The Continuing Confusion Over Same-Sex “Marriage”

by

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California Superior Court Judge Richard Kramer ruled in mid-March that California’s ban on same-sex marriage is unconstitutional. He wrote, “It appears that no rational purpose exists for limiting marriage . . . to opposite-sex partners” (Washington Post, 3/15/05).

Supporters of the ban on same-sex marriage argued to the contrary that it is part of California’s traditional understanding of marriage to limit marriage to heterosexual partners. Judge Kramer argued, however, that an appeal to tradition in this case is no stronger than the earlier appeal to tradition to uphold a ban on interracial marriage. In other words, just because something is traditional gives it no greater claim to legitimacy than a break with tradition if people conclude that it is time to break with tradition.

Addressing the charge that allowing same-sex marriage could lead to marriage between siblings or between children, the judge argued that “the case law upholding same-sex marriage ‘is not saying that therefore anyone can marry anyone else.’” The government, he said, would still be able to claim an interest in blocking incestuous or underage unions. But what would be the grounds for government to claim an interest in blocking such unions? Presumably the grounds would be the tradition that such unions are illegitimate because of health and social reasons. Yet those traditional reasons arise only from a relatively recent tradition. Children were given in marriage in earlier societies and some brothers and sisters have married without harm. So what if an increasing number of citizens decide that they want to challenge the newer tradition, which represents nothing more than a prejudice against child marriages?

The point of raising these questions is to say that neither support for nor rejection of traditional practices should be allowed to stand as a sufficient ground for law. Tradition, particularly in the common law tradition of the United States, should be given the benefit of the doubt, but only until good arguments of justice can be offered to change the law in a material way. Banning interracial marriage, for example, was shown to be rooted in white prejudice against blacks, not in any material difference between a racially mixed marriage and a same-race marriage. Once the law was changed to disallow racial discrimination there was no longer any basis for prohibiting heterosexual people, of any race, to marry.
But sexual differences between men and women do not exist because of a prejudice. And it happens to be the case that only heterosexual couples can have sexual intercourse. There is a structural difference between homosexual play and heterosexual intercourse. That is the material basis and the “rational purpose” in law for the traditional identification of marriage as a heterosexual institution.

If Judge Kramer (or any legal or legislative body) asserts that “no rational purpose” exists for limiting marriage to heterosexual couples, he is, without material legal argument, simply dismissing, arbitrarily and dogmatically, the long-established “rational purpose” for heterosexual marriage. His assertion of a constitutional right of individuals to marry does not come close to addressing marriage law. Thus, his decision will not liberate the institution of marriage from a long-standing injustice that has until now excluded one form of it. To the contrary, heterosexual marriage does not exist because of a prejudice against gay marriages. It exists because of the distinct identity of heterosexuality. The question that must be addressed head on is whether there is a structural difference between heterosexual coupling and homosexual coupling that provides any reason for distinguishing them in law. That is not, first of all, a question of either a civil right or a prejudicial attitude.

To argue that the Constitution guarantees equal treatment to all citizens, both men and women, does not say anything about what constitutes the institutions in which citizens participate. Equal treatment under the law does not by itself yield a definition of marriage, or the family, or a business enterprise, or a university. Civil rights protections function only to assure every citizen equal treatment under the law depending on what the material dispute in law is all about. Law that is just must begin by properly recognizing and distinguishing identities and differences in reality in order to be able to give each its legal due.

If, for example, someone wants to argue that two people who have not in the past been recognized as marriage partners should now be recognized as marriage partners, one must demonstrate that marriage law (not civil rights law) has overlooked or misidentified something that it should not have overlooked or misidentified in the past. For thousands of years, marriage law has concerned itself with a particular kind of enduring bond between a man and a woman that includes sexual intercourse—the kind of act that can (but does not always) lead to the woman’s pregnancy. A homosexual relationship, regardless of how enduring it is as a bond of loving commitment, does not and cannot include sexual intercourse leading to pregnancy. Thus it is not marriage. But the long tradition of making this distinction is not what establishes the legitimacy of the law. The legal tradition is grounded in something and it is that “something” that must be evaluated. For if tradition is not a sufficient ground for law, then neither can the objection to tradition be a sufficient ground for changing the law. Otherwise, each new change amounts to nothing more than the start of a new tradition that can be objected to as a mere tradition that should be changed.

The much disputed question of whether same-sex relationships are morally good or bad, healthy or unhealthy, is beside the point at this stage of legal consideration. The first question is about identity and difference. One cannot argue about whether a particular marriage is good or bad if one doesn’t start by recognizing what constitutes marriage. This is what I am referring to as the material legal matter of properly recognizing and identifying what exists and distinguishing between marriages and
friendships, between schools and banks, between churches and multinational corporations. It has nothing to do with civil rights.

For the law to recognize marriage as a certain kind of heterosexual bond with an enduring character and responsibility that includes sexual intercourse, involves no discrimination whatever against those whose personal bonds do not and cannot include sexual intercourse. Those who choose to live together in life-long homosexual relationships; or brothers and sisters who live together and take care of one another; or two friends of the same sex who are not sexually involved but share life together in the same home—all of these can be free to live as they do, and they suffer no civil rights discrimination by not being identified as have a marriage relationship.

This is the same as saying that there is no civil rights discrimination against a young man who wants to be hired as a nurse in a hospital but is denied the opportunity because he is unqualified to be a nurse. There is a material difference between a qualified nurse and someone who thinks of himself as a nurse but is not qualified to be one. What divides them is not an illegitimate prejudice by the trained nurse or by hospital administrators who hire nurses. The question behind marriage, in other words, is a structural one that precedes and underlies lawmaking. The argument about the structural identity of marriage is not first of all a legal argument about how people should be treated within the bonds of that structure. Rather, it is about what constitutes the structured relationship in the first place and whether homosexual relationships should be identified as having the structure of marriage. Only after that has been decided can civil rights considerations emerge about how citizens should be treated fairly with respect to marriage.

Some of those who want homosexual relationships to be redefined as marriages say that many aspects of their relationship are like marriage—having sexual play, living together, loving one another, etc.—and therefore they should be allowed to call their relationships marriages. But this cannot be a proper matter of law until the empirical case has been made that a homosexual partnership and a marriage are indistinguishable. Otherwise, the appeal amounts to nothing more than a request that homosexual partners be allowed to call themselves what they want to call themselves regardless of the differences that exist in reality. The answer they want, and the answer Judge Kramer was willing to give them, is that the court should change marriage law based on the principle that reality is defined by the will and declarations of individuals, all of whom should be treated without discrimination. The antidiscrimination principle is appealed to not in order to show that some married couples have previously been denied the recognition of their marriage. Rather the antidiscrimination principle is being used to say that no citizen should be denied the right to call something what he or she wants to call it.

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[Background for the argument above can be found in the Center’s Guidelines for Government and Citizenship (see Homosexuality). Go to www.cpjustice.org/guidelines.]