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The Undergraduate Scholar
Indiana University Hutton Honors College
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Dear Reader:

University life remains one of the most unique experiences young adults have the opportunity to take part in. Participating in classes, finding friends, and discovering more about our interests quickly fills up the hours, and we suddenly realize that among the homework, jobs, and other activities, another semester has gone by.

The Undergraduate Scholar taps into a specific vein of that experience: the tricky necessity of learning to communicate our thoughts in the written word. From the paper pulled together overnight to the research-oriented thesis that takes all semester, students at IU develop prose on a variety of topics -- everything from scientific reports to musical dissertations to essays of literary interpretation. The Undergraduate Scholar is designed to present these works to the student body so that these efforts of learning can be further shared.

This following student essays represent the culmination of the diligent work done by the authors and The Undergraduate Scholar staff. We are pleased to present the Spring 2011 edition and hope that the ideas contained within help to display the breadth and depth of the learning taking place here at IU.

Sincerely,

Lauren Conkling
Coordinator, The Undergraduate Scholar
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The MSM Blood Donation Ban: Challenges to Articulating a Movement for Reform

Julia Napolitano
In 1985, following the Center for Disease Control’s (CDC) identification of HIV/AIDS as a distinct illness spread by bodily fluids, the U.S. Food and Drug Administration (FDA) began officially banning blood donations from any male who had had sex with another male (MSM) since 1977. The measure, having been introduced two years earlier as a non-mandatory precaution, was originally intended to curtail the entry of HIV into the blood supply. The measure passed because government and medical authorities noted the then elusive illness’s high infection rate among MSM communities. The FDA’s Blood Products Advisory Committee (BPAC), established in 1980, and American blood banks fell under harsh criticism when it became apparent by the end of the decade that their failure to act sooner had resulted in numerous transfusion-related HIV infections. It was not until 1985, a few years after evidence that a blood-borne communicable virus had surfaced and the same year that the FDA instated the MSM blood ban, that the U.S. Department of Health and Human Services (HHS) approved and implemented new blood screening technologies that tested for HIV in all donated supplies. It remained to be seen whether these methods alone would prove effective in safeguarding the blood supply. Consequently, the MSM policy was met with general acceptance.

Most authors writing on the subject today agree that drastic donor-screening policies drafted in the early 1980s were justified in light of how little was known about the disease at the time. Similar bans have come and gone since the appearance of HIV/AIDS, most notably the ban on all blood donations from Haitian immigrants who emerged as a “high risk group” along with MSMs. In 1991, responding to advocates’ arguments that the policy “was not subjected to close scientific scrutiny,” nor was it consistent with the treatment of other populations exhibiting higher risk for HIV infection, the FDA rescinded the policy entirely. Central to the advocates’ argument was that individual sexual risk behaviors, not identity-based risk categories, should form the basis for donor screening. Given that the government and the public largely acknowledged such, it is surprising from a logical standpoint that the argument was not automatically applied to other perceived risk groups as well.

The government has periodically revisited the MSM policy, with the most recent review in June 2010 when HHS affirmed the current ban by saying that there is not sufficient research to justify its alteration. The American Red Cross, which is under the jurisdiction of the FDA, and two other blood industry organizations have explicitly stated their disapproval of the ban as it stands, proposing instead a one-year deferral for MSM that is more in keeping “with criteria for other groups at increased risk for sexual transmission of transfusion-transmitted infections.” Despite their disagreement with the federal government, however, none of these entities appear to have actively pursued efforts to challenge the stagnancy of this debate, nor have advocates for reform exploited this disagreement to their advantage.

Canada and the United Kingdom currently impose bans almost identical to that
in the United States, as did several Australian states prior to 2000. Upon consolidation of blood bank policies by the Australian Red Cross Blood Service as advised by the government’s Therapeutic Goods Administration, the ban was relaxed nationwide to a one-year deferral criterion. As of this fall, advocacy groups such as the Australia Federation of AIDS Organisations are pushing for governmental reconsideration of specific aspects of the blanket deferral policy, including pluralistic treatment of male-to-male sexual activity.

Most advocacy rhetoric frames the ban as an instance of social discrimination, while the government and those who otherwise support the current policy generally argue that allowing MSM donations would threaten the safety of the blood supply. More specifically, they argue that there is not sufficient proof that doing so would not pose such a threat.

This paper seeks to answer the question of why it has proved so challenging to bring about any substantial and productive changes to the ban despite ongoing discussion over a period of thirty years. What have been the core obstacles to its modification? Advocates for changing the ban have missed opportunities to effectively frame it as an issue of broad concern, which is necessary for any movement to gain momentum. There are a number of angles from which the topic can be approached: charges of social discrimination as well as the lack of reliable scientific data from a central authority are only two frames that advocates could use to mobilize their supporters. Because advocates have neglected to address such issues in depth, they have not fully developed their argument to its greatest potential. Advocates already focus the argument on social discrimination, but what about unpacking this charge to spark discussion about the multiple implications of such discrimination? Questioning the extent of the ban’s social consequences – for example, its success in undermining public trust of the blood supply and hindering meaningful conversation about why male-to-male sex is considered a high-risk behavior – might reveal additional talking points that could resonate with more people. What about framing the argument in terms of blood donation scarcity as well? And challenging the fragmented authority over the American blood industry that provides no direct target for demanding reliable, empirical data regarding the potential increased risk for HIV to infiltrate the blood supply? Advocates could demand that the FDA work with the Red Cross and assume responsibility for conducting its own substantial research, rather than recycling the same limited statistics used by HHS and rejected by the Red Cross.

Although these issues haven’t gone completely unnoticed in literature on the subject, they have not been incorporated into a wholesome movement. Advocacy efforts to amend the MSM blood donation policy in the United States have been decentralized and incomplete. Advocates for the policy’s reform have missed two major opportunities: for one, they have failed to fully address the multiple factors that have contributed to the ban’s stability, and two, they have failed to incorporate these issues into a cohesive argument, instead treating them separately and narrowly in both public and scholarly discourse.

II. Survey of existing literature: underdeveloped and disconnected arguments

Popular and scholarly on the subject of the MSM blood donation ban generally
neglects to question why it has not changed, focusing instead on why it should or should not be changed.

First and foremost, most reform rhetoric faults the ban as being socially discriminatory in nature without examining the extent of its claim’s implications. Limited literature refutes this argument, with available scholarship supporting the ban and denying its discriminatory overtones, and also falls short of fully articulating what this social discrimination really involves.

In his article “The rights of blood donors should supersede any asserted rights of blood donors,” J.P. Brooks makes a case against efforts to remove the ban because, he claims, blood testing is fallible and more research effort should be invested therein before opening the donation pool to more people. Brooks pits donors against recipients, employing an us-versus-them rhetoric to shift claims of discrimination to ones of victimization. He offers insight on the ways in which misinformation about this issue gets perpetuated, including an empty argument that because the intake questionnaire does not explicitly ask donors if they are homosexual or heterosexual but rather asks about the nature of sexual activity, it does not discriminate against an identity-based group of people. He carefully selects research to support his claim that for scientific reasons, not social ones, it would be detrimental to expand the donor pool to “risky groups.” Ironically, Brooks insists on referring to “the gay commentator” in his conceptualization of “the opposing side,” again reinforcing his us-versus-them standpoint.

There is no shortage of points in this article that advocates could pick apart and use to strengthen their argument, and yet relatively few have done so. Why have more advocates not attacked Brooks for pitting donors against recipients? Are blood donors not also blood recipients? Advocates need to bring out nuances such as these in order to support their argument that the policy is inherently discriminatory and to perhaps mobilize a greater number of people.

The second major component of the MSM policy that advocates have neglected to target is what Brooks blatantly exposes as the fact that there is a dearth of reliable data on what the actual risks of lifting or otherwise modifying the current ban would be. He writes, “With regard to the MSM rule, we should maintain the restriction until science compels a change.” Who and what, then, will “compel” such a change? The FDA and blood collection entities have echoed this sentiment. Cleary they are not the answer.

Ushma Neill argues in her editorial “Don’t ask, don’t tell…and don’t donate” that the ban should be lifted first and foremost because it discriminates on the basis of bigotry and not science. She contradicts Brooks by stating that blood testing is reliable (Brooks cites an estimate that completely lifting the ban would increase risk of HIV transmission by 500%), much more so than an impractically enforced donor ban. Additionally, she acknowledges the impracticality of imposing the current “blanket rule that discriminates against sexually active gay men as a whole” while nevertheless denying that the policy singles out a particular group. This argument is valid and important, but fails to articulate the implications of her suggestion. Specifically, what would be the alternative to the current “blanket rule?” A logical progression to her argument could have been to advocate for
a more wholesome approach to reducing risky sexual behavior. Furthermore, while it is understandable that this piece remain somewhat hands-off as it is part of a scientific journal, Neill adopts the same tone as most others invested in the topic: “The FDA should be urged to lift this antiquated restriction,” she writes. Urged by whom?

John Culhane tackles the issue by examining how overlapping political and social structures have contributed to the ban’s stability. His article “Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools” addresses both the inconsistent but effectively complex nature of exclusionary governmental policies, and what’s at stake in this particular MSM situation, including the negative impact it has on the blood supply’s lacking amount. Culhane, too, recognizes the problem of screening donors on the basis of perceived risk rather than by a thorough evaluation of what makes a donor “risky.” His article broaches the topic of avoidance politics: indeed, the MSM policy is socially discriminatory in that it precludes any meaningful conversation of what exactly characterizes the riskiness of male-to-male sexual behavior. Because the policy does not define “sex,” it is a policy largely based on the unknown, and based on fear. This is a crucial aspect of the general social discrimination argument, and one that has not been analyzed or even acknowledged by the large part of reform advocates.

Some authors and advocates have criticized terminology itself as a key aspect of the ban’s endurance, but again, few have integrated this argument with the other dimensions outlined thus far. In “Negotiating Exclusion: MSM, Identity, and Blood Policy in the Age of AIDS,” Jessica Martucci examines nuanced usage of the term “MSM” and the ambiguous identity politics at play in the blood donation bans. Her argument is a discursive one, focusing more on how the rhetoric surrounding it has been strategically adapted by proponents to keep it in place. Martucci strengthens the argument that by relegating “risky behavior” to one kind of sexual behavior, supporters of the ban successfully avoid having to confront the complex realities of HIV/AIDS transmission. She writes about how the FDA feared a resurgence of accusations of unresponsiveness akin to those levied prior to 1985, when the government maintained its position, likely out of ignorance and denial, that the blood supply was “completely safe” from HIV. The government made a strategic point by noting that the term “MSM” referred to behavior, not identity, but it failed to explain why, if behavior was the real concern, other behaviors were not discussed or categorized as aggressively.

Martucci’s argument is significant, but again, needs to be combined with other points, such as Culhane’s observation of avoidance. Martucci does include a substantial section entitled “Keeping the blood supply safe” in which she details the evolution of blood screening procedures. The fact that these technological advancements have proved effective in greatly reducing the entry of HIV into the blood supply is used by many advocates as an argument for ridding of social group screening, but as Martucci notes, these technologies have not been “as clear or dramatic” as many would like to think. This shows the technical discordance between advocates and opponents (see Neill and Brooks). There is evidently no communication between these authors referencing the non-existent consensus on the extent to which data and technology are accurate. Furthermore, the argument of “social discrimination” is multi-faceted and incompletely addressed, nor is there a conversation occurring in regards
to whom should be held accountable for investigating and providing this information.

Jorge Roman, writing for the American Journal of Nursing, explains how the FDA, in upholding the ban and shirking its responsibility of obtaining data that it could use to confidently support its position, simply perpetuates the fear of MSMs as a uniformly high-risk group. His article touches on two key missed opportunities set forth in this paper, problems resulting from the nuanced nature of the policy’s social discrimination as well as the lack of consistent data and authority. He also raises the question of why other individuals who engage in high-risk behaviors – anyone who has “unprotected oral, vaginal, or anal sex with multiple partners” but who cannot be grouped neatly into one category of people – are held to a different standard, as they are deferred for a one-year period, not for life. He concludes by saying that “the United States should change its policy and ensure that it relies on science rather than on a historic precedent.” Realizing that to do so may not be within the scope of his particular piece, Roman does not draw attention to whom exactly should be held accountable (the FDA? Blood collection agencies?) or how. And while he likely does share this view, in his article he does not explicitly engage all of the other components of the social discrimination argument, such as pointing out that this is an issue that concerns everyone and that the first step to effecting change is to bring as many people on board as possible. Again, this is reflective of the overall nature of reform advocacy: it raises some excellent points, but rarely are all of the points addressed together to tackle the question of where advocacy reform should start.

One piece of scholarship that does touch upon the fractured nature of social discrimination rhetoric is Charlene Galarneau’s “Blood Donation, Deferral, and Discrimination: FDA Donor Deferral Policy for Men Who Have Sex With Men.” Similar to Culhane’s piece in that it discusses the roles deep-seated stigmatization of same-sex sexuality and tendency to avoid the topic play in upholding the ban., Galarneau goes further to briefly address why and how a movement against the ban must integrate political, medical, and social dimensions in order to retain salience. She also expands her discussion to include other aspects of blood regulations, such as an examination of a former policy that prohibited Haitian nationals from donating. Galarneau’s analysis comes closest to the kind of integrated framework that reform advocates might seek to improve their solidarity and momentum, but as demonstrated, it appears to be a unique voice in this scholarship. Still, Galarneau’s article is not intended to study all of the factors that have failed to articulate these dimensions. Perhaps the greatest question that remains is how exactly interest groups will heed her suggestion to approach contestation of the ban from a place of redefined solidarity.

Evidenced by the diverse and sometimes conflicting concerns raised by these various authors, the MSM blood policy is shrouded in complexity and frequent misunderstanding. In the absence of a united front against it, it is difficult for people with varying priorities to genuinely care about pursuing its reform and to identify opportunities for coalitional discussion.
While no part of the MSM blood donation policy has changed since its enactment, the issue has come before the U.S. government for review on a few occasions. Why didn’t any of these instances produce a different outcome?

Responding to shifting demographic patterns of HIV/AIDS transmission in the late 1990s, gay rights advocates and medical experts, including blood banking agencies such as the Red Cross, began urging the FDA to reconsider the MSM policy. The first major review occurred in 1997 at a meeting called by BPAC. Committee members went into the conference intending to “reconsider” the policy. What they ultimately reconsidered, however, was how to “deal with the uncertainties and assumptions” surrounding HIV/AIDS research and suggested donor deferral precautions. The meeting brought to light all of the complications associated with discussing and, consequently, classifying risky behavior. It became clearer that the safety of the blood supply depended on targeted screening with restrictions proportional to the most accurate assessment of “riskiness.” BPAC as a whole acknowledged that the existing MSM policy alienated public trust and reflected an immature conceptualization of MSM sexual behavior, but that there was no obvious alternative to changing the policy and appeasing the masses. The meeting concluded with the realization that significant improvements in HIV/AIDS and sexual health research were necessary to developing an efficient and ethical system for screening blood donors.

BPAC reconvened again in 2000, this time ready to review the policy alongside the advent of a new form of blood testing called nucleic acid amplification (NAT). Thwarted by discussion of the new viral strain HHV-8, however, the results of the meeting echoed those achieved in 1997: committee members were still unsure of the test’s capabilities in detecting HIV and other sexually-transmitted infections. They maintained their position that population-based screening was not ideal, but as one committee member stated, “[we don’t] have the resources and tools to set up the very careful studies that would be needed to…evaluate different ways to ask a question….I am open to changing the question but I, personally, don’t have all the information at hand to do it.”

In 2006 and 2010, the U.S.’ three leading blood products agencies – the American Association of Blood Banks, ABC, and the Red Cross – issued a joint statement in support of “the use of rational, scientifically-based deferral periods that are applied fairly and consistently among blood donors who engage in similar risk activities.” A frustrating outcome to policy reform advocates, it appeared that no matter how long a time passed between official government meetings on the subject, the result was consistently one of absolved responsibility. Most everyone from authorities in the matter as well as the general public was aware that the MSM blood donation ban hinged on more than just pure “discrimination,” but no one appeared to have adequately articulated answers.

Specific missed opportunities: social discrimination rhetoric

To this point, an astounding degree of misinformation and incoherence both in the
interpretation of the MSM blood ban policy’s social implications and empirical technicalities exists. A reiteration of the social discrimination component to advocates’ arguments will promote more critical thinking about combining the nuanced ways of framing the issue, in hopes of striking a chord with more people. Again, all of the points raised by Neill, Culhane, Roman, and the other authors are valid and useful, but with the exception of Galarneau, they do not sufficiently address the possibility of expanding the advocacy framework to include a variety of intersecting issues. While Galarneau, along with Martucci’s discussion of naturalizing social categories, highlights the multiple dimensions of the social discrimination argument, the aim of her article is not explicitly to incite advocacy groups to reframe their cause. These dimensions are commonly acknowledged, but advocates must tie them together.

The observation of how the MSM policy naturalizes a social category could prove particularly useful when paired with the observation that an unwarranted, antiquated fear of “gay blood” persists. More attention could be paid to the comparison between the MSM policy and other policies outlined in the FDA’s blood donation criteria. Only some of the cited authors mention the double standard for females who have had sex with MSMs then subject to a one-year deferral, yet this is a strategic observation to demonstrate one way in which the MSM ban is illogical. Because the donation criteria should be strictly behavior-based, more emphasis should be placed on risky behavior. This is not inherently a “gay issue.” Could this instead be an opportunity to campaign for citizens’ improved self-awareness of their own health?

To extend this last point, return to Culhane’s remark that “the inconsistency resulting from [the] ‘define it yourself’ approach cannot be sound policy…This ambiguity furthers the stereotypical image of gay men as dangerous just because of their “gayness,” as opposed to any specifically high-risk behavior.” Discrimination of MSMs, many of whom, admittedly, do identify as “gay,” goes beyond just saying “you’re going to be prohibited from donating blood, end of story.” Through the MSM policy, the government is effectively telling these people, “we know your sexual health better than you, and once you’ve been slated in this category, there’s no getting out.” Such handling of the situation translates to an overt indifference to overarching public health, which includes physical and socio-political well-being. The government is sending the message that it does not have faith in its citizens to take an active role in their own health care, and therefore will invest no effort into bolstering the public’s competency or in bolstering public trust in the country’s health institutions. Framed as such, advocates may be able to gain support from people engaged in public health, social education reform, etc., but who previously did not see the MSM policy as an issue of immediate concern to them. This might extend to medical communities concerned, for example, with the adverse impact such a ban has on an already lacking blood supply. However, this angle requires more concrete support.

Specific missed opportunities: unaccountable authority and unreliable data

It is difficult to locate one set of empirical data to showcase the many different
ways in which researchers try to measure, among other things, the potential increase in HIV-infected blood donations were MSMSs allowed to donate, and the estimated augmentation of the blood supply resulting from a larger donor pool. Most studies assume a 12-month deferral period as advocated by the Red Cross and as practiced in Australia. The FDA cites a 2003 report in defense of the ban in Transfusion, the journal of AABB, formerly the American Association of Blood Banks, now an international organization. It provides a mathematical model for estimating the “impact if a 12-month deferral policy for MSM on the risk of introducing contaminated units in the blood supply and the benefit of obtaining additional donations.” The report concludes that the risk increment “would be very small but not zero,” though it clearly states that [their] “analysis was not intended to determine whether the deferral policy for MSM should be made less stringent or not,” but rather to “provide a basis...for decision making.”

A one-page report put out by the Williams Institute, part of UCLA’s law school, interprets data collected by other research teams, and concludes by saying that lifting the MSM ban would increase the total annual U.S. blood supply by 0.6% to 1.4%. The authors use the Red Cross’s and AABB’s claim to justify their trust that the potential risk in doing so outweighs the benefits.

An article published by the Canadian Medical Association Journal points to contradictory policies, such as organ donation that allows MSM participation after a 5-year deferral and the 12-month deferral for females who have had sex with MSMSs that exists in both the U.S. and Canada. Recommending a 12-month deferral revision to Canada’s law, the authors state, “[t]he current policy is counterproductive in terms of loss of donors, loss of good will, student protests, donor boycotts and lawsuits, among other negative effects.”

Finally, a British article published in the international journal on transfusion medicine, Vox Sanguinis, concludes that in the U.K., the benefit of a 12-month deferral rather than a complete ban is not worth their calculated 60% increase of HIV transmission risk. While these four reports appear well-intentioned and more or less methodologically legitimate, the striking differences between them – in both their findings and recommendations, as well as their research methods – beg the question of whose data should be trusted as a basis for policy making and for reform advocacy.

Given the United States’ decentralized blood authority with HHS advising the FDA who imposes mandatory guidelines for ARC, to whom are advocacy groups supposed to appeal? The FDA relies on a smattering of seemingly random studies and advising reports. Whose job is it to conduct research and analyze conflicting reports?

The greatest missed opportunity: lack of an integrated approach

“Framing” as a process of collective social action refers to the construction and sustaining of meaning that is necessary for a movement to keep its momentum among constituents, opponents, and other key actors in the rest of society. The process of framing entails identifying what needs to be changed, potential ways for the actors involved to effect said change, as well as considering how to best expand the movement and mobilize a greater
number if constituents. Perhaps the overarching downfall of advocacy to reform the MSM blood policy is that no clearly defined advocacy exists. The issue has not been framed singularly to draw together all of the social and political implications addressed above. Blood donation, as an issue of public health, is at the crux of both the personal and the political. It necessarily concerns all citizens in some way or another.

Case study: Why Australia’s story differs

A report issued by the executive director of the Australian Federation of AIDS Organisations, Inc. (AFAO) November 2010 calls on the Australian Red Cross to pursue “the opportunity to consider the implications of improvements in testing and disease surveillance mechanisms, changes in community practices, and understanding of those practices informed by current social and behavioural research.” Emerging from the government’s political precedent, the change in 2000 from separately regulated lifetime bans to a nationwide 12-month deferral policy, the author cites an “enabling environment” as the key element to fostering successful discussion. He repeatedly mentions the need to continually “contextualize and question” public health policies and “engage with” all relevant parties involved (blood bank services, the government, and the public, including advocacy organizations like AFAO) in developing them.

A few striking elements in AFAO’s overall approach to the issue arise. For one, the report is being written on behalf of a large network of groups, and draws on information surveyed from the public. In short, AFAO provides evidence of an advocacy front that is much more solidified and visible than that of the United States. Secondly, AFAO emphasizes the need for improved “medical and social research” in order to form the basis for analyzing the MSM policy. The problems surrounding the issue, it is acknowledged, overlap social and scientific spheres: it is crucial to demand consideration of them both. Third, and most significantly, the report advocates for better communication with the public and promoting education and public engagement on the subject.

The recommendations outlined in the review are highly nuanced. One main distinction made is between different kinds of MSM sexual activity. As Culhane notes, by simply ending the discussion with a blanket “MSM” category, policy makers render a great disservice to actually identifying and reducing the real risks at hand. AFAO states that “[t]he absence of a Red Cross Blood Service donor deferral policy outlining the evidence base for each category of deferral or a similarly framed discussion paper to inform this preliminary stage of the review has hampered analysis of the current MSM deferral policy.”

A regard for strong communication, public education and engagement, accurate research data, accountable authority, and coalitional work appear to form the basis for framing the MSM policy debate in Australia. Perhaps the United States could emulate Australia’s forward thinking approach.
IV. Conclusion

The MSM blood donation policy is astoundingly complex. Its endurance relies heavily on deeply embedded social and political issues. Advocacy in both public and scholarly spheres has failed to articulate all of these dimensions. Only once these issues are fully addressed and identified are they capable of forming the basis for a collective movement around which many different people can mobilize. The results of such a movement could translate to greater awareness of and regard for physical, institutional, and social health.

The task lies in how those concerned can effectively communicate their ideas with each other and to a wider audience. Precluding this is the fact that, as exemplified by the periodically contradicting evidence related to empirical data claims, Americans lack the knowledge to talk about the exact health implications of lifting or modifying the MSM ban. Reforming the MSM donation policy would require a full-fledged reevaluation of how Americans reconcile “taboo” and complex health issues, and a serious commitment to structuring a more centralized, yet not private or monopolistic, system for conducting health research. Despite the breadth of these challenges, however, the rewards of taking these steps will assist the process. As Culhane writes, “Public health must not act to fuel the fire of distrust, especially in minority communities, by acting in ways that can fairly be characterized as bigoted or illogical. This behavior erodes the fragile, always contingent, trust that public health relies on to do its job. And there is no more important function of government than to safeguard the public’s health.”

Endnotes

10. Ibid.
20. Culhane, 137.
27. Martucci, 223.
29. Martucci, 231.
30. “Joint Statement Regarding Donor Deferral for Men Who Have Had Sex with Another Man (MSM),” American Red Cross, last modified June 29 2010, http://www.redcross.org/portal/site/en/menuitem.94aae335470e233f6cf911df43181aa0/?vgnextoid=89859fee79f79210VgnVCM1000089f0870aRCRD.
34. Mark A. Wainberg et al., 1324.
38. Ibid.
Julia Napolitano is a graduating senior from Niskayuna, New York with majors in Gender Studies, French, and Linguistics. She is interested in policies concerning sex, gender, and sexuality, and has recently decided to explore sex research as a possibility for graduate school. In the immediate future, Julia hopes to work for a family law agency specializing in same-sex and single parent adoption. She enjoys cooking, spending time with her friends, and shopping at Goodwill, and intends to start volunteering again at the local animal shelter.

Title artwork by Katharine Yugo

Katharine Yugo is currently a junior originally from South Bend, Indiana, majoring in English and Gender Studies. After graduation she plans on going to graduate school for social work and eventually working as an advocate for victims of domestic violence.
Cetaceans in Captivity: The Education Fallacy and the Modern Ark’s Voyage to Apathetic Attitudes Concerning the Conservation of Wild Cetaceans

Sabena Siddiqui
The Marine Mammal Protection Act (MMPA) has posited that cetaceans in public display facilities are ambassadors of their species, educating the public about marine conservation issues and inspiring an intrinsic sense of stewardship toward wild populations of cetaceans. Over the course of history, the captive industry has undergone numerous image transformations, ranging from menagerie to “modern ark,” recovering species from the brink of extinction through conservation stewardship and environmental education. However, a mere five to ten percent of captive facilities actually engage in substantive conservation efforts, either in wild habitats or by planning breeding programs. Additionally, education programs and materials developed by captive facilities generally lack the credibility and accuracy ensured by a peer-review system, and in many cases appear to intentionally mislead the lay community, leading to the erroneous perception that captive facilities are benevolent and significantly safer for cetaceans than wild habitats. Approximately 135 million people attend American Zoological Association (AZA) accredited zoos and aquaria annually. Potential long-term impacts of these programs on participant perceptions of cetaceans in captivity should be evaluated through qualitative (narrative) and quantitative (survey) research methods, analyzing the validity of the educational value of viewing captive cetaceans.

Marine Mammal Education Guidelines for Captive Facilities in the U.S.

The Marine Mammal Protection Act (MMPA) of 1972 exempts the public display of marine mammals from prohibitions because the U.S. Congress supports the view that the display of captive specimens is an important educating tool for the public about the biology, conservation, and ecological value of marine mammals. Section 104(c)(2)(A)(i) of the MMPA requires that public display facilities (e.g., SeaWorld) provide a program of education or conservation for visitors that meets “professionally recognized standards.” However, the MMPA states that the education and conservation programs should be based on professionally recognized standards which are from the public display community itself. These federal education benchmarks are intended to be used as guidelines upon which educational programs are developed at captive facilities and are subsequently distributed to millions of visitors of captive cetacean facilities annually.

Following the 1994 amendments to the MMPA, the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NOAA/NMFS) requested the Association of Zoos and Aquariums (AZA) and the Alliance of Marine Mammal Parks and Aquariums (AMMPA) submit standards for education and conservation programs specifically deemed acceptable by the committee. The NMFS currently publishes education program standards for three professional associations: the AZA, AMMPA, and SeaWorld Parks and Entertainment. Collectively, these three organizations comprise sixty percent of the captive cetacean facilities within the U.S. Paradoxically, organizations associated with the public display of marine mammals are permitted to self-regulate the quality of their public
education programs and the accuracy of the information reported therein, despite the fact that these materials are distributed to millions of annual visitors and online users.

The NMFS guidelines were originally published in order to serve as interim benchmarks for organizations currently holding or applying for a federal permit allowing the public display of marine mammals under the auspices of the MMPA. However, the guidelines were never codified into enforceable regulations. The NMFS does not re-evaluate the education and conservation programs of marine mammal display facilities on any routine basis after a permit has been issued. Hence, there are currently no existing mechanisms by which the NMFS may monitor, regulate, or enforce standards of accuracy for educational programs produced by public display facilities and, subsequently, there are no consequences, either monetarily or publicly, imposed upon public display facilities for failing to meet minimum standards established by the NMFS. Perplexingly, organizations associated with the public display of marine mammals are permitted to self-regulate the quality of their public education programs and the accuracy of the information reported therein, despite the fact that these materials are distributed to millions of annual visitors and online users. A program should meet minimum standards for education or conservation. The information provided must be accurate concerning cetacean natural history, biology, behavior, and conservation. Also, it is vital that existing evidence is present that demonstrates a strong correlation between attendance at captive cetacean facilities and educational experiences which instigate pro-conservation behaviors. The conclusion that viewing captive cetaceans is a prerequisite for developing formative behaviors, attitudes, and beliefs about the environment and wildlife in visitors has actually been based on very little conclusive or peer-reviewed scientific research.

The Modern Ark

Throughout the diverse spectrum of mission and corporate objectives among zoos and aquaria, the industry as a whole has endured several transformations over the course of its long history. Historically, captive animals were a part of private gardens and the objects of private ownership, which eventually evolved to public menageries. Menageries were often mobile collections of exotic animals, peaking in popularity roughly from the mid-sixteenth centuries to the late-nineteenth centuries, and incorporating illusions and tricks performed by showmen in tandem with captive animal displays. Additionally, from the mid-nineteenth century to as late as the mid-twentieth century, roadside attractions and/or self-described “freak shows” incorporating human and captive wildlife exhibits were also popular attractions.

Recently, the modern zoo has transformed yet again by assuming pivotal roles of public educator and research facility. The rise of environmental and animal welfare movements that characterize the 1970s sparked an interest in conservation and brought attention to those zoos that inadequately provided for their animals’ holistic sense of well-being from social, cognitive, physical, and physiological perspectives. To facilitate this new role, zoological parks began hiring full-time veterinarians and researchers began modifying their
animal collections in the 1980s and 1990s, turning them into exhibits with realistic habitats. The modern captive industry markets itself as a conservation center that saves species on the brink of annihilation as a result of diminishing population numbers and inbreeding, habitat destruction, or other causal agents of extinction. Acampora describes contemporary attitudes concerning the relationship of humans to captive animals as the “new Noah,” whereby individual animals are perceived to be rescued from the dubious existence associated with circus life to the more benign fate resembling that of a museum or an ark.

Following this industry model, captive cetacean facilities have transformed themselves and have collectively adopted the novel identity of a “modern ark” with missions alluding to a pioneering spirit, education, and conservation. Through pervasive and skillful marketing and public relations strategies, the industry capitalizes on opportunities to emphasize their role as modern arks - hedges against the extinction of wild species. The SeaWorld and Busch Gardens Conservation Fund, for example, states that its mission is to “work with purpose and passion on behalf of wildlife and habitats worldwide, encouraging sustainable solutions through support of species research, animal rescue and rehabilitation and conservation education.” Increasingly, public display facilities use mission statements, the foundation statements upon which a corporation’s image, vision, and values are based, to firmly entrench their perception as savior to species imperiled in an unpredictable and dangerous world.

Despite heavily promoting their pivotal role in species and habitat conservation as an industry in general, estimates suggest that a mere five to ten percent of captive facilities actually engage in substantive conservation efforts, either in wild habitats or by planning breeding programs (e.g., conservation genetics). With a few notable exceptions, the captive display industry as a whole has reneged on its promise to enhance and contribute meaningfully to imperiled species’ population recovery plans.

In 1980, the Wuhan dolphinarium attempted to initiate a captive breeding program for the Yangtze River Dolphin, also called the Baiji (Lipotes vexillifer), which was declared functionally extinct. The failure of the program was particularly poignant, since the Baiji is the first known cetacean to be declared extinct as a direct result of anthropogenic impacts. Following in the wake of the Baiji, the Vaquita Porpoise (Phocoena sinus) now holds the dubious distinction as the world’s most critically endangered marine mammal, with population estimates as few as 125 individuals. Unfortunately, there are no existing captive breeding programs for this species and even wild individuals are rarely observed.

Currently, the Ocean Park Conservation Foundation is the only member organization of AMMPA that routinely provides funding to support conservation efforts directed toward the five known species of river dolphins. This lack of wider funding emphasizes the disconnect between the purported mission-based conservation practices of contemporary captive animal facilities and the reality of the failure to implement mission-based practices in meaningful ways, such as captive breeding programs, maintaining conservation genetic databases, release programs, habitat restoration, and so on.

Though the popularity of specific modes and themes of animal displays tend to wax and wane over time and even across cultures, the ever-changing face of the captive display
industry has been, and will continue to be, influential in shaping the perceptions, attitudes, and values of the lay community with respect to the relationship between humans, wildlife, and increasingly, the natural habitats in which they are found.

The Education Fallacy

Education is also commonly cited as a primary justification for the existence of zoos and aquariums alike by curators and zoo officials, who often claim that the educational aspect in captive facilities can spark an interest in the public which will eventually evolve into action. Contrary to popular perception, captive facilities may in fact not be very effective in their mandate of “educating the public”.\textsuperscript{22} In general, K-12 public education curricula in the United States contain very few formalized wildlife education modules, marine science and similar ‘magnet’ school programs notwithstanding.\textsuperscript{23} With little background knowledge regarding wild cetaceans, the public heavily relies upon the captive industry for information about the animals. Since 1989, MMPA provisions have forced captive cetacean facilities to become reluctant purveyors of wildlife education on a very large scale – an estimated forty-eight million visitors pass through the turnstiles of AZA, AMMPA, and SeaWorld facilities annually.\textsuperscript{24} To that end, each visitor is also a potential consumer of marine mammal public education programs. In addition, forty-eight thousand teachers attend formal training workshops presented by the AZA every year.\textsuperscript{25} “Visitors recognize the need for conservation, so they look towards the zoo to fulfill their conservation and environmental education.”\textsuperscript{26}

SeaWorld has developed a plethora of online resources and media education programs, such as “Shamu TV,” targeting teachers, students, children, and parents.\textsuperscript{27} In addition to deficient information in educational materials, much of the information contained within these and related programs related to cetacean lifespan, cognition and intelligence, behavior, and captivity-related stress is often misleading or incorrect\textsuperscript{28} and is in direct conflict with the fundamental objectives and spirit of the MMPA, which states that the public display of captive marine mammals serves as “an accurate wildlife educational tool for the public”.\textsuperscript{29}

Kellert concluded that those who attended zoos did not differ in their prejudices about animals compared to those who did not attend zoos and were willing to eliminate entire classes of animals, including mosquitoes, fleas, moths, and spiders.\textsuperscript{30} The desire to eliminate entire classes or species shows a lack of basic knowledge of ecological relationships, the role of guilds or species in ecosystem structure and function, and the cascading effects within an ecosystem of eliminating even a single species – the charisma of the species notwithstanding. Furthermore, there are currently no credibly peer-reviewed studies to counter captive industry claims that say, through a combination of internally developed and published education materials and direct experience, visitors’ long-term sense of empathy toward and understanding of cetacean species is heightened or changed; consequently, attitudes and beliefs regarding environmental conservation have not shifted in significant ways.\textsuperscript{31} Corporations such as SeaWorld heavily market and promote the entertainment
aspect of their captive cetacean shows, eclipsing any possibility of an educational experience for visitors. On its website, SeaWorld bills its featured orca shows as “a rock and roll concert of unprecedented proportions, combining improvisational movements of killer whales with music remixed with some of the hottest rock stars of the industry”.  One may unambiguously conclude from the program’s description that this particular orca show is not focused on educating the public about the ecology, behaviors, or threats to the welfare and conservation of wild orca populations.

Facilities actively defend the highly profitable entertainment aspect of cetacean captivity over educational opportunities by suggesting that their visitors have limited tolerance and attention spans. Randall Brill of the Chicago Zoological Society states, “Dad, mom and the kids are not looking for a technical lecture on cetaceans. They are spending their money and want to be entertained”.  In reality, visitors of aquaria and zoos experience each exhibit in rapid succession, typically stopping briefly to observe feeding behaviors or behavior deemed to be “entertaining”.  In fact, viewing animals on display and watching marine mammal performances were the primary motivators for people to visit dolphinariums, rather than learning about animals or wildlife conservation.

Mission statements centered around conservation and education demonstrate that the captive display community has claim to being education-focused in theory; in practice, however, their facilities are used as entertainment.

Highly choreographed, repetitive marine mammal shows present an image of mutual cooperation, showing that the animals are having ‘fun’, and that a special, affectionate bond exists between the trainer and animal. Tricks often involve hugging, kissing, and other signs of affection, further impressing the point of social bonding. Such actions (described as “behaviors” and not as “tricks”) portray human modes of affection and are very likely to be meaningless within the context of the complex social interactions and behaviors exhibited by wild cetaceans. In reality, the manifestation of ‘affection and bonding’ with trainers, as with other behaviors, is reinforced through a highly regulated and consistent system of food rewards (dead fish, in the case of cetaceans) that comprise a portion of the total ration of a captive animal’s daily ration and caloric intake.  While this positive reinforcement process is not concealed from visitors during cetacean shows, the manifestation of affection is very likely to be emotively disconnected from the training process that is produced.

Perhaps the most impressionable consumer demographic of cetacean-related educational experiences is young children, who may be easily confused by images of completely tamed top predators – an image which is diametrically opposed to those presented in contemporary television educational programs on channels such as Animal Planet, Discovery, and National Geographic. Captive facilities may indirectly convey the idea that only confinement separates humans and wildlife, and that animals serve no greater function than to provide entertainment to humans. It is often argued that children could learn much more about wild cetaceans by participating in a whale watching experience, thereby observing animals in their natural habitats and displaying natural behaviors.  The incongruity between an animal’s natural behaviors and the artificially-reinforced behaviors of captive animals may in part contribute to the shock and disbelief people often feel when domesti-
cated or wild animals attack – there is no baseline reference for what an animal’s behavioral suite actually is or indication that the animal may be under various natural conditions.

The most poignant example of diametrically opposed beliefs and attitudes about a captive animal’s ‘rogue behavior’ is the death of marine mammal trainer Dawn Brancheau in February 2010 by Tilikum, a bull orca owned by SeaWorld Orlando that had been involved in two previous deaths. An autopsy later revealed that Brancheau suffered from a torn scalp, amputated arm, multiple fractures, spinal injuries, and scratches consistent with tooth raking.

The grim reality of Brancheau’s death is in stark contrast to SeaWorld’s marketing and PR images portraying Ms. Brancheau hugging, kissing, or otherwise being in close contact with Tilikum. These and similar images confuse most of the general public, and in particular, children, who may not be able to cognitively process opposing concepts of the positive images of “Flipper” and “Shamu” as presented by the captive cetacean industry, and the reality of the natural instincts and behaviors of a top predator.

Drs. Lori Marino and Naomi Rose testified at the House Committee on Natural Resources meeting regarding education and captive cetaceans. Both refuted the validity of education and conservation claims made by the captive industry and conducted an extensive review of the public educational materials by SeaWorld, the AZA, and AMMPA. Marino and Rose independently found a substantial lack of information concerning some of the most fascinating and complex characteristics of cetaceans including natural history, social structures, and the evidence of culture in cetacean communities. Without including even the most rudimentary life history, traits and social behaviors of wild cetaceans, visitors cannot evaluate the ethics and value of maintaining cetaceans in captivity for entertainment purposes.

Perceived Perils Facing Wild Cetaceans

Inaccurate information can strongly influence the lay community to believe that cetaceans in captivity are safer and longer-lived than their wild counterparts. In the Bottlenose Dolphin Information Book, SeaWorld lists the following as threats to wild populations of dolphins: diseases, including viral, bacterial, and fungal infections, and stomach ulcers, skin disorders worms; predators like killer whales, sharks, stingrays; and red tide; and human activities such as hunting and fishing.

Notably among these threats, the book omits the international trade in wild dolphins, which is particularly relevant to the bottlenose dolphin, the archetypal Flipper and most common captive cetacean. In Taiji, Japan, an epicenter for the wild dolphin trade, drive hunts, claim 23,000 dolphins annually, as individuals are selected for the captive dolphin trade while the remaining animals are culled for meat. This figure does not include other drive hunt locations worldwide. The drive hunts supporting the captive cetacean industry are not cited as a threat to dolphins, while “predators” such as stingrays are listed. Stingrays feed mainly on shellfish, mollusks, bivalves, and worms. Pelagic rays, such as the manta ray, feed on plankton and rarely on fish. It is therefore inconceivable that stingrays would hunt dolphins and this idea represents the height of misinformation concerning dolphins’ roles in marine food web dynamics. It is
more accurate to list stingray encounters as “unlikely hazards”, though the overall intent to portray wild habitats as rife with perils is certainly achieved.

Furthermore, natural predators do not “harm” cetacean populations in general, and in reality prey species evolve concurrently with their predators in order to adapt to the regulating effects of predation. The perpetuation of such inaccurate information about natural systems and individual species can lead to an extremely flawed or regressive understanding of even the most rudimentary ecological principles and applicability to wild populations of cetaceans, thereby distorting legitimate challenges to the health, welfare, and population viability of wild cetaceans.

SeaWorld’s Beluga Whale Information Book reports current legitimate threats, such as environmental hazards, subsistence hunters, toxins, oil, habitat alteration, and numerous diseases (viral, bacterial and fungal infections, skin diseases, tumors, heart disease, urogenital disorders, and respiratory disorders). However, the handbook also invokes dramatic images of whales becoming trapped in ice, where they can be eaten by polar bears, or become victims of starvation or suffocation.

The information book does not make a clear distinction between natural threats, to which evolution has designed the species to adapt, and anthropogenic threats that often seriously compromise population stability. Building upon the misconstrued understanding of ecology, these resources create cognitive stereotypes of the wilderness as a dangerous and stressful place, rife with perils for wild cetaceans. It should therefore be of no surprise that information presented in this fashion may cause the lay community to believe that cetaceans are actually much safer and experience a higher quality of life within captive facilities. The so-called modern arks appear to provide cetaceans with safety, protection from disease and predators, and an interesting and rewarding social life – both among other cetaceans and their human captors. Because the same protection measures cannot be guaranteed in wild habitats, the lay community could begin to associate the food-rich, predator- and pathogen-free “benefits” of captivity as the most effective means of conserving cetacean populations.

Inaccurate Life History Information in Educational Resources

Orcas (Orcinus orca)

The AMMPA’s website provides incorrect information regarding the lifespan of dolphins in the wild relative to those in public display facilities. The AMMPA states that “Beluga and killer whales in our facilities live as long as or longer than those in the wild”. Rose, in her analysis of captive lifespans, directly refutes these claims, citing that “only two captive female killer whales (currently alive) have passed the age of 40 (in 45 years of maintaining the species in captivity and out of almost 200 individuals), only one or two others passed 30 before their deaths, while dozens have died in their pre-teens, teens, and 20s. No captive males have yet passed 35, less than a handful reached 30, and most have died in their pre-teens, teens and early 20s….22 killer whales, all but one younger than 25 years of age at death, have died in the past 24 years at SeaWorld facilities.”
In its Killer Whale Teacher’s Guide, SeaWorld states that killer whale life expectancy is typically between 25-30 years in age,\textsuperscript{50} while its Killer Whales fact sheet claims that killer whale life expectancy remains unknown.\textsuperscript{51} Further complicating the issue, the latter publication also supports the claim that female killer whale life expectancy is 50 years, while a male may be expected to live for 30 years.

For financial and marketing reasons, SeaWorld refrains from directly addressing the lifespan of captive killer whales. The corporation wants to ensure that public perception remains firmly correlates cetacean longevity with captivity. This intent comes to light the “Shamu Never Dies” campaign in which the legacy name of Shamu passes on to multiple animals, ensuring that in fact, Shamu never dies – literally or metaphorically, thereby creating a false and exaggerated sense of the longevity of any one particular animal. Following the death of an orca at SeaWorld Texas in 1991, a spokesman was quoted as stating, “Shamu has not died today. One of the whales who plays that role we lost this morning, yes. But Shamu lives on.”\textsuperscript{52,53}

SeaWorld’s claims of truncated or unknown lifespan and other life history traits either ignore or conflict with knowledge generally accepted by the scientific community. For example, a 1990 study published by the International Whaling Commission (IWC) provides data that demonstrates that the mean life expectancy for male killer whales is approximately 30 years for males and 50 for females, with a maximum range of 50-60 years and 80-90 years, respectively.\textsuperscript{54} Rose, in her testimony to the House Committee on Natural Resources Subcommittee on Insular Affairs, Oceans and Wildlife regarding educational aspects of public display of marine mammals, states that, “The fact that in one wild population, conditions are good enough to allow killer whales to realize life spans that are similar to human beings is barely mentioned. If one wild population can achieve these life spans, then certainly captive killer whales, if conditions are safe and healthy (as SeaWorld claims), should be able to achieve them.”\textsuperscript{55}

\textit{Beluga Whale (Delphinapterus leucas)}

In its Beluga Whale Information Book, SeaWorld reports that the average lifespan of a beluga whale ranges from 20-30 years. However, a study demonstrated that beluga whales actually deposit a single dental growth layer annually, and not two, indicating that beluga whales may live twice as long as previously believed.\textsuperscript{56} This study points to the fact that SeaWorld provides outdated and inaccurate information in educational materials. Perhaps more misleading are provocative statements in the same publication that suggest that maternal behavior in first-time beluga mothers may not be instinctive but that these females are taught the appropriate response to nursing behavior elicited by their newborn calves through proper training given at SeaWorld facilities. In wild populations, research has shown that female cetaceans learn maternal behaviors from other females in their social group; furthermore, there is positive correlation between increased frequency of female interaction and subsequent successful calf rearing.\textsuperscript{57} By selectively omitting the influence of natural social interactions among wild cetaceans on calf rearing success, SeaWorld effectively creates the perception that direct human intervention is vital to the survival of
newborn beluga calves, which would otherwise languish or perish under the care of their inexperienced mothers.

*Bottlenose Dolphins* (*Tursiops truncatus*)

In comparison to the information on orca and beluga whale lifespan, SeaWorld portrays accurate information regarding bottlenose dolphin life expectancy. Even further, SeaWorld openly reports statistics concerning captive dolphin life span, perhaps because the mean life expectancy of bottlenose dolphins is similar for both captive and wild populations. It is interesting to note, however, that if the purported health and safety advantages conferred to captive animals are as beneficial as SeaWorld claims, then captive animals should enjoy a significantly longer lifespan than wild animals.

Other Factors of Life in Captivity

*Collapsed dorsal fin*

SeaWorld’s educational materials often attempt to normalize the phenomenon of fully collapsed fins in both wild and captive populations of killer whales. All adult male killer whales in captivity have collapsed dorsal fins, while only a small percentage of wild adult male killer whales have collapsed fins.\(^5\)** In the Killer Whales Teacher’s Guide, SeaWorld describes the commonly used technique of photographing the dorsal fins of animals to identify individuals based on morphological variations and unique physical anomalies (e.g., scarring, notches, etc.).\(^6\)** The publication depicts an image of a killer whale with a fully collapsed dorsal fin, with no indication whether the animal is captive or wild, with a caption reading, “Some killer whales have irregular-shaped dorsal fins, sometimes leaning to one side.” The publication includes an activity whereby students match photographs of killer whale dorsal fins taken five years apart, including images of collapsed dorsal fins.\(^7\)** The visual effect implies that this condition is natural, when it is not. SeaWorld furthers the association between natural conditions and collapsed dorsal fins by stating that seven of 30 males in a wild New Zealand population have “collapsed or bent dorsal fins,” ignoring the difference between bent and fully collapsed fins.\(^8\)**

The Killer Whale Information Book attributes genetics, injuries, or lack of physiological structural support as possible explanations for dorsal fin collapse.\(^9\)** The fact that the vast majority of wild adult male killer whales have erect fins negates this last explanation. The lack of bones or muscles for support has no correlation with dorsal fin stability. If gravity were a plausible explanation, dorsal fin collapse would be far more common in wild populations of killer whales. Captive breeding is discussed frequently and in detail in SeaWorld’s educational resources. Readers may assume that captive killer whales with collapsed dorsal fins are related to each other and pass this trait on to subsequent generations due to the mention of genetics as a possible cause for dorsal fin collapse.
Stress

On the organization’s website, the AMMPA addresses the issue of “stress in captive cetaceans.” The AMMPA states: “A recent scientific study of steroid hormones produced by the adrenal cortex, a commonly used metric of stress in animals, demonstrates that stress is not an issue in marine mammal in-water interactive programs.” It further cites a study that provides “clear evidence that [the] animals are in a healthy environment.” However, Marino analyzed the study and pointed out several fundamental flaws in the experimental design and subsequent conclusions. For example, the authors compared stress hormone levels of captive bottlenose dolphins in swim-with-the-dolphin (SWTD) programs with those of dolphins in shows and stated “no evidence...that animals involved in interactive SWTD programs experience any measurable levels of stress greater than any other measured population of Tursiops.” This finding can only be considered relevant if a non-captive control group had been used as a control group. She also notes that the research was not based upon a scientifically rigorous process, and furthermore that the work published was a short paper in a conference proceeding and not a peer-reviewed journal.

The AMMPA’s website further states that “Symptoms commonly referred to as stress indicators, such as ulcers, are more common in wild animals that have been found stranded than in animals in responsible public display facilities.” The episodic nature of a stranding event represents a physiologically traumatic experience for cetaceans, and consequently one would expect animals to present elevated rates of ulcers and related pathologies relative to ‘normal’ conditions. The fact that stranded cetaceans are likely to exhibit certain related pathologies may not be common knowledge to the lay community. The AMMPA does not address the increased presence of pathological illness in wild stranded cetaceans. Consequently, this may be misleading and/or confusing to the lay community, leading to a cognitive association that cetaceans in captivity are safe from the physiological stresses of existence in the wild. Furthermore, The AMMPA’s online FAQ section states that “The results of behavioral and medical evaluations of animals in public display facilities indicate the animals breed very successfully, form social groupings, eat well and exhibit the same behaviors they do in the wild.” This statement denies the presence of abnormal behavior in captive cetaceans and posits the perception that behavior of captive animals parallels that of wild cetaceans. Marino, however, asserts that there is a convincing amount of literature supporting the correlation between stress and the increased presence of aggression, illness and mortality in captive cetaceans.

Intelligence

The AMMPA attempts to normalize or remove the uniqueness of cetacean intelligence in publications by ignoring relevant scientifically credible information. From its website, the AMMPA makes the statement, “…people continue to infer that dolphins and whales are uniquely intelligent.” It is therefore cognizant of the commonly-held belief that cetaceans possess a unique intelligence when compared to other species. In response to the seemingly ambiguous position of the AMMPA with regard to cetacean intelligence, Marino states, “The Alliance seems to suggest that the intelligence of dolphins is high
enough to make them suitable “subjects” in various human-driven activities. On the other hand, it downplays that same intelligence so as to undermine concerns about keeping these intelligent animals in captivity.”

The AMMPA attempts to downplay the uniquely large mass of the cetacean brain. Many cetacean species have brains up to five times larger than expected for their body size. The scientific community has a breadth of research and literature that demonstrates the correlation between body size and brain size. The AMMPA claims that dolphins are large animals with proportionately sized brains. Furthermore, dolphin brain body ratio is second to modern humans. This is perhaps in order to remove the public’s ability to draw conclusions and implications from the reality of cetacean intelligence and similarity to human intelligence. The absence of peer-reviewed literature and restricted comparative studies framing the discussion of cetacean intelligence leaves little doubt that the AMMPA portrays scientific information in its publically available resources in a highly honed manner that advocates a “safe position” for it in balancing the acknowledgement of cetacean intelligence, which seems to suggest that cetaceans are “intelligent enough to be interesting and entertaining, but not so intelligent that they can thrive in the wild without human intervention.”

The AMMPA provides an inaccurate portrayal of captive cetaceans by ignoring relevant empirical evidence regarding the actual lack of psychological or physiological well-being in captive cetaceans. Additionally, eliminating variables relevant to the context of peer-reviewed studies suggests that AMMPA intentionally presents data to fit a desirable public message regarding the state of captive cetacean welfare, which in turn shapes public perception of captive cetacean facilities.

**Conclusion**

In a study funded by the Vancouver Aquarium, a virtual beluga whale display was created with the use of Artificial Intelligence (AI) programs to simulate an actual beluga whale exhibit. IMAX theatres, animatronics, DVDs, interactive and traditional curatorial displays, and virtual reality simulations with accurate portrayals of wild cetacean behavior, social structure, communication, and physiology could be possible solutions to counter inaccurate and misleading perceptions of cetaceans fostered by the captive display industry.

In an effort to appeal to a more informed, empathetic, and environmentally aware public, the captive display industry has gone through a profound image transformation and proclaims to serve as a “modern ark” and savior of species on the brink of extinction. The development and implementation of the MMPA’s clauses concerning education and conservation created a largely self-regulating public display community. Inaccurate and/or misleading educational resources in areas such as natural history traits, behavior, and intelligence may create unrealistic perceptions of wild cetaceans. The paucity of accurate, scientifically credible information regarding the unique social and cognitive characteristics of cetaceans may contribute to diminished visitor appreciation for the true nature of cetaceans. Viewing captive cetaceans with shortened life spans that display extreme and un-
natural behavior can create a disconnection between the nature of captive cetaceans and the true nature of wild cetaceans. Inaccurate portrayals of wilderness and wild habitats as scary and dangerous places can create a public that is sympathetic to captivity and fearful of wild cetaceans becoming harmed in a dangerous habitat. The species upon which the captive industry rely for profit can in effect, be harmed by the validation of inaccurate information which promotes their removal from natural habitats.

Endnotes

5. Ibid.
12. Ibid.
15. “Zoos and Eyes...”
18. T. Bettinger and H. Quinn, “Conservation funds...”
22. R. Acampora, “Zoos and eyes…”.
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24. Ibid.
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52. V. Williams, “Captive Orcas…”
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73. L. Marino, et al., 2006.
Sabena Siddiqui is a junior planning on pursuing an individualized major in animal behavior. After volunteering at the Indianapolis Zoo and interning in the manatee care & research department at Mote Marine Laboratory in Sarasota, FL, she has an insider’s perspective on captivity. She is president of the American Cetacean Society National Student Coalition, an organization that uses research and education to promote advocacy for the world’s cetaceans (whales, dolphins and porpoises) and oceans. In a time where activism is characterized by extreme rhetoric that is often counterproductive, Sabena hopes to take back rhetoric and activism with the next generation. As a dedicated animal activist, she began researching cetaceans in captivity after being inspired by the Academy award winning film The Cove. This essay has been put into a poster format, which was presented at the American Cetacean Society conference in Monterey, California. Her research has since been accepted to two international marine conferences. She plans on interning with the Dolphin Communication Project for the 2011 summer which includes swimming with wild dolphins in the Bahamas to collect behavioral data in the field.

Title artwork by KatharineYugo
Against Marriage

Briénne Strohl
In this paper I look at the current legal status of marriage. I agree with Robin West that, in the near future, marriage will be transformed from a private agreement to public proclamation. I argue that civil marriage is unconstitutional and in violation of both the Fourteenth Amendment and the right to privacy implicit in the Bill of Rights. I conclude by calling for a redirection of LGBT goals away from same-sex marriage and toward disestablishment.

Against Marriage

In July of 2011, Illinois’ gay couples will be granted the right to enter into civil unions. Rep. Greg Harris sponsored the bill, which he believes ensures that his state “treats all of its citizens equally under the law.” Understandably, many feel this is a clear triumph for justice and liberty, but in truth SB1716 is far from a victory: it is a step in the wrong direction.

Before Illinois, the states of Connecticut, Vermont, New Hampshire, and New Jersey passed bills allowing civil unions between two individuals of the same sex (though only New Jersey has yet to move on to allowing gay marriage). Eight other states allow domestic partnerships and six issue full civil marriage certificates to gay couples. Of the 44 states that do not offer gay marriage, only three (Rhode Island, New York, and Maryland) legally recognize gay marriages performed in other states, and thanks to the Defense of Marriage Act they do not have to.

Why all this confusing legislation? What is the difference between domestic partnerships and civil unions, and what exactly is marriage?

Civil unions and domestic partnerships are easy to define when contrasted with civil marriage. A civil union is a marriage recognized only on the state level. It is not a marriage on the federal level, and therefore bars parties in a civil union from receiving tax benefits and other marriage-dependent federal rights. Domestic partnerships are weaker still, possessing no federal recognition and only some of the spousal rights of the state. The far trickier question is the definition of marriage itself. “Marriage” is separately a religious, historical, and legal entity, though the public psyche usually fails to recognize these distinctions. In this murky pseudo-legal realm resides the Holy Grail of the modern gay rights movement. But once the smoke of a scandalous history and a complex religious existence dissipates, the solid legal form of civil marriage reveals itself to be an unworthy goal. The expansion of civil marriage to include a broader demographic potentiates a deeper and graver problem: marriage is unconstitutional.

This issue requires immediate attention. The history of marriage in the U.S. contains several significant shifts and redefinitions, most notably the “patriarchal” marriage of the 1800s, the “traditional” marriage of the 1950s, and the “contractual” marriage of the 1970s. In the early 21st century we find ourselves in the midst of another transition.

Only once in the history of the U.S. has the privacy of contractual marriage been opened into the public sphere as it has been in recent years. In the late 1800s, the federal
government waged a sort of war on the Church of Jesus Christ of Latter Day Saints (LDS). In the end, properties and funds owned by the Church were taken and its members disenfranchised. All this was allowed to happen with the free exercise clause in full force under the guise of defending the (traditionally Christian) definition of marriage as necessarily binary. LDS founder Joseph Smith claimed to have received from God a “Revelation on Celestial Marriage” encouraging the practice of polygamy, which soon became official church doctrine practiced by many of the inhabitants of what later became Utah. The Morrill Anti-Bigamy Act of 1862 could properly be called the original defense of marriage act, and a total of 55 proposed constitutional amendments concerning polygamy followed.

Today’s marriage crisis parallels the attack on Mormon polygamy of the 1800s as Christian regulations on romance are bleeding over into secular legislation. Then and now, the conflation of religious morality and secular justice is dangerous and flagrantly un-American. Furthermore, the war against the Church of LDS evidences the very old tradition of heteronormativity, a tradition of inequality that remains an obstacle to sexual freedom today and stems also from Christian values. Society assumes a certain sexuality is “normal” (namely heterosexuality), just as it assumes a certain religious affiliation is “normal” (Christianity), and lawmakers legislate accordingly. As we shall see, this marginalization of non-heterosexualities plays an important role in the injustice that is civil marriage.

1996 saw a new Defense of Marriage Act that heralded the contemporary era of public debate on the morality of marriage. Today, political campaigns are being decided by the prospect of government mandated definitions of marriage. The private romantic relationships of Americans are increasingly being classified and limited not by discussions between the individuals involved, but by public debates, sensational court cases, and constitutional amendments. Historic reformation are stirring.

Arguments for Marriage

By and large, the right’s arguments for traditional marriage fit into at least one of three categories: sanctity, tradition, and reproduction. Speaking for the United States Conference of Catholic Bishops, Archbishop Joseph Kurtz of Louisville introduced a public address on the defense of marriage with these representative remarks, hitting on all three categories:

Marriage existed long before the state or The Church. It is the foundation of the family and society. The testimony of history and the judgment of our own natural reason point to one simple conclusion: marriage was given to us from the beginning by God with a particular structure and for specific purposes. It is the exclusive union of one man and one woman, joined in an intimate community of love and life. In and through this special community a man and a woman pledge themselves to each other for a lifetime, and accept the responsibility of bringing children into the world and caring for them. For many centuries these truths about marriage were accepted without
question, and perhaps even taken for granted. Sadly, this is no longer
the case.

Archbishop Kurtz and the many whose position he represents clearly do not rec-
ognize a separation between the civil institution of marriage currently undergoing fierce
debate and the religious institution they hold sacred.

Of course, religious leaders are not alone in making these arguments. The symbol
of the biological, nuclear family consisting of one man, one woman, and children is written
into public policy on all levels precisely because so many elected officials think like Arch-
bishop Kurtz. They believe that the crumbling of society itself will come with the alteration
of governmentally sanctioned notions of “family.” On the floor of the Illinois House of Rep-
resentatives, Rep. Ron Stephens went so far as to claim that divergence from the American
conception of traditional marriage was responsible for the fall of the Roman Empire.³

The downfall of the sanctity argument is simply that it does not apply to civil mar-
riage or relevant legislation. It is a perfectly good personal argument informed by a particu-
lar religious, moral, and cultural tradition, but it is irrelevant to the laws of a government
that has pledged never to pass laws respecting establishments of religion. As per the Free
Exercise Clause, it is plainly the right of individual US citizens to decide for themselves
what place, if any, their religious communities ought to have in validating and regulating
their romantic relationships: “sanctity” arguments belong in debates over the nature of re-
ligious regulation. Marriage as a religious institution, and thus any God-given sanctity that
may be attached, is outside the scope of law and is not pertinent to civil marriage.

The argument for marriage as a cultural tradition is not only weak but thoroughly
disturbing. This idea, of course, relies on the unfounded assumption that what is older is
better. This is not an unusual viewpoint from the right, and perhaps there is occasionally
value in a practical “if it ain’t broke don’t fix it” attitude. But American patriarchal mar-
riage has always been horribly broken. The narrative of marriage’s history inherent in
right-wing discourse is dangerous because it assumes that marriage lacked any significant
problems before the mid-twentieth century. To be a wife meant to be a caring mother loved
and respected by her husband and her community. Reality was otherwise. Wifehood circa
1850 meant, in every sense of the term, slavery to the husband. It meant never owning
anything – land, money, or even one’s own sexual or reproductive body. There were no
legal repercussions for the rape of one’s wife. It meant confinement to the domestic sphere:
women had no political power at any level of government. Worst of all, it meant submis-
sion to chastisement by one’s husband. It was considered a husband’s obligation to punish
his wife when she failed to obey him, and this meant physically. Wives were beaten, just as
blacks in the fields.⁴ Those arguing for the preservation of a tradition that never existed are
in desperate need of an historical wake-up call.

The only right-wing argument for civil marriage that is worth serious consider-
ation is that of reproduction. The idea is that government should be able to regulate marital
relationships because the production of children is necessary for the continuation of the
country. As David Boise said recently in his oral argument to the California Supreme Court,
“there is clearly a rational basis justifying the traditional definition of marriage. The key rea-
son that marriage has existed at all in any society and at any time is that sexual relationships between men and women naturally produce children. Society has no particular interest in a platonic relationship between a man and a woman no matter how close, no matter how committed it may be.” Boise was speaking in defense of Proposition 8, which banned gay marriage in the state of California. Specifically, he was responding to the suggestion by one of the judges that the proposed revocation of Prop 8 was analogous to that of the Racial Integrity Act of 1924 in Loving v. Virginia (which banned interracial marriage until ruled unconstitutional). Boise insisted that Prop 8 was different because, while the state had a legitimate interest in any marriage that could produce children, gay marriage offers no such “rational basis” for protection under the Fourteenth Amendment.

The unconstitutionality of preventing gays from enjoying the same marital rights as straight couples is a different, though far more clear-cut, issue that is beyond the scope of my argument. However, Boise’s defense of so-called “traditional” marriage rests on the proposition that civil marriage exists for the purpose of creating new citizens. This is directly relevant, for if true, it is potentially a basis for government jurisdiction over marriage, and thus its existence in U.S. law.

Civil marriage, however, has not been concerned with children since 1964. Prior to that year, Connecticut had a law prohibiting the dissemination of council to couples inquiring about contraception, as well as the use of birth control of any sort. Estelle Griswold, then director of the Planned Parenthood League of Connecticut, was convicted of violating this law when she and the League’s medical director were found to have been advising couples on methods of birth control. She appealed, and the U.S. Supreme Court ruled that the Connecticut law violated the right to privacy implicit in the Bill of Rights. The case effectively granted married couples the right to use contraceptives, but there were deeper, more fundamental results. Griswold v. Connecticut also established that the First, Third, Fourth, and Ninth amendments together create a right to privacy within marriage. Second, in protecting under that right the freedom to employ contraception, all legally recognized sexual relationships thereafter no longer existed in law for the purpose of bearing children, as the sexually active couple was free to choose indefinitely to not conceive. By legalizing contraception for married couples, the case divorced civil marriage from the conception of children.

Arguments for marriage from the left are more diverse. Robin West discusses two in Marriage, Sexuality, and Gender. Though these arguments provide emotionally stirring reasons for getting married, they do not address the justifications for government intervention into the sex lives of its citizens. Mary Shanley’s anthology Just Marriage includes several essays that fall under either West’s categories or the more conservative categories discussed above. Most are personal extensions of the sanctity argument. Consider Shanley’s “On the Public Importance of Private Unions.” After explaining the position of contractualists (those who would eliminate marriage law and move its content into contract law), she criticizes it for its failure to capture the “internal stance,” the view from within a marital relationship. “The internal stance,” she says, “reflects the fact that when people marry they become part of an entity that is not reducible to or identical with its individual components.” Marital
synergy is a refrain throughout the book. This isn’t precisely a religious sentiment, but it has similar problems to the sanctity argument. Firstly, what actually goes on in a marriage after the certificate is signed cannot be regulated externally due to the right to privacy, as cited in *Griswold v. Connecticut*. A legal document does not maintain a marriage, but a couple’s emotional commitment can. The success of a marriage has nothing to do with the legal status of “married.” Secondly, whether the sanctity of marriage is God-given or constructed by the couple, it is not the business of government to intervene in these kinds of issues: freedom of thought is the conceptual architect and legal product of the freedoms of religion, speech, and expression. A justification for civil marriage based on the thoughts of individuals is no justification at all.

**Against Marriage**

With these potential contentions set aside, I will now present my central claim: that civil marriage is not only groundless but positively unconstitutional. Specifically, it violates the Fourteenth Amendment’s Equal Protection Clause with regard to unmarried individuals. There is precedent supporting its lack of a rational basis, but I’ll argue further that it fails every other step of the equal protection test as well.

Shortly after *Griswold v. Connecticut*, a similar situation transpired in Massachusetts. In 1971, pro-choice activist William Baird gave a lecture at Boston University on birth control and overpopulation. After the lecture, he furnished a contraceptive (a spermicidal foam, specifically) to an unmarried woman in the audience. Massachusetts charged Baird with a felony, for contraceptives could only be distributed in the state by registered medical professionals (which he was not), and then only to married couples. The defense argued that the Massachusetts law violated the right to privacy noted in the Griswold case seven years earlier. In the end, the law was overturned, but not because of the right to privacy. The pertinent question was reframed as such: rather than asking whether the right to privacy applied to the sex lives of non-married individuals as well, the court asked whether there ever were grounds in the Griswold case for differentiating between married and unmarried people in the first place.¹⁸

To understand the court’s ruling and the broader significance thereof, one must be familiar with the interpretation of the Equal Protection Clause of the Fourteenth Amendment employed in law. The clause reads that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The broadest interpretation of the clause would make most legislation impossible: for instance, distinctions in legislation between 8-year-olds and 50-year-olds and between billionaires and the poor could not be made. To prevent this stalemate, the group being denied protections awarded to others undergoes an “equal protection test” when any question arises regarding the validity of distinctions.

The test comprises several parts. For quick reference I’ve composed a sym-
bolic representation of the equal protection test as it applies to existing laws under review: \((ivm)\rightarrow (c1=u)\)*\{\(~(ivm)\rightarrow (c2=u)\)*\[~(f-->(r=u))\], where \(i=\)immutable, \(m=\)maltreated, \(\sim=\)not, \(c=\)compelling, \(f=\)fundamental, \(u=\)uphold, and \(r=\)rational. The operators: \(v=\)or, \(\Box=\)if/then, \(*=\)and, \(\sim=\)not, and \(==\)identity. First, the question is asked, “Is the characteristic defining the group immutable?”(i). Skin color and gender, for instance, are immutable. Choice of vehicle is not. Obviously, not all defining characteristics are so unequivocal. If the answer to the first question is yes, the distinction is subject to “strict scrutiny” which means asking, “Is there a compelling argument that the state has a legitimate interest in protecting one group and not the other?” (c). If the answer to that is yes as well, then the law in question can be upheld (u). Otherwise it’s unconstitutional. If the answer to the first question, however, is “no”, then the second question becomes, “Does the group under review have a history of maltreatment?”(m). If yes, the state may have an ulterior motive for legislating against them, which again triggers strict scrutiny. If there is no immutable characteristic and no history of maltreatment, the test moves on to the question of whether or not a fundamental interest is at stake (f). Fundamental interests are a purposefully unclear set, of which the most famous are life, liberty, and the pursuit of happiness. If an interest the court deems fundamental is at stake, strict scrutiny is triggered. If not, the law can be upheld as long as there is a “rational basis” for the distinction (r). The rational basis section is a very easy one to pass because any reasonable ground whatsoever applies. Very few cases involve distinctions that failed the rational basis test.

*Eisenstaedt v. Baird* is such a case. Though the defense’s initial criticism of the Massachusetts law concerned an extension of the right to privacy, the case moved into equal protection law when unmarried individuals were identified as an insular group against which the state legislated. An equal protection test was clearly in order. Is it constitutional to uphold a law granting rights to married people that singles are denied? In this case, singles made it all the way through the first three sections; according to the judges, the group was not defined by an immutable characteristic, did not have a history of maltreatment, and there was no fundamental interest at stake. Ultimately, though, there was simply no legitimate interest for the state that warranted distinguishing between married and single people in awarding the right to use contraceptives.

The implications of that ruling are potentially much more extensive than have so far manifested. It seems that non-married people have delighted in their right to use contraceptives just like married couples and left it at that; the effort exerted in attempts to broaden inclusion in the marital demographic remains overwhelmingly greater than that in attempts to secure further equality for unmarried citizens. Though married people enjoy 1,049 federal rights and benefits denied to the unmarried, singles seem oblivious to their own marginalization.9

Assuming, keeping with the Eisenstadt ruling, that the unmarried don’t warrant strict scrutiny, the tedious enterprise of examining every single marital right and benefit for a rational basis may appear a bit excessive. When running the unmarried through the full equal protection test, however, I obtain very different results from those judged in 1971. If, upon further consideration, the unmarried fail every single step of the equal protection
test, the process of awarding them far-reaching equality may be streamlined. Conveniently, that’s exactly the case.

The first step is immutability. Is the class of unmarried people defined by an immutable characteristic? At first glance one may be inclined to think not. After all, marriage is something you can opt into or out of – but it is not so simple. It helps to keep in mind that the defining characteristic in question is that of the unmarried. The status of “married” certainly isn’t immutable, as anyone can say “no” to a proposal. But “unmarried” is a default state that was never initially chosen; every adult is not totally free to opt out of unmarried status, as it requires the cooperation of another person. Since “unmarried” is the default state, an individual can not actually choose freely to exit the class into which she was born, making it an immutable characteristic. Moreover, barriers indefinitely prevent some people from getting married. Some who desire marriage simply fail to find a partner. Others may not have access to marriage due to physical or mental illness.

That alone is enough to trigger strict scrutiny (as opposed to the rational basis test, or “ordinary scrutiny,” applied in Eisenstadt v. Baird), but there’s more. The second question is, “Does the group have a history of maltreatment?” I can’t fathom what led the Supreme Court in 1971 to answer “no” to this question. The correct answer is unassailably “yes”, and especially for the subclass of unmarried women. Until fairly recently, it was nearly impossible for an unmarried woman to support herself due to society’s bias toward patriarchal marriage. An adult woman without a husband underwent severe economic and social maltreatment, all the worse if she bore children. The economic maltreatment in particular continues today, largely as a result of the rights denied to the unmarried. Mariko Chang provides ample evidence of this in her book Shortchanged: Why Women Have Less Wealth and What Can Be Done About It, specifically in chapter four, “How the Deck Is Stacked Against Mothers.” Chang explains:

Social Security benefits… are based on the highest 35 years of taxable earnings, and even a few years of part-time work or time spent as a stay-at-home parent can have a large negative impact. If even one of the years over that averaging period was spent working part-time or engaging in full-time caregiving, a person’s average earnings will be penalized. To make up for low-earning years, a woman needs to either work full-time for additional years, have higher average earnings for those years when she did work in order to compensate for the low-earning years, or save even larger sums of money for retirement.10

Social Security (along with many other government programs) is designed to benefit married couples who can choose one parent to stay home while another continues to earn a full income, and anyone attempting to raise children outside of marriage is severely disadvantaged. There is most certainly reason to suspect ulterior motives behind legislation that creates a disadvantage the unmarried.

So, the defining characteristic of the class in question is immutable, and there is a clear history of maltreatment. Is there also a fundamental interest at stake? Does legislation
against singles encroach upon some basic, fundamental human right?

Yes, it does. In the past, identifications of fundamental interests in Supreme Court cases have included the right to parent. I’ve already noted one area in which legislation against the unmarried encumbers parenting, which ought to be sufficient grounds for failure of the fundamental interest section. Robin West enumerates:

All unmarried parents… both the truly single, and those in committed, but unmarried relationships, will find their parenting burdened by marriage laws, and by the scores of financial benefits withheld by virtue of that status. Unmarried poor parents will not have a deceased marital partner’s Social Security or military pension on which to draw—and nor will she have the possibility of drawing on that of a deceased companion, coparent, or intimate. She will not have the benefit of favorable tax treatment, or private health insurance provided to spouses, that are routinely accorded married persons. She will not have a partner with a virtual “power of attorney” to make decisions on her behalf or that of her children, should she become incapacitated. Either directly or indirectly, the law is deeply implicated in a regime that has an adverse impact upon a class of people trying to engage in a basic, fundamental life activity—bearing, nurturing, and raising children—and trying to do so outside the protective perimeters of marriage.

With or without government intervention there are challenges faced by single parents to which couples are not subject. It is the fundamental right of an individual to confront those challenges and raise her children, with or without a co-parent. The problem is not that single parents have a tougher time overall, but that a huge portion of that hardship is caused by the denial of marital benefits to unmarried parents. They and their children are severely economically discounted in our society.

Finally, does the state have any interest whatsoever in denying rights to single people it affords to married couples? In approaching this question, it is important to remember that civil marriage is not about child rearing and that no-fault divorce means a marriage can end at any time. Thus, the many arguments founded on the state’s interest in procreation are void. Arguments for the stability life-long partnerships create in society are flimsy as well: there is no longer any legal obligation to remain married and a third of US marriages last less than ten years. The most legitimate interest the state might have in the institution of civil marriage is the care members of a marriage provide for each other. Whenever one individual supports another in a time of need, he removes that responsibility from the state. Ideally, married couples who engage in this kind of support consistently are rewarded copiously for it through their many rights and benefits. It makes sense for the government actively to encourage and fortify such care-giving behavior. However, relationships related to caregiving are not exclusive to marriage and can take many forms.

Recall the words of David Boise. “The key reason that marriage has existed at all in any society and at any time is that sexual relationships between men and women natu-
rally produce children. Society has no particular interest in a platonic relationship between a man and a woman no matter how close, no matter how committed it may be.” In truth, society has no legitimate interest in the private sexual lives of citizens, yet it has every interest in close and committed relationships whether or not they be of a sexual nature as well. By indiscriminately providing financial support to married couples who may not require it solely by virtue of their presumably sexual partnership, less funding remains for the unmarried people in selfless, draining, committed care-giving positions. There is no rational basis for providing financial benefits and other civil rights to married people while denying it to the unmarried. The distinction serves no state interest and harms society as a whole.

Free Exercise and the Sanctity of Marriage

In my opening, I said that legalizing gay marriage is a step in the wrong direction. I was referring to more than the theoretical unconstitutionality of it. It is not the best move for the LGBT community (or anyone else) practically and politically, either. Adding monogamous homosexuality to the short list of government endorsed family models makes only a tiny chip in the edifice of heteronormativity written into so much of U.S. law.

The disestablishment of civil marriage is a worthier goal than gay marriage. Firstly, it does nothing to discourage discrimination against the vast array of polyamorous sexualities and family models. In the words of Nathan Rambukkana, “there are as many styles of polyamory as there are polyamorists—with no single tradition being the sole factor influencing any one particular group.”14 If the intention behind the fight for gay marriage concerns no more than the gay community wanting to be invited to the exclusive cocktail party for respectable married couples, it is dishonest of its proponents to masquerade as champions of liberty and equality. But if liberty and equality really are the goals, the movement has a colossal blindspot.

A false dichotomy exists in popular and political discourse about human sexuality, which the following quotation captures quite well:

The heterosexual’s erotic preferences and aversions usually do not permit an understanding of the homosexual. Homosexuals as well are baffled by attraction to the opposite sex. This creates two distinct camps from which banners can be flown. And though they may be ideological threats to each other, the two camps are distinct; they are as clearly different as the American eagle and the Russian bear. Their threat to each other is familiar, and the battle lines are clear-cut.15

The failure to recognize any expression of sexuality beyond relationships of the long-term monogamous heterosexual and homosexual types—as even existent, let alone legitimate and worthy of protection under the law—evidences the powerful reign that patriarchal marriage still holds over the Western psyche.

The cacophony of the battle between the Christian right and the LGBT community is so great that it leaves liberals with the impression that justice would be satisfied if a peace between the two were reached through civil unions or gay marriage. Allowing the tradi-
tions behind patriarchal marriage to determine the scope of the terms on the table severely cripples any chance the left might have of forging real sexual freedom and equality.

Secondly, disestablishment would do much more to protect the sanctity of marriage than either prohibiting or allowing same-sex civil marriage. As the title of the Defense of Marriage Act implies, conservatives believe modifying the definition of civil marriage will threaten their cherished religious institution—and in a way, they are right. Political debates over the definition of marriage revolve around issues of profound religious significance, such as decency and morality, suggesting that America’s lawmakers do not clearly distinguish between religious and civil marriage, either. That conflation carried into legal practice and amendments to the state and U.S. constitutions really does threaten the ability of religious organizations to define religious marriage for themselves. This applies not only to communities that would sanctify a narrower set of marriages than allowed by US law, but to those that would employ a much broader definition of marriage; for example, the Komaja international spiritual community, which promotes long-term polyfidelity, or group relationships.

The denial of freedom civil marriage imposes upon the right to form loving and sexual relationships however and with whomever one pleases extends beyond religious communities. Whether or not one considers such liberties to be “sacred,” per se, they are certainly a definitive feature of the concept of the United States. Jakobsen and Pellegrini rightly note an important parallel between the conditions of religious and of sexual freedom. Religious disestablishment is absolutely necessary for the free exercise of religion. Though not explicitly stated in the constitution, the same is true of sexual disestablishment. As long as there is a particular sexuality endorsed by the government, the free exercise of sexuality will never be possible.

And the free exercise of sexuality is, in fact, constitutionally mandated. It is the necessary result of the combination of *Griswald v. Connecticut* and *Eisenstadt v. Baird*. Griswald established an interpretation of the Bill of Rights wherein the right to privacy within marriage is implicit. The ruling in Eisenstadt that the Fourteenth Amendment protects married couples and unmarried individuals alike drew that right to privacy over all citizens. Because both of these cases directly involved the free exercise of sexuality, it is sound to conclude the existence of an implicit right to the free exercise of sexuality in the Constitution. Thus, the best possible battle the LGBT community and its allies can fight is not for the modification of the federal definition of marriage but for its complete disestablishment.

I have shown that all common arguments in favor of civil marriage are groundless. I have further demonstrated that civil marriage violates the Fourteenth Amendment by failing equal protection at every step. If the early 21st century is to be a time of radical transformation in marriage law, let it not be a time of quibbling over matters belonging in the private sphere. Let it instead herald the disestablishment of the unconstitutional civil institution of marriage and welcome in its place a more reasonable and efficient liberty for all.
Endnotes


7. Robin West 69-103.


12. Robin West.


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Title artwork by KatharineYugo
A Crisis of History: Identity Confusion in Early Modern England and Shakespeare’s History Plays

Andrew Weatherford
Perched on the edge of the Middle Ages and the beginning of the Early Modern Era, Shakespeare finds himself writing during a time of great social change. With drastic shifts in theology and the continuous cycle of monarchical successions, Early Modern English citizens find themselves scrambling to keep up with these changes and to associate themselves with a “proper” religious or social identity. One of the distressing effects of these rapid shifts in the dominant theology and political factions is the severance that is created in the process of historiography. By making it difficult to positively or truthfully associate with one’s past, a sense of a truly historical transmission of ideals and beliefs was difficult to propagate in Early Modern England. The purpose of this essay, then, is to discuss the anxiety over the transmission of history that may be observed in Shakespeare’s history plays as he proposes various solutions to this problem concerning the lack of a truly historical identity.

First, however, it is important to note that this search for a stable historical identity is most certainly not limited to this sense of the past in Early Modern England. Being cut off from the traditionally stable sources of identity, such as religious or political affiliations, Early Modern English society was left wondering where to turn to rediscover their lost sense of self. It was in this way that theatre was provided with a unique opportunity to address this crisis of identity vis-à-vis this rapidly changing social realm. Jean-Christophe Agnew notes this trend in his work *Worlds Apart* as he states: “the theatre of this period was an experimental medium, one in which ancient meanings and associations mingled with current allusions and passing topicality,” and it was in this “marginal” social position, as Agnew describes it, that the theatre is able to achieve this synthesis and thus confront these issues of identity confusion.

The importance of the theatrical confrontation of these issues is dramatically revealed if we consider the ineffectiveness of the already established mediums of social commentary available to Early Modern English citizens. Scott Lucas, in his essay “Coping With Providentialism” (2005), describes how literature became an outlet for Protestants coping with the devastating experience of the reversal of the Reformation during the reign of Mary Tudor: “in the manner of trauma victims, Edwardian and Marian evangelicals created numerous urgent attempts to confront the most painful failures of the Reformation and to lay to rest the disturbing doubts about their own identity [...] that those failures produced.” According to Lucas, these attempts to deal with these doubts were expressed in numerous literary publications, which tended to only further this crisis of identity. Such was the case of the evangelical William Baldwin whose coping work was completed “at the cost of tearing down his and his fellow evangelical’s own formerly confident sense of identity.”

Focusing not on the Reformation, but the emergence of the Early Modern market, Agnew points to theatre as being a much more effective “coping” mechanism than was literature for the people of England during this time. Agnew describes the problems that generate from the emergence of the market as ones of a “problematic” nature: “that is to say, they were putting forward a coherent and repeated pattern of problems or questions about
the nature of social identity [...] in commodity transactions—the who, what, when, where, and why of exchange.” From this confusion of the market, Agnew argues, we can see these same questions and concerns of identity beginning to circulate or pass into the “experimental medium” of the theatre.

Agnew’s description of this process reveals the superiority of the theatrical confrontation of these identity issues when compared to Lucas’s literary examples. Agnew describes theatre as a privileged and, in a way, tailored medium established for this specific role: “the theatre not only mimed new social relations with the visible framework of the old; it improvised—as a matter of its own constitutive conventions—a new social contract between itself and its audience, a new set of conditions for the suspension of disbelief.” It was in this “marginal” social position, and with this new contract between the theatre and the audience, that theatre became a safe venue for people to address these destabilizing issues of identity. This “safety” was created by establishing a medium for social commentary that was distinctly separate from the real consequences of the social world. In other words, the theatricality of theatre is what made it, at turns, less realistic and yet more poignant—the former resulting from the recognition of the suspension of disbelief needed for the execution of these plays, and the latter stemming from the almost cathartic representation of these issues on stage.

With theatre becoming the golden standard for addressing issues of identity, we can begin to look to the work of Shakespeare to reveal how some of his plays address these issues. In an essay that presents, perhaps, the largest scope on the effects of social change and how theatre addresses the identity confusion that results, Elizabeth Fowler discusses the effects of the Reformation on the ideas of social contracts—in her opinion, the “glue” of society. In “Towards a History of Performativity: Sacrament, Social Contract, and The Merchant of Venice,” Fowler argues that the changes in theology brought about by the Reformation dramatically shifted the foundations of Early Modern England’s contractorial language and ideals:

The Reformation conversion of the sacraments is an important event in the history of social contract theory [...] important because potential theology and practices have a power to explain and produce interiority that can only be dreamed of by literary fiction in these centuries; important because much of economic and political thought about what glues human beings together into polities grows out of sacramental discourse and its constructions of intentions, interests, and the passions.

Fowler points to The Merchant of Venice, and the economic talk therein, as being indicative of the identity confusion caused by the Reformation. Now, with different definitions of sin and forgiveness after the split from Rome, the people of England were left to reevaluate what held or “bound” them and others to their social contracts—essentially, they began to question what forces held society together. Fowler turns to the economic language of “bonds” found throughout Merchant of Venice, as the emerging new “glue” of society:

At the center of each bond is a ritual incorporating a pair of speech
acts and requiring a confession of the bond and a recognition of newly created social persons: a husband and wife where there were none before, a set of friends where there were enemies, a new master and servant, and so forth. These occasions of contract bring society into being?

In such terms, Fowler wishes us to view the effects of the Reformation as not only creating a confusion of identity, but as essentially breaking apart society and forcing it to adapt to a new form of interaction in order to insure social cohesion.

As Fowler has pointed out through her work, the break from Rome and Catholicism seems to have been one of the more “traumatic,” to return to Lucas’s phrase, experiences for Early Modern England. Consequently, it may come as no surprise that I would wish to argue that it was this event, alongside others, that all conspired to create a rupture in Early Modern England’s historical identity. With the Reformation, and some of the more drastic shifts in monarchical power, it became dangerous for citizens to associate with the past institutions and monarchies--as well as, in many ways, dangerous to not associate with the “proper” identity of the faction then in power. Through censorship, imprisonment, and even torture or execution, the dominant powers of Early Modern England enforced their own version of a historical identity and made it difficult for history to be transmitted naturally. Similar to the effects that Fowler describes, this separation from a true or natural historical identity has the potential to become catastrophic. Catastrophic, in that most social identities are created from either subscription to or rebellion against a past identity, but when these historical identities are unstable and constantly shifting, this process of identification becomes an unnatural one of continual disconnection from the one’s past and reality.

In opposition to this process we begin to see a strong movement towards the retention of historical credibility in late medieval or Early Modern England. Several literary discourses intended on re-establishing the true and natural standard of history began to become available. This movement seems to begin in 1515 with Lucian’s How to Write History being translated from Greek into Latin and thus being made available to an English audience. Written originally to counteract the flooding of the historical market of literature with poorly crafted and disingenuous works of “history,” the Greek rhetorician and satirist Lucian outlines in his letter to a friend the pitfalls to be avoided and the ideals to be embraced by historians. In his discourse, and in direct opposition to Early Modern England’s troubled trend of historical transmission, Lucian states: “above all and before everything else, let [the historian’s] mind be free, let him fear no one and expect nothing, or else he will be like a bad judge who sells his verdict to curry favour or gratify hatred.”

Of course, no one is free from the influences of the ideologies of their times, but the added pressures of censorship and imprisonment made this ideal a difficult one for historians to uphold in Early Modern England. Thomas Blundeville later takes up this calling for the return to historical legitimacy in 1574 in his work The True Order and Methode of Wryting and Reading Hystories-- England’s first discourse on the study of history. Echoing Lucian’s call for a commitment to truth and accuracy, Blundeville outlines the duties of the
historian and how these ideals separate them from other writers:

And some doe make of so much asmuch, as true Philosophers and Hystoriographers, whose office is to tell things as they were done without either augmenting or diminishing them, or swarving one iote from the truth. Whereby it appeareth that the hystoriographers ought not to fayne anye Orations nor any other thing, but truely to reporte every such speach, and deede, even as it was spoken, or done. 11

As the subject of historiography began to circulate through English society theatre also began to assimilate these ideas into its own works. To turn more specifically to Shakespeare and his concern over historiography, it may be helpful to view the work of David Quint who, in his essay “Alexander the Pig: Shakespeare on History and Poetry,” discusses how Shakespeare began to participate in this discussion on the importance of historical accuracy. Quint, through the study of Henry V, describes the effects of this revitalizing movement in historical standards as being directly opposed to the factions that would disrupt the usefulness of the past including, not only these religious and political institutions which disrupted the natural transmission of history, but also the institution of poetry:

For most Renaissance humanists, the past retained the status of a classic; history was to be read as exemplary text, a series of models held up for imitation. But the humanist cultural program [theatre and poetry] was subject to self-criticism, produced by nascent historicism that at once challenged the authority of the past and initiated a dialogue with it. The reflections of Henry V upon its own presentation of history allude to and grow out of this humanist self-criticism.”12

For Shakespeare, Quint argues, this creates an issue that must be addressed in the play; if history is an ultimate truth, as Early Modern England is beginning to view it as, then what business does theatre or poetry have in portraying it? If Shakespeare, or theatre in general, wishes to take up the issues of a lost historical identity then Shakespeare had to find a way to present his subject without confounding his own intentions of making history a legitimate and relevant institution. In Quint’s reading of the play, Shakespeare accomplishes this by creating a “theatrical distance,” through the use of the Chorus and other characters and devices that also forces a historical distance for his audience and subject:

Shakespeare frequently finds devices to distance the spectator from the stage action of his plays. In the discourse of Henry V, the willed aesthetic distance […] corresponds to a recognition of historical distance. Dramatizing rather than concealing the hybrid nature of his play which is both history and poetry […] The preservation of distance in Shakespeare’s play allows a critical response to the historical event which perceives its otherness from the experience of the present interpreter.13

Quint would have us recognize that by dramatizing history, Shakespeare does destabilize the “empirical truth” of history, but by maintaining the observation of the otherness of history he forces not a rejection of its truth, but instead promotes a different use of history.
This alternate use, according to Quint, “does not consist in a series of prescriptive models which the past may hand down and impose upon a passive present age, but is rather the product of an active process of interpretation by which the present may also define itself in relationship to the past.”\textsuperscript{14} In other words, the former model of history was a unstable function of moralizing from past exemplars, whereas this new model of history, suggested by theatre, was a process of establishing a solidified social identity.

Another critic who analyzes \textit{Henry V} in order to trace out Shakespeare’s concern with history is Brian Walsh, who in his essay “Chantry, Chronicle, Cockpit; \textit{Henry V} and the Forms of History,” argues for the presence of a strikingly modern conception of history in this play. According to Walsh, Shakespeare “historicizes practices of historiography” in \textit{Henry V}, which “demonstrates a rupture in English historical culture between what we now call the Middle Ages and his own late-sixteenth-century moment.”\textsuperscript{15} Shakespeare, Walsh argues, accomplishes this by presenting the “pre-Reformation” notions of historiography as outdated and old fashioned when compared to the methods that both the theatre and Early Modern England have now embraced as legitimate forms of historical transmission.

It is this “modern” depiction of the transmission of history that has captured the attention of most modern literary critics, and which has lead to a deficiency in the critical evaluation of historiography represented in the works of Shakespeare. This “modern” nature of \textit{Henry V} has hindered the most accurate evaluation of Shakespeare’s handling of the process of historiography in his plays. The presence of this modern sense of history is undeniable as these critics have all noticed, but what they have failed to recognize is Shakespeare’s complicated response to this discussion of historiography. \textit{Henry V} is not the only Shakespearean history play to question the most viable mode of history transmission. Rather than beginning at the end, it is helpful to turn to Shakespeare’s earlier works to better understand his treatment of the process of historiography, which does seem to culminate in the portrayal of a very modern transmission of history in \textit{Henry V}.

Seemingly the first of Shakespeare’s work to openly question this idea of historical transmission is \textit{Richard III}. During Richard’s rise to the throne, Shakespeare provides an interesting scene that questions the process of historiography in a discussion between the soon to be assassinated Prince and Richard’s crony Buckingham. In this scene the Prince questions the historical record of the ominous Tower of London as he doubts whether or not it was Julius Caesar who built it:

\textit{Prince} \hspace{1cm} Is it upon record, or else reported
\hspace{1cm} Successively from age to age, he built it?

\textit{Buckingham} \hspace{1cm} Upon record, my gracious lord.

\textit{Prince} \hspace{1cm} But say, my lord, it were not registered,
\hspace{1cm} Methinks the truth should live from age to age,
\hspace{1cm} As ‘twere retailed to all posteriety,
\hspace{1cm} Even to the general all-ending day.

(3.1 lines 71-77)
This view of history, although honorable and true to the opinion of the undeniable truth of history, is obviously naïve. Not only is this particular mode of transmission impractical in reality where the “truth” of historical identity has already been troubled and complicated, as is noted in John Speed’s 1632 *The Historie of Great Britaine*, but it also fails in the play itself as Richard manipulates the truth of all things in order to force his way to the throne.

Another history play that proposes an alternate form of historical transmission is the model implied in *Julius Caesar*. This play reenacts history and provides an excellent example for the historical identity that the popular opinion supports, which can be registered in Dante’s treatment of Brutus in his *Inferno*, as being on level with Judas and Satan himself. In *Julius Caesar*, Shakespeare complicates this historical view by portraying both Mark Antony and Brutus in a rhetorical, and then later physical, battle over the justness of Caesar’s assassination. In complicating and providing a plausible rationale for Brutus’s betrayal we can see how if Brutus had been the victor of this decisive battle, that perhaps history may have held a different opinion of this act. This is representation of history is essentially the age-old conception of the victor earning the position to write history. Shakespeare’s play then, portrays this method of historiography as, if not exactly just, being at the very least viable.

My last example of Shakespeare’s different proposals for sources of historical identity comes from *Richard II*. This mode, however, has received some critical evaluation from Jennifer Vaught in her essay “Masculinity and Emotion in Early Modern England.” Vaught describes this mode of transmission in this way:

> When Richard and his Queen exchange farewells in a public thoroughfare on his way to the Tower, he resists his impending burial by imploring her to perpetuate his legend in the secluded setting of a fireside [...] he entreats her to keep his sacred memory alive by continuing to voice her grief in the stories she tells about him.

Drawing her reading from a scene in which Richard describes this sympathetic retelling of his story (V.1.lines40-50), Vaught outlines this new proposal for history. Shakespeare displays here a method that relies not on chronicled or documented acts, but similar to the method of history proposed in *Julius Caesar*, operates on the power of popular opinion. Operating on the sympathy of history’s audience, Shakespeare portrays this method as a very powerful mode of transmission. For if we trace out the consequences of this established historical identity for Richard, who goes from despised and deposed King in *Richard II* to the lamentable and conscience disturbing figure for King Henry in *Henry V*, we see a complete change in the popular opinion of history presumably derived from this sympathetic mode of transmission.

This is an interesting complication of the “modern” reading that many critics wish to apply to the treatment of history in *Henry V*. Although the text and representation of history, as critics have noted, is modern in its execution, the foundation of this history is actually the result of what would seem a very antiquated sense of history. A generation after
Richard’s deposition, the general public and even the son of the deposer himself, all exhibit an adherence to this sympathetic mode of history transmission.

As this example shows, the depiction of historical identity in Shakespearean history plays is a much more complicated issue than what modern critics seem to recognize. Throughout several of his works Shakespeare addresses the crisis of identity that results from dramatic social changes during this Early Modern era in English history. These drastic changes in the social environment of England altered almost every institution that society relied on to provide itself with a stable identity resulting from a stable past; from religion, to economics and politics, and even into the institution of history, these rifts created by such radical changes severely altered contemporary conceptions of self and nation. As a result of this theatre evolved to become Agnew’s “experimental medium” and provide an opportunity to confront these issues, and in turning to the most prominent playwright of Early Modern England we are able to find traces of these confrontations. It is important, however, for critics and scholars to note all the implications of these works in order to gain a full sense of the confrontation and questioning occurring during the evolution of Early Modern theatre, rather than assuming only the most “modern” issues or solutions are pertinent to the discussion of the contemporary identity confusion in Early Modern England.

Endnotes

3. Lucas pg. 265
4. Agnew pg. 9
5. Agnew pg. 11
7. Fowler pg. 74
51

Binography


3. Dante, Alighieri. The Inferno. Originally published 1308(?)


6. Kraemer, Don J. Jr. “‘Alas, Thous Hast Misconstrued Every Thing’: amplifying Words and

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Title artwork by Keely Bakken
Tracking the Results: The Problem of Ability Grouping in Schools

Tess Kuntz
Tracking, the process of separating students by ability level into different “tracks” and catering instruction to the needs of those groups, takes place almost everywhere in the United States, whether students realize it or not. In some schools, it is an obvious component of the educational structure, as students are well aware of their respective tracks. In other schools, tracking takes place on a more covert level, with some classes being segregated by ability and others being more heterogeneous. In any case, tracking has been fully integrated into instructional strategies across the country. While it can certainly make teaching more efficient, there is considerable debate over the use of tracking in schools due to its susceptibility towards injustice in the grouping process and its potentially damaging effects on student motivation.

The idea that students learn best in a homogeneous educational environment motivates tracking; that is, it is easiest for students perform well when they are in classes with students of a similar ability level as their own. This is logical, given that a homogeneous learning environment would require the teacher to create lesson plans focusing on the needs of students with one pace of learning. On the other hand, in a heterogeneous learning environment, teachers’ lesson plans must attempt to advance all students of different levels. If the teacher only needs to address students at a specific level, they will be able to create more focused lessons. In addition, students are thought to benefit from tracking because lower achievers do not hold the high-achieving students back, while lower achievers are not left behind as high achievers advance. As such, tracking helps to provide the most efficient means for educating students because it should allow them to work at their own pace.

In a certain sense, tracking in schools is based on flow theory, which argues that intrinsic motivation works best when students become fully absorbed in a task. The appropriateness of the task for the individual is a crucial element of flow. “The challenge of the activity should correspond to the student’s skill for engaging in the activity, as balancing the two is critical to creating an environment conducive to flow.” In attempting to establish learning environments where students are all at approximately the same level, schools facilitate activities that will create flow in many students, as opposed to only a few in a heterogeneous classroom. Further, homogeneous classrooms tend to have more competition than others because students feel that they are capable of outperforming classmates but are not guaranteed to do so, thus increasing competition, which can be a precursor to flow.

Therefore, tracking benefits students by harboring flow.

While most schools do use tracking for the aforementioned reasons, most accept it as a very flawed system. Many of its most damaging flaws derive from its subjectivity. Students of low socioeconomic status and minorities are disproportionately placed in tracks for low-achieving students. Preconceived notions that teachers subconsciously hold about those students and the self-fulfilling prophecy created by such groundless assumptions contributes to this inequity. Additionally, as Oakes and Guiton concluded in their study on the dynamics of tracking decisions, the politics of these decisions frequently favor those...
students who are already at an advantage due to socio-cultural factors. For example, there tends to be some version of track mobility at many schools, but usually the only students that are able to utilize it are those whose parents take an active role in their education and put forth the effort to help their students change tracks. Thus, there is no completely fair and objective way to place students in varied tracks, and the least privileged students face most of the negative consequences.

The English Language Learner group (ELLs) presents a particular challenge when it comes to tracking placement. These students have a much harder time with typical curricula because they have not yet acquired fluency in the language in which the lessons are taught. However, it would be wrong to label them as having lower ability, as their proficiency in the English language does not indicate a lack of ability in most subjects. While tracking aims to allow higher tracks to move quickly, placing ELLs in those tracks would undermine this objective, as the teacher would need to circumvent the communication barrier for ELLs. As a result, “many English learners find themselves enrolled in low-track curricula with limited exposure to either the content or discourse necessary to enter into higher education.” This injustice goes against fundamental American ideals such as equality in education, as ELLs are not given equal consideration in their track placements.

The consequences of injustice aside, inequality in tracking placements has lifelong effects for students. If a student is placed in a low track in elementary school, it is quite likely that the student will remain in a low track for much of his or her education because schools expect students to remain at approximately the same ability level. A lack of track mobility is an issue; for one thing, students originally placed in low tracks struggle to migrate to tracks that can lead to higher education. Also, the fact that minority students are disproportionately placed in low tracks encourages stereotypes about these students that, in combination with other factors, contribute to the societal racism that the public education system purports to attempt to eliminate. Low placement typically offered to ELLs further exacerbates discrimination. In its long-term effects on individual students and its advancement of prejudices, tracking limits both individuals and the world in ways that extend far beyond the initial consequences of injustice.

Even if students were tracked ideally—that is, if they all ended up in the tracks that were most closely aligned with their abilities every single year in every single subject—there would still be serious concerns about tracking’s effects on motivation. Even students in high tracks sometimes face motivation problems at the hands of the tracking system. Competition can be extraordinarily high in high-track classrooms. As a result, even a minor failure can lead to humiliation and a loss of self-esteem. This has the potential to cause significant detriment to the student’s competency belief, the belief that one has the knowledge and skills necessary to achieve a task, which is a critical component of student motivation. Also, there are some schools in which high-track classes are expected to work without the help of a qualified teacher. For example, a student from Richmond, Indiana was placed in a high track class for mathematics in eighth grade. In this class, students were essentially required to do independent study. None of the students in the track did the work as the school intended them to, and, as a result, they struggled in their future mathemat-
ics courses. In these situations, even those students normally privileged by the tracking system experience a lack of motivation as a result of the practice.

The effects of tracking on motivation are even more prominent in low-track classrooms. By putting students in tracks, schools demonstrate an entity view of ability, the belief that a person’s ability to do something is not within that person’s control and does not change. Tracks serve as a manifestation of this idea because they display to students and outsiders that some individuals are capable of learning a certain amount of information, while other students are capable of learning more. This leads to the interpretation by students that their ability is fixed and, to a certain extent, that their worth is determined by their predetermined ability. The fact that students rarely change tracks augments this belief. This is relevant to motivation because motivation depends on self-efficacy, the term used to describe one’s beliefs about his or her abilities. If students believe that they are capable of accomplishing what they set out to do, they will be more motivated to put effort into it. Therefore, students in lower tracks who have been conditioned to believe that they are less capable than others, are likely to be less motivated in their schoolwork. Carbonaro’s study reinforces this conclusion, showing that students in high tracks put more effort into their work than students in low tracks and that students’ experiences within their track are partially responsible for track differences in effort. Further, it has been proven that in most cases, teachers in low-track classrooms use fewer substantive instruction methods than teachers in high-track classrooms do and that high-track students receive more assistance from counselors than most other students do. These differences help explain why students in low tracks exhibit less motivation than students in high tracks.

While there are clearly many problems with tracking, no clear solution exists. Even schools that claim not to track do so to some extent almost without fail. Therefore, schools should eliminate tracking that obviously places some students ahead of others, which only serves to undercut students’ motivation. Instead, schools need to try to incorporate a more holistic placement process. As much as possible, heterogeneous classrooms should be used. However, there are some upper-level classes that should not be available to everyone. Students should be able to apply for positions in these classes and then, if they have shown proficiency in the subject area, should be permitted to take them. If they have not shown proficiency, they may still experience a loss of motivation, but it will be limited to the students who applied and were rejected. Without reforming the tracking system, no school will provide the level of education that students in our country deserve to have.
Endnotes

2. Ibid, 273.
16. Ibid.
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Title artwork by Katharine Yugo
Free Speech in the Americas and the Laws that Govern It

Erin Boland and Claire Ronner
At least 10 Mexican journalists have been killed during the past year as a result of publishing stories about drug cartels and advocating for an open press. Fidel Castro, the President of Cuba, has been on an annual “Enemies of the Press” list since 1959. From these examples, it would seem that the free speech rights the United States media enjoy do not extend deeply into the Southern Hemisphere. Because of its proximity to places such as Cuba and Mexico, it is reasonable to assume that Puerto Rico and the mainland United States would have had a greater influence on free speech rights in these areas than appears to be the case today. Immediately, it is easy to see where free speech practices differ greatly between the areas in question; however, Mexican law as written may surprise a free speech researcher, while Cuban law as written appears exactly as restrictive as the free speech researcher might expect.

This paper will explore the legal background between the United States and Puerto Rico as well as discuss variations in media law between Puerto Rico and the United States. From there, the media environments in Cuba and Mexico will be assessed in the context of media law as found in their constitutions. United States/Puerto Rican law and Mexican/ Cuban law will also be analyzed against each other.

II. The relationship between Puerto Rico and the United States

Even before officially becoming a United States territory, some Puerto Ricans had wanted to be afforded the same rights as any state in the Union and many are still pushing for Puerto Rico to become the next state. In fact, the first two political parties formed in Puerto Rico wanted it to become an organized territory as the first step into statehood (Ayala and Bernabe pg 20). It is important to note, however, that not all Puerto Ricans want the territory to become a state. Puerto Rico remains at the same level of attachment with the United States that it has had since the early 20th century, despite movements to make Puerto Rico either a state or completely sever its ties with the United States. Since neither movement has gained enough support to change what has become the norm in Puerto Rico, it remains in limbo between statehood and independence.

Early Puerto Rican political history begins with the colonization of the island by Spain. In 1898, Puerto Ricans sought liberation from the Spaniards and decided to approach the United States for help. As a result of the Treaty of Paris that ended the Spanish-American War, the United States took Puerto Rico, Cuba, Guam, and the Philippines under its control. Two years later, in 1900, the Foraker Act provided Puerto Rico with its own insular government and turned the island into a U.S. territory under the jurisdiction of the 1st Circuit. It was not until 1917 that Puerto Ricans gained American citizenship with the Jones Act.

As part of the island’s independent government, Puerto Rico maintains its own constitution. It elects a governor, a House of Representatives, and a Senate. The United
States only takes care of typical federal issues such as social security, control of the air, land, and sea, currency, military matters; interstate trade and the like. However, Puerto Rico differs from the 50 states in that it is exempt from some of the Internal Revenue Service’s tax code and is ineligible to vote for any representatives, senators, or the president (Riviera). This arrangement appears puzzling and unfair, but it remains rooted in the traditions of past U.S. colonialism. Until enough Puerto Ricans demand a change, they will be caught between statehood and independence, subject to federal laws they have no say in.

The Constitution of Puerto Rico begins with a declaration that “the democratic system is fundamental to the life of the Puerto Rican community…” (“Constitution of the Commonwealth of Puerto Rico” par. 3). From there, the basic setup is similar to the United States’ Constitution, with the key differences residing in Article II, the Bill of Rights. Here, freedom of speech and the press is not mentioned until Section 4 as opposed to being the first thing mentioned in the U.S. Constitution’s Bill of Rights. Specifically, the section states that “[n]o law shall be made abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances.” This translation draws its inspiration from the First Amendment, and the original Spanish language also mirrors these sentiments (“Constitución Del Estado Libre Asociado de Puerto Rico”).

The Founding Fathers certainly held freedom of speech, the press, and religion in the highest regard, which could be why these concepts were placed first. Why, then, would Puerto Rican legislators bury free speech language all the way in Article II, section 4? This may be because free speech is a right already guaranteed to Puerto Rico by the U.S. Constitution, and while important to include, was not a primary concern of Puerto Rican legislators.

Perhaps the overlap of free speech language between the two constitutions prevents many cases disputing free speech infringements in Puerto Rico from making it to the Supreme Court. There were a few cases concerning free speech that remained in the lower courts, but none that have influenced precedent across the entire United States. In fact, the only recent case to be heard in the Supreme Court is Posadas v. Tourism, a case concerning the casino company Posadas and potential First Amendment infringement on their commercial speech (Posadas). The case was decided in 1986 with a decision favoring the casino company’s right to some commercial speech, despite ruling the act generally constitutional.

Exactly why no other free speech cases from Puerto Rico are making it to the Supreme Court is unclear. Surely the media environment in Puerto Rico does not operate perfectly. For whatever reason, though, any suits being brought to court just are not a priority for the federal Supreme Court. This means that the connection between Puerto Rican media rights much more closely mirrors the rest of the United States’ than was previously anticipated. It was expected that more than one free speech case would arise from Puerto Rico to study.
III. Mexican Free Speech rights

The current Mexican media environment makes for an intimidating threat for the aspiring Mexican journalist. Molly Moore of the Washington Post opens her article, “The PEN May Be Mighty, but in Mexico It Gets Bodyguards” with an anecdote about Homero Aridjis, who must be attended by bodyguards every time he leaves the house, whether he be to walk his dog or go to poetry readings (Moore). This fear for the lives of journalists and writers all over Mexico has been around since at least 1996, which is about how early Moore places reports of threats and abductions. Despite the organization of the Society of Journalists, which is one of two newly formed Mexican watchdog agencies created to assist journalists, Moore cites the attacks as coming from a variety of sources such as drug cartels and corrupt politicians.

The Mexican government seems to be moving reluctantly to pursue justice in the journalist-related cases, but some promising strides recently have been made to legally continue expanding free speech and other related rights. For example, in June of 2002, a Freedom of Information law took effect. According to Kate Doyle, a senior analyst and director of the Mexico Project at the National Security Archive, the law passed unanimously in both chambers of the Mexican Congress (Doyle par. 1). This is indeed an important piece of legislation for any government to embrace, and represented “a compromise between two proposals presented to the Congress during 2001” (Doyle par. 2). According to Doyle, many states were also considering similar legislation at the time. Up to date information on how many states have adopted similar legislation for the state level is not available, but the fact that any are even considering it is exciting for press advocates.

IV. Cuban Free Speech Rights

While the title lends itself to the belief that Cuba does indeed have at least a small measure of free speech rights, reality proves otherwise. Cuba, since its initial days of independence from Spain, has struggled with providing its people unbiased, full-coverage news. Although there is no law either allowing or prohibiting censorship, the Department of Revolutionary Orientation regulates the press. Its creation in the 1960s gave it the duty of producing propaganda and “propagating the government ideology.” The regulation of the Department of Revolutionary Orientation flexes its arm when citizens try to start an independent press, which has led to physical violence, jail time, and house arrest (Press Reference-Cuba 8).

As a result of strict and fastidious monitoring by the government, few independent journalists continue their work unless driven by political motivation. Various independent outlets exist, but are technically banned by the government and any journalists affiliated will lose their accreditation. State-employed writers produce material that is strictly monitored by the government, which has the ability to filter content and cut anything that does not accurately portray Cuba according to its standards. The president of Cuba-Net, an American organization that works toward press freedom in Cuba, labeled state writ-
ers’ works as “very somber and unimaginative journalism.” (Press Reference-Cuba 2). The “accurate portrayal” of Cuba extends to foreign journalists too; if the Cuban government does not like what you are saying about Cuba, it will not let you back into the country -- or out. If the “reality of Cuba” is not represented in a work, the government basically denies all access to information for that journalist, because its mission is not being propagated (Press Reference- Cuba 3).

To give an idea of how serious the matter is in Cuba despite the near end of the Castro regime, the Committee to Protect Journalists (CPJ) includes Fidel Castro annually on its “Ten Worst Enemies of the Press” list. The CPJ also placed Cuba on the top ten worst places in the world to be a journalist list in 2002, heralding that “the Cuban government is determined to crush independent journalism on the island but has not yet succeeded…” (Press Reference- Cuba 7). Cuba made strides by releasing various imprisoned journalists over the past decade, but little progress has been made in the direction of a completely independent press.

Cuba has three national daily publications: Granma, Juventud Rebelde and Trabajadores. Granma has the biggest circulation, and is essentially the government’s lapdog. Its pages are filled with propaganda and celebrate all actions done by the government. The Juventud Rebelde, which translated means “rebel youth,” ironically continues the theme of pro-government messages, except targeted toward a younger audience. The rest of the publication includes pro-Cuba celebrity gossip, music reviews, and sporting event coverage that, when blended with the government’s messages, serve to “indoctrinate the young people of Cuba into a belief system that serves the state’s interests.” (Press Reference- Cuba 5). One of the very few independent publishers is Adolfo Fernandez, who creates his newsletter using a photocopier and distributes copies to friends and families; although he acts as a semi watchdog for Granma and Juventud Rebelde, even he admits that he holds back in his stories to avoid government intervention (Press Reference- Cuba 7).

Listed after the right to physical education, sports, and recreation is the article outlining Cuban citizens’ “right to free press” in the Constitution of the Republic of Cuba 1992:

“Citizens have freedom of speech and of the press in keeping with the objectives of socialist society. Material conditions for the exercise of that right are provided by the fact that the press, radio, television, cinema, and other mass media are state or social property and can never be private property. This assures their use at exclusive service of the working people and in the interests of society. The law regulated the exercise of those freedoms.” Chapter VII, Article 53

One almost wonders why Cuba even bothered including this article in its Constitution, as it does not actually grant anything to the public except a presumed notion that they have a free press. And that is the most specific that Cuban law gets about freedom of press and freedom of information. Other resolutions and acts expound upon the stipulations for certain journalists: collaboration with journalists of the “enemy” is forbidden, anyone providing information to the United States either directly or indirectly receives a prison...
sentence of up to 15 years, and anyone caught spreading material that could be subtle propaganda for the United States government receives eight years. According to the Juventud Rebelde, “Independent journalists are mercenaries: The (U.S.) Empire pays, organizes, teaches, trains, arms and camouflages them and orders them to shoot at their own people.” Strong words for a government with a strong position (Press Reference- Cuba 6-7).

With such strict government regulations, there is no given right to criticize the government in the press. Those who do not work for the government-controlled publications are subjected to various persecutions from officials. They typically meet informally to try and send uncensored articles to Spanish media outlets all across the world, particularly to Europe and the United States. Random abuses (as stated previously) include house arrest, disconnected phone service, and random police surveillance on buildings where independent journalists reside. Despite the introduction of the Internet to Cuba, as of 2000 only one half of one percent of the population had access; after all, the government controls that too (Press Reference- Cuba 15).

As can be seen, the media environment in Cuba is grim for independent journalists. No information could be found about the state of journalism or any changes in Cuba in its most recent years, but then again Cuba does not exactly make its information available for the world. This was also the problem when attempting to find Cuban court cases dealing with freedom of speech and/or information; the Cuban system is very closed, and not much leaves the island. So to see how Cuban and American laws interact, two court cases will be used to observe the differences between Cuban restriction and American freedom.

The Cuban Museum of Arts and Cultures v. City of Miami case displays that, although a difficult concept for many Americans to grasp, not every Cuban believes their system is faulty (See Appendix 4 for case brief). The case, which addresses a problem between a Museum selling paintings by pro-Castro artists and the City of Miami, reveals the ironic disconnect between mainstream American ideology and the unpopular minority. Everyday Americans who are anti-communism, for example, see no problem trying to squash anything that goes against our beliefs of freedom; however, in doing this they are limiting freedom of speech as much as their “enemy” communist counterparts. America is accustomed to open access to information and freedom to criticize the government, but has to keep in mind that these laws apply to even the beliefs that go against the norm, from Ku Klux Klan activity to Castro’s press limitations.

The Cuban American Bar Association, et al v. Warren Christopher, et al case, while it contains much legal jargon about various statutes, again demonstrates the disparity between American beliefs and actuality (See Appendix 5). After many wars where the United States has entered a country and proceeded to set up a more “stable” government, aka a democracy, America tends to appear as if it is merely perpetuating its fundamental ideas. Although these ideas include fair trial, rights to information, and free speech, all nearly globally accepted practices, nowhere is the United States given a right to impose its governmental system, but we do it because it is what we believe is best. With this case, the double standard can be seen: Cuba is widely condemned for its repression of free speech and Americans outrage over that. However, when the United States government detains
Cuba’s people, they are denied First Amendment rights to access legal information to help with their situation.

Of course, these rights are denied because the migrants attempting to leave Cuba are not considered United States citizens when detained in safe havens like that in Guantanamo Bay. But if the United States has the right to go into other countries and essentially impose governmental structures, which is not a right stated under the Constitution, why could these migrants not receive protection despite the lack of American soil? Is America not a place where its ideals are being promoted? If these migrants are receiving the hospitality of the United States in the safe haven, they had every right to believe they would also receive American rights. Of course, according to the language of the law, it is understandable why these rights legally do not apply; nevertheless, America needs to be cautious of cases like this to avoid world criticism.

Cuba has a very closed government system. Here in the United States, many measures that the Castro regime imposes appear strict and unnecessary, but from the perspective of some Cubans these regulations are vital for the survival of Cuba. In a sense, Cuba strives to protect its people and its national identity from attack; the United States goes into an uproar when any foreign official publically critiques the American system. Castro has every right to be frustrated with the outside world, but he also has a duty to his people. The important aspect of looking at Cuban law is to examine whether there is a balance between Castro’s personal ideas and what is actually beneficial for the country. If the latter outweighs the former according to the Cuban people, then the outside world needs to reduce its Cuban bashing, despite ideologies that are different from the majority.

V. Free Speech Comparisons between the United States, Mexico and Cuba

United States and Mexico

Eight years ago, Mexico took strides regarding access to information when it passed its Freedom of Information law on June 10, 2002. The product resulted in a version compromised between proposals from Group Oaxaca and the Mexican government, which includes the following rights: access to all government information, routine publication of various documents (budgets, salaries, internal reports, etc), the ability to request for the release of documents through a user-friendly process, and the right to appeal any denial to information, even to the point of taking a case to court (Doyle 1). The catch, however, is that this level of transparency only applies to the executive branch; Congress and the judicial side did not fall under this act.

The Mexican law looks very similar to its American counterpart. Both define what is made available to the public and which branch(es ) fall under the law’s reach. Both allow for legal measures when repeatedly denied access to information, and various documents are expected to be public almost without dispute. Like the United States’ list of exemptions, Articles 13 and 14 of the Mexican law describe that which is classified, including national security, international relations, economic stability, personal life, and ongoing investigations (Doyle 2). A new aspect designed by the government states that “informa-
tion may not be classified when the investigation of grave violations of fundamental human rights or crimes against humanity is at stake,” revealing the importance of an open government to the country. One difference, however, is that the Mexican law does not make the “government’s internal deliberative process” available, meaning the notes and commentaries from government officials while forming law is not open to the public (Article 14). This directly counters the United States’ Freedom of Information Act (FOIA), exemption five.

Although Mexico might be lacking in one area of its Freedom of Information law, it surpasses even the United States with one aspect. The Mexican Act creates government bodies that will be in charge of following through with the new legislation. Every agency is required to create a “liaison section” that will ensure the publication of information as well as respond to the requests of the people. The “Information Committee” will monitor classification standards and organize documents for archiving; every agency is required to publish a collection of its classified files biannually, when the Information Committee will review that which has been classified (Doyle 3).

On paper, Mexicans possess almost as many rights as United States citizens. The Mexican government has put much time into bringing the country up to speed with the rest of the democracies around the world. Mexico has developed into the democracy it claims itself to be, passing laws and acts that increase the rights of citizens all around. Fortunately or unfortunately, Mexico’s “censorship” comes from forces outside of the government, whereas those of Cuba stem from a long tradition of communist control.

**United States and Cuba**

The first and foremost free speech infringement that comes to mind when considering Cuba would be the right to criticize the government. The Cuban Constitution does not expressly say that citizens do not have the right to criticize their government, but hints at it in a couple of places. In Article 5, the Constitution says, “The Communist Party of Cuba… is the highest leading force of society and of the state, which organizes and guides the common effort toward the goals of the construction of socialism and the progress toward a communist society…” which sounds as if anything that might subvert the socialist system would definitely be censored. In Article 3, the Constitution grants Cuban citizens the right to “struggle through all means, even armed struggle against anyone who tries to overthrow the political, social and economic order established in this Constitution.” Article 53 mentions of free speech as well as a free press, but only as long as it furthers socialist ideals. It also makes the press an arm of the state, never to be privately owned (Cuban Constitution).

Compare this to many Supreme Court decisions that hint at the right to criticize the United States’ government via an interpretation of the First Amendment. The Supreme Court mentions many facets of this, among them that a government official cannot retaliate after being criticized, and a soldier may not disrespect a military officer while questioning the government. It does not appear that the Supreme Court has bothered to actually incorporate this part of First Amendment interpretation into any solid decision on any one case; however, it remains that the right to criticize government exists in the United States.
The right to gather news is not granted in the United States Constitution, and cases such as Branzburg v. Hayes and Richmond v. Virginia demonstrate that the Supreme Court has no interest in introducing a special right to be able to gather news (see Appendices 2 and 3 for case briefs). For example, the media does not have a special right to go where the public is not allowed—areas such as ride-alongs with the police. Congress and the Supreme Court have, nevertheless, granted the media access to ‘public records’ and ‘public meetings’. Access to public records and meetings loosely connect with a potential right to gather news. In any case, laws such as FOIA and sunshine laws do not exist in Cuba in any form, be it explicit or implied. With Article 53 that makes the press owned by the government, it is possible there never will be. After all, why would the press need access to the government if they are a part of it? Cuban governmental agencies have no legal responsibility to make anything public, to the detriment of any sort of free press.

VI. Conclusion

For some countries, the law is not always what it appears to be, and for others, it is exactly that. As previously stated, Mexico on paper is much more progressive than that which actually occurs in its media environment. Cuba, on the other hand, is as restrictive as one would think it to be, with all roads leading to “the aims of the society.” Puerto Rico enjoys the luxuries of United States First Amendment rights, curbing problems before they even arise because the commonwealth has previous cases from the U.S. court system.

The United States is still unique in its free speech laws compared to these other South American/Caribbean countries. These disparities are expected between the institutions of democracy and communism, but not as anticipated between bordering democracies. Mexico’s current climate is devastating; the government has come so far in its development of freedom of information laws only to have drug cartels and violence threaten these advancements. This easily could have been solely focused on the Mexican media environment, but it is vital to know how other free speech acts are presented across South America in order to understand what countries have done and what “works” or does not. These countries/commonwealths were once united by Spain, and traces of their connection are still revealed through the culture. Each has created its own free speech laws, and each has had successes and failures. The important point is that no country here completely neglects free speech, but rather uses legislation to create freedoms or impose restrictions in attempts to coincide with the beliefs of its people.

Works Cited

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