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Not a Moral Issue? Judicial Nonsense in Washington State

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Once again, a judge used sociological analysis as a disguise for his own political and moral judgment, and finally cloaked his decision in the convoluted language of legal evasion. Citing Massachusetts' Goodridge case as a precedent, Judge Hicks joined the chorus calling for legal recognition of same-sex relationships. In a 38-page ruling, Judge Hicks wrote: "The clear intent of the Legislature to limit government approved contracts of marriage to opposite-sex couples is in direct conflict with the constitutional intent to not allow a privilege to one class of a community that is not allowed to the entire community."

Going beyond that argument, Judge Hicks found that homosexuals are a protected class under Washington State's Constitution, a designation previously granted only to groups marked by immutable characteristics such as race or gender. The finding that homosexuals are now a "suspect class" extends considerable legal protections to homosexuals as a group. Just last month, King County Superior Court Judge William Downing had declined to declare homosexuals a protected class, citing precedence in federal law.

A close look at Judge Hicks' written decision reveals the radical nature of this ruling. The judge began by arguing that the state's constitution grants its residents liberties and protections not included in the U.S. Constitution. According to the judge, "Our issue is simple. Do the state or federal Constitutions, as they exist today in amended form, prohibit the Washington Legislature from enacting a valid civil law for all the people of this state that authorizes marriage between adult couples of opposite sex and prohibits marriage between adult couples of the same sex?"

The judge found that the legislature's intent was crystal clear. "It is clear that there is no question of legislative intent. . . . The legislature's intent is to prohibit same-sex marriage as contrary to our civil law, regardless of any other basis, religious or societal, that may condone such civil unions."

In an interesting twist, Judge Hicks cited Washington State's Equal Rights Amendment in making his decision, citing its language to the effect that "equality of rights and responsibility under the law shall not be denied or abridged on account of sex." We should note that, when the Equal Rights Amendment [ERA] was debated at the national level, this is precisely the trajectory its proponents denied would ever appear. Judge Hicks used this provision in order to argue that denying a woman the right to marry another woman, or a man the right to marry another man, was a violation of the Equal Rights Amendment.

Further into his argument, Judge Hicks announced his finding that marriage "is a fundamental right." As a "fundamental right," marriage was thus declared to be the equal property of all citizens, regardless of history and precedent. Next, Judge Hicks cited the Goodridge decision by the Supreme Judicial Court of Massachusetts–the decision that led directly to the legalization of same-sex marriage in that state. "The point that must be addressed is that the government itself creates a civil marriage, and the government is a partner in all civil marriages. Based on their research and reasoning, the Massachusetts Supreme Court, reviewing many of the same cases reviewed here, concluded that the ban on same sex marriage did not meet the 'rational basis' test for either due process or equal protection. They found that the same sex marriage ban 'works a deep and scarring hardship on a very real segment of the community for no rational reason'."

Of course, this redefines "rational basis" without regard for moral argument, constitutional history, or the universal understanding of marriage as a heterosexual institution.

Judge Hicks cited the State's argument that partners in a marriage are "expected to engage in exclusive sexual relations with children the probable result and paternity presumed." With sweeping condescension, Judge Hicks declared this understanding of marriage–the very understanding central to civilization itself–as a "Lilliputian" view, referring to Jonathan Swift's famous satire Gulliver's Travels. Thus labeling the majority of Americans as small-minded, the judge went on to declare Swift's book "an allegorical work that is as important today as when it was written."

The judge cited reproductive technologies such as artificial insemination as means whereby same-sex couples can "bear children" and insisted that same-sex couples can now adopt children with the state's approval. "No one argues that heterosexual couples must have children, even if they are able, or that divorce is not a common experience for children of heterosexual marriages," declared the judge, arguing that heterosexual marriage offers no stable basis for child-rearing or the family.

In a bizarre section, Judge Hicks belittled an amicus brief that had argued that "the state evolves out of and depends for its stability upon stable families," and continued with the assertion that "new generations must be produced for society to perpetuate itself." Rejecting that argument, Judge Hicks went on to editorialize on his personal and unsubstantiated concern about population control. "On the issue of the need to produce children let us leave aside the relationship between unbridled growth of the world's population in relation to the world's resources to sustain the population and let us look narrowly only at home."

Judge Hicks got to the heart of the matter when he single-handedly declared that the word "family" no longer has an objective and defined meaning. "For at least two generations we have understood 'family' as something more than a man mating with a woman to have a child. A single parent is a family. Grandparents raising grandchildren without the help of the parents is a family. Adults giving foster children a home are a family. Same sex couples who adopt children are a family. Opposite sex couples who adopt children are a family. Single parents with children who marry each other bring into being a new family. A childless couple, same sex or opposite sex, can be a family. An older child raising his or her siblings is a family. There are other examples. Clearly, it seems to this court, a same sex couple, especially a same sex couple with adopted children, is a family. Is this the kind of family that the government has an interest in making more stable?"

In this offering of amateur sociological analysis, the judge ignored the fact that virtually every example he cited–other than same-sex relationships–is defined as rooted in the heterosexual structure of marriage and the traditional understanding of parenthood, even if these relationships fall short of the ideal. In the name of equality, Judge Hicks will destroy civilization's most central institution.

Nevertheless, the most bizarre and troubling section of Judge Hicks' decision came in its final pages. Turning the very notion of law on its head, Judge Hicks declared: "For the government this is not a moral issue. It is a legal issue. Though these issues are often the same, they are also quite different. The conscience of the community is not the same as the morality of any particular class. Conscience is what we feel together as one community. Conscience makes us one people. What fails strict scrutiny here is a government approved civil contract for one class of the community not given to another class of the community. Democracy means people with different values living together as one people. What can reconcile our differences is the feeling that with these differences we are still one people. This is the democracy of conscience."

That is the language of legal and moral irrationality. Judge Hicks simply declares, based on his personal assertion, that same-sex marriage is "not a moral issue" for the government. Instead, he insists that this is "a legal issue" alone. Can he possibly be serious in making such a claim?

The strict and artificial separation of law and morality is part and parcel of the modernist experiment and the postmodern worldview. Of course, it is also manifest nonsense. Every statute, indeed every letter of the law is filled with moral meaning and moral significance. A law as simple to understand as a parking regulation comes down to the morality of protecting citizens and allocating the just use of common property. More to the point, a law against murder is not a statute intended to identify murder as a procedural inconvenience, but rather to declare the society's conviction that the taking of innocent human life is wrong and thus immoral.

Of course, Judge Hicks must possess sufficient intelligence to understand the imbecility of his argument. That's why he had to follow his declaration with the awkward explanation that, "Though these issues are often the same, they are also quite different." When a judge or politician declares, "We cannot legislate morality," we can count on the issue at hand to be related to sex and personal behavior–not to murder, embezzlement, or bank fraud.

Capping off this legal atrocity is a corrupted understanding of conscience. According to Judge Hicks, "Conscience is what we feel together as one community." If that is all there is to it, there would have been no abolition of slavery, no civil rights movement, and no higher law than what the current moral opinion of a people will sustain. By that standard, who can question the "conscience" that allowed ordinary German citizens to participate in the death industry of the Holocaust?

This ruling by Judge Richard Hicks adds one more irrefutable piece of evidence to the argument that a Federal Marriage Amendment is absolutely necessary if we are to have any chance of protecting marriage throughout this nation. This tragic decision–available for all to see in written form–is a warning of even worse things to come, if an activist judiciary is not stopped in its tracks.

When a judge, sworn to uphold and interpret the law of the land, addresses an issue like same-sex marriage and declares, "this is not a moral issue," nothing less than civilizational collapse appears fast on the horizon.
