

Obergefell v. Hodges, June 26th, 2015

Love and Stuffiness:

*The SCOTUS decision, and the questions it raises.*

I learned of this year's June 26th Obergefell v. Hodges decision exactly one day before being, amusingly, confused for gay by an apologetic barista. I went to coffee with an exceptionally close male friend of mine, so close, in fact, that we had to explain to the server that we would not be paying "together". After this, we had to give reassurance that no offence was taken at the assumption. The barista was apologetic, and I couldn't think of a single reason why I was supposed to be offended. But should she have apologized? *Yes, and no.*

*Should she have apologized? Yes, apologize:* In raising these questions, the decision reveals a double standard, even as it conceals the reason it was tactful for the barista to quickly apologize.

Just as business operates under a comprehensive, and oftentimes convoluted, legal framework, it also functions under the moral sensibilities of the "average" consumer. Sometimes the form this takes is proscriptive, sometimes it's reactive. Consistently, however, business responds to the climate created by its consumers. Accordingly, the apology that was offered reveals the barista's belief about the offensiveness of being incorrectly identified as gay, a belief most likely reinforced by the culture. Despite the supposed lack of a stigma on queer lifestyles, it seems unlikely that the apology would've been as strenuous if I had been mistaken for straight. In this sense, there's "no stigma" in the same sense that there is no stigma on mental health related issues. A tactful move to apologize, then, and avoid the ire of a customer.

This year's June 26th Obergefell v. Hodges decision has introduced several interrelated, and previously little acknowledged questions of principle. First, does the decision constitute legal precedent for the acceptance of polyamory? After all, is it not true that the same arguments for gay marriage can be reappropriated by the inchoate pro-polyamory movement? And, should this be an unfair appraisal, what arguments might allow for gay marriage, while denying what we might term numerically unbalanced (that is, polygamous, not one to one) marriages?

The court's ruling in Obergefell should hardly be surprising. Prefigured as it was by the United States v. Windsor decision in 2013, in which section 3 of the Defense of Marriage Act was flattened, and in which the federal limitation of the definition of marriage to heterosexual unions alone was ruled unconstitutional, as it violated the Due Process Clause of the Fourteenth Amendment. Justice Kennedy's opinion put the decision cogently, "The federal statute is

invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”

Once the court grants this level of protection to same-sex partnerships, can it stop short of full marriage rights? Not likely.

In *Lawrence v. Texas*, 2003, the crucial question of the state’s power to use moral disapproval as a justification for legitimate discrimination was considered, and rejected. With this rejection the decision in *Obergefell* was all but settled. To oppose the *Obergefell* decision, one would also need to oppose (tantamount to wishing the overturn of) the *Lawrence* case. If moral disapproval is not a sufficient justification for denying marriage rights, then the traditional marriage side is predetermined to fail.

Even *US v. Windsor* was prefigured by the 1967 *Loving v. Virginia*, the decision that effectively eviscerated anti-interracial marriage laws. Though the harm done in *Loving v. Virginia* far outpaced the harm done in *Obergefell* (Richard Loving, the male member of the couple behind the case, had been sentenced to a year in jail, as “racial integrity” laws could carry prison time), the distinction is a matter of degree rather than principle. *Loving* proves that sensibilities can shift, and that legal protections shift with them.

The constitutional protections afforded to liberty evolve as culture and social conditions do. Otherwise, one would have to contest the previous precedents to *Obergefell*, in addition to *Obergefell*. That may not be a problem for some contenders. Even so, the burden of proof is on those who wish to contest these decisions. And so far no satisfactory principles have been offered that explain why the concept of “traditional marriage” should be used to exclude same-sex unions.

Opponents of the *Obergefell* decision have called it judicial activism and opportunism. They argue, following Justice Scalia’s lead, that the majority defends inscrutable principles by inquisitional means, charging the pro-side with merely tarring their opponents. But the *Obergefell* decision follows a historical trend; *Loving v. Virginia* in 1967, *Lawrence v. Texas* in 2003, *US v. Windsor* in 2013. This was not judicial activism as much as judicial exercise: a fair application of the law is not the same thing as a rewriting of those laws. The principle of marriage equality, based upon the application of Due Process Clause, is strong. On what legal argument, then, should homosexual marriages unprotected and unrecognized by the law?

The question again, then: Should the barista have apologized? *No, don’t*. Even if tactful, her mealy-mouthed apology did nothing in particular. Furthermore, the only principle behind the

action was catering to potential prejudices. Shifting sensibilities and plurality make it hard to track what offends any given person.

Imagine, now, that I was in a small group. In the midst of our laughter, I was mistakenly identified as belonging to a polygamous union. Somehow, the minority status of polygamy doesn't seem to justify the moral outrage I might've felt.

And this reveals the double standard. The Obergefell decision creates a false sense of progressivism, wherein gay-rights activist celebrate the acceptance of gay marriage, and reject the similar arguments from polygamists, contorting themselves to do so. But the legal principle is solid, and there is precedent. Yet, supporters of the decision are coming out, strenuously, against polygamy, enforcing arbitrary limits. You sometimes see that an apparent double standard conceals two single standards, and is, therefore, not hypocrisy. That is not the case here. Here, a single standard has been shaped into a double standard. Certain gay marriage supporters, now that status has been achieved, begin advocating for limitations in marriage rights, rather than the diffusion of equality. The response to polygamy shared the same queasiness that forced the barista to tepidly apologize. In fact, the majority decision represents homosexuality becoming more conservative, as much as the culture at large becoming more progressive.

Homosexuality is no longer criminal, and no longer considered immoral, let alone a recognized as a "sin". On its face, then, we should praise the decision; Corinthians be damned: love has been patient enough. As for the barista, should she have apologized? Well, no and yes.

Daniel Thomas Mollenkamp  
Yorktown, Virginia