MARRIAGE DEBATES

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THE CALIFORNIA MARRIAGE CASE: INTERESTS OF THE STATE

It's been called, cleverly but aptly, "The War of the Ring." It is being waged all across the public square, but the hottest and most consequential battles are in the courts. On one side are those who want marriage legally redefined to "the union of any two persons," with the law treating the parties' gender as irrelevant to the civil meaning of marriage. Hence, "genderless marriage." On the other side are those who want to preserve "the union of a man and a woman" as a core meaning of the marriage institution. Hence, "man/woman marriage."

Genderless marriage proponents – since the beginning represented by brilliant and well-funded lawyers with a clear, step-by-step strategy for victory in the courts – scored early appellate court victories, in British Columbia, Ontario, and Massachusetts. The Canadian court victories led to parliamentary acquiescence, a bill replacing man/woman marriage with genderless marriage across Canada. The Massachusetts court victory, however, led to a wave (still cresting) of state constitutional amendments enshrining man/woman marriage. Less well known is that since the Massachusetts court decision in November 2003, all American appellate courts speaking to the matter – one in Indiana, one in New Jersey, and two in New York – have rejected the constitutional arguments for genderless marriage. Those arguments are now before a California appellate court, and

the paramount question is whether California has interests of a nature to sustain the limitation inherent in man/woman marriage.

The answer is this: The State of California has compelling interests in preserving, sustaining, and even strengthening the vital social institution of man/woman marriage. As a matter of recent history, a large majority of Californians expressed their understanding of that truth when they voted in favor of Proposition 22: "Only marriage between a man and a woman is valid or recognized in California."

The clearest and strongest explication of the State's compelling interests in man/woman marriage is commonly known as "the social institutional argument." I will summarize it in a moment. But first I note certain extraordinary aspects of the argument.

1. Each building block in the argument is uncontroversial. Virtually all serious students of social institutions accept the validity of the understandings comprising it.
2. To date, the argument remains unrefuted. The appellate courts that have mandated genderless marriage (in Massachusetts and Canada), in order to reach that result, ignored or otherwise evaded the argument, and these courts' elision of the argument is now well demonstrated in the scholarly literature. In contrast, the courts that have engaged the argument have rejected genderless marriage. Moreover, the brilliant and committed legal scholars supporting genderless marriage, many present today, to date have not countered the argument.
3. The argument fully qualifies as Rawlsian "public reason" and satisfies even Linda McCain's high standard: "The requirements of public reason would . . . require

the delineation of precisely how same-sex marriages threaten the institution of marriage in terms of public reasons and political values implicit in our public culture." This achievement of the social institutional argument merits emphasis exactly because, as Margaret Somerville has accurately observed: "One strategy used by same-sex marriage advocates is to label all people who oppose same-sex marriage as doing so for religious or moral reasons in order to dismiss them and their arguments as irrelevant to public policy. [Further,] good secular reasons to oppose same-sex marriage are re-characterized as religious or as based on personal morality and, therefore, as not applicable at a societal level."

4. Because the argument demonstrates that adoption of genderless marriage will necessarily de-i9nstitutionalize man/woman marriage and thereby cause the loss of its unique social goods, the argument effectively refutes the notion that the proponents of man/woman marriage have only one "real" motive and that is animus towards gay men and lesbians.
5. Because the argument demonstrates society's (and hence the government's) compelling interests in preserving the vital social institution of man/woman marriage, the argument is a sufficient response to all constitutional challenges leveled at the laws sustaining that institution, and that is so regardless of what standard of review the court applies.

The social institutional argument for man/woman marriage is a sufficient response because of what it succeeds in demonstrating. It demonstrates that marriage, like all social institutions, is constituted by a web of shared public meanings; that these meanings

teach, form, and transform individuals, providing identities, purposes, and projects; and that in this way, these meanings provide vital social goods. Across time and cultures, a core meaning constitutive of the marriage institution has virtually always been the union of a man and a woman. This core man/woman meaning is powerful and even indispensable for the marriage institution's production of at least six of its invaluable social goods. The man/woman marriage institution is:

1. Society's best and probably only effective means to make real the right of a child to know and be brought up by his or her biological parents (with exceptions justified only in the best interests of the child, not those of any adult).
2. The most effective means humankind has developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not just the basic requirements like food and shelter but also education, play, work, discipline, love, and respect).
3. The indispensable foundation for that child-rearing mode – that is, married mother/father child-rearing – that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child's – and therefore society's – well being.
4. Society's primary and most effective means of bridging the male-female divide.
5. Society's only means of conferring the identity of, and transforming a male into, husband/father and a female into wife/mother, statuses and identities particularly beneficial to society.

6. Social and official endorsement of that form of adult intimacy – married heterosexual intercourse – that society may rationally value above all other such forms. That rationality has been demonstrated in the scholarly literature and remains, to date, unrefuted.

The social institutional argument further demonstrates that, with its power to suppress social meanings, the law can radically change and even deinstitutionalize man/woman marriage, with concomitant loss of the institution's social goods. Further, genderless marriage is a radically different institution than man/woman marriage, as evidenced by the large divergence in the nature of their respective social goods (in the case of genderless marriage, only promised, not yet delivered). Indeed, observers of marriage who are both rigorous and well informed regarding the realities of social institutions uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage, and this is so regardless of the observer's own sexual, political, or theoretical orientation or preference.

Another social institutional reality is that California can have, at any one time, only one social institution denominated "marriage." That is because this society, as a simple matter of reality, cannot, at one and the same time, have as shared, core, constitutive meanings of the marriage institution "the union of a man and a woman" *and* "the union of any two persons." California, as a simple matter of reality, cannot, at one and the same time, tell the people, and especially the children, that "marriage" means "the union of a man and a woman" *and* "the union of any two persons." The one meaning necessarily displaces the other. Hence, every society must chose: either to retain the old

man/woman marriage institution or, by force of law, to suppress it and put it its place the radically different genderless marriage institution. But to suppress, by force of "constitutional" law no less, the shared public meanings constituting the old institution is to lose the invaluable social goods flowing from those institutionalized meanings. Thus, the social institutional argument refutes the "no-downside" argument advanced by genderless marriage proponents, seen in the famous tactic of asking: "How will letting Jim and John marry hurt Monte's and Anne's marriage?"

I ought to say here that phrases like *gay marriage* or *same-sex marriage* are misleading. These phrases get people thinking that California will keep its old kind of marriage and just a get a new and separate kind. But that is not so because of the social institutional realities just reviewed; California will have one and only one kind of civil marriage. And after a judicial decree of genderless marriage, made in the name of constitutional norms of equality, liberty, dignity, and autonomy, California will certainly *not* be the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, each equally secure in its own space. Rather, California will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially constrained, officially disdained, and sharply curtailed. And if you are thinking that the unenlightened can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings, think again. Social institutional studies teach that the dominant society and its language and meanings will, like an ocean and its waves, inevitably wear down and cause to disappear any island

enclave of an opposing norm. To the degree that members of the enclave were to adopt the speech of the dominant society, they would lose the power to name and in large part the power to discern what once mattered to their forbears. To that degree, their forbears' ways' would seem implausible to them, and probably even unintelligible – a result some are rooting for, albeit not too openly.

Regarding Professor Coontz, her core message is that society has already de-institutiuonalized man/woman marriage, that love has conquered marriage, and that *now* all marriage is in our society is a publicly and officially celebrated close personal relationship, with "close personal relationship" meaning a relationship stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction that the relationship brings to the two (for now two) adults involved. If she is saying that this is what marriage ought to be, she has lots of company. That "ought" is what drove the drafters of the ALI's *Principles of the Law of Family Dissolution* and in Canada the Law Commission's *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships.* But, of course, there are competing social theories as to what marriage "ought" to be, both in the academy and across the electorate, and at least since the time of Justice Oliver Wendell Holmes, Jr., it has been considered bad judicial form to anoint, in the name of constitutional equality or liberty or whatnot, one social theory and to suppress the competing social theories, especially those like the one embedded in Proposition 22, which was enshrined in law by an act of pure democracy.

If Professor Coontz is saying that the close personal relationship model is *now* – after a process of evolution – what marriage "is," well, she is just wrong as a matter of

fact. Granted that she is *not* wrong in some communities on the East and West Coasts and she is *not* wrong in that world created by Hollywood, but she is wrong, on the ground, across California and the nation. (52 of 58 California counties voted in favor of Proposition 22, and you know where the six are clustered.) Even the lone dissenting judge in a recent New York appellate decision could not bring himself to assert fully that the close personal relationship model is all that marriage now "is" in this country; all he could bring himself to say is that there is "a widely held view" that marriage is no more than "a partnership of equals … founded upon shared intimacy and mutual financial and emotional support." He deemed this enough to conclude that "the gender of the two partners to a marriage is no longer critical to its definition." But, of course, a judge intent on redefining marriage through an equality argument must assert, as Professor Coontz does, that all marriage "is" is a close personal relationship. That is because to reject that model because it is factually inadequate (that is, true as far as it goes but going not nearly far enough) is to reject the equality argument for genderless marriage. That is exactly what we see in the court decisions sustaining the man/woman marriage institution. By the same token, judicial *acceptance* of that model's accuracy and adequacy is the foundation for judicial acceptance of the equality argument. *But*, to date, judicial acceptance of the close personal relationship model has been an unexamined and unproven and unprovable starting point of analysis, not the result of thoughtful examination. This obvious feature of cases such as *Halpern* in Ontario and *Goodridge* in Massachusetts has led Douglas Farrow to label, and fairly so, their approach as "obviously circular, and viciously so."

Returning to the social institutional argument, it shows that the man/woman meaning at the core of the marriage institution produces invaluable social goods that will be lost inevitably if that institution is replaced by the radically different genderless marriage institution. In other words, it shows that California has compelling interests in preserving the man/woman marriage institution, and that is a sufficient response to all constitutional challenges leveled against Proposition 22.

But in the courts, a party's arguments are often no better than the lawyer hired to present them. California hired Bill Lockyer to present to the California courts this State's and this society's compelling interests in man/woman marriage, that is, to defend Proposition 22 against the current swarm of constitutional challenges. But Attorney General Lockyer has chosen not to do that. He has *not* said that, in good conscience, he cannot and therefore will not defend Proposition 22. Rather, he has presented as a purported "defense" of man/woman marriage *only* that argument that, if I were Jennifer Pizer at Lambda or Shannon Minter at National Center for Lesbian Rights, I would have begged him to make – the "it is a tradition, therefore sustain it" defense. Every 2L at this law school knows that "tradition" may get some traction against a substantive due process/liberty argument but gets absolutely none against an equal protection argument, witness *Brown v. Board of Education.* You may think that what I am seeing in my mind's eye is the A.G.'s office lobbing a softball underhanded to Barry Bonds. No, no. What I am seeing in my mind's eye is not slow-pitch softball but tee-ball, with the A.G.'s office not just setting the ball on the tee but also asking if they can adjust its height to better suit Barry.

So the interesting question is what is behind this A.G. office performance. Personally, I cannot believe that it is a matter of competence or its lack. I know the work-product of the A.G.'s office; those folks have the candle-power and the professional savvy to throw 95-mile-an-hour fastballs. So why the tee-ball approach when there are 95-mile-an-hour fastballs to be thrown for strikes for the man/woman marriage team? The only other plausible answer that comes to my mind is a scary one because it implicates a lawyer's duty of zeal to his client's cause and a lawyer's duty of candor to the court. I have been reflecting on Bill Lockyer's opposition to Proposition 22 when both he and it were in the Legislature and his opposition leading to the 2000 initiative campaign. I have been reflecting on whether he is personally and politically conflicted on the marriage issue. But most of all I have been reflecting on the A.G. office's brief in response to the friend-of-the court briefs filed with the Court of Appeal. That A.G. brief saved its strongest effort for this: countering and diminishing a brilliant *pro*-man/woman marriage *amicus* brief filed by Ken Starr on behalf of a majority of Californians; this was the *amicus* brief of the Roman Catholic Church, of the Church of Jesus Christ of Latter-day Saints as the second-largest church in the State, of the evangelicals, and of the orthodox Jews.

So what is going on here, and what will the consequences be? The New Jersey A.G. effort in *Lewis v. Harris* has been weak (although not as weak as the California counterpart), but there the state supreme court can*not* readily say: "The A.G.'s talk about the State's interests is weak and unpersuasive" and then on that basis mandate genderless marriage. That is because the New Jersey intermediate appellate court decision

sustaining man/woman marriage sets out in detail the social institutional argument, and as a matter of intellectual honesty and judicial integrity it is just not good form for the state supreme court to now say, "We are reversing the lower court's judgment as wrong but we are not going to explain why."

The California Court of Appeal faces no such constraint, and how much of a constraint the *amicus* briefs will prove to be, I cannot even guess. But I am sure of this: If the California appellate courts allow this contest to be decided by one swing of the bat – Barry's swing at the ball Bill Lockyer has set on the tee – most people in the stands are going to know that something wrong has happened.

For a detailed scholarly examination of the social institutional argument in favor of man/woman marriage see Genderless Marriage, Institutional Realities, and Judicial Elision, 1 DUKE J. CONST. L. & PUB. POL'Y 1 (2006).