# **ESSAI**

Volume 5 Article 11

1-1-2007

# Justice for All: Discrimination of Same-Sex Marriages

Leslie A. Bertram

College of DuPage, essai\_bertram@cod.edu

Follow this and additional works at: http://dc.cod.edu/essai

# Recommended Citation

Bertram, Leslie A. (2007) "Justice for All: Discrimination of Same-Sex Marriages," ESSAI: Vol. 5, Article 11. Available at: http://dc.cod.edu/essai/vol5/iss1/11

This Selection is brought to you for free and open access by the College Publications at DigitalCommons@C.O.D.. It has been accepted for inclusion in ESSAI by an authorized administrator of DigitalCommons@C.O.D.. For more information, please contact koteles@cod.edu.

#### Justice for All: Discrimination of Same-Sex Marriages

## by Leslie A. Bertram

(Sociology 2220 & English 1102)

<u>Thesis statement</u>: In denying same-sex partners the right to marry, the government of the United States is discriminating against them in their ability to access the social, legal, and economic benefits available exclusively to lawfully married couples.

- I. Legal marriage should be available to all U.S. citizens
  - A. The right to marriage is a consequence of the Fourteenth Amendment of the Constitution.
  - B. Discussing the rights of marriage is inherently difficult due to the diverse and intermingled definitions of the word marriage.
- II. There are various reasons that gays and lesbians seek the right of marriage.
  - A. Marriage legitimizes a relationship in the eyes of society.
  - B. Voluntary employment benefits may be available solely to married couples.
  - C. Only legally married couples have access to benefits provided by state and federal government.
- III. Constitutional rights can be compromised by public opinion.
  - A. Unjustifiable, yet ingrained notions, are occasionally reflected in laws.
  - B. Current marriage laws are based upon outdated ideas and heterosexual assumptions.
- IV. Constitutional equality for same-sex marriage can be achieved if governments stand strong against the opposition.
  - A. Canada's Supreme Court has been successful thus far in fighting both public opinion and political party appeals.
  - B. South Africa legalized same-sex marriages despite a robust anti-gay outcry from its citizens.
- V. The debate about same-sex marriage has become entrenched in United States politics.
  - A. The voices of the moral majority have led the opposition.
  - B. Federal mandates have handcuffed the states' authority to decide on marriage issues.
  - C. Vermont and Massachusetts have taken a stand for equal marriage rights.
- VI. Marriage is a Constitutional right guaranteed under the First Amendment.
  - A. The United States government must afford equal rights to all of their citizens.
  - B. In order to be impartial, justice must remain blind and deaf to both petitioners and detractors.

In 1868, after the abolition of slavery in the United States, the government decided to take measures to ensure "equal protection of the laws" to all citizens. The Fourteenth Amendment to our Constitution was written for that reason, and it further decreed that state governments may not "deprive any person [of these rights] without due process of law." Since that time, U.S. Supreme Court has acknowledged that several basic rights, including the right of marriage, must not be denied regardless of a person's race, nationality, or gender. There is one minority group, however, that the Court has refused thus far to recognize, and in doing so, has obstructed their right to obtain legally recognized marriages. For that reason, homosexuals remain bound in the shackles of discrimination by the government of the United States of America (qtd. in Moss 101-2).

In centuries past, political and economic advantages were the foundation for joining two people together in marriage. The union also insured the legitimacy of their offspring, which secured their children's inheritance. After a time, the Christian Church used its authority to portray marriage according to its canon, and, gradually, these beliefs became embedded into many societies. Wars, immigration, and industrialization have further contributed to perceptions of marriage. A person's insight of what a marriage is, or what a marriage should be, is just an amalgam fashioned from all cultural, economic, political and historical events which have proceeded them (Coontz 7-8, 106). Some ideas have become so strongly ingrained that it is difficult to separate civil marriage – one sanctioned by a government – from religious marriage – one blessed and approved according to religious doctrine. Yet, it is imperative to do so in considering homosexuals' petition for marriage rights. Impartiality requires that one excises superfluous ideas about marriage and considers only its civil, legal and human dimensions (Denike 72, 77). Kevin Moss points out that "viewed functionally, legal marriage is essentially a binding commitment uniting two intimately related adults" (107).

Since the U.S. Constitution proclaims that the right to marry is inalienable, it should follow that a lawful marriage must be obtainable by all petitioners – including homosexuals. Aside from this hypothesis based upon civil rights (Moss 102, 107), however, one may wonder why homosexuals would fight so hard for the ability to enter into this precarious partnership, of which nearly half end in divorce (Coontz 277-8). Sensing the public's intolerance of their lifestyle (Brewer 1210), some homosexuals perceive lawful marriage to be an inauguration into conventional society. The permission to get married also evokes equality between non-traditional and heterosexual couples. Others simply seek the opportunity to celebrate openly the love and joy connected with their relationship in the same manner in which heterosexual couples do (Denike 72-3, 84). For most people, however, the lure of a marriage license is that it alone provides admission to a plethora of social and financial benefits. In the U.S., over 1000 privileges are solely available to married couples (Coontz 278); these include state and federal benefits, as well as employment compensations (Kuiow 93).

In the business world, employers are not required by law to offer benefits, such as health and life insurance; however, if employers should choose to make them available, they must do so without discrimination. Over the last twenty years, some employers began stepping forward voluntarily to afford equal benefits to "spousal equivalents" (qtd. in Kuiow 94-6). Their decision corresponded with an upward trend in public support to afford protection against job discrimination to homosexuals. As recently as 2000, 68% of respondents in a National Election Study were in favor of such anti-discrimination action (qtd. in Brewer 1209-13), and by 2001, ten states, plus the District of Columbia, had such legal protection in place (Kuiow 94).

The largest list of restricted rights contains those supplied at the state and federal level. These include, but are not limited to: Family and Medical Leave Act (FMLA); inheritance and real estate rights; child custody; emergency health care procedures; tax laws (Kulow 93-5); survivor benefits; pensions; divorce (Castesana 134); and access to reproductive technologies (Lunn 15). The economic

and legal ramifications of withholding these privileged compensations from families in interdependent relationships are immeasurable (Denike 80), especially when children are involved (Hart 32). Yet, these committed, monogamous couples are unable to procure the marriage license that would entitle them to these benefits because their government has decreed that their choice of life partner is unacceptable (Moss107).

The citizens of countries with democratic governments trust that their nation's constitutions afford them a guarantee of basic human and civil rights (Castresana 131). For this to occur, however, decisions regarding these basic rights must have their roots in jurisprudence as opposed to public opinion (Denike 74). Unfortunately, that is not always the case; prejudices can prevail over fundamental rights (Castresana 131). In 1968, when some of the first discussions took place in Denmark regarding the granting of marriage rights to gays and lesbians, passionate debates took place in the legislature pitting principals of equality and justice against supporters of tradition and morality (Lunn 12-13).

For centuries, stereotypical ideas about homosexuals have flourished (Moss 103) alongside the existence, and often acceptance, of same-sex love in society. Conflict theorists point out that, in the structuring of societies, dominant groups attempt to maintain their power by forcing their perspectives upon all members (Ledeer 54, 78). In recent history, general misunderstandings about homosexuality, combined with the assumption that gays are directly responsible for the proliferation of the AIDS epidemic, have buoyed homophobia (Moss 103). Research, likewise, continues to indicate there is a strong, positive correlation between negative preconceptions about gays and lesbians and negative behaviors toward them (Grapes 52). Gays and lesbians have faced physical and verbal violence in revealing their sexual preferences (Moss 103). Prejudices filter down to their children when Courts deny custody to gay parents, or when the children themselves are ridiculed and humiliated by their peers (Hart 32). Given that strong voices persistently preach against the abnormality and aberrance of homosexuality, many people assume that it is true (Ledeer 77-8). Unfortunately, this "truth" has become law in countries such as South Africa and the United States, when statutes against sodomy were adopted (Massoud 301 and Grapes 52). These laws, which merely stem from philosophies which are "rooted in the traditions and collective conscience of [the] people" (qtd. in Moss 105), continue to fuel the opposition to same-sex marriages because people associate it falsely with bestiality (Brewer 1211) or deviance ("Quick Hits" 10).

When debating the issue of same-sex marriage, those disputing it may present for argument the assumptions of their country's current marriage law. The primary premise involves a heterosexual couple, with each member embracing a distinct, gender role, united for the purpose of procreation. Like the edicts banning sodomy, marriage laws reflect historical customs patterned on patriarchal families (Lunn 10, 17) and reproductive intentions. Because the granting of same-sex marriages strikes at the heels of all three of these suppositions, the U.S. Courts continue to deny petitioners' requests. In fact, the Washington State Court of Appeals specifically refused a same-sex couple due to their lack of procreative prowess. This decision is both unilateral and discriminatory when one considers the marriage licenses that have not been similarly denied to heterosexual octogenarians or sterile individuals (Moss 105).

Across the border, in Canada, a majority of its citizens, as well as the country's marriage law, similarly embrace traditional, heterosexual beliefs about marriage. Yet, in July 2005, the Supreme Court of Canada decreed same-sex marriages to be legal in that country. The Court's decision had its foundation in its wish to provide for constitutional equality regardless of sexual orientation. Just six months later, following an initial outcry, the public had all but lost interest in continuing to debate the issue. Members of the Conservative political party, however, have not yet conceded; they continue to plague the legal system with appeals. Despite that fact, the verdict remains in place, and Canada's government, thus far, has succeeded in guaranteeing civil and human rights for all of its citizens by standing resolute and ignoring social prejudices (Denike 71, 74-6, 82).

In South Africa, a country that only recently has broken their chains of apartheid, we find another example of civil rights triumphing over injustice. In the last decade, a wrestling match has been taking place between the forces of sexual discrimination and the defenders of constitutional equality for gay and lesbian citizens. In its struggle to uphold gay rights, the government, along with advocates such as Nelson Mandela and Desmond Tutu, has been fighting to bury the cultural remnants of homophobia. In January of 2007, despite the fact that up to 50% of the population consider themselves to be anti-gay (Massoud 301, 303-4, 306), the South African parliament voted overwhelming to legalize same-sex marriage. There was some concern that, in defense of church doctrine, outraged clergy may refuse to perform the ceremonies ("Quick Hits" 10). Nevertheless, South Africa has joined the ranks of countries such as Iceland, Germany, Hungary, Taiwan, and Argentina in recognizing these non-traditional unions (Coontz 275-6) and, in doing so, has provided these couples with many, if not all, of the rights and benefits of legal matrimony (Kuiow 93).

Unfortunately, in the United States, the issue of same-sex marriage remains a pawn in the political games of both the Republican and Democratic parties. The ebb and flow of opposition and support permeates the power struggles between the conservative and liberal elected officials; candidates wield their viewpoints as campaign tools when vying for office (Brewer 1208, 1210). In countries such as Spain, it was just such a swing in political party domination, after the 2004 elections, which enabled the government to approve the sanctioning of same-sex marriages (Castresana 132). Despite recent, positive shifts in public opinion regarding gay rights in the U.S., especially among females and those who have reached higher levels of education (Grapes 58 and Brewer 1215), many lawmakers are reluctant to exhibit support for gay and lesbian marriages (Moss 103). Doing so could risk alienating their supporters, which could result in lost votes and possible defeat during subsequent elections (Brewer 1208).

Globally, one of the most vociferous factions is the moral traditionalists who opine from their religious pulpits against same-sex marriage (Denike 71). They pontificate about what the detrimental outcomes would be if alternative relationships were to become legally recognized (Lunn 11) They have, in essence, declared war on gays, lesbians, and any who support this sexual minority's quest for equal rights (Coontz 273-4), and one of their most frequently used weapons has been the spewing of religious doctrine (Denike 78).

In countries such as Spain (Castresana 132), Denmark (Lunn 13), and the United States, the Roman Catholic Church has become firmly entrenched in the battle of ethics (Denike 71-2). In referencing the precepts of their faith, Christians proclaim that marriage is a divine union of a man and a woman involving a physical connection, for which God specifically designed them, with procreation being a natural and expected consequence (Lunn 10-11). For that reason, "homosexuality" and "marriage" are contradictory terms—for them—and prohibiting same-sex unions is justifiable and understandable—for them (Denike 78). Yet, that does not give them the right to inflict their beliefs upon the rest of society (Castresana 136), especially since gays and lesbians are not seeking permission from the Catholic Church to marry. Besides, their point of view violates the cardinal rule of democratic governments in enacting laws, which is the separation of church and state (Denike 71, 77).

The power to make decisions regarding civil marriage lies solely within the petitioned government, yet the specifics vary by country. Unlike Canada, where the federal government maintains authority, the United States' Constitution has conferred that control to the individual states. In May of 1992, Hawaii's Supreme Court challenged its State's ruling to deny marriage to homosexuals, arguing that Hawaii's current marriage law was discriminatory. It should be noted that, even now, no state's statute mentions the specific sex of either of the two partners contracting a marriage license (Denike 72, 76-8). Yet, immediately following this Court's decision, legal dialectics began in earnest for the elicitation of evidence that would "justify the presumption that marriage is for heterosexuals only" (qtd. in Denike 78).

To calm the ensuing public uproar, the U.S. Congress moved quickly to pass the Defense of Marriage Act (DOMA) in 1995 (Kuiow 95 and Denike 76). In declaring that legal marriages were only those linking a male and female participant, Congress blocked access to federal benefits to all but heterosexuals couples. DOMA further stated that, in the event that an individual state should decide to recognize same-sex unions, no other state was legally bound to reciprocate (Kuiow 95). A flurry of activity followed within the legislature of various states, and, currently, no fewer than forty-three states, including Hawaii, have taken action to preclude homosexuals from obtaining marriage licenses. With eleven states going so far as to bury the language within their constitutions (Coontz 274), lifting the ban on homosexual marriage in the United States will be more difficult to achieve (Denike 77).

Although the tangled threads of civil rights and religious attitudes are evident in the aforementioned instances, they are not irrevocably intertwined in all states. In May of 2004, Massachusetts' Supreme Judicial Court voted to afford same-sex marriages (Denike 77, 83). Similarly, since July of 2000, civil unions have been an option in Vermont (Kuiow 93). While both arrangements include full marriage rights for their participants, some believe that the use of the term *civil unions* may be the key ingredient needed to bridge the divide that this knotty issue has created (Coontz 275). By referring to same-sex matrimony as something other than marriage, a perceived separation can be maintained between homosexual and heterosexual partnerships. In the question of Constitutional discrimination, however, if homosexual and heterosexual unions are truly equal in the eyes of the law, the government must categorize them both as marriages. To do anything less would compromise the balance of their value in the eyes of society, and, until society achieves that equilibrium, the issue of same-sex marriages will remain contentious (Denike 85).

When the Fourteenth Amendment was written, its authors sought the abrogation of discrimination, and for the last one hundred and forty years this potent amendment has demanded equality and tolerance for "politically powerless minorit[ies]." Therefore, it is this amendment, with its provisions of due process and equal protection, which provides homosexuals the possibility of freeing themselves from the restraints of discrimination (qtd. in Moss 102).

Homosexuals are asking the government of the United States of America to allow them to enter into legal marriages – marriages consisting of two consenting, monogamous adults that will bestow upon them the benefits and rights enjoyed by all legally married couples. Because this appeal is based upon the First Amendment's recognized rights of marriage, the petitioners' request should be based solely on its Constitutional merit. Their government's deliberation should not include cultural considerations, political ramifications, or preceding historical events, nor should public opinion weigh in on its ruling. Until, and unless, the government of the United States contemplates the granting of same-sex marriage in this unbiased manner, it is showing discrimination against homosexuals (Moss 101-2).

Pam Lunn suggests that, if the U. S. government were to legalize same-sex marriage, the perception of conventional marriage would be shattered, and, "like Humpty Dumpty," it may never be successfully reassembled (11). Perhaps that is inevitable, however, since the institution of marriage already exhibits many obvious cracks in its long-held traditions (Coontz 274). Furthermore, if discrimination against non-traditional marriages is to end, a complete fracture must occur between the moral majority and the Courts of law, because homosexuals are seeking affirmation of their constitutional rights, not religious rights (Denike 74). Therefore, if justice is truly to be blind, laws must cover all people like a blanket, insuring human and constitutional rights without political, religious, or social bias (Denike 77).

\_\_\_\_

## Works Cited

- Brewer, Paul R. "The Shifting Foundations of Public Opinion about Gay Rights." *The Journal of Politics* 65.4 (2003): 1208-1220.
- Castresana, Carlos. "Gay Marriages in Spain." *The Peace Review: A Journal of Social Justice* 17.2 (2005): 131-136.
- Coontz, Stephanie. Marriage, A History: From Obedience to Intimacy or How Love Conquered Marriage. New York: Viking Penguin, 2005.
- Denike, Margaret. "Religion, Rights, and Relationships: The Dream of Relational Equality." *Hypatia* 22.1 (2007): 71-91.
- Grapes, Katharine. "Ignorant Discrimination: How Education Levels Affect Attitudes Toward Homosexuality and Gay Rights." *Sociological Viewpoints* 22 (2006): 51-59.
- Hart, Melissa. "Meet the Queerspawn." The Gay and Lesbian Review Worldwide 12.6 (2005): 32-33.
- Kuiow, Marianne DelPo. "Same Sex Marriages: How Will They Impact Employers?" *Journal of Employment Discrimination Law* 3.2 (2001): 93-97.
- Leeder, Elaine. *The Family in Global Perspective: A Gendered Journey*. Thousand Oaks: Sage Publications, Inc., 2004.
- Lunn, Pam. "Anatomy and Theology of Marriage: Is Gay Marriage and Oxymoron?" *Theology and Sexuality: The Journal of the Institute for the Study of Christianity and Sexuality* 7 (1997): 10-27.
- Massoud, Mark F. "The Evolution of Gay Rights in South Africa." *Peace Review: A Journal of Social Justice* 15.3 (2003): 301-307.
- Moss, Kevin. "Legitimizing Same-Sex Marriages." *Peace Review: A Journal of Social Justice* 14.1 (2002): 101-107.
- "Quick Hits: Sex in the News." Contemporary Sexuality Jan. 2007:10.