

It's Still a Long Way Coming: The Importance of Humanizing the Same-Sex Marriage Discussion.

By Sarah Antinora

August 1996. The incessant ringing of the telephone on his bedside table awakens David at 2:15 A.M.. Through his grogginess he is finally able to recognize his sister-in-law's voice and process her words: "There's been an accident." Chris has been in Texas for the last week, attending a conference. Although they have been married for over five years, the hospital's first call was to Chris's parents. Chris's sister has been kind enough to notify David. Even though he will be on the next available flight to Dallas, David will not see Chris for another four days, since Chris's parents do not recognize his marriage to David, and neither does the state of Texas.

It has now been fifteen years since the battle over same-sex marriage came to the legal forefront. In 1993, the Hawaii Supreme Court ruled that it was unlawful for the state to deny marriage licenses to couples solely on the basis of sexual orientation. It was found that such denials were in violation of the Equal Protection Clause of the Fourteenth Amendment, unless a "compelling reason" could be shown for the discrimination. And, yet, by the end of the decade, the federal Defense of Marriage Act (DOMA) had been signed into law in addition to the numerous states (including Hawaii) that had amended their constitutions to define marriage as solely between a man and a woman (George 33). As with any polarizing issue, there are at least two sides, and to state that the issue of same-sex marriage polarizes is an understatement. Those opposed to same-sex marriage, who call themselves "Pro Marriage Activists," tend to focus their rhetoric around the term "marriage" itself. The same-sex marriage of my friends David and Chris is portrayed as not only a distortion of the term, but a threat to the family.

The assertion that marriage has always referred to one man and one woman joined in a union to provide for the rearing of children troubles me. However, I find the arguments on the other side just as disturbing. Proponents of same-sex marriage rally their arguments behind the issues of civil rights and equal protection under the law. They ask, how can this country, founded on the principle that all men are created equal, legally restrict whom one marries? The answer to this question, to me, is obvious--ethically and morally, it cannot be justified. But this discourse misses the point. The understanding that we as a society are not talking about a same-sex couple, but two people who love each other, has been shunted aside during the discussion. It is all too easy to withhold someone's rights when we speak in the abstract, as the "Pro Marriage Activists" do in their discussion of the term "marriage." Similarly, the proponents of same-sex marriage

have diluted their arguments by focusing on law, instead of human needs. It is my contention that in order for society to reach humane legal decisions, we must continually place the actual people and their stories at the forefront of the debate.

Before examining the idea that both sides of the same-sex marriage debate leave a critical aspect of the issue out of the discussion, it is important to scrutinize on what exactly they do center their rhetoric. As stated earlier, "Pro Marriage Activists" focus their arguments against same-sex marriage on the term "marriage." In February 2007, a panel consisting of four speakers, all of whom are connected to the current California litigation regarding homosexual marriage, convened to discuss the issue. During the debate (SSMC), The Honorable Ken Starr asserts that the institution of marriage has "historically been understood to be the union of one man and one woman" and "is in fact part of our history and part of our tradition, part of our culture....[The] legal definition of marriage corresponds to the definition of most religions" ("Same-Sex Marriage in California: Legal and Political Prospects"). This traditionalist and historicist argument is frequently used by opponents of same-sex marriage. Historically, marriage has described the union between a man and a woman; therefore, the term cannot be applied towards same-sex partners.

Robert P. George expounds on this reasoning in an article he wrote advocating for the passage of the so-called 28th Amendment. He writes, "At the time the U.S. Constitution was adopted, it was taken for granted that marriage is the union of a man and a woman....Our forefathers shared the consensus of humanity...." In fact, George claims the definition was so taken for granted that the word does not even appear in the Constitution. Court cases on this issue have even been decided based solely on what many view as the historical definition of "marriage," since the relationship being proposed "is not a marriage" (*Singer v. Hara*). By claiming this traditional definition as the only definition, opponents to same-sex marriage are able to withhold the term in relation to non-heterosexual couples. The intention is to stop the debate before it even begins; how can we argue over who receives the label of "marriage" if the definition itself defines who is entitled to it?

However, same-sex marriage advocates challenge this claim. For example, across cultures and centuries, marriage has at times included polygamy. While polygamy has never been legal under United States law, it has been an acceptable marital practice throughout history. Polygamy dates back to at least the Old Testament, and it was considered a sign of wealth and

success in many non-Western cultures and in the Church of Latter Day Saints in the U.S.. As Jeff Jacobberger, an audience member of the SSMC, asserts, "To state that for millennia we've understood marriage to be between one man and one woman is simply a historical lie." This reasoning discounts the idea that society can define the term "marriage" based on the historical use of the word. If the term has not always indicated a union between one man and one woman, then it cannot be assumed that this particular definition holds true today.

Still, regardless of these entanglements over semantics, it is true that the United States has consistently defined marriage as between a man and a woman. However, should the historical characterizations of terms such as "marriage" and "person" influence legal decisions today? If we interpret The Constitution by only using the definitions understood by our forefathers, then only white, land-holding, opposite-sex couples are entitled to a legally sanctioned union. Before the enactment of the Fourteenth Amendment, marriage only pertained to white U.S. citizens. Until the 1967 *Loving v. Virginia* decision, marriage was legally defined as not only being between members of the opposite sex, but also of the same race. As a country we now understand that these laws created a fundamentally racist definition of "marriage." And, yet, the protestors of the *Loving v. Virginia* decision believed the courts "had no business redefining traditional marriage"--an eerily similar argument as the one put forth by opponents of homosexual marriage today (Graham 41). Gay rights advocates question the use of historical definitions of marriage as viable in current society. After all, "it's simply not the case...that we are frozen in time at the enactment of the constitution" ("Same-Sex Marriage in California: Legal and Political Prospects"). However, note that throughout the entire debate of this one aspect of the same-sex marriage issue, the actual human relationship between same-sex partners is not discussed. There is nothing quite as impersonal as a dictionary, and both sides of this issue allow the debate to center on definition instead of personhood.

While the above arguments combat the claim that the definition of "marriage" ends the debate before it even begins, advocates for same-sex marriage address the religious and moral concerns more directly. This position is often depicted as a Christian perspective, but it is important to me not to fall into that rhetorical trap. It is true that many of the leading opponents of same-sex marriage are affiliated with Christian organizations, but it is misleading to color all opponents as Christian or to claim that all Christians are intolerant of homosexuality. Instead it is important to acknowledge that many of the religions practiced in the United States do morally

object to same-sex marriage--and any homosexual behavior for that matter. However, gay rights advocates argue that religious beliefs should not mandate law. Justice Kennedy's decision in *Lawrence v. Texas* is often cited in support of this idea: "The issue is whether the majority may use the power of the State to enforce these views [moral principles] on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" While all citizens are entitled to their religious beliefs, and moral principles, the stated role of the law has never been to uphold one set of morals to persecute the rights of others. And, indeed, there are many existing laws that are frowned upon by a majority of the religious institutions, such as the right to divorce or have an abortion. While religious beliefs must be respected, those who do not hold those beliefs should not be held to those moral standards, especially if those beliefs infringe upon a basic right. Additionally, gay marriage advocates point out that the First Amendment protects every religion's right to choose for itself whether to recognize a marriage or not ("Same-Sex Marriage: Legal and Political Prospects"). This argument acts as an acknowledgement that many will disagree with the practice of same-sex marriage, and that as U.S. citizens they have the right to disapprove. That disapproval, however, should not prohibit the legal recognition of those marriages.

November 1998. My new husband and I stand in the receiving line, greeting all of our wedding guests. Although this is a tremendously joyous day, we both know that we originally never planned to have a wedding. We have been committed to each other for five years and neither of us are members of a church. The idea of a legally or religiously sanctioned union has never appealed to us. However, a few events in the last few years changed our minds. Without "marriage," we could not share health benefits or claim tax credits, and we had to jump through a plethora of hoops to purchase our home together. And, of course, there was the incident in Texas--the knowledge that as an unmarried couple we would have no rights during life and death situations. David and Chris are now approaching me and I almost don't want to meet their eyes. Their love is no different than ours. Why are Michael and I entitled to all of the benefits of "marriage," and they are not?

Thus far, the definition of marriage as between one man and one woman has been discussed. However, those who oppose homosexual marriage believe there is another facet to the definition. John Eastman offers this final characteristic of marriage during the SSMC: marriage is fundamentally founded on the "connection to procreation and the rearing of children." It is believed that marriage is the institution used by society to protect its children and guarantee the continued survival of the human species. Less eloquently, William Edge, the president of a same-sex marriage opposition group in Canada, asks, "Marriage is made for man and woman to procreate, and how are you going to get two queers to procreate?" (Gatehouse 28) Margaret

Somerville laid out her argument in favor of marriage as a "reproductive human relationship" in a brief submitted to the Standing Committee on Justice and Human Rights in 2003. She claims that her objections are purely secular-based and not influenced by homophobia. Somerville argues that the state must provide children with the best opportunities to be raised by their biological parents and it has "obligations not to facilitate the creation of situations that are not in the 'best interests' of children." Eastman supports this argument by supplying studies demonstrating that children raised by two natural parents have fewer problems than children raised by a single, divorced parent or one biological parent and a step parent ("Same-Sex Marriage in California: Legal and Political Prospects"). He argues that those studies must be interpreted, until proven otherwise, to also indicate that children raised by same-sex parents would have more difficulties. This argument shows that opponents to gay marriage not only use semantics--defining "marriage" as the union between one man and one woman for the purposes of rearing children--but also employ social concerns over the welfare of children as a way to caution against permitting same-sex couples to have the title of "married." Yet, it is interesting here that those making this argument go out of their way to proclaim a lack of homophobia in forming their opinions. In fact, they want to claim that the argument is not about homosexuality at all; it is about the welfare of our children.

While it would be difficult to find anyone who argues against providing the best environment for children as possible, legally this argument has some flaws. The California Supreme Court has already ruled that sexual orientation cannot be a factor in denying an adoption petition. Thus, sexual orientation in regards to parenting should not even enter into the same-sex marriage debate. Further, not a single study exists "showing children are harmed in any way by having lesbian or gay parents ("Same-Sex Marriage in California: Legal and Political Prospects"). In fact, research has shown that there is no difference between children raised by heterosexual parents and same-sex parents. The American Academy of Pediatrics, Child Welfare League of America, both of the APA's, and the National Association of Social Workers all have taken the position that "sexual orientation is completely irrelevant to a person's ability to parent" ("Same-Sex Marriage in California: Legal and Political Prospects"). Currently there are hundreds of thousands of same-sex partners already raising children. According to the 2000 Census, 250,000 same-sex households are raising children under the age of eighteen. Shouldn't the government allow for those families to raise their children to the best of their abilities, by legally

recognizing the parents as married?

Additionally, advocates for same-sex marriage also question the belief that marriage is inextricably tied to procreation. It is clear that not all married couples have children, whether by choice or circumstance. Yet, those marriages are legally recognized by the state. In fact, the U.S. Supreme Court has decided that states must allow married couples legal access to contraception, allowing couples not to procreate. To imply that only partnerships that further the human species should be recognized as marriages is faulty. Hence, same-sex marriage supporters argue that the ability to procreate should not even be a factor in determining who is eligible to marry ("Same-Sex Marriage: Legal and Political Prospects").

March 2004. After attending a kickboxing class, David and I relax on my couch by flipping through the channels on the television. David stops on a program that I never watch, Bill O'Reilly's daily right-wing rant. The topic that has forced David into immobility is San Francisco's recent decision to grant marriage licenses to same-sex couples. Of course these marriage ceremonies have been a source of joy in the gay community in the last few weeks. However, O'Reilly is not full of joy. Instead, he is spewing hatred against homosexuals. Okay, he is not explicitly making remarks against homosexuality, but the subtext is clear. When I ask David if he and Chris will be making a pilgrimage to San Francisco, he replies with a no. "This won't last. Just wait. They'll find a way to take these licenses away."

Since many of the pros and cons for same-sex marriage are on equal footing, opponents to gay marriage use the rhetoric of fear to influence public opinion. One of the most outspoken opponents to same-sex marriage is Dr. James Dobson of Focus on the Family, a Christian-based organization focused on "nurturing and defending families worldwide." In his book Marriage under Fire, Dobson outlines all of the above arguments used against the legalization of homosexual marriage in support of the idea that marriage as an institution is under attack. This is a frequent rhetorical technique used by those opposed to same-sex marriage--in essence, legalizing homosexual marriage will "destroy the traditional family" (Dobson). Dobson and others employ the "slippery slope" argument to demonstrate how family and the institution of marriage will be destroyed by gay marriage. Dobson argues that "legalized gay marriages lead inexorably to polygamy and other alternatives to one man/one woman unions" since courts will have to "prove that a polygamous relationship is detrimental to society" and not the other way around. Incest, pedophilia, and polygamy will all have legal grounds for marriage recognition if same-sex marriage is allowed. If same-sex marriage is prohibited, these other atrocities can be avoided. Therefore, opponents to gay marriage focus their argument on defining marriage in such a manner that cannot possibly include same-sex partners.

To reach this end, opponents to homosexual marriage advocate two legal options. The first legal acts adopted to restrict marriage to opposite-sex couples were the DOMA's, enacted at both the federal and state levels. In the federal DOMA, marriage is defined as "a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Amendments adopted at the state level often have similar wording to the federal DOMA. While DOMA does not restrict states from allowing same-sex marriages, it does allow states to not issue same-sex marriage licenses or recognize same-sex marriages from other states.

This tactic has been fairly successful. Only one state, Massachusetts, currently issues marriage licenses to same-sex couples, while only one state, Rhode Island, legally recognizes same-sex marriages from other states. Nine states, in addition to the nation's capitol, provide legally recognized civil unions between same-sex partners, while more than thirty states have passed laws that deny the recognition of same-sex marriages granted out of state ("Same Sex Marriage, Civil Unions and Domestic Partnerships"). Sadly, my friend David was correct. California is currently both one of the states to recognize civil unions and to contain a DOMA in the state Constitution.

The second legal push is for what is being called the 28th Amendment. This amendment would read, "Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, no state or federal law, shall be construed to require the marital status or the legal incidents thereof be conferred upon unmarried couples or groups" (George 33). This amendment calls for the definition of marriage, in every state, to only consist of one man and one woman. It also prohibits the recognition of civil unions or domestic partnerships as an extension of marital rights. Thus, only opposite-sex marriage partners would be entitled to benefits such as marital tax breaks, property rights, and the marital privilege against being forced to testify against one's spouse (George 33).

However, those in favor of same-sex marriage claim that neither of these legal avenues is constitutional. In fact, most of the arguments used by advocates for gay marriage are legal in nature. When not defending against their opponents' arguments, gay rights advocates usually use legal discourse to support their position, with the focus on demanding equality as defined in the Constitution. Federally, the *Loving* decision held that marriage is a basic civil right. Restrictions on that right can only be lawful if a legitimate governmental reason is proven for doing so; in

other words, the Equal Protection and Due Process Clauses impose limits on states' powers over family law. Since the advocates for same-sex marriage have addressed any and all of the issues put forth as the possible reasonable basis to restrict gay rights, same-sex couples are equally entitled to marriage as a fundamental right. Any restrictions put on that right will necessarily be grounded in discrimination. If the 28th Amendment is passed, it would be "the first ever to mandate discrimination against one group of Americans and the first constitutional decree of second-class citizenship since the end of slavery" (Graham 39). Similarly, DOMA denies same-sex partners from receiving the approximately 1100 benefits that federal laws automatically grant to married couples, ranging from survivor rights to family discounts at national parks. This holds true even in states that have created civil unions that are equitable to marriage, as in Virginia (Graham 39). Thus, in restricting "marriage" to only one man and one woman, DOMA and the 28th Amendment deny same-sex couples the right to marry the partner of their choosing and the rights and benefits stemming from legal recognition of a marriage, benefits that heterosexual couples take for granted.

Interestingly, while advocates for same-sex marriage seem to argue against their opponents' objections on equal ground, the same does not hold true for how the opponents address arguments made by advocates in favor of gay marriage. Opponents evade most of the constitutional arguments posed by gay rights advocates, with the exception of those who center their debate of state rights versus federal rights (a debate that tends to ignore the merits of the same-sex marriage issue all together). To address these arguments would be to acknowledge that a restriction of rights would be based on sexual orientation. Opponents want to restrict a homosexual's personal liberties, liberties granted to heterosexuals, based solely on sexual orientation. There is no way to escape that this is bigoted thinking, and all too reminiscent of how many felt about mixed-race couples not so long ago.

The discourses used by the two sides of the same-sex marriage debate are multiple and diverse, employing religious, historical, societal, and legal rhetoric. However, when all of the pretence is removed, it is difficult not to see the same-sex marriage issue as a human issue. After all, the Supreme Court stated in *Loving v. Virginia* that the right to marry is one of the "basic civil rights of man." And, yet, where are the humans in these arguments? The "Pro Marriage Activists" discuss "marriage" in terms of semantics. When reading these arguments it is easy to forget that many of those making them speak from an anti-homosexuality position. In fact, it is

easy to forget that we are even discussing an issue of homosexuality. Lawrence Friedman calls this technique "the person from Pluto" approach (54). According to Friedman, we see lawmakers use this approach when "the textual surface of the law, the actual rules and regulations, should be so phrased and framed that an alien from outer space, totally unaware of the realities of life," would not be able to tell what types of inequities and prejudices are indelibly intertwined with these decisions (54). While Friedman describes this approach in relation to the cases addressing racial segregation, "Pro marriage advocates" use moral objections, hysteria predicting the doomsday of marriage, and the marriage definition from centuries ago to obscure the fact that homosexuality and the rights of homosexuals are the true centers of this debate. If a "person from Pluto" read many of the articles objecting to same-sex marriage, that person would most likely not understand the inherent homophobia that prompts many of these arguments. I believe that the human aspect of this issue has been kept out of these arguments strictly because these humans are homosexual. If those opposing gay marriage discussed the human aspect of this issue, they would have to discuss homosexuality. They understand that our contemporary society would not accept an across-the-board condemnation of homosexuals. Their arguments would not be considered rational if they were exposed as, or even suspected of being, based in prejudice and hatred. Therefore, the person from Pluto approach allows for "Pro Marriage Activists" to present their arguments as grounded in the rational, by removing the human aspect of the issue from the discussion.

While those opposed to same-sex marriage are right to assume that blatant prejudice against homosexuality would automatically discount their argument to most U.S. citizens, it is also much too clear that a fear of homosexuality is still prevalent in our culture. The 2004 elections are a case in point. At the time, the United States was dissatisfied with the economy, the war in Iraq, and its standing on the world stage of opinion. History has shown that when the United States as a country is discontent with the status quo, they vote out the party that is currently in office. Therefore, going into the 2004 election, it was assumed that the Democrats had a good chance of reclaiming the House of Representatives and that the Democratic nominee John Kerry would be elected president. The Republican tactic for staying in office? Make same-sex marriage a central issue of the election. Counting on a large turnout of traditional, neo-conservative Christians to vote in favor of DOMA initiatives, the Republican party used this sector of the population's intolerance of homosexuality to ensure a party victory. And it worked.

If gay rights advocates were not aware of the continued intolerance of their lifestyle in the new millennium, they completely understood after the 2004 elections.

It is this understanding of existing intolerance that inspires proponents of same-sex marriage to also remove the human element from their arguments. This seems to be counter-intuitive. At a quick glance, it would seem that the way for gay rights advocates to win the right to call their unions “marriage” would be to humanize their plight. However, same-sex marriage advocates have realized that to humanize this issue means to alienate those who disagree with homosexuality. Hence, they have chosen legal discourse over humanistic rhetoric. When gay rights advocates ground their arguments in legal rhetoric, it is very difficult for their adversaries to win. Under Equal Protection, homosexuals should receive the same rights as heterosexuals. Their partnerships should receive the same benefits as their opposite-sex counterparts. Their relationships should be regarded with the same impartiality as any other union. Gay rights advocates understand that if one reads the law and The Constitution with impartial eyes, they will win the right to marriage.

However, “impartiality” is the key term here. To win over the huge population that is somewhere in between the two polar opposite sides of this argument, gay rights advocates must allow the general public to forget, if even for a moment, that this is a gay rights issue. Sadly, we are still a culture that would like to believe that gay is more like “Will” than “Jack”--or that two men may love each other, but we do not want to see them physically demonstrating that love with a kiss. By removing the human aspect from their argument, proponents of same-sex marriage have allowed the politically-correct (but not quite tolerant) group in the middle to seriously consider the legality of applying the term “marriage” to same-sex couples. The aim is to frame the debate as the civil rights issue that it so fundamentally is. As legislation against same-sex marriage becomes exposed for what it truly is, the hope is that society will demand equality for all.

March 2009. David and I have talked more about the issues surrounding same-sex marriage in the last six months than in all the time we have known each other. While this project has highlighted the issue recently for me, it is the marriage cases currently being heard in the California Supreme Court that has had us talking. These cases question the constitutionality of Proposition 8, an initiative passed by California that allowed for a definition of marriage amendment to be added to the state constitution. While he and Chris have been “married” for more than fifteen years and their union has been legally recognized as a domestic partnership for almost as long, David understands that his “marriage” is always written in quotation marks. His marriage is not acknowledged as being as beautiful or as valid as my own. And, since his

battle with the Texas hospitals in 1994, he has been extremely hesitant to even leave the state of California--he knows that when he leaves its borders, he and Chris are legally recognized as strangers.

The idea of a “separate but equal” civil union is inherently unequal. The civil union, at its core, states that David’s relationship is not worthy of the term “marriage.” A previous draft of this project ended in optimism. I quoted Chad Graham, who wrote, “Gays and lesbians should savor all these moments....Twenty years from now, we're going to look back at this whirlwind and it'll seem like a quaint, distant, memory" (43). While I would like to believe this prediction is still true, I am honestly not so sure. November 4, 2008 delivered a complex mixture of feelings regarding civil rights. Our country took a giant step forward in electing our first African-American president (regardless of whether or not one agrees with his policies) and a huge step backwards in California with gay rights. If a requirement for discussing the issues of same-sex marriage is that we remove the human element from the equation--that we pretend we are not discussing gay rights--then we are still far away from the tolerant society foreseen in Graham’s quote. Until our discourse centers on the humans who have these inalienable, basic rights to marriage, it is clear that same-sex partnerships will never be accepted as the commitments to love and fidelity that so many of them are, regardless of the word we legally use to define them.

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