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Thinking About Polygamy

SANFORD LEVINSON*

“In United States history,” Professor Calhoun begins her paper, “there have been four important bars to civil marriage.”¹ These four, she says, involve marriages between slaves, marriages across racial lines, polygamous marriages, and same-sex marriages. She is, of course, absolutely correct that these *are* “four important bars to civil marriage” that have operated within our history as a nation (or, previously, as colonies of Great Britain). Yet the sentence is subtly misleading if it is taken to mean that these constitute an exhaustive list of “important bars.” Consider, for example, the prohibitions of incestuous marriages and the use of minimum-age requirements to prevent “underage” marriage (which thereby becomes the equivalent of statutory rape).

Perhaps they are excluded from the list because of an assumption that few people actually wish to engage in incestuous or “underage” marriage. This is obviously an empirical, rather than conceptual, question, and the actual evidence, assuming we could easily ascertain it, might be more complicated than one would assume. As to incest, a 2002 report published in *The Journal of Genetic Counseling* noted that “[i]n some parts of the world . . . 20 to 60 percent of all marriages are between

* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School. I am very grateful to Larry Alexander and Steven Smith for both inviting me to the very interesting conference on marriage at the University of San Diego School of Law and being extremely gracious hosts. I am also grateful to the other participants for their consistently interesting and provocative arguments, even (or especially) when I disagreed with them. The general topic, as one can easily predict, is extremely controversial, and all too much public discussion settles for polemic and posturing. None of this was present during the discussion, where strikingly different views were presented with courtesy even if with suitable intensity.

1. Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005).

close biological relatives.”² If we include the marriage of cousins within the definition of incest, then I would be somewhat surprised if incestuous marriages in American history have not been at least as frequent as the number of polygamous marriages even during the heyday of the unreformed Mormon Church,³ not to mention the present practices of those “renegade” Mormons (at least from the perspective of the Church of Jesus Christ of Latter-day Saints) who refuse to accept the 1890 reversal by the LDS of the duty to engage in polygamy.⁴ Similarly, there is no particular reason to believe that marriages involving quite young individuals are so rare as one might hope. Older readers might recall rock star Jerry Lee Lewis’s marriage some years ago to a thirteen-year-old cousin⁵—indeed, since he apparently had not yet divorced his current wife, Lewis’s marriage presumably qualifies as incestuous, bigamous, and underage all at once!—even as younger ones might have read about Mary Kay Letourneau, who as a thirty-three-year-old teacher entered into a sexual relationship with a twelve-year-old male student, whom she married after serving a seven-year prison term for rape.⁶

In part, I think that Professor Calhoun’s list reveals the continuing (and inevitable) power of unexamined background assumptions even as the central thrust of her paper is to challenge certain of these assumptions. Consider in this context the fact that we often refer casually to American politics being based on “universal suffrage,” ignoring, for starters, the tens of millions of children who are not entitled to vote. The reason that *this* exclusion—unlike, say, the exclusion of felons from voting in many states—is almost never thought to challenge the assertion of “universal suffrage” is that “we”⁷ assume that the exclusion is perfectly sensible and that, indeed, any argument to the contrary would be, to say the least, questionable. (“Do you really mean to allow a five-year-old to vote? That’s just crazy!”) It is not that the restriction of suffrage to adults, at

2. See Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y. TIMES, April 4, 2002, at A1.

3. As Ms. Grady writes:

It is not known how many cousins marry or live together. Estimates of marriages between related people, which include first cousins and more distant ones, range from less than 0.1 percent of the general population to 1.5 percent. In the past, small studies have found much higher rates in some areas. A survey in 1942 found 18.7 percent in a small town in Kentucky and a 1980 study found 33 percent in a Mennonite community in Kansas.

Id.

4. See Calhoun, *supra* note 1, at 1029.

5. See Rotten.com, Jerry Lee Lewis, <http://www.rottent.com/library/bio/entertainers/music/jerry-lee-lewis/> (last visited Aug. 19, 2005).

6. *Letourneau Marries Former Student Fualaau: Notorious Pair Weds Following Teacher’s Release from Prison*, MSNBC, May 21, 2005, <http://www.msnbc.msn.com/id/7926717/>.

7. The “scare quotes” are intentional because, inevitably, the existence of the community that makes such judgments can itself become a major bone of contention.

least legally defined, is not important; it is that we cannot take seriously a critique of the exclusion of children. For most, the same would be true regarding the restriction of suffrage to citizens and the concomitant exclusion of long-term resident aliens. “Universal suffrage” is just thought to mean the availability of the vote to adult law-abiding citizens. Those who are in fact excluded are, in some sense, not viewed as part of the relevant universe.

So Professor Calhoun is smuggling a highly normative, rather than merely empirical, claim into her assertion of what counts as an “important” bar to civil marriage. No one, one assumes, would wish to defend prior bans on slave or interracial marriages.⁸ In some ways, her paper is written to those who believe, as I do, that the prohibition of same-sex marriages is no more defensible than those earlier bans, and she asks whether the same legal tolerance should be added to polygamous marriage. But, as noted, she does *not* ask similar questions about incestuous or underage marriage. I assume the reason is that she herself would not credit any argument made by, say, a brother and sister that respect for their autonomy should entitle them to a marriage license. Or she may simply be making a tactical judgment that it would be far too costly to her own political aims to suggest analogies to incestuous marriage. Consider what use social conservatives would make of a frank admission by a proponent of same-sex marriage that the same arguments (especially if based on a strong theory of autonomy) would indeed apply to incest.⁹ It is easier, in every sense, to hope that no one will think of incest.

8. Though, as became clear in the discussions at the conference at which this paper was initially presented, if one views marriage primarily through the lens of “what is good for children” rather than a more libertarian “is there any legitimate reason to prevent adults from acting autonomously in matters of love,” then the arguments against same-sex marriage would seemingly apply to interracial marriage or, for that matter, interreligious marriage, inasmuch as there would certainly be some plausible, albeit disputed, evidence that children in what might be termed “heterogeneous” marriages may have more social difficulties than children from “homogeneous” marriages.

9. Pennsylvania Senator Rick Santorum made just such a connection in a 2003 interview condemning the possibility (which, of course, turned out to be the reality) that the Supreme Court’s would overturn Texas’s laws barring same-sex sodomy. “If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery.” Sean Loughlin, *Two Republicans Criticize Santorum for Remarks About Gays*, CNN, Apr. 24, 2003, <http://www.cnn.com/2003/ALLPOLITICS/04/24/santorum.gays>.

It is useful to recall, in this context, the twists and turns in Justice Blackmun's dissent in *Bowers v. Hardwick*,¹⁰ when he attempted to differentiate the (putatively illegitimate) ban by Georgia on what the majority insisted on calling "homosexual sodomy" and its bans of adult incest and adultery.¹¹ It is, after all, difficult to defend these two bans on anything other than purely "moral" grounds. This is especially the case with adult incest, which can be viewed as a "victimless crime," unlike incest involving children or adultery.

The standard "genetic" argument that is often trotted out with regard to adult incest—children of incestuous parents are more likely to have certain birth defects—is riddled with holes;¹² indeed, I am tempted to describe it simply as bogus. Begin with the fact that it is, in the modern world, extraordinarily under-inclusive if the genuine concern is protecting the gene pool or simply reducing the risk of children born with certain defects. We now live in a world that, for better and worse, allows genetic testing of *all* who wish to get married; if the state truly cares about protecting the gene pool or prospective children, then it could obviously refuse a marriage license to *any* couple whose genetic match is, in the view of the state, suboptimal. I obviously put to one side whether we would tolerate such a move toward state-mandated eugenics. The central point is that one can scarcely limit one's eugenic impulses to the trifling number of incestuous unions as against the far more likely number of "ill-matched" nonrelated couples. The "genetic" argument is also, and just as obviously, over-inclusive with regard to those siblings who might be sterile and thus unable to give birth. The use of the "scientific" argument against incest is, therefore, simply a subterfuge for the "moral" argument that one is ultimately making.

The same is true of adultery. Although adultery can be viewed as a "crime" with a "victim," it can also be viewed, as Justice Blackmun himself suggested, as simply a breach of promise (or contract).¹³ And it is a fundamental truth of our particular legal order that we almost never "punish" people for breaching contracts, even if we allow the victims of a breach to sue for damages. Again, the only plausible rationale for criminalizing adultery is that one is morally offended by that particular breach in a way that one is not morally offended by other breaches of promise; indeed, one may be a fan of theories of "efficient breach" that *encourage* promise-breaking in certain instances,¹⁴ which might even

10. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

11. *Id.* at 209 n.4 (Blackmun, J., dissenting).

12. See Grady, *supra* note 2.

13. See *Bowers*, 478 U.S. at 209 n.4.

14. The theory of "efficient breach" of contract was apparently first articulated by Robert Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*,

extend to countenancing adultery when the adulterer's gains are greater than the cuckolded spouse's losses (and, by stipulation, the errant spouse has compensated the victim, perhaps through a generous divorce settlement). So the problem facing Justice Blackmun, which I dare say he did not solve with flying colors, is to explain why society, acting through the state, can exhibit its moralism with regard to incest and adultery, but not to "homosexual sodomy."¹⁵

Justice White had a different problem in his majority opinion:¹⁶ he had to reassure heterosexuals, who survey data suggest are active and eager participants in oral sex¹⁷ (which usually counts under state law as "sodomy"¹⁸), that they were not at risk of punishment in Georgia (or anywhere else). So he simply rewrote the Georgia statute, which did not in fact differentiate between straights and gays, to apply only to "homosexual sodomy,"¹⁹ with the negative pregnant, for the majority of heterosexual Americans, that their own rights to engage in fellatio and

24 RUTGERS L. REV. 273, 284 (1970). See also Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989).

15. See, e.g., *Bowers*, 478 U.S. at 190.

16. *Id.* at 188.

17. See *Schochet v. State*, 541 A.2d 183, 206 n.3 (Md. App. 1988):

In his first report, *Sexual Behavior in the Human Male* (1948), Alfred Kinsey found that fewer than half of the men interviewed engaged in fellatio or cunnilingus, even during marriage. In the category of highest incidence—married men with 13+ years of education—45.3% performed cunnilingus and 42.7% engaged in fellatio. Five years later, in his *Sexual Behavior in the Human Female*, Kinsey reported that 54% of the married women interviewed had engaged in pre-coital cunnilingus and 49% had engaged in fellatio. See also P. Gebhard and A. Johnson, *The Kinsey Data* (1979). In their 1977 Redbook Report on Female Sexuality, C. Tavriss and S. Sadd found that 93% of wives responding reported having engaged in cunnilingus and 91% had engaged in fellatio. They concluded from this response that, "Today it is clear that if the sexual revolution has occurred anywhere, it is in the practice and acceptance of oral sex. Among people under age twenty-five, it is virtually a universal part of the sexual relationship."

P. Blumsteln and P. Schwartz have reported similar statistics—93% of heterosexual couples had engaged in cunnilingus and 90% had engaged in fellatio. See also W. Masters, V. Johnson, and R. Kolodny, *Human Sexuality* 393 (1985). Nor is this phenomenon confined to the young. E. Brecher reports in *Love, Sex, and Aging* 358–59 (1984), that, among people over 50, 49% of women and 56% of men engaged in cunnilingus and 43% of women and 49% of men engaged in fellatio.

Id.

18. For a listing of sodomy laws, see *Sodomy Laws*, <http://www.sodomylaws.org/usa/usa.htm> (last modified Apr. 30, 2005).

19. See *Bowers*, 478 U.S. at 190.

cunnilingus (and probably even anal sex) were not at risk, even as the state could prohibit similar behavior when engaged in by same-sex couples. Thankfully, *Lawrence*²⁰ brought an end to this foolishness, though Justice Kennedy scarcely did any better than Justice Blackmun in offering a full explanation of the reach (and limits) of the libertarianism that seemingly underlay the opinion.²¹

So what remains clear is that *some* degree of social moralism is constitutionally acceptable even in a liberal constitutional order, though, as a matter of fact, we have no particularly good way of offering a satisfactory theoretical account of what is acceptable. The best that most lawyers can do is to engage in a basically quasi-sociological, Holmesian, reading of the law that predicts judicial activity on the basis of the judges' own likely views about given behaviors. This allows me to say with some confidence that the Court will strike down a given instance of social moralism when it becomes viewed by significant portions of the society, including, especially, elites with whom judges tend to identify, as "oppressive" rather than "constitutive" of a decent society. Thus, it seems extremely probable that the Court will definitely *not*, in any foreseeable future, look kindly on a brother and sister or adult parent and adult child who wish to have sex with one another or, even more certainly, get married to one another, despite the fact that many of us are quite confident (even if some rue rather than applaud) that the Court will, in the not too distant future—say ten to twenty years—find the ban on same-sex marriage to be as objectionable, constitutionally, as the earlier ban on interracial marriage. The task would be considerably more difficult if lawyers were held to the same standards as philosophers and had to present plausible systematic accounts of the lines we draw with regard to what is acceptable or unacceptable.

In any event, it is the obvious political, even if not "philosophical," difference between same-sex and adult-incestuous marriage that, by analogy, offers the best answer to Professor Calhoun's perhaps artfully naïve inquiry as to why proponents of same-sex marriage are not eager to ask, at least in public, "And indeed, why *not* also polygamy?"²² If I were advising gay- and lesbian-rights groups, I would heartily counsel them to distance themselves from the socially marginal groups that today advocate polygamy. There would be little to gain, and possibly much to lose, by embracing the strange practices of decidedly off-putting people from Utah and Arizona as part of the argument on behalf of better treatment for gays and lesbians. But this is, obviously, entirely a

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

21. *See id.* at 562–79.

22. Calhoun, *supra* note 1, at 1027.

political point. It has nothing at all to do with the philosophical and empirical arguments that take up the remainder of her paper.²³

As it happens, I am in substantial agreement with Professor Calhoun that polygamy may have at least enough to be said for it that it should not be banned in contemporary American society, especially given the legal and social toleration today of what some call the “serial polygamy” that is the consequence of the easy availability of “no fault” divorce.²⁴ To be sure, some of the participants at the San Diego conference clearly indicated their unhappiness at this development in American society; they would clearly love to turn the clock back to a time when divorce was, at the very least, difficult, if not, indeed, impossible. But even they recognized that there is simply no possibility, within contemporary America, of any such literally “reactionary” development. For better and, perhaps, worse, we are, as a society, irrevocably committed to privileging individual autonomy over the presumptive social benefits of preserving marriages.

The easiest defense of polygamy, of course, would be based on individual autonomy. If consenting adults wish to live in such a relationship, why ought not the state allow it? Or, to put it in standard constitutional terms, why should it not be a violation of equal protection of the law if Alice, Brad, and Carol are not allowed to purchase the same marriage license that Alice and Brad or Brad and Carol would presumably be allowed to purchase? (Obviously, there is also the possibility that Alice and Carol would like to purchase a license.) What particular interest does the state have in restricting the legal boon of marital status to two persons instead of three (or more)?

One answer sounds in social morality, but, of course, it is just such an answer that is ruled out by many forms of “liberal” theory, which require that the state be neutral among different moral views, at least in the absence of demonstrable harm to third parties.

Much of the discussion in San Diego, especially about same-sex marriage, attempted to deflect attention from the unabashed “moral” argument (that same-sex marriage flouts natural law) by offering a more consequentialist form of argument that attempted to discern harms in the practice. That is, several participants suggested that same-sex marriages

23. *Id.* at 1027–42.

24. *Id.* at 1031 (citing Nancy Rosenblum, *Democratic Sex: Reynolds v. U.S., Sexual Relations, and Community*, in *SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE* 78 (David M. Estlund & Martha C. Nussbaum eds., 1997)).

are bad for children, because there is something very important about being raised by parents of two sexes.²⁵ Not surprisingly, one response was that the evidence is decidedly mixed on this point; it was suggested, for example, that the very worst situation for a child is a household consisting of the birth mother and a live-in boyfriend. Similar arguments were heard, especially with regard to the question of whether a liberal state had any business encouraging the institution of marriage at all, about the presumptive costs to children of being raised by single parents, whether male or female.

Consider, though, another argument made in defense of marriage as a social institution to be encouraged by state policies. Several people suggested, altogether plausibly, that a boon of marriage is precisely the “til death do we part” promise (whether or not it actually describes reality) that makes it more likely than it might otherwise be that our (married) partners will take care of us when we are old and sick. And concomitantly, that we will choose to take care of our ailing partners even if we are in fine form because, after all, we promised to. As someone sailing ever more rapidly into what is euphemistically called one’s “sunset years,” I am not at all disrespectful of such arguments.

The hook, though, is that if one assesses marriage *not* as an idealistic “meeting of two minds” or joinder of “soul mates” and the like, but rather as an institution focused, in the early stages on rearing children, and then later on taking care of ailing partners, then polygamy begins to look better and better. Begin with the children: There is no reason at all why a child who benefits from the presence of two parental caregivers would not benefit even more from the presence of more adults (and half-brothers and half-sisters) that would have their welfare at heart. Even if one is a Darwinist (as were several people in San Diego) and therefore committed to the view that “birth parents” are more likely to be interested in the welfare of their children (that is, their genes) than are other nongenetic contributors to the child, one might still believe that non-birth parents or caregivers, if treated as part of the “family,” will be beneficial rather than detrimental to child welfare (not to mention the often harried parents forced to cope by themselves with the tasks of childrearing). This is, after all, simply a form of the “extended family” argument.

One might argue, of course, that children of polygamous families would suffer a certain social opprobrium, but this has nothing more to commend it than the argument that children should be protected by the

25. Whether there are *only* “two sexes” is beyond the scope of this brief Comment. Though consider the existence of hermaphrodites, transsexuals, and others who fit quite uneasily within the standard, unexamined assumption that there are two-and-only-two bins within which all of us can be sorted.

state from participating in interracial families. The Supreme Court unanimously rejected such an argument in *Palmore v. Sidoti*,²⁶ where the judge below had assigned custody of a teenage child to her father instead of her mother solely because the white mother had entered into a relationship with an African-American.²⁷ This would, said the judge, serve to protect the child from the inevitable social tensions attached to being viewed by outsiders as a member of an interracial household.²⁸ The opinion in *Palmore* is remarkably short²⁹—as is basically true with respect to *Loving v. Virginia*,³⁰ the case unanimously striking down Virginia's antimiscegenation law in 1967³¹—conveying the notion that the Supreme Court saw literally no merit in the argument that the state could in effect honor the bigoted views of many of its citizens by incorporating them into its determination of what is in the “best interests of the child.”³² The best way of understanding *Palmore* is as a declaration that when determining such interests judges must assume, albeit counterfactually, that our society lives up to the demands of our liberal social order. If that is correct with regard to the legitimacy of taking race into account when deciding how children should be raised, then the same argument would seemingly apply with regard to whether a child is in a monogamous or polygamous (or, of course, same-sex) home.

It is with regard to caregiving at the end of life that the arguments for polygamy seem strongest. After all, what we are talking about is a form of social insurance. We are seeking not only financial contributions from the income streams of our mates—those we could get by purchasing an adequate insurance policy—but also a reasonable likelihood that we will be taken care of in our dotage, when we are least likely to be particularly attractive in the overall social marketplace, by someone who actually cares about us and is thus indifferent to the availability of “better” mates in the outside market. It may be true that one's partner in a monogamous marriage is marginally more likely to do that than a partner in a polygamous marriage, though for obvious reasons there is nothing that can count as real data on the point.

26. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

27. *Id.* at 430–31.

28. *Id.* at 431.

29. The entire opinion is only five pages long. *Id.* at 430–34.

30. *Loving v. Virginia*, 388 U.S. 1 (1967). The opinion here is eleven pages long. *Id.* at 2–12.

31. *Id.* at 2, 13.

32. *See Palmore*, 466 U.S. at 433.

But one is also taking a far greater risk by relying only on a single partner. Retirement analysts emphasize the importance of diversifying one's portfolio. Sound "blue chips," such as General Motors, AT&T, TWA, Penn Central, and the like (let alone Enron), might have undetected problems; one should put one's retirement savings into a good index fund. Similarly, if one is interested in being taken care of when one gets ill, a participant in even the most loving monogamous marriage is putting his or her eggs in one decidedly fragile basket. Even putting aside personal "betrayals" of late-marriage divorces, there is always the possibility of accidents and fatal illnesses that remove the anticipated caregiver from the scene. Incidentally, this is certainly true of women, who are, because of differences in life expectancies coupled with the fact that it continues to be the case that most husbands are older than the wives they marry, at far greater risk of being left alone than are their husbands. This obviously suggests that polyandry may make more social sense than polygyny, unless one assumes that the multiple wives would indeed be willing to take care of one another even in the absence of the now-dead husband. If legally recognized polygamy were available, one might easily foresee a relatively large number of "communal marriages" entered into by middle-aged or old-aged persons. Though one should not ignore (or disdain) the likelihood of a sexual element in such marriages, the far more likely explanation would indeed be to make sure that one is less likely to be left alone as one gets older. And, incidentally, one might expect the children of monogamous marriages to be especially approving of such communal marriages if the alternative is that the sick, now alone, parent will show up at their doorstep demanding that the children now provide the care the parent needs.

Professor Calhoun provides a real service by opening up our minds with regard to our conceptualization of marriage-as-a-state-controlled-institution and her suggestion that we ought to be far more pluralistic than we are now with regard to what should count as a legally recognized marriage. I personally find her arguments unanswerable, *unless* one makes a strong argument that there is a transcendent morality regarding the institution of marriage that a liberal state can, and should, recognize. But, of course, this is just to reopen the oldest question about political liberalism, which is the relationship between the public order and conflicting views of how best to lead one's "private" life.