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Litigating Same-Sex Marriage: Might the Courts Actually Be Bastions of Rationality?

by
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The great political philosopher John Stuart Mill once asked, "Was there any domination which did not appear natural to those that possessed it?" (Mill 1984, 269–270). For same-sex couples seeking access to the institution of marriage, the public sense that marriage is naturally and obviously meant only for opposite-sex couples has been a formidable barrier. The first state supreme courts to rule on same-sex marriage, in the early 1970s, simply relied upon dictionary definitions to hold that marriage was obviously a heterosexual institution.[1] Politicians mostly ignored the issue altogether until the courts of Hawaii, Vermont, and Massachusetts forced public debate of the issue.

Over the past several years, things have changed. In this brief article, I argue that there has been a serious divergence in how the courts and non-judicial political figures have engaged the issue of same-sex marriage, with the courts well out in front in terms of moving past the reflexive notion that marriage simply has to be opposite-sex.

There is a lively debate about whether courts are primarily interpreters of law or operate mainly as institutions through which judges follow their policy preferences (e.g., Segal and Spaeth 1999; Gillman 2001; Volokh 2001). Certainly, this article will not resolve that debate. Nonetheless, it is instructive to compare the reaction of the public and non-judicial politicians to that of the courts in response to the increasingly urgent pressing by same-sex couples for legal recognition of their relationships. While the public and elected officials have felt free to continue the mantra that exclusion of same-sex couples from marriage is obviously right, courts have moved past their initial dismissiveness and are more rigorously engaging this issue.

Courts, unlike the public, legislators, or executive officials, are obliged to actually consider and respond to facts and arguments presented by the gay and lesbian advocates. Further, courts must publicly set out the reasons for their decisions in writing. As a result, the courts have been bastions of rationality in dealing with same-sex marriage, as compared to other governmental actors, outside of a small number of enclaves such as San Francisco. So far, two state high courts, the Supreme Judicial Court of Massachusetts and the Supreme Court of Hawaii, have held that same-sex couples are legally entitled to get married, and the Supreme Court of Vermont has held that same-sex couples are entitled to all the legal rights of marriage.[2] What has been less commented upon is that even some appellate courts from "red states" have engaged the question of same-sex marriage much more seriously than other government officials and they have struggled to give a cogent explanation for excluding same-sex couples from marriage. In the most recent case, an Indiana appellate decision rendered in January 2005, the same-sex plaintiffs did not prevail, but the courts in these cases conceded them a great deal of ground, and ultimately based their decisions on grounds wide open to critical dissection in future litigation.

This is not to say that victory for same-sex plaintiffs is inevitable. As noted, not only do many believe that judges pursue their own policy preferences, but there is widespread disagreement about whether courts can or should rule for same-sex marriage rights given their institutional limitations, their countermajoritarian role, and the possibility of violent backlash, among other reasons (see, e.g., Sunstein 1994). Nonetheless, I argue here that the grounds upon which courts are now distinguishing between same-sex and opposite-sex couples, i.e., the capacity to reproduce by accident, is ultimately so narrow that the courts will have to abandon this line of reasoning, promising at least the possibility of future victory for same-sex plaintiffs.

Unlike the courts, public officials do not need to defend their positions on issues in any sort of rigorous analytic manner. During his presidential run, John Kerry frequently averred that he opposed same-sex marriage, but never explained his position beyond saying, "I personally believe that marriage is between a man and a woman."[3] Even Senator Hillary Rodham Clinton has not gone beyond the argument that marriage is only for opposite-sex couples because that is the way things have always been. In January 2000, she said, "Marriage has got historic, religious, and moral content that goes back to the beginning of time, and I think a marriage is as a marriage has always been: between a man and a woman."[4]

By contrast, the courts have addressed this issue far more substantially. In *Lawrence v. Texas* (2003), while striking the sodomy laws of Texas, the Supreme Court cautioned against sweeping and simplistic accounts of history,

and asserted that history and tradition are only the beginning points of any discussion of the basic rights of human beings. The Court did not specifically address the issue of same-sex marriage; instead it simply noted that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." In dissent, Justice Scalia asserted that the Court's decision in *Lawrence* "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."

Indeed, now that *Lawrence* has done away with sodomy laws, it is not at all clear why same-sex couples should be barred from marriage. As noted, this has not affected the rhetoric of public officials who still see no need to explain their opposition to same-sex marriage. The courts, however, have been obliged to give more thoughtful answers to the question of why only opposite-sex couple may wed. Since *Lawrence*, two appellate courts, one in Arizona and one in Indiana, have issued opinions on same-sex marriage. Both courts, relying on similar reasoning, denied the same-sex petitioners' claims for relief. This article focuses on the recent Indiana case, *Morrison v. Sadler*.

The *Morrison* court began by noting that, after *Lawrence*, moral disapproval of same-sex relationships as a constitutional basis for denying the right to marry was no longer tenable, despite the urgings of amicus groups such as Catholics Allied for the Faith. Nor did the court resort to the simplistic dictionary-based arguments that marriage was opposite sex "by definition." With these arguments discarded or abandoned, the Indiana court focused on the same issue as the Arizona court: the inability of same-sex couples to bear children via sexual intercourse. I argue that if the same-sex marriage ban rests on this argument, then it rests on very thin ground indeed, and that the courts have had to grow quite narrow in focus in order to sustain it.

I have argued extensively elsewhere (Gerstmann 2003) that while the governmental interest in the well-being of children is strong, there is no logical relationship between the same-sex marriage ban and children's well-being, even if one accepts the argument that opposite-sex couples are inherently better parents than same-sex couples. In fact, the Indiana court did not give credence to this argument, saying that "we accept that there are a growing number of studies indicating that same-sex couples are at least as successful at raising children as opposite-sex couples." Instead, the court merely stated that it was a legislative task to make such a determination.

Nonetheless, even deferring to the legislature on this issue, there is still no logical connection between banning same-sex marriage and maximizing the chances that children will be brought up by opposite-sex, married parents. The actual effect of the ban is to bar children already being raised in same-sex households from the protection afforded by the benefits of marriage. Further, this has the irrational effect of punishing children for the "sins" of their parents. Even if we assume that gays and lesbians are wrong to live with a same-sex partner, this is obviously not the moral responsibility of the child. Long ago, in *Levy v. Louisiana*, the Supreme Court struck down as irrational a law that prevented an illegitimate child from suing for wrongful death when the child's mother was killed. The justices held that it is irrational to punish a child for the perceived sins of the parent. Likewise, it is irrational to punish the children of same-sex couples by denying them the legal rights they would have if same-sex marriage were legal.

Furthermore, if marriage is primarily about providing a stable environment for children, then the current rules on who may marry and who may not are poorly suited to this purpose. After all, opposite-sex couples are allowed to marry whether or not they intend to, or are capable of, having children. Some courts, including the Arizona court, have said that inquiries into the willingness or capacity of opposite-sex couples to bear children would violate their privacy. This is a difficult argument to sustain. First of all, there are some groups, such as, for example, very elderly women, who cannot bear children. Yet, it is inconceivable that any legislator who wished to keep his or her job would argue that, say, because their reproductive years are over women over the age of 80 should be banned from marriage and the legal and financial benefits it affords. Such a ban would not necessarily violate the constitutional doctrine of equal protection (the government is allowed to treat men and women differently when there are real differences in their situation), but would no doubt be seen as cruel and pointless. Why is it any less so when same-sex couples are banned from marriage for this reason?

The Indiana court dealt with this argument, in part, by noting that the legislation is not to be overturned "merely because it is not framed with such mathematical nicety as to include all within the reason for the classification and to exclude all others." This is a well-known principle of law, but linking opposite-sex status to child-rearing lacks more than "mathematical nicety." While 46% of married opposite-sex couples are raising children under the age of 18 in their home, same-sex couples are not far behind; 34% of lesbian couples and 22% of male same-sex couples are raising children under the age of 18 in their home (Simmons and O'Connell 2003). These numbers would likely be even closer if same-sex couples could marry and we were comparing married opposite-sex couples to married same-sex couples. Far from merely reflecting differences, the law is, at least in part, creating statistical differences by forbidding marriage to opposite-sex couples who would like to create a more stable environment for their children.

The categories of "child-raisers" and "opposite-sex couples" overlap poorly, not only because it is true that many opposite sex-couples cannot or will not have children, but also because, as the above figures illustrate, a great many same-sex couples do have children, either by adoption, reproductive technology, or from prior opposite-sex relationships or encounters. The same-sex marriage ban denies children living in same-sex households, some 2–8 million in number (Patterson 1995, 262), the benefits and protections of having married parents.

The Indiana court had difficulty justifying a same-sex marriage ban on the inability to procreate as a rational policy, yet had to somehow distinguish between opposite-sex and same-sex parents. The court began by noting that, while sexual intercourse can quickly, unexpectedly, and cheaply result in a pregnancy, artificial methods of reproduction, and also adoption, are time-consuming and expensive:

> Likewise, the Plaintiffs essentially contend, it actually would further the State's interests in marriage and the strengthening of families to allow same-sex couples to raise families within the institution of marriage. This argument does not recognize the key difference between how most opposite-sex couples become parents, through sexual intercourse, and how all same-sex couples must become parents, through adoption or assisted reproduction. Becoming a parent by using "artificial" reproduction methods is frequently costly and time-consuming. Adopting children is much the same. Those persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. "Natural" procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or

planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant.[5]

Based upon this difference between reproduction by intercourse and reproduction by artificial means, the Indiana court concluded that same-sex couples with children are *actually so stable that they do not need the institution of marriage to provide a stable environment for their children:*

> What does the difference between "natural" reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the State of Indiana's clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the "protections" of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place. By contrast, procreation by "natural" reproduction may occur without any thought for the future. The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from "casual" intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, "accidents" do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the "natural" procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a "change in plans."[6]

Although the same-sex plaintiffs lost the case, the judicial portrayal of same-sex couples in this case is remarkably positive. The court acknowledged that the great weight of social science data indicates that "same-sex couples are at least as successful at raising children as are opposite-sex couples."[7] The court then asserts that same-sex couples with children are likely so committed to their families that their children do not have the same need for married parents as do children of opposite-sex couples who may accidentally blunder into parenthood after a careless sexual encounter. To say the least, this presents a stark contrast from the once ubiquitous image of gays and lesbians as promiscuous pleasure-seekers more likely to molest children than to nurture them in loving, stable homes.[8]

It also stands in sharp contrast to much of the rhetoric regarding gay families coming from our nation's executive branch, much of which still demonstrates unreflective hostility. Five days after the Indiana decision, PBS announced that, under heavy pressure from the U.S. Department of Education, it was pulling from distribution an episode of "Postcards from Buster." Buster is an animated rabbit, the friend of the popular animated aardvark "Arthur." In the "Postcards" series he visits a diverse group of families, including children of single parents, children who live with their grandparents, and a family of fundamentalist Muslims, all without objection by the federal government. In fact, Buster himself is the child of divorced parents. Yet his visit to a Vermont family with lesbian parents prompted Department of Education Secretary Margaret Spelling to threaten PBS's federal funding, asserting that, "Many parents would not want their young children exposed to the lifestyles portrayed in the episode."[9] This hostility to same-sex families comes from the very top of the executive branch, with a president who denounces judicial efforts to fairly engage the issue of same-sex marriage as "activism" dangerous to families and children. As recently as in his February 2, 2005, State of the Union Address, President George W. Bush declared: "Because marriage is a sacred institution and the foundation of society, it should not be redefined by activist judges. For the good of families, children and society, I support a constitutional amendment to protect the institution of marriage." Compared to this open hostility to same-sex marriage, and even compared to the statements of liberal senators such as Kerry and Clinton, the Indiana decision is far more thoughtful and far more laudatory of same-sex families.

What of that, though? Some advocates of same-sex marriage might question what good comes from positive portrayals by the courts when the end result is a loss for the plaintiffs. I would argue that there are potentially two very significant benefits to this respectful judicial description of same-sex parents. First, as I demonstrate elsewhere (Gerstmann 1999), judicial rhetoric can have an important impact upon the broader political debate. The judicial hostility to gay and lesbian claims expressed in the now-overruled *Bowers v. Hardwick* served as justification for a wide array of sexual orientation-based discrimination, as the Court itself acknowledged when it overturned that decision in *Lawrence v. Texas*. Further, the federal courts' repeated insistence that gays and lesbians do not deserve the same level of legal protection as groups such as African Americans has rendered gays and lesbians vulnerable to the charge that they are seeking "special rights" that they neither need nor deserve (Gerstmann 1999). The interplay between judicial decisions and politics is complex, but to the degree that judicial decisions affect the larger political dialogue, the Indiana decision, along, of course, with *Lawrence*, puts gays and lesbians seeking equal rights on far friendlier grounds than have past decisions.

Second, the Indiana decision rests on grounds wide open to legal attack on appeal or in litigation in other states. Most obviously, there are many same-sex families where the children are not the result of reproductive technology or adoption, but of heterosexual intercourse performed by one member of the couple. The Indiana court acknowledged this but avoided the problems it creates for the court's reasoning by relying on an omission in the plaintiffs' legal arguments:

> It is possible, and indeed it likely frequently happens that a same-sex couple may raise a child or children that one or both members had earlier as a result of an opposite-sex relationship. The Plaintiffs focus on same-sex couples who have children by assisted reproduction and adoption. We do likewise, focusing on the inability of a same-sex couple to have a child together within the confines of their intimate relationship.[10]

This judicial parry can easily be countered in future litigation by providing statistics on the numbers of same-sex couples raising children born to one member of the couple by ordinary reproductive means. If the heterosexual monopoly on marriage rests on such slim grounds, then there is much reason for optimism that other courts will recognize the right of same-sex couples to wed. As noted, there are those who doubt that legal arguments and logic are important predictors of judicial outcomes, but for those who believe that legal arguments have at least some significant effect on judicial outcomes (see, e.g., Epstein and Kobylka 1992), the courts' difficult struggle to differentiate between opposite and same-sex parents and the respective benefits of marriage for them, signals at least the possibility of future success, especially as the idea of same-sex marriage grows less novel over time.

Notes

1. The Supreme Court of Minnesota was the first high court to rule against same-sex marriage (1971, *Baker v. Nelson*). The Kentucky Supreme Court followed two years later in *Jones v. Hallahan*.
2. The decision of the Hawaiian court was effectively overruled by popular referendum before it took effect.
3. CNN Crossfire (May 17, 2004): Transcript # 051700CN.V20.
4. Quoted in Andrew Sullivan, "State of the Union," *The New Republic 18, 20 (May 8, 2000)*.
5. *Morrison v. Sadler*, at 19–20 (Lexis Pagination).
6. *Morrison v. Sadler*, at 20–21 (Lexis Pagination).
7. *Morrison v. Sadler*, at 27–28 (Lexis Pagination).
8. For example, contrast this with the portrayal of gays and lesbians in Colorado during the 1992 campaign to pass a state constitutional amendment rescinding civil rights protections for gays and lesbians. Gerstmann 1999, 111–112).
9. U.S. Newswire, January 28, 2005.
10. *Morrison v. Sadler*, at n.9.

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