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The Floodgates Open: USA Today Promotes Polygamy

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Jonathan Turley, Shapiro Professor of Public Interest Law at George Washington Law School, is a well-known legal scholar. Indeed, he is one of America's foremost constitutional specialists, whose face became familiar to most Americans through media coverage of the Clinton sex scandals and the former president's impeachment trial. Turley offers a voice of professorial reason, and he has not been closely identified with social activism. Nevertheless, in his article published in USA Today, he presents a forceful case for the legalization of polygamy.

In the background is a case out of Utah which may lead the U.S. Supreme Court to review the right of states to criminalize polygamy. The plaintiff in that case, Tom Green, is a Utah polygamist who has been convicted in Utah, but has now appealed to the Supreme Court, citing the Court's 2003 decision Lawrence v. Texas which struck down laws criminalizing sodomy. As Turley comments, "If the court agrees to take the case, it would be forced to confront a 126-year-old decision allowing states to criminalize polygamy that few would find credible today, even as they reject the practice. And it could be forced to address glaring contradictions created in recent decisions of constitutional law."

As Turley sees it, laws against polygamy run counter to the logic of the constitution and lack credibility in today's context of sexual revolution. "Individuals have a recognized constitutional right to engage in any form of consensual sexual relationship with any number of partners," Turley argues. "Thus, a person can live with multiple partners and even sire children from different partners so long as they do not marry. However, when that same person accepts a legal commitment for those partners 'as a spouse,' we jail them."

The professor's logic makes sense–if we accept his premise that citizens have "a recognized constitutional right" to engage in any form of consensual sex with any number of partners, without respect to gender. As he sees it, criminalizing polygamy is nothing more than a form of national hypocrisy. Since no existing laws criminalize the sexual behavior, the criminalization is directed only at those who would solemnize their sexual relationships by claiming the institution of marriage. As Turley and polygamists see it, "it is simply a matter of unequal treatment under the law."

Beyond all this, Turley sees religious liberty as an underlying issue. "The difference between a polygamist and a follower of an 'alternative lifestyle' is often religion," he explains. And that religion in this case is Mormonism. The Mormon practice of polygamy was controversial from the start, and opposition to polygamy was in part what drove the Mormons to the Utah territory in 1847. Mormon leader Brigham Young, later governor of the Utah territory, taught that Mormons would put their salvation at risk by refusing to accept polygamy. However, the federal government and public opinion were adamantly opposed to polygamy, and the issue became the major obstacle to Utah's acceptance as a state. In 1862, Congress passed the Moral Anti-Bigamy Act, which outlawed polygamy in U.S. territories. The bill was signed into law by President Abraham Lincoln, and the nation waited to see how Mormons would respond. The answer came quickly when in 1874 Brigham Young's personal secretary, a man named George Reynolds, set himself up as defendant

in a test case to contest the constitutionality of the moral act. In 1878, the High Court upheld the act in the case Reynolds v. United States.

In his USA Today article, Professor Turley levels his guns at that 1878 opinion, charging that the court "refused to recognize polygamy as a legitimate religious practice, dismissing it in racist and anti-Mormon terms as 'almost exclusively a feature of the life of Asiatic and African people.'" Later, the court would declare polygamy to be both "a blot on our civilization" and "a return to barbarism."

According to Turley, this is an undeniable violation of the Constitution's free exercise clause. "Given this history and the long religious traditions, it cannot be seriously denied that polygamy is a legitimate religious belief," Turley asserts. "Since polygamy is a criminal offense, polygamists do not seek marriage licenses. However, even living as married can send you to prison. Prosecutors have asked courts to declare a person as married under common law and then convicted them of polygamy."

Turley does not advocate polygamy, insisting that he detests the very concept. "Yet if we yield our impulse and single out one hated minority, the First Amendment becomes little more than hype and we become little more than hypocrites," he urges. "For my part, I would rather have a neighbor with different spouses than a country with different standards for its citizens."

But does the criminalization of polygamy violate the Constitution's free exercise clause? In its 1878 decision, the Supreme Court ruled that it did not. As evidence, the court cited the state of Virginia's adoption of a law criminalizing polygamy after it had passed an act establishing religious freedom and after the state's constitutional convention had sought an amendment to the Constitution of the United States stipulating that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience." Only after adopting these safeguards to religious liberty did Virginia adopt the statute first set down by King James I of England, making polygamy a criminal offense punishable by death.

When Turley dismisses this argument, he is laying the groundwork for arguments to be put before the Court citing religious liberty as the justification for decriminalizing polygamy. In reality, however, laws against polygamy are more likely to be struck down on other grounds–the very grounds used to promote same-sex marriage.

As Stanley Kurtz noted in a seminal article first published in the August 4-11, 2003 edition of The Weekly Standard, "Among the likeliest effects of gay marriage is to take us down a slippery slope to legalized polygamy and 'polyamory' (group marriage). Marriage will be transformed into a variety of relationship contracts, linking two, three, or more individuals (however weakly and temporarily) in every conceivable combination of male and female."

Kurtz is indisputably correct in this assessment, but same-sex marriage advocates routinely dismiss such claims as scare language and reckless hyperbole. Kurtz dismisses their evasion. "The bottom of this slope is visible from where we stand. Advocacy of legalized polygamy is growing. A network of grass-roots organizations seeking legal recognition for group marriage already exists. The cause of legalized group marriage is championed by a powerful faction of family law specialists. Influential legal bodies in both the United States and Canada have presented radical programs of marital reform. Some of these quasi-governmental proposals go so far as to suggest the abolition of marriage. The ideas behind this movement have already achieved surprising influence with a prominent American politician."

In 2000, after the state of Vermont had adopted legislation allowing civil unions, Matt Coles of the American Civil Liberties Union's Lesbian and Gay Rights Project, asserted: "I think the idea that there is some kind of slippery slope [to polygamy] is silly." Nevertheless, the ACLU has intervened in Tom Green's case and has declared its support for the decriminalization of all "laws prohibiting or penalizing the practice of plural marriage." If Matt Coles can't see the slippery slope, it is because he is already standing at its bottom.

Jonathan Turley's article may serve as a catalyst for future legal developments, but Stanley Kurtz's article in The Weekly Standard offers a powerful and persuasive refutation of the pro-polygamist arguments. Kurtz reviews developments at the level of popular culture, noticing the emergence of polygamist and polyamorist groups and the publication of Loving More, which he describes as "the flagship magazine of the polyamory movement."

More frightening still is the survey Kurtz provides of developments among family law radicals. As he notes, "State-

sanctioned polyamory is now the cutting-edge issue among scholars of family law." Kurtz provides ample documentation for this claim, demonstrating beyond doubt that the real agenda behind calls for decriminalizing polygamy is the destruction of marriage as our society's normative institution. Martha Fineman, Professor of Law at Cornell University, has argued for the elimination of marriage as a legal category. University of Utah law professor Martha Ertman, described by Kurtz as "standing on the cutting edge of family law," argues for eliminating all distinctions between traditional marriage and polyamory, rendering the issue "morally neutral." Martha Minow, professor at the Harvard Law School, wants a complete transformation of family law. As Kurtz explains, "Minow argues that families need to be radically redefined, putting blood ties and traditional legal arrangements aside and attending instead to the functional realities of new family configurations." Kurtz notes that in their 2002 book Joined at the Heart, former vice president Al Gore and his wife Tipper used Minow's definition of a family: It is any group "joined at the heart" regardless of relationship established by blood or law.

We get the point. If marriage is not culturally understood and legally defined as a relationship between a man and a woman, it can and will mean anything. Those who claim that marriage can be redefined to allow same-sex relationships without destroying the institution itself are lying to themselves and to the public.

Jonathan Turley's article serves as a signal of where the debate over marriage is going. Once again, the courts stand at the center of this cultural conflict. All this goes to show once again that we will either define marriage for the courts, or the courts will define marriage for us. Can there be any doubt where this is headed?
