to do and they want to solemnize their relationship by marriage. They can't. Tyler, since she was a child, has always dreamed about getting married. She watched the same Disney movies that we all grew up with, Cinderella "married" Prince Charming. Olson has found Prince Charming in Tyler. They can't marry. Just as Perez couldn't marry Sharp.

The creation of a Registered Domestic Partnership for same-gender couples is merely the attempt to create a separate and substantially equal status to marriage. It doesn't work. It will never work. A registered domestic partner is immediately labeled as a gay or lesbian once he or she completes any application asking for marital status, be it health insurance, employment or hospital forms. They are immediately more prone to discrimination and disparate treatment that we all know still exists in society against the gay and lesbian community.

What same-gender couples want is equality in marriage, not a separate system that just applies to them and no one else.

The California attorney general argues that the California Supreme Court should defer this issue to the state Legislature because over time, the political system will right any wrongs, and cites the Registered Domestic Partners Act and amendments thereto as evidence of the quick change that is occurring with the state of California, relative to this issue. This argument is the same argument that Justice John Shenk made in his dissent in *Perez* when he stated "the legislature is, in the first instance, the judge of what is necessary for the public welfare. Earnest conflict of opinion makes it especially a question for the legislature and not the courts." The issue in *Perez* of course was a law prohibiting interracial marriage, which this court struck down as being unconstitutional in 1948. If we had to wait for public opinion and the resultant political process to determine this controversial issue, whites and blacks would still not be allowed to marry in some states today.

The attorney general also argues that marriage is *traditionally* between a man and a woman, and the state has an interest in maintaining this long-standing tradition. That was exactly the same argument that the state made as it argued to uphold laws prohibiting interracial marriage in the *Perez* case. The dissent in *Perez* advanced the same arguments being advanced by the attorney general today, namely 29 states at that time had laws prohibiting miscegenation, the dissent stating that there was a long history of banning such marriages. History no matter how long that history may be, does not trump a fundamental right. The right to marry is a fundamental right. Prisoners on death row have a judicially recognized constitutional fundamental right to marry yet gays and lesbians don't, simply because of an immutable trait?

The concept of separate but equal was disapproved in *Brown v. Board of Education* and in *Perez*, yet it still exists today for millions of people simply because of their sexual orientation.

We are cognizant of the fact that this issue is as hot a political topic as was this court's recognition of interracial marriage. We are hopeful that this court will continue its long tradition of protecting fundamental rights regardless of whether the decision is popular. Society did not fall apart in 1948 after *Perez* nor after the Supreme Court decided *Loving* more than 40 years ago. The framework of our society will not fall apart when this court gives same-gender couples the dignity they deserve. All they ask for is equality in marriage. The last time we looked, Massachusetts is still a state in good standing, is functioning and has not shattered into a million pieces because of its decision upholding equality in marriage.

Before the creation of the Registered Domestic Partners Act, same-gender couples were not allowed to get on the bus that would take them to legal recognition of their relationships. With the creation of the RDPA, same-gender couples are now permitted to get on the bus but must go to the back. We believe that the time is long overdue for California to recognize that same-gender couples have a right to share the bus equally by allowing them to marry the one they love. "Loving" is what they were meant to do.

Gloria Allred and **Michael Maroko** are law partners in the law firm of Allred, Maroko & Goldberg. They represent their clients in a case currently before the California Supreme Court, *Tyler v. County of Los Angeles*.