

Same-sex Marriage and the role of Religion
By William Duncan
2010 FAIR Conference

You'll perhaps be surprised with my presentation because it's not anything that you've heard about lately, kind of an obscure topic. You probably recognize this, maybe you are all so young you won't, but 30 years ago this topic of same sex marriage which has been so prominent in the news lately didn't really exist, certainly not as a main stream legal topic or any other kind of topic for that matter. So, we've seen a dramatic sea change over the past couple of years but I think especially lately with the "Proposition 8" campaign in California. We have also seen as a subset of that discussion, an increasing amount of scrutiny and interest in the question of what role religious organizations and religious believers have in the debate over marriage, over the definition of marriage with, of course, accompanying criticism.

And although it's disproportionate probably to our numbers, certainly if you were to look at the number of voters in California who are Latter-Day Saints, the interest, and really the criticism of the church and its support of "Proposition 8" is disproportionate to our numbers and possibly to some degree influence as Dr. Lawrence described this morning. But it's there and I think it's worth addressing. So, over the next few minutes I would like to talk about this question: what is the legal definition of marriage and how religion plays into that?

I will of course focus on the involvement of Latter-Day Saints in the debate and the Churches involvement. Although the Church of course is not alone, many other churches are involved. I began my career working at the Catholic University of America with the US Conference of Catholic Bishops and others who are also very engaged on this issue. But it's an interesting one and we've seen over the past couple of years, really since 2008, a development of a lot of interest and scrutiny of the church. Everything it says about this topic becomes big news probably bigger than is reasonable but, you know, we have to report on something. And I noticed that recently that there seems to be at least one and there may probably others, kind of a legal stalker who's developed; a person who follows the church around, even where the church is not actively involved in a campaign, like in Maine, files complaints alleging that they are. This is all very interesting and I think timely. Okay.

Well I want to respond to three basic criticisms of the church and of religious groups generally, as they get involved in the public debate over same sex marriage. I'll respond to all those criticisms and also make some my comments about what I think the criticisms tell us, maybe give us some suggestions about how we ought to be focusing our thoughts and resources on the topic.

The first criticism: churches should not be involved in public issues.

This is not of course confined to the same sex marriage debate. There are people who believe that churches, religious people of faith should have no say in any public issue and

in fact would be thrilled to see everyone that is religious go back to their homes and practice religion quietly. But that's not going to happen, and it shouldn't either. The first response I want to make to this is that I feel that criticism is highly selective. If there are organizations that support certain – what they would describe as progressive or social justice issues and are also religious, they typically don't get the same kind of scrutiny and attack. This attack is really an attack on the substance of the legal and policy questions about marriage as opposed to the churches per se.

As an example, I just noted this statement from Joe Solmonese who is the President of an organization called the Human Rights Campaign, a major lobbying firm in Washington DC that gets involved in gay right issues. He said on a television show, "we're going to go after your church." This was in response to an audience member who was LDS who'd said "why are you attacking our church so dramatically" he said "we're going to go after your church everyday for the next 2 years unless and until Proposition 8 is overturned." Okay. So that sounds like a very aggressive argument that churches shouldn't be involved. But the same organization has a unit called the religion and faith program which has as its mission, specifically, getting religious groups of an approved variety, from their perspective, to weigh in on legislation in the most direct lobbying kind of way.

So some of the criticism is selective and I think we ought to be aware of that and realize that some of it is not offered purely in good faith. The problem with the objection goes beyond just whether or not it's a principled objection. The problem is that there is nothing in our history and traditions in the United States that would justify the idea that people should be excluded from a public debate because of their religious beliefs. I ought not probably have to labor that point because it should seem obvious to us as we look at the history of the United States we have a powerful strong history of involvement of clergy in public debates, starting with the founding era and the framing of the constitution. So those of you who are familiar with constitutional history might have seen a series of volumes, *Political Sermons of the American Founding*. So the United States at least has always had robust involvement from people of faith in the public debate and that ought to be the way it should continue and believers should not feel cowed in any way as they participate in public discussions. They have the right just as every citizen has the right; it's one of the principles of our free society.

One of the other core problems with this objection that churches should not be involved in public issues, is the way it views religion, the intrinsic understanding of religion it advances. It sees religion as a tool for achievement of another end. Okay. So in the example I gave that was illustrated on the last slide, some groups feel it's appropriate for religions to be involved as long as they take a view on issues that they feel comfortable with. But when churches get involved in a way that they don't like and they say: "no churches, you shouldn't have a say in this." That's a deeply troubling view and I hope again that that is a reasonably obvious point.

This is the exact opposite, of course, of the way religious believers understand their belief. They don't see themselves as advancing some kind of public or political goal, they see themselves as acting on their doctrinal and faith commitments which may at times

have public implications. That's clearly the way that the church is involved as an organization and as Latter-day Saints individually are involved in this issue. So, I think that's the key thing to know. I have noted on this slide an interesting quote from an activist, who singled out the LDS Church and said "I'm not intending it to harm the religion. I think they do wonderful things. Nicest people. My single goal is to get them out of the same-sex marriage business and back to helping hurricane victims."

Okay, what's the problem with this? Well besides its monumental presumption and patronizing tone, I think the key problem here is that this person believes that religion is a tool to achieve other kinds of social ends, where it is just not. The reason that the LDS church does such great work on hurricane assistance and other kinds of disaster relief is because its doctrinal understanding, its core understanding of the dignity of human beings, the obligation we have to care for our neighbors and at the same time our doctrinal beliefs about marriage and family and these other things require that we be involved in a significant way in defending what we believe is right about marriage and family. If you take away the core belief then there is no involvement.

So you can't pick and choose which issues churches should be involved in and they need to be allowed the freedom to do that for themselves and clearly that's been reflected in our policy in the United States but I think that is being threatened. Let me say one thing before I address that. I do think though that it's not the case that people have to listen to religious voices on these issues. All kinds of churches speak about all different kinds of issues in all kinds of ways and they ought to. And I think we as citizens don't have to give them more weight than other voices in the public square. And I don't think that we should have an expectation that when we participate in public discussions that people should treat our beliefs badly and not criticize or argue with us.

I think that this point makes clear to those who want to be involved that they ought to be involved in a way that shows respect for the fact that many people will not agree and many people will not even understand the nature of our concerns on these issues. I think the Church has done a nice job and set an example for us on this with their document issued during the Proposition 8 campaign called the Divine Institution of Marriage. Because on the one hand it does describe the Church's doctrinal concerns over the issue of marriage but it also tries hard to include arguments from social science or empirical data, from observation, and cites sources who are not Latter-day Saints at all in making their argument. In other words trying to speak the language of other people so that they can understand what the church is arguing, what it's saying and I think that it shows respect and civility. I also very much like the new campaign from the US Conference Catholic Bishops which talks about marriage and again in terms that I think are apprehensible to believers and non-believers alike. I think that's very appropriate. Okay, let's dig deeper here.

What concern is raised for us by this criticism? What should we learn from this criticism? I think the first is that there really is a movement among some people, certainly in elite circles, to harness religion, to believe that religion has no purpose other than to serve some other social or political end. I think we have to be aware of that. I use the word

harness because it was used specifically in an article I read some time ago from an activist who said, "we should continue to harness progressive religious believers and use their messages." But using and harnessing, these are the kinds of terms that are not really consistent with our understanding of religious liberty and I think it's important for us to keep that in mind as we engage in this debate.

The other thing is I think we also have to be aware that this kind of discussion, this kind of thinking where religious groups and religiously motivated individuals are not allowed in the public square is threatening to put us into a world of secular orthodoxy where there are certain right and wrong viewpoints that no one is allowed to transgress. No one is allowed to say anything contrary to and that would in effect or even formally exclude religious discussion from the public square which would be a disaster and a great tragedy.

Second criticism: The church is trying to take away people's civil right, the church is trying to deny civil rights to people.

Okay, this of course is where we can begin to talk a little bit about the Proposition 8 cases cited this week. I think the first thing that's important to understand is that this is an entirely contested position. The position that individuals have a right to their own definition of marriage and that this right needs to be enshrined in the law is highly contested. There are many people who don't believe that. The mere assertion of a strong opinion does not create a constitutional right. So the premise of the question already starts to beg some other questions such as: Where did that right come from? What's the source of that right? What's the nature of that right? Can the church be denying a right if the right doesn't really exist in the constitution?

The highest courts of Washington, Maryland, New York are not exactly thought of as bastions of right-wing thinking, have all held that defining marriage is the union of a man and a woman is entirely consistent with their state constitution. The voters of at least 30 states have amended their state constitutions to define marriage the union between a man and a woman. They clearly do not see that this is a question of taking away people's rights, they see the question very differently. Far from being an instrument of discrimination, the understanding of marriage that we have inherited over millennia of human experience actually fulfills a much different role. It's not meant to discriminate or put some groups down in favor of others, but it's among the human institutions that are universal across religious organizations, across time, across cultures. We see that all or nearly all human societies has had some kind of institution and it looks a lot like marriage that brings together men and women who may create children, into an institution where any children born to them are more likely to have a relationship with the people who made them. Also at the same time, it encourages people who may create children to take responsibility for the children that their union, and really their union alone, may create because other kinds of sexual relationships don't have that same effect.

Marriage for those who believe that marriage should continue to be defined as a union of a man and a woman, the union of husband and wife, is not understood in any way as having to do with the rights of individuals but more to do with the birth right of children

to live in a society that values their birth right of a mother and father. They believe that is something worth protecting and defending even if of course it may create a feeling of rejection among some; which is to be regretted and which we ought to work to ameliorate but it's going to be there and that's unfortunately part of this discussion.

Again, I want to point out strong opinions don't equate to constitutional entitlement, so you can't say that the church is trying to take away rights when it's not clear that the right exists in the first place. Okay. I think I have talked a little bit about this.

Deeper concerns here. What should we be concerned about when we hear this criticism that the church is trying to take away rights? Well, let's talk for a second about this as it relates to the decision this week from Judge Vaughn Walker in the US district court in the Northern district of California.

You probably know from reading the news that Judge Walker ruled the Proposition 8 which had been supported by many religious groups including the LDS Church as well as many non religious people. He ruled that Proposition 8 is inconsistent with the federal constitution, so he struck it down and said that it could no longer be enforced. In the course of coming to that conclusion he made some legal arguments related to due process and equal protection of the law. I suspect eyes will glaze over if I go further. But they are all based on a root presumption that the only reason that one would support the ideal of marriage as the union of a man and a woman, is if one desired to send a message that heterosexual people are superior to people who identify as gays and lesbians.

Now I think the Law of Occams Razor would tell us that's probably not at the top of most people's list when they were standing to pull the lever in favor of Proposition 8. They weren't thinking, "gosh, this will be a way of kicking around some of my neighbors." Particularly that seems unlikely in a state like California where same sex couples are given all the benefits of marriage by a different – using a different name "Civil Unions" but with no significant substantive difference. It seems unlikely that the voters of California were acting merely out of spite. I hope that will seem obvious even to people who disagree.

Judge Walker doesn't see it that way. He sees spite as being at the root of this. As I have written in a number of places over the past couple of days, what you want to imagine to yourself is how this relates to the question—if marriage has always existed in all or nearly all human societies and it has always involved a man and a woman and has been geared towards relating them to their children, is it really possible that all of western civilization sort of banded together and said, "gosh, let's think of a way to discriminate and show hatred towards some members of our society, how can we best do that? Let's create this thing called marriage that would be the way to kick out people we disagree with." It seems to be an unlikely and implausible explanation for Proposition 8 but it's the one that the judge accepted.

So what's really at work here? Well I think there are a couple of things. The right that Judge Walker believes he is vindicating is not the right that we would think of if we were

to say a person has the right to marry. The idea of a right to marry arose in the context of inter-racial marriages where a number of states have these odious laws that said that people could not marry another person solely because of their race. Not surprisingly given the fact that our constitution specifically addresses the question of racial discrimination, the court said that's not reasonable and that's an inappropriate restriction on the ability of people to enter the marriage institution. But they didn't say that the marriage institution has no meaning at all and that it's infinitely plastic. They just said racial classifications have no place and that's the right decision. But what we're looking at here is not the same thing; it's not a right to enter the institution of marriage as it's always been understood. It's the right to remake the institution of marriage to achieve an entirely different end.

Maggie Gallagher, who was until recently the President of the National Organization for Marriage, calls the right that the court is trying to vindicate an equality right on steroids. Not just a right to equal access to benefits, which again, are already available in California, a right to live in a society in which disagreement with your position is seen as morally wrong. It relies on the idea that someone's sexual orientation is an inborn characteristic that can have no moral consequences for anybody regardless of its expression and that cannot be subject to any legal regulation.

Now the irony of course of this as we've seen recently in the US Supreme Court case involving the Christian Legal society which wanted to have a chapter at Hastings Law School, is the court is using the exact opposite way of looking at religious freedom. It says, "Look our cases don't allow us to make a distinction between the status of being a person who identifies as gay and lesbian on one hand and acting on those beliefs or acting on that orientation in one way, that's not allowed by our cases."

But on the other hand we would allow universities to say to a religious group, "you're free to believe whatever you like as long as you don't bring those beliefs into the public discussion." Right. So we're seeing a dramatic reversal of constitutional doctrine. Recognizing this right of course would necessarily mean stigmatizing religious beliefs about sexual morality as discriminatory. They would have to be treated that way in order for this right to exist and that's because these beliefs were founded on the idea that all sexual conduct, whatever the predilection a person may experience ought to still be judged by an objective standard.

All of this suggest to me that C. S. Lewis' comment has more than theological import when he said, "Pride gets no pleasure out of having something only out of having more of it than others." It seems ironic to me that an activist movement which often uses pride as a slogan would not be satisfied to have the same access to the institution of marriage that everyone else has, the ability to marry someone of the opposite sex because that relationship alone is a relationship from which children are born. But they want to require the government to endorse the message to those who see things differently than they do are outside the realm of civilized discourse.

And so this raises our third concern, which is directly addressed in the case from this week: The argument that religious beliefs about marriage are hateful or hurtful.

Now this I think is perhaps the most powerful argument, because the intention of making the argument is to dissuade religious believers from being involved in the public square, because no one wants to be hateful and act in a way that hurts other people certainly without any reason. Just to give you an example, this week from the findings of fact from Judge Walker's opinion, Finding of Fact #77. This is not an assertion of opinion, I mean it is in reality, but he claims that it is finding a fact. "Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." So Judge Walker sees direct harm even in the mere assertion of traditional moral understanding of sexuality.

So this is the sub text of this whole Proposition 8 case—that the only reason voters approve Proposition 8 was because of irrational bigotry. It's also, I think, the most unfair criticism the one that borders really on libel. The Christian teaching that the only appropriate outlet for sexual intimacy is between a married husband and wife. This is not a belief of course that's isolated only to the LDS church but shared widely across many religious traditions. I hope it's clear to everyone that is not motivated by the desire to harm others; it's motivated by true and sincerely held doctrinal beliefs about the being and dignity of human people. It's based on an idea that people can accept consequences for their actions and that those who are most vulnerable to the realities of human gender difference, particularly children but also women to a great degree, ought to be protected. Their rightful claims ought to be treated as deserving of respect.

Let me just give you an example of where I think the statements from the church belie this accusation. I just picked kind of somewhat at random this statement from the church issued in the context of the public debate over defining state marriage amendments in 2004. "We the Church of Jesus Christ Latter-day Saints reach out with understanding and respect for individuals who are attracted to those of the same gender." I have no reason to believe that this is disingenuous and many reasons to believe that it's entirely sincere. I have been working for some time with others on a book called *Understanding Same Sex Attraction*. I think it tries very hard to dispel this notion that religious morality is hateful, that it is meant to hurt other people. Instead, we understand exactly the opposite. The fruition of human dignity requires an understanding of, and a willingness to live, in accordance with principles of human happiness, principles that are revealed both in doctrinal teaching but also in nature.

And I think it's worth our challenging this at every point, it's just not true. We ought to think to ourselves why would this accusation be made? Is there something about the way that we interact with others as we debate this question of marriage or any other kind of moral, that would lead people to believe that we are doing so out of hatred? If we think that maybe there is justification for their feelings we ought to change immediately and bring our behavior into line with standards of civility that I believe are also our covenant obligation, but at the very least are the polite way to conduct ourselves in public. Okay?

Besides being untrue and unjust this accusation is threatening. The accusation of hatred is a real threat to religious liberty as we understand it. If the accusation is accepted then any conflict between religious liberty and other kinds of claims for rights invariably require religious liberty to yield. If you doubt that, I'll use an example I use with some of my college students and just ask them to think about the way our society views racial discrimination and racial hatred. What do we do as a society about people who hold to the evil belief that some races are inferior to others? We exclude them from public debate. I mean if a presidential candidate were to express an opinion that one race was inherently superior to the other? That person would no longer be a viable presidential candidate and I think that's a good thing. That's the way that happens. We even had a private university, Bob Jones University that was denied its tax exemption because it forbade interracial dating on campus.

So our society and our laws do not look kindly on racial discrimination. So then just think of the corollary. If we accept the notion that the religious standards of morality are actually nothing but mere manifestations of another kind of bigotry, why would we expect that the law would not treat religious believers in the exact same way that we treat people who are bigots based on racial prejudice? And to some degree we've already seen some of this happen as we've seen conflicts between religious liberty and other kinds of rights of claims. I just noted a couple here that I think are reasonably well known but there are others. A wedding photographer in New Mexico who is fined for refusing to participate as a photographer in a same sex commitment ceremony. The photographer was an evangelical Christian and felt that would not be appropriate for her. Parents in Massachusetts of different religions who objected to curriculum that promoted same sex marriages as an ideal and were told that they didn't have any option of objecting. The US Court of Appeals for the First Circuit held that the state had a compelling interest in ensuring that all children are taught that same sex marriage is now the law of state and it ought to be accepted by everyone.

A Methodist Camp Association in New Jersey which owns property, lost its tax exemption on that property when they refused to allow it to be used to host a commitment ceremony for same sex couple. They weren't allowed to use the building for that purpose based on church law, but the law of the state not only denied them tax exemption but is also currently pursuing a discrimination complaint against them in federal court. There are many similar kinds of examples of what we can expect if we don't rethink the way our society is now viewing this question.

The sad thing about all of this is the conflict could easily be avoided if both sides were to embrace an ethic of genuine tolerance and diversity. Recognizing that we are going to see things in different ways and as long as people work within the normal system for making laws then we are going to have to live with each other and we are going have to convince each other of our point of view. Right now that's not happening and that's why we are dealing with the question we are.

I want just to say in conclusion that I don't think that there is any reason that members of the LDS Church or any religion should feel abashed in participating in public discussions

about issues that they believe have moral import. They have that right, they have that obligation to be involved, to say things and of course, to say them in an appropriate way with civility and kindness, but to speak their minds on the questions even if they don't agree with the prevailing orthodoxy. The threat of their feeling that they no longer can, the threat of our feeling that because we have religious beliefs, we can't speak on public issues is too grave and it amply justifies the Church's concern about this issue and their involvement in this question and their desire to vindicate the long standing principles of religious liberty. Thank you.