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Will Same-Sex Marriage Lead to Polygamy?

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Wednesday, April 14, 2004

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That fact is underlined by Richard A. Posner in a recent article published in The New Republic. Posner is a judge sitting on the United States Court of Appeals for the Seventh Circuit, and he also serves as senior lecturer at the University of Chicago Law School. He is one of the nation's most prolific and influential legal scholars, and his opinion on this question cannot be dismissed lightly.

Furthermore, Posner is, generally speaking, a supporter of same-sex marriage. A legal pragmatist, he suggests that the nation should experiment with same-sex marriage in order to see if the legalization of homosexual relationships "works." Posner accuses the legal advocates of same-sex marriage of ignoring the clear implications of their own argument.

Posner's analysis comes in the context of his review of Evan Gerstmann's new book, Same-Sex Marriage and the Constitution. Gerstmann is no lightweight. His book is considerable both in size and in influence. Published by Cambridge University Press, it carries academic clout as well.

Posner criticizes Gerstmann for basing his case for same-sex marriage on the argument that marriage is a "fundamental right." Such rights cannot be taken away by the state without a compelling reason, and Gerstmann argues that the state does not have any compelling reason to deny same-sex couples the rights of marriage. As Posner explains, "When Gerstmann describes the right to marry as fundamental, he means that any person who wants a marriage license has a strong presumptive right to it regardless of how the person defines marriage." When applied to same-sex marriage, this appears to bolster Gerstmann's case. If marriage is indeed a "fundamental right," the state must offer a compelling argument against the right of homosexuals to marry, and Gerstmann alleges that the government has made no such case.

Posner then leaps upon the great legal crevice created by Gerstmann's argument. When Gerstmann argues that marriage is a fundamental right, asserting that same-sex couples cannot be denied this right, Posner understands this logic to go far beyond Gerstmann's argument. Once marriage is defined as a fundamental right, all persons must be granted that right unless the state offers a genuinely compelling argument that would support its denial. As Posner argues, "He might be a man who wanted to marry his sister (both being sterile), or a very mature twelve-year-old boy (say, a freshman at MIT) who wanted to marry his twelve-year-old girlfriend (say, a freshman at Harvard), or a married man who wanted additional wives so that they might help out his current wife around the house, or a busy professional woman who wanted two husbands, the better to take care of the house and the kids, or a homosexual male who wanted three male spouses." If marriage is a fundamental right, Posner explains, then it is a fundamental right for everyone–not only for heterosexual and

homosexual couples.

"If the right to marry, irrespective of the conventional limitations on number, object, and so on, is fundamental in the portentous sense of putting on the state the burden of showing that the recognition of the right in the particular case would work some serious social harm," Posner instructs, "then it is doubtful that a marriage license could be refused in any of the cases that I have described. For what harm does polygamy do, exactly, and what harm does incest do when there is no possibility of children? Gerstmann's approach thus has implications far beyond the question of homosexual marriage as it is ordinarily understood."

Gerstmann is at least partially aware of the problem, Posner asserts, but he cannot resolve it. "When he attempts to distinguish polygamy from homosexual marriage by saying that denying a right to marry several women does not deny the right to marry the person of your choice, he overlooks the fact that woman who would like to be a polygamist's second wife is denied the right to marry the person of her choice." In addressing this question, Gerstmann argues that if a man were allowed to have two wives, "There could be no objection to his being allowed to have a thousand wives." Posner affirms that Gerstmann is here correct–but makes the very point he seeks to deny. If marriage is claimed as a fundamental right, it is a right that cannot be taken away from any proposed marital arrangement that cannot be proved to bring social harm.

This argument is not just a matter of legal technicalities. This is no inconsequential debate between ivory tower academics. The question is a matter of serious and consequential legal and moral significance. Posner, who is no friend of traditional marriage, at least in his legal reasoning, understands that Gerstmann's argument in favor of marriage as a fundamental right would lead to a complete breakdown of the whole structure of laws regulating marriage and human relationships. Gerstmann, according to Posner, simply will not see the obvious implications of his own argument. Since the American people would almost surely reject same-sex marriage by a landslide if this point were understood, Gerstmann obviously hides the implications of his own argument from his reader–and perhaps even from himself.

Gerstmann argues that incestuous marriages (even when the partners are sterile) should be denied legal status because this could lead to the exploitation of children. Posner allows that this is indeed a reason for forbidding a father to marry his daughter, but the argument does not hold water if it is extended to forbidding a marriage between siblings, he says. Gerstmann's approach opens the door for an endless array of contested questions about potential patterns of intimate relations. Posner comments: "It is a strange implication of Gerstmann's approach that if a man wanted to marry his sterile sister, his eighty-year-old grandmother, three other women, two men, and his Chihuahua, a court would have to turn summersaults to come up with a 'compelling state interest' that would forbid these matches."

Posner's article is helpful as it destroys Gerstmann's legal thesis with devastating power. At the same time, Posner's own position is grossly inadequate. He sets the standard of "compelling state interest" so high that no argument is likely to determine that status. He seems to allow that same-sex marriage would certainly be legalized if marriage is recognized as a fundamental right. Actually, the deleterious and disastrous results of displacing and destroying heterosexual marriage as the centerpiece of human civilization should be without question a "compelling state interest." Defenders of traditional marriage can point to a general pattern of social breakdown, inevitable trauma to children, an innumerable other social ills in order to make this case. The fact that Posner is not willing to make the case does no mean that the case cannot be made.

At the same time, we are in Posner's debt for his incisive critique of Gerstmann's argument–an argument that has become the mainstay of the homosexual movement. We should also note Posner's analysis of recent court decision on the issue of homosexuality, especially the Lawrence v. Texas decision handed down last year by the U.S. Supreme Court. In nullifying sodomy laws and declaring a basic right to homosexual practices, the Supreme Court unabashedly engaged in social engineering. Posner sees no alternative to this, and calls upon jurists to be honest that this is exactly what they are doing.

"Judges like to pretend that their decisions are dictated by 'logic,' or by an authoritative text or precedent," Posner explains, "because it downplays the element of judicial discretion, which worries people." According to Posner, "The pretense wears particularly thin in constitutional cases about marriage and sex, because the Constitution does not say anything about these subjects, and the framers of the Constitution, and of the major amendments, in particular the Fourteenth Amendment, which is the principal source of constitutional rights against the states, were not thinking about marriage, sex, homosexuality, or related topics when they drafted these founding documents."

That assessment is profoundly accurate, and Posner simply explains that the Supreme Court's decisions in sex-related matters (including Roe v. Wade) are all "political" decisions, in the sense that they are "motivated by values not dictated by the orthodoxed materials of judicial decision-making." As Posner admits, "Precedent and analogy operate as fig leaves in such cases."

A fig leaf serves as a good description of the legal rational behind the U.S. Supreme Court's decisions in so many matters related to human sexuality and the sanctity of human life. Eagerly engaged in social engineering, justices have claimed a legal basis for their arguments, but Posner sees through this pretense and calls upon judges to admit that they are doing politics form the bench.

Defenders of traditional marriage would do well to pay attention to Judge Richard Posner's analysis. His explanation of fig leaves and fundamental rights is both incisive and important–and his status as a legal scholar cannot be discounted. If marriage no longer means uniting a man and a woman, it can mean virtually anything–and will.
