

New York Court of Appeals' Hetero-normative Legal Mind

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Richard Stumbar argued the same-sex marriage case before New York State's Court of Appeals. It has taken him a few weeks to recoup from the negative finding of the Court. He is bound by a sense of legal decorum as well as deference to the court in his part of this discussion. Zillah Eisenstein is professor of politics and the feminist author of some ten books dealing with the complexities of sexual and gender configurations of injustice. She is *not* bound by a sense of legal decorum or deference to the court in the following.

New York State's highest Court, in a 4-2 decision, has held that denying marriage to same-sex couples does not undermine equal protection of the law or access to the fundamental right of due process; and therefore the decision does not violate the state constitution. Justice Robert Smith writes for a plurality of Justices that: "We hold that the New York Constitution does not compel recognition of marriages between members of the same sex"¹.

The Appeals Court crafted the question before them as "whether a rational legislature could decide that these benefits should be given to members of opposite-sex couples, but not same-sex couples". This test commonly known in constitutional jurisprudence, as the "rational basis" test is the lowest level of scrutiny utilized by the courts in judging equal protection claims. In deciding on the constitutionality of laws which burden other groups of individuals with unequal treatment the courts have historically scrutinized the legislation with a more stringent test when the burdened class has had a long history of discriminatory treatment. In not using a heightened standard of review the plurality of the court turned a blind eye to the long history of discrimination, hate and violence perpetrated on gays and lesbians.

In applying the rational basis test the plurality relied on two bases to support the discriminatory classifications in the New York marriage laws. The majority decided that limiting marriage to "a union between a man and a woman" is rational, because heterosexual parents are more suited to raising children than gays or lesbians. Not even the State of New York made such a claim in its brief in defense of the marriage laws. Indeed, the record contains support of gay parenting from many prestigious professional groups including psychologists and social workers. The studies show no differences in outcomes for children raised by gays or lesbians than those raised in "traditional" households. Experts be damned, the court had a higher power supporting its decision; "intuition and experience suggest that a child benefits from having before his or her eyes,

every day, living models of what a man and a woman are like.” An unexamined heteronormativity constructs the Courts discriminatory stance.

The Court then relies on the claim that marriage is more necessary for heterosexuals in that they can have unplanned sex and pregnancies. Marriage is supposed to create security of this whimsy. In the words of the Court, “an important function of marriage is to create more stability and permanence in the relationships that cause children to be born.” Marriage and “its attendant benefits” becomes an “inducement” in the words of the Court for opposite-sex-couples. As such marriage is necessitated by the “potential for instability” in heterosexual sexual unions.

The Court argues that “homosexuals” plan their pregnancies or adoptions more assiduously and therefore don’t need marriage in the same way. “Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.” Gays “do not become parents as a result of accident or impulse,” whereas heterosexuals do. One might assume from this that gays and lesbians are more responsible and careful with their decision making about bearing and rearing children, whereas heterosexuals are more carefree and irresponsible. Given this, the law is used to make up for this heterosexual limitation. In this sense, the Court argues why heterosexuals should be included in marriage; rather than arguing why homosexuals should be excluded. But this hardly seems fair because gays are still excluded; albeit that it is their strengths rather than their limitations that form the basis of the exclusion.

The Court constructed this decision at the lowest level of legal scrutiny using the criteria of rational basis. The Court’s decision was to reflect the constitutionality of the laws; and not the morality or immorality of homosexuality. The Court is not supposed to use morality as its criterion for law-making and legal decisions. But little else other than heterosexism—given that no factual evidence is provided--can explain the statement that marriage of opposite sexes works better for children than marriage. No specific data is provided to justify such a claim. Instead the Court is reduced to defending its position on the basis of “intuition and experience” that children need to have “living models of what both a man and a woman are like”. In the end the people of New York are left with a decision that is both poorly written and sloppily argued. We are asked to blindly accept that gay marriage is wrong even though the decision puts forth no plausible rational basis for this claim. If heterosexism is irrational, the decision reads likewise.

Let us unpack our argument a bit more analytically here. First of all we take issue with the strange phrasing which links marriage to opposite sexes. Rather than opposite, males and females form a continuum of biological varieties. And men and women—which are the terms that are used to describe the cultural constructions of what male and female means—are not one and the same with each other. Male is not synonymous with man, nor female with woman; nor is sex synonymous with gender. The law simply confuses all these subtleties.

Male and female connote a differentiation of the biological sexes and some scientists even argue that this clear division of two sexes belies the diverse biological realities that inhabit sexual identities, as in inter-sexed individuals. But more to the point here—the constructions of gender—of what it means to be a man and a woman—is culturally defined and therefore there are more than two meanings of gender at any given moment. This varies according to time and place and cultural and geographic location. This variety, not surprisingly, applies to the institution of marriage as well.

Given the above discussion we think it makes little sense to simply say that marriage should be limited to “a union between a man and a woman” or that marriage needs a male and a female. Gender, reflects socialization and cultural constructions and meanings. There are many females who choose not to be “women” in a traditional sense of the term, or “womanly” if this means feminine. This is also true for men, and males, and meanings of manhood. So you never exactly know what you are getting when you think you have a man and a woman. No wonder so many heterosexual marriages end in divorce.

According to the law, marriage is a fundamental right, and according to constitutional jurisprudence, fundamental rights are supposed to be shared by all humans alike. So the Appeals Court had to make gays other-than-human, meaning not like heterosexuals. Their ‘othering’ and differentiating of gays from the normal, even if irresponsible behavior of heterosexuals, is what underlines their decision. There is little use of rational argument; but rather the irrational argument of unexamined heteronormativity formulates the Court’s absolutist moralism. The New York State Appeals Court decision should extend the rights to civil marriage to gays because they are like any other human being. Yet the Court clings to its position writing, “that the definition of marriage to include only opposite-sex couples is not irrationally underinclusive”.

The equal protection of the law is denied to gays in terms of their right to marry because of prejudice, not reason. If the Court had not chosen to see gay marriage as immoral they would have used the criteria of “heightened scrutiny” which would have defined sexual orientation as a “suspect class”, like race or gender. With this level of scrutiny, rather than the lower standard of ‘rational basis’ gays would have been recognized as a burdened class, and protected with rights as such. Then the long history of discriminatory practices and exclusions and the law that exists to remedy them would have been put in play.

But the Court not only ignores this history of discrimination, it also confuses gender discrimination with sexual discrimination. So it argues that “limiting marriage to opposite-sex couples” is not engaging in sex discrimination because the “limitation does not put men and women in different classes, and give one class a benefit not given to the other”. As such, men and women are treated the same: “they are permitted to marry people of the opposite sex, but not people of their own sex”. But by conflating the categories of sex and gender, gays and lesbians, as such, have no legal standing, and therefore no actionable identity.

The present law that denies gays the right to marry is archaic, uniformed, discriminatory, and exclusionary much like miscegenation law was in the past. The law in this instance is being read with deep prejudice and therefore the Court is unable to see its own irrational bias. The Court has chosen to normalize and rationalize its own moral agenda as though it were the same as rational judgment.

All this said we are not sure that marriage is worthy of gays, or heterosexuals who truly want to create long-term, honest, stable relationships. Marriage has varied historically. It was initially a religious institution before it was orchestrated by the state. It was formerly an institution only applicable to whites; black slaves could not marry. Later on, mixed race marriages were illegal.

At one time the traditional heterosexual family of a man and a woman constituted a clear majority of all marriages. Today, less than a quarter of all families are

defined by such traditional forms. More than one-half of all marriages now end in divorce. Those that remain legally in tact often have still suffered deceit and illicit affairs. What mythology of the family per se is the Court attempting to protect here?

Maybe gays will be giving up too much—their ability to create alternative and meaningful loving unions for themselves and their children—if and when they are allowed to legally marry. Maybe heterosexuals should follow the gay lead here and opt for other family forms, even if they have had to develop them because of rights denied them. Or as the statement “Beyond Same-Sex Marriage”² that envisions new strategies for creating families for everyone reads, what is needed is “a recognition of diverse family forms with flexible economic benefits, regardless of sexual orientation, race, gender/gender identity, class, or citizenship status.” Instead of trying to fit into an anachronistic singular version of the traditional nuclear family new multiple understandings are needed. We agree that “marriage is not the only worthy form of family or relationship, nor should it be legally and economically privileged above all others.”

Nevertheless, as long as marriage is the legal authorization of people’s devotion to each other, gays should have a right to choose it, or not. It is why Richard went before the court to argue on behalf of 24 couples from Ithaca, New York.

¹ See the decision of the plurality, written by Justice R. S. Smith, New York State Reports, pp.1, 3, 5, 6, 9, 11, 13, 15.

² See: www.beyondmarriage.org/full_statement.html