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SAME-SEX MARRIAGE AND POLYGAMY: A NON-TRADITIONAL PAIRING

By David Lake*

I. INTRODUCTION

“Organized chaos” is perhaps the best term to describe the scene. Roughly 12,000 angry–yet peaceful–protestors converged on Los Angeles City Hall in November of 2008, only a few days after voters approved Proposition 8.¹ They brandished signs declaring “No on Hate,” or “No More Mr. Nice Gay.” Passage of the highly controversial proposition officially made homosexual marriage illegal in the State of California. Many voters felt that marriage should only be permitted between one man and one woman, while others believed that such ideology is discriminatory; “I hope that it shows there are a lot more people affected by the choices we make on a ballot,” said Christine Pease, a protestor in Los Angeles.² Although the proposition brought the issue to a head in California, the controversy was anything but new.

In April of that same year, just a few months prior to Proposition 8, a group of women shed tears as they spoke with reporters. The women were part of a polygamist sect in western Texas, and federal authorities raided their religious compound and had taken their children. Photos of crying mothers appeared in the *New York*

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1 Jessica Garrison Corina Knoll, *Prop-8 Opponents Rally Across California to Protest Gay-Marriage Ban*, L.A. TIMES, Nov. 16, 2008, at B1.

2 *Id.*

Times, causing many Americans to wonder if the raid was morally justifiable. “I’m not going to just sit and wait,” said one of the mothers. “I have to do something every day to let them know that I want my children back.”³

The two scenarios may seem disconnected; however, they both display the controversy surrounding different forms of non-traditional marriage. Support for one of these non-traditional forms of marriage may be greater than another, but modern culture’s understanding of “traditional” marriage appears to be changing. This article does not seek to advocate one form of marriage over another, or even to argue the moral correctness of either, but rather to establish the legal relationship between same-sex marriage and polygamy. The inherent characteristics and legal implications of these two forms of non-traditional marriage are similar. It follows, then, that if same-sex marriage is determined to be legal, polygamy should be legalized as well. Likewise, if polygamy is outlawed, same-sex marriage must be also. The two institutions are conjoined, and legal decisions concerning one will likely have ramifications for the other.

II. THE NATURE OF TRADITIONAL VS. NON-TRADITIONAL MARRIAGES

Even within the homosexual community, the connections between polygamy and homosexual marriage are recognized. In July of 2006, an organization called Beyond Marriage issued a statement on rights for the Lesbian-Gay-Bisexual-Transgender (LGBT) community,⁴ which was subsequently signed by several hundred people including university professors, labor union leaders, attor-

3 Kirk Johnson, *Separated from Children, Sect Mothers Share Tears*, N.Y. TIMES, Apr. 16, 2008, available at http://www.nytimes.com/2008/04/16/us/16raid.html?_r=3.

4 *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships* (July 26, 2006), <http://www.beyondmarriage.org/>.

neys, and activists.⁵ The statement outlines the political agenda of the organization, which is essentially to “respond to the full scope of the conservative marriage agenda.”⁶ The treatise declares that there are other family relationships beyond “traditional nuclear families” that are worthy of legal recognition, and that traditional marriages “should not be legally...privileged above all others.”⁷ Among other relationships, the statement notes that “households in which there is more than one conjugal partner” are household relationships worthy and deserving of legal recognition.⁸ Many proponents of same-sex marriage recognize the similarity between polygamous and homosexual marriages and feel that both need to be advocated if either is to be legalized.

To fully comprehend the similarities between polygamy and homosexual marriage, an understanding of how the two differ from traditional marriage is necessary. Marriage, as it is traditionally understood in Western civilization, is a legal union between one man and one woman, in which they form a family by becoming husband and wife. Robert P. George, a professor of politics at Princeton University and prolific author on marriage, delivered a forum address at Brigham Young University on October 28, 2008 entitled, “On the Moral Purposes of Law and Government.”⁹ In the address, George said, “Marriage is a pre-political form of association, what we might call a natural institution. It is not created by law, though law recognizes and regulates it in every culture.”¹⁰ Traditional marriage pre-dates politics and thus, according to George, is natural to the human character.

5 *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships* (Aug 4, 2006), <http://www.beyondmarriage.org/signatories.html>.

6 *Beyond Same-Sex Marriage*, *supra* note 4.

7 *Id.*

8 *Id.*

9 Robert P. George, *On the Moral Purposes of Law and Government* (Oct. 28, 2008), *available at* <http://www.byub.org/talks/Talk.aspx?id=2345>.

10 *Id.*

The union of marriage, George explains, is both emotional and physical. In a marriage, the individuals express affection for one another, as well as “permanence, monogamy, and fidelity.”¹¹ Thus, they become united emotionally. There is also a physical aspect. As George explains, what makes marriage “different from all other forms of friendship and sharing, is the sharing is founded upon bodily communion... Bodily union [is] made possible by the sexual complementarity of man and woman.”¹² By uniting both physically and emotionally, the individuals in a marriage can become “one.”

Unions such as gay marriage and polygamy both seem capable of fulfilling the emotional union required of marriage. Proponents for the legalization of gay marriage argue that love is all that is needed for a marriage, and that homosexuals qualify for legal recognition of marriage rights. When speaking of marriage as an emotional union, George states, “By this definition, two people of the same sex can be emotionally united, but by the same token so can three or five or seven.”¹³ Thus, the emotional connection in marriage (i.e. that of expressing affection, permanence, fidelity, etc.) can be achieved in both homosexual and polygamous marriages.

As noted previously, the physical aspect distinguishes traditional marriage from close friendships and non-traditional marriages. According to George, “bodily communion” differentiates marriage from friendship and sharing. “Two people can unite as a reproductive unit,” George explains, “but that’s not something three people or five people do.”¹⁴ In a traditional marriage, the physical complementarity of husband and wife allow them to fulfill the physical aspect of marriage and potentially form a family. Reproduction is a two-person act, only possible between one man and one woman. Thus, polygamy and gay marriage differ from traditional marriage in that they fail to meet the physical criteria of having the potential to reproduce through bodily communion. Two individuals of the same

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

gender are not physically complementary and do not have the potential to reproduce. Likewise, only two people can be involved in the physical act of reproduction. Consequently, polygamous relationships fail to meet the physical criteria as well.

In order to be a “traditional marriage,” the union must meet both the physical and emotional requirements outlined by George. If a marriage does not fulfill both of these requirements, it is not traditional. The inherent characteristics of same-sex marriage and polygamy are similar, and the two can be considered connected. They both fail to fulfill the physical aspect of traditional marriage because individuals in these marriages are not physically complementary and cannot form a reproductive unit. Proponents of same-sex marriage advocate the idea that an emotional connection is all that is needed for a marriage to be valid, and polygamous marriages fulfill the emotional aspect of marriage as well. Therefore, if such is the case, then polygamy is as viable a form of marriage as is same-sex marriage.

III. THE *REYNOLDS* DECISION: DEFINING TRADITION

In 1878, the U.S. Supreme Court decided that anti-polygamy laws were constitutional, and that polygamy was *not* a viable form of marriage.¹⁵ George Reynolds lived in the Utah Territory and was a member of the Church of Jesus Christ of Latter-day Saints, which, at the time, encouraged polygamous marriages. Polygamy, however, was considered a crime.¹⁶ Feeling that the anti-polygamy laws violated his First Amendment right to freedom of religion, Reynolds appealed his case to the Supreme Court. The Supreme Court decided that the law prohibiting polygamy was, in fact, constitutional. The Court stated that a party’s “religious belief cannot be accepted as a justification of an overt act made criminal by the law of the land.”¹⁷ Although polygamy was part of Reynolds’ religion, he was not justified in breaking the law that criminalized this non-traditional form of marriage.

15 See *Reynolds v. United States*, 98 U.S. 145 (1878).

16 *Id.*

17 *Id.* at 10.

In his opinion, Chief Justice Waite describes part of the reason why the statute prohibiting polygamy was constitutional. He explains,

Polygamy has always been odious among the northern and western nations of Europe...At common law, the second marriage was always void...and from the earliest history of England polygamy has been treated as an offence against society...It may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society.¹⁸

According to the Supreme Court, polygamy has always been seen as an offense in Western civilization, especially in the United States and under English common law. Chief Justice Waite implies that the United States' traditional abhorrence of polygamy derives from the English tradition of the same. Thus, according to *Reynolds v. United States*, laws prohibiting certain forms of marriage because they are non-traditional are perfectly within the realm of the Constitution. Polygamy was traditionally outlawed and "odious," and therefore the court was justified in upholding a law that criminalized it.

Although the law outlawing polygamy was upheld, the *Reynolds* decision presented a dilemma concerning homosexual marriage laws. If laws prohibiting a form of non-traditional marriage, such as polygamy, are constitutional because they are based on tradition, then what does that mean for other forms of non-traditional unions, such as homosexual marriage? As outlined by the previously noted criteria, homosexual marriages do not fit the definition of traditional marriage. *Reynolds v. United States* set a precedent in declaring that laws prohibiting non-traditional marriages are constitutional if they are based on tradition, and the continuation of such ideas has been seen recently in the raid on the aforementioned polygamist compound in Texas. *Reynolds* declared the criminalization of polygamy to be constitutional, and set a precedent that continues today for homosexual marriage as well. Consequently, laws prohibiting homosexual marriage are constitutional as long as the *Reynolds* decision stands. If homosexual marriage is declared to be constitu-

18 *Id.* at 38-39.

tional by the Supreme Court under the right to privacy and the “traditional marriage” argument is voided, then they may also overturn *Reynolds* and legalize polygamy by default. This could be remedied, however, if the court explicitly states that the marriage can only be between two people.

IV. THE DEVELOPMENT OF PRIVACY AND THE EROSION OF *REYNOLDS*

Among the many arguments in favor of same-sex marriage, one of the strongest is the issue of privacy. Supreme Court precedent has established that whatever consenting adults do behind closed doors is protected by the right to privacy.¹⁹ Proponents of same-sex marriage infer the right to marry from the right to have an intimate relationship without state intervention, as established through the development of the right to privacy in court cases such as *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas*. In Justice Scalia’s opinion for *Lawrence v. Texas*, establishing that consenting adults have a right to privacy in their own homes, he states, “Today’s approach to *stare decisis* invites us to overrule an erroneously decided precedent...if...its foundations have been ‘eroded’ by subsequent decisions.”²⁰ Therefore, as the argument for same-sex marriage has been strengthened by the development of privacy rights, *Reynolds v. United States* has been “eroded” away.

Griswold v. Connecticut established that the right to privacy exists in the penumbras of the Bill of Rights,²¹ although it is not specifically enumerated.²² From the *Griswold* decision came the *Roe v. Wade* and *Lawrence v. Texas* decisions. In the opinion of the court on the *Lawrence* case, Justice Kennedy stated, “The most pertinent beginning point [for the *Lawrence* decision] is our decision in *Gris-*

19 *Lawrence v. Texas*, 539 U.S. 558, 517 (2003).

20 *Id.* at 531.

21 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

22 See *id.* at 517. (“[T]he right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights”) (Goldberg, J., concurring).

wold v. Connecticut.²³ Thus, *Griswold* was the starting point for the development of privacy rights that are now making way for the legalization of same-sex marriage.

After *Griswold v. Connecticut* established that the right to privacy was implicit in the Bill of Rights, several other cases began to emerge that defined the extent to which privacy is implied. In December of 1971, the Supreme Court reached a decision on *Roe v. Wade*.²⁴ The *Roe* decision established a woman's right to abort a pregnancy, and laws prohibiting abortions were declared unconstitutional. In delivering the opinion of the Court, Justice Blackmun stated that the Texas laws prohibiting abortion "were unconstitutionally vague and that they abridged [Roe's] right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."²⁵ Thus, the Court reinforced the jurisprudence established in *Griswold* by reiterating that the right to privacy is implicitly found in the Bill of Rights and that the right to privacy includes sexual decisions. In speaking of a woman's right to terminate a pregnancy, Justice Blackmun stated, "Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras."²⁶ Therefore, the Court recognized that the right to privacy includes the right to terminate a pregnancy, and likewise the Bill of Rights protects the rights to "personal, marital, familial, and sexual privacy."²⁷ To emphasize this idea, Justice Blackmun later explained that prior cases establishing the right to privacy "also make it clear that the right has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . [and] family relationships,"²⁸ so the constitutional right to privacy protects sexual and marital choices.

23 *Lawrence*, 539 U.S. at 517.

24 *Roe v. Wade*, 410 U.S. 113 (1973).

25 *Id.* at 158.

26 *Id.* at 163.

27 *Id.*

28 *Id.* at 176.

As the right to privacy has developed through the Supreme Court, so has the argument for same-sex relationships. After *Griswold* and *Roe* established a right to sexual privacy, *Lawrence v. Texas* emerged in the Supreme Court in 2003. In this case, the Court found that a Texas law forbidding “two persons of the same sex to engage in certain intimate sexual conduct” was unconstitutional.²⁹ The Court decided that if the act is consensual, then the government cannot intervene. In declaring the Texas law to be a violation of the right to privacy, the court “placed emphasis on the marriage relation and the protected space of the marital bedroom.”³⁰ According to the Supreme Court, the Constitution shields whatever sexual choices consenting adults make and creates the “marital bedroom” as a private, protected area. In making this decision, the court declared, “Our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”³¹ Thus, consenting adults can make whatever sexual choices they want, regardless of sexual preference. The court decisions and traditions of the past fifty years, essentially beginning with *Griswold v. Connecticut* in 1965, were deemed the most applicable in the case.

In his dissenting opinion, Justice Scalia makes several points about the *Lawrence* decision that, at times, seem to echo the wording of *Reynolds v. United States*. He states,

Our Nation has a longstanding history of laws prohibiting *sodomy in general*—regardless of whether it was performed by same-sex or opposite-sex couples... Proscriptions against that conduct have ancient roots. *Sodomy* was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.³²

29 *Lawrence v. Texas*, 539 U.S. 558, 513 (2003).

30 *Id.* at 517.

31 *Id.* at 538.

32 *Id.* at 537.

Thus, Justice Scalia argues that sodomy has traditionally been prohibited by law. Such laws, he claims, “have ancient roots.” Sodomy was prohibited by English common law, which created a tradition for American laws. All of the original thirteen States had laws against sodomy when the Bill of Rights was ratified. Tradition, Scalia argues, is why sodomy should not be legalized.

If *Lawrence v. Texas* allows for same-gender sexual activity, such as sodomy, in spite of a long-standing tradition of laws against it, then what effect does that potentially have on other non-traditional sexual activities? Justice Scalia recognizes the potential snowball effect that the *Lawrence* decision could have. He says,

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity... Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.³³

If the Supreme Court permits non-traditional sexual and marital activities such as sodomy, which is protected by the right to privacy, then the door may possibly open for other private, sexual acts as well. The same right to privacy that legalized sodomy also extends to “activities relating to marriage,” according to *Roe v. Wade*.³⁴ If the law permits same-sex couples to participate in certain sexual activities, and protects the privacy “of the marital bedroom,”³⁵ then the legalization of same-sex marriage is logically the next step. Justice Scalia recognizes that laws against polygamy and same-sex marriage are called into question by the *Lawrence* decision.

Griswold, *Roe*, and *Lawrence* have all developed the right to marital and sexual privacy, and the development of the right to privacy paves the road for same-sex marriage. With the development of the right to privacy in the marital bedroom, laws concerning traditional marriage have been overruled and redefined. These decisions imply a change from the traditional laws regarding marriage

33 *Id.* at 533.

34 *Roe v. Wade*, 410 U.S. 113, 176 (1973).

35 *Lawrence*, 539 U.S. at 517.

and sex, especially in the case of *Lawrence*. As Justice Scalia notes, *Lawrence v. Texas* was decided in spite of legal tradition. Tradition, however, compels the Supreme Court to declare anti-polygamy laws constitutional in the *Reynolds* case. Consequently, if one form of non-traditional marriage is legalized, what does that mean for *Reynolds v. United States*? As previously stated, Justice Scalia explains that the *Lawrence* decision shows that a previous case can be overruled if “its foundations have been ‘eroded’ by subsequent decisions.”³⁶ The *Griswold*, *Roe*, and *Lawrence* decisions have all eroded the foundations of *Reynolds v. United States* by ruling against tradition. If the privacy cases eventually lead to a legalization of same-sex marriage, then *Reynolds* will be eroded to the point that it will essentially have been overruled. If one form of non-traditional marriage is permitted in spite of long-standing legal tradition, then the other will need to be permitted as well.

V. CANADA: AN EXAMPLE OF THINGS TO COME?

As American society becomes more comfortable with the idea of same-sex marriage, legislation and state court decisions are beginning to favor it. As of March 1, 2010, eleven states have either legalized same-sex marriage or recognized a form of civil union or

domestic partnership.³⁷ How much time will pass until a Supreme Court decision is handed down, and same-sex marriage is deemed constitutional across the country? Once this happens, polygamy laws are likely to follow suit.

This trend is already evident in Canada. Recently, in the case of *Blackmore v. British Columbia*,³⁸ a leader of a polygamous sect was charged with marrying 19 women. According to his lawyer, their defense was based on the fact that Canada legalized same-sex marriage in 2005.³⁹ Blair Suffredine, former provincial lawmaker and Blackmore's attorney in the case, stated, "If (homosexuals) can marry, what is the reason that public policy says one person can't marry more than one person?"⁴⁰ According to the British Columbia Attorney General, this case had the potential to be the first test of Canada's polygamy laws.⁴¹ In September of 2009, this case was dismissed on a technicality concerning the appointment of a special prosecutor, and the court made clear that the case dismissal "[had] nothing to

37 The following states recognize same-sex marriage or some form of civil union or domestic partnership: California: Domestic Partner Registration, Cal. Fam. Code §§ 297 through 299.6 (2009); Connecticut: Civil Union, Conn. Gen. Stat. §§ 46b-38aa through 46b-38pp (2010); Iowa: Marriage; Gender – Age, Iowa Code § 595.2 (2008); Massachusetts: Goodridge v. Dep't of Pub. Health 440 Mass. 309 (2003); Maryland: Valid Marriages, Md. Fam. Law Code Ann. § 2-201 (2010); Maine: Prohibited Marriages; Exceptions, 19-A M.R.S. § 701 (2009); New Hampshire: Civil Union Recognition; Obtaining Legal Status of Marriage, RSA 457:45 through 457:46 (2009); New Jersey: Civil Unions, N.J. Stat. §§ 37:1-28 through 37:1-36 (2010); Oregon: Leave to Attend Criminal Proceeding; Definitions, ORS § 659A.190 (2007); Vermont: Civil Unions, 15 V.S.A. §§ 1201 through 1207 (2010) (Vermont recognizes existing civil unions, but does not allow them to be formed); Washington: State Registered Domestic Partnerships, Rev. Code Wash. (ARCW) §§ 26.60.010 through 26.60.901 (2010).

38 *Blackmore v. British Columbia*, [2009] B.C.J. 1890 (Can.).

39 Jeremy Hainsworth, *Defense for Canada Polygamists Cites Gay Marriage*, ASSOCIATED PRESS, Jan. 21 2009.

40 *Id.*

41 Ben Winslow, *New Charge Filed in Canadian Polygamy Case*, DESERET NEWS, Feb. 7, 2009, at B4.

do with the merits of the alleged offences.” Thus, the court did not make a decision on the polygamy charges, leaving the door open for future interpretation.

Although about 85 percent of Canadians oppose the legalization of polygamy,⁴² Blackmore’s defense was not as far-fetched as many may believe. If people oppose polygamy and support same-sex marriage, their opinion is legally inconsistent. In 2006, Canada’s federal Justice Department issued a report urging lawmakers in Ottawa to legalize polygamy.⁴³ According to the Canadian Press, the study was “intended to provide the Liberal government with ammunition to help defend its same-sex marriage bill,” which was passed in 2005.⁴⁴ Although lawmakers in Canada have not followed the advice of the Justice Department as of yet, Canadian governmental leaders seem to recognize the legal connection between same-sex marriage and polygamy. Clearly, Canada is a sovereign nation distinct from the United States, but it is still a developed, Western, North American nation that shares many of the same traditions and values of the United States. If the legalization of same-sex marriage has opened the door for the decriminalization of polygamy in Canada, who is to say that the United States should be any different? Whether polygamy will be decriminalized in Canada following their legalization of same-sex marriage remains to be seen, but the possibility is there and is already presenting itself.

VI. CONCLUSION

The connection between same-sex marriage and polygamy is an idea that some Americans have yet to consider. Many who have examined it, however, may still dismiss it as a slippery-slope argu-

42 John Ivison, *Polygamy Makes for Strange Political Bedfellows*, NAT’L POST, Mar. 4, 2009, available at <http://network.nationalpost.com/np/blogs/fullcomment/archive/2009/03/04/john-ivison-polygamy-makes-for-strange-political-bedfellows.aspx>.

43 Dean Beeby, *Canada: End Polygamy Ban, Report Urges Ottawa*, CANADIAN PRESS, Jan. 13, 2006, at A10.

44 *Id.*

ment and pay it no heed.⁴⁵ Nonetheless, the connection between the two exists, and the possibility of legalizing both is real. As traditional marriage is redefined in the minds of Americans in favor of same-sex marriage, legal decisions are opening doors for polygamy as well. The argument for same-sex marriage has been strengthened by the development of privacy rights over the last 50 years. As privacy rights, including sexual and marital rights, have been strengthened and redefined, the foundation of *Reynolds v. United States* has eroded away. Thus, as the argument for same-sex marriage has developed, the possibility of legalizing polygamy has become more tangible. It is still possible that the Supreme Court will not permit same-sex marriage, and that they very well may use *Reynolds v. United States* as a precedent. However, if the court decides to legalize same-sex marriage, polygamy ought to, of necessity, be legalized as well. They are twin issues, and any legal decision concerning one will have ramifications for the other.