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Mere Moral Opprobrium? Far More than Marriage is on Trial

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Both sides in the federal trial over same-sex marriage have now rested, and the nation awaits the decision of U.S. District Judge Vaughn Walker. Nevertheless, the judge's decision will not put the matter to rest, no matter his ruling. Both sides have pledged, if they lose, to appeal his ruling all the way to the Supreme Court. To that, Michael Lindenberger of *Time Magazine* adds: "What's equally clear now, after nearly three weeks of evidence, is that no matter what happens, the debate over gay marriage will never again be the same."



As Lindenberger argues, the case has finally put the issue of same-sex marriage before the federal courts, setting the stage for a landmark decision, no matter how the judge rules and however the case is finally decided upon appeals. "Both sides see it as a crucial test of whether society can insist that heterosexual unions are worthy of the full sanction of the law in a way that other unions are not," he reports.

Lindenberger also makes this assertion: "For decades, governments at every level have created one set of rules for heterosexuals in America, and another set for its gays and lesbians." This is only partly true, for in reality governments have established "one set of rules" for married heterosexual couples and "another set" for *everyone else*. In other words, same-sex couples are not alone in having been denied a legal right to marry.

The unusual legal team of David Boies and Ted Olson — famous adversaries in the 2000 case, *Bush v. Gore* — made their case against California's "Proposition 8" amendment prohibiting same-sex marriage almost entirely on the argument that opposition to homosexuality is nothing but evidence of moral objections rooted in religious faith. This argument becomes crucial when understood in the context of the 2003 Supreme Court decision in the case *Lawrence v. Texas*, in which the nation's high court ruled that mere "moral opprobrium" is no basis for a denial of any right to homosexuals.

Lindenberger then explains:

For his part, Boies told TIME that the trial has shown that legal discrimination against gays — in particular rules banning their marriage — starts with simple prejudice, in the form of religion-inspired views about the morality of homosexuality itself. "The Southern Baptist Convention describes homosexuality as an 'abomination,'" Boies told TIME, as he prepared for what would be three days of sometimes blistering cross-examinations as the trial wound down. "The Catholic Church calls homosexual activity 'gravely immoral.' Who is kidding whom? These are sincerely held beliefs, to which they are certainly entitled. But no one ought to kid themselves that what is behind [efforts to ban gay marriage] is anything other than a majority imposing its beliefs on other people."

In fact, Boies and Olson made this the central argument of their case against Proposition 8. As Mathew Staver, now dean of the Liberty University School of Law, commented, "What struck me is that the plaintiffs have tried to put Christianity on trial rather than Prop 8."

Then Lindenberger reports this:

The Rev. Albert Mohler, a leading figure in the fight against gay marriage, says that in light of Lawrence, he understands Boies' line of attack. But he told TIME that marriage is different. It is "the central institution of human society." "The problem with that argument is that the current case has to do with marriage, not merely with the right to engage in certain sexual acts," says Mohler, who is the longtime president of the flagship seminary of the Southern Baptist Convention in Louisville, Ky. "There are more than ample grounds to argue that the sustenance of marriage is necessary for the flourishing of human culture. Thus, anything that damages marriage or subverts its place in society is deleterious in its effects. Throughout history, societies have regulated marriage with this danger in mind, recognizing in marriage the privileged status granted to the heterosexual union as the best context for procreation and the raising of children — functions understood to be vital to the society's well-being. The argument put forth by Boies would mean the effective deregulation of marriage, since his arguments already presented in court could be proposed by any number of others, including those representing polygamists."

As this paragraph makes clear, Christians are put in a very strange position in today's postmodern/post-Christian culture. We cannot be unclear or uncomfortable in acknowledging the Bible and the Christian faith as our moral authorities. To shrink from this — or in any sense to be unclear — would amount to treason against our convictions. My understanding of human sexuality, of morality, and of what it even means to be human is drawn from the Bible. As Martin Luther famously declared at the Diet of Worms, if I am convinced that the Bible teaches anything, I am under the glad obligation to receive it as true and obey it as a believer in Christ. In this sense, the historic Christian understanding of homosexual acts as sinful (and of same-sex marriage as inconceivable) is nothing less than faithfulness to the Bible as the Word of God.

At the same time, we also recognize ample reason to support the institution of marriage on other grounds as well. As I told Mr. Lindenberger, it is no accident that all societies throughout history have privileged marriage even as they have defined it as an exclusively heterosexual institution. This includes societies and cultures that are not even remotely Christian, and many that are not even based on a theistic worldview. Confucian cultures of the East, for example, have also defined marriage as inherently and exclusively heterosexual.

If we take Mr. Boies' logic seriously, anyone who comes to any moral issue with any religious conviction is simply ruled unfit for public influence or consideration — no matter what argument he or she might bring. The problems with this are gargantuan and obvious — this would mean that the vast majority of Americans are excluded from any public debate over an institution as central as marriage.

Professor Marc Spindelman of Ohio State University told Lindenberger that, even as many Californians may have been motivated by religious conviction to vote in support of Proposition 8, "not everyone who voted for it did." Will the federal courts now attempt a psychoanalysis of California voters and, eventually, of the American people?

Boies' argument finds its roots in philosophies of public reason such as those proposed by Robert Audi and the late John Rawls. Rawls argued that a liberal society must require the exclusion of all "comprehensive doctrines," by which he meant religious worldviews. Audi argues that public discussion — and certainly any legislative or judicial forum — must require all parties to come to the table with both a secular rationale and a secular motivation. In his words, all parties have an "obligation to abstain from advocacy or support of a law or public policy that restricts human conduct, unless in advocating or supporting it one is sufficiently *motivated* by . . . adequate secular reason."

In other words, Audi argues that it is not enough that all parties come to the table with secular reasons for their proposals. They must also come with a normatively secular motivation. And who, we must ask, will be the judge of those motivations? Once again, on this ground the vast majority of Americans would be excluded from all public decision-making.

David Boies and Ted Olson made their case on just this argument — that the people of California were motivated, at least to some degree, by their religious convictions. Of course, if this logic holds, it would mean the establishment of secularism as the only acceptable faith in postmodern America. Only by denying any religious faith could a citizen "prove" his or her secular motivation.

By any measure, the decision in this case will be momentous — and for reasons that go far beyond the question of same-sex marriage and homosexuality. In this case, far more than marriage is on trial.

I am always glad to hear from readers and listeners. Write me at mail@albertmohler.com. Follow regular updates on Twitter at www.twitter.com/AlbertMohler.

Michael Lindenberg, "[Gay Marriage: Prop 8 Trial Rests, and a Key Ruling Awaits](#)," *TIME*, Thursday, January 28, 2010. I appreciate Mr. Lindenberg's careful reporting on this issue. Readers should review his other articles on the case, [available here at www.time.com](#).

See also:
Robert Audi, *Religious Commitment and Secular Reason* (Cambridge University Press, 2000), page 96.

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