

WITH THIS RING

BY KATRIN BRIDGET SNOW

On December 17, 1990, Ninia Baehr and Genora Dancel walked into the Department of Health on the island of Oahu to apply for a marriage license. They were denied, and the lawsuit they filed led to a dramatic ruling from the Hawaii Supreme Court, and fueled a nationwide debate about the meaning and purpose of marriage.

The Hawaii Supreme Court is the first court in the world to rule that banning same-gender marriage is sex discrimination. But it isn't the first time courts have grappled with or challenged widely held beliefs about marriage. Twice in America's recent history the nation has fought bitterly over its definition of marriage. In 1967 the U.S. Supreme Court overturned miscegenation laws, which still banned interracial marriage in 16 states. Nearly a century earlier the Supreme Court upheld a ban on polygamy in the midst of a raging battle between the federal government and poly-gamist Mormons. Both of these battles over marriage taboos left a legal and social legacy that penetrates today's fight over same-gender marriage.

Polygamy:

When the Mormons settled in the Salt Lake Valley in 1846 polygamy was not an important church practice. But it became one. Mormon founder Joseph Smith taught that polygamy was related to one of the religion's core theological concepts, called the restoration of all things. "The idea was that Mormonism was a return to Old Testament practices," says historian Michael Quinn, "and you had a real literalism involved in that concept of the restoration of all things that had been preached and practiced." Quinn, who writes extensively on the Mormon Church, says that Mormons believe they are descended from the 12 tribes of Israel. They see themselves as a new Hebrew people in America, and believe they are restoring an ancient priesthood. A number of Old Testament figures were polygamous, notably David, who slew Goliath, and King Solomon, who alone had 700 wives. From these examples, says Quinn, it wasn't much of a leap to establish polygamy.

In 1852 the church announced its practice of polygamy to the world, and in Utah, says Quinn, polygamy was legally protected by the laws of the territory. The territorial government in 1851, the same year it authorized slavery, authorized the Mormon Church to perform marriages consistent with its doctrines. "It never mentioned polygamy, but it legalized marriages performed by the Mormon Church consistent with the doctrines of that church," says Quinn. "That was a very clever way of legalizing polygamy and that infuriated the Republican establishment in Washington, D.C."

Rapidly polygamy became the symbol of a budding theocracy. To break the theocracy the federal government went after polygamy. Historian Richard Van Wagoner says federal authorities knew they could use polygamy to turn the nation against the Mormon people. "They realized that if you want to get the whole country to train its guns on Mormon political power, what you wanted to do was stir them up because they hate polygamy," says Van Wagoner, author of *Mormon Polygamy: A History*. "So you get people all stirred up on that and then you focus your guns on the church. They knew polygamy would be a tremendous amount of ammunition to oppose those people and break their political back."

In the latter half of the 1800s Congress passed a series of anti-polygamy laws amid vicious condemnation. "As to polygamy, I charge it to be a crying evil," denounced Illinois Representative John McClelland, arguing for a federal ban on polygamy in 1860. "Sapping not only the physical constitutions of the people practicing it, dwarfing their physical proportions and emasculating their energies, but at the same time perverting the social virtues and vitiating the morals of its victims. It is a scarlet whore...and deserves to be blotted out, if it be practicable to do so."

The heated rhetoric continued and the laws became even more severe. Arguing before Congress in 1870, in favor of a law that would strip Mormons of the right to vote and hold office, Republican Representative Shelby Cullom of Illinois decried, "Polygamy has gone hand in hand with murder, idolatry, and every secret abomination. Misery, wretchedness, and woe have always marked its path....It is an institution founded in the lustful and unbridled passions of men, devised by Satan himself to destroy purity and authorize whoredom."

The federal guns of Fort Douglas situated in the foothills of the Wasatch Mountains were trained not on Indian villages but on the Salt Lake settlers. Congress, battling the Mormons' political power, passed laws eliminating basic civil rights for Mormon people. "The Mormon Church was stripped one by one of virtually all of its civil rights and civil liberties: the right to emigrate, the right to vote, the right to serve on juries," says Ed Firmage, a law professor at the University of Utah and author of *Zion in the Courts*. "They stripped mates of the right not to give evidence against themselves and women went to jail rather than give evidence against their husbands for being polygamists. They denied the right to hold office, though the Constitution specifically prohibits any religious test for holding office."

Meanwhile the rest of the country weighed in. The language used to condemn polygamy, both in Congress and across the country, was threaded with religious references as is the language used to condemn homosexuality today. And there are other social parallels between these two battles to preserve traditional marriage. "Women's organizations (and) evangelical Protestant organizations throughout America joined to condemn the Mormon practice of polygamy as a threat to the institution of marriage in America," says Quinn. "And Mormons in editorials and sermons made this argument: it's ridiculous for you to argue that the practice of polygamy by a few people is going to somehow undermine the practice of marriage or the institution of marriage nationally, but national hysteria built behind that claim."

Not all the anti-Mormon laws held up in court, but many did. Historians say the nationwide persecution drew Mormon people together to defend a practice that nearly half of married

Mormons engaged in. But unlike the proponents of same-gender marriage the defenders of polygamy often didn't want to be in these marriages. Richard Van Wagoner says the vast majority of Mormons who engaged polygamy were not in it for love.

"They believed God required that of them to attain the greatest degree of glory in heaven," says Van Wagoner. "No doubt some entered into it for sexual purposes, but the vast majority believed it was commanded of them. And there were periods of time when a man could not hold a position of leadership in the church unless he had two wives. A lot of men only took two, as the minimum required. Sometimes they took a sister of the first wife to be more compatible."

Eventually the government even threatened to seize the Mormon temples, the only locations where Mormons can perform certain holy rituals. Under this threat then-church president Wilford Woodruff in 1890 announced to the world that the Mormon Church had abandoned polygamy and declared that his advice to church members would henceforth be to refrain from any marriage that violate the laws of the land.

It had been a blow to Mormon leaders when they lost the case of George Reynolds before the U.S. Supreme Court, the case they expected would turn the tide in their favor. In its ruling the court considered and rejected the claim that polygamy was protected under Constitutional guarantees of the free exercise of religion. Firmage says the Supreme Court's ruling undermined the free exercise clause for years. "The *Reynolds* rationale, not necessarily the conclusion that polygamy was beyond the pale, but the way they reached that conclusion really read 'exercise' out of the free exercise clause, he says. "Because the court basically said you can believe what you want but you can't practice what you want."

Moreover, says Firmage, the court decided polygamy could not be a protected religious practice because polygamy was illegal, and it was odious, but it didn't have any evidence showing why polygamy should be condemned. "There was never any data offered to show why polygamy was bad, what it did to the body politic," says Firmage. "Did morals go to hell on wheels? Was it a licentious practice? Were there more robberies, rapes, murders, larcenies, general lack of moral tone in Utah? All of the observers that came out to Utah, non-Mormon observers, reported to the contrary."

In the aftermath of *Reynolds* a series of religious freedom cases driven by groups like the Amish forced a more severe test upon states wishing to constrict the free exercise of religion, so that today *Reynolds* might come out differently. "It would have to stand on an entirely different basis," says Firmage. "Basically saying: government you must prove compelling interest and necessary means to ban polygamy. I don't think that test could honestly be met."

Legal scholars differ on that point. Some say polygamous marriages could be banned if it's shown that they compromise women's equality. But opponents of same-sex marriage worry Firmage might be right. Lynn Wardle is a law professor at Brigham Young University and has been advising the state of Hawaii on its case against same-gender marriage. Wardle says if you change the definition of marriage and the legal test becomes: "These people wish to be married, what compelling interest can the state show to prevent it?" Then Wardle asks, where will it stop? "How do you distinguish incest? How do you distinguish the man who says, 'I want to marry my sister?' Or the father who says, 'I'm 45, my daughter is 25, we want to marry

each other, she's an adult, I'm an adult, what's to stop us?' Or polygamous relationships, or child marriages?"

Proponents of same-gender marriage say there are compelling interests that could be used to bar incestual child marriages, but they are arguing that the burden of banning a marriage between two consenting adults should rest with the state.

Polygamy, because it was argued on free exercise grounds, leaves no legal legacy for same-gender marriages. The strongest parallels between the debates over polygamy and same-gender marriage are social: the language of condemnation and the fear of undermining the institution of marriage. The strongest legal precedents influencing same-gender marriage are found in a later America, the America of 1967, the year the Supreme Court legalized interracial marriage.

Miscegenation

America in the 1960s was a hostile place for interracial couples. Jonathan Zimmerman is an assistant professor of history at New York University and has studied interracial couples. He says physical violence was a constant danger. "I found an interesting memoir from a black journalist, 1967-68, who was dating a white woman," says Zimmerman, "where he points out that when he's with her, he always makes sure he has a full tank of gas because he's absolutely sure that if he were to break down with her in a white neighborhood, that at least he would be killed."

Zimmerman calls interracial marriage the final psychic frontier for integration. It used to be more commonly called miscegenation, which some understood to mean more than a mixing of the races. It was a mixing of kinds, or species, considered to be unnatural. And this was reflected in court rulings upholding miscegenation laws.

"Equality of the races does not exist and never can," intoned the Georgia Supreme Court in 1869. "From the tallest archangel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity."

Less than two generations ago those views still permeated America's courts: "Almighty God created the races white, black, yellow, Malay, and red...and He placed them on separate continents. And but for the interference with His arrangement there would be no cause for such marriages. The fact that He separated the races He did not intend for them to mix."

That was the Virginia court in 1959, and the case was *Loving vs Virginia*, the landmark case that would legalize interracial marriage and set the stage for the Hawaii Supreme Court in 1993 to question the legality of its ban on same-gender marriage. By the time the U.S. Supreme Court ruled on *Loving* in 1967 16 states still banned interracial marriage. In its defense before the Supreme Court, Virginia used an argument that had worked, until then. "Virginia was arguing, 'Look, our law isn't racist because we say a white can't marry a black, and a black can't marry a white, so we're not treating them differently,'" says law professor Lynn Wardle. "And the court brushed that aside and said, nonsense. It said, this is White Supremacy, racism."

The court rejected the idea that because the law applied equally to whites and blacks it was not racial discrimination. In the language of the court, race is a suspect classification. That means if the law treats people differently because of their race, it must have a good reason for doing so. The Hawaii Supreme Court in 1993 relied directly on the *Loving* court's analysis.

"Today in Hawaii a woman and a woman cannot get married, even though they are in the same situation as a man and a woman, and the only variable there is sex, or gender," says William Eskridge, a law professor at Georgetown University and author of *The Case for Same-Sex Marriage*. "But sex and gender under the Hawaii Constitution, and under the U.S. Constitution is also a kind of suspect classification. So the argument is not that race and sex are the same. The argument instead is that race and sex are both suspicious classifications and when the state uses them to exclude citizens from a certain right, the state has to come up with a justification that is not based on the unpopularity of a certain group or some kind of irrational, unfounded prejudice. And that's a very compelling similarity."

Wardle says the *Loving* analogy is an appealing rhetorical parallel, but wrong. "Race is wholly irrelevant to any legitimate purpose the state has with regard to regulating marriage," he says. "You cannot say the same regarding gender. Gender goes to the core of the reason the state regulates marriage."

Not long ago, Eskridge and others like to point out, race was considered fundamental to the reasons the state regulates marriage. Eskridge says Wardle's notions, and others like them, are based on religious views of marriage which any religion should always have the right to defend, but that some religions do marry same-gender couples and the state should be neutral in its treatment of the marriage license. Eskridge believes the time has come for the courts to decide that, like race, gender is not relevant to the reasons the state regulates marriage.

Lyle Wardle believes gender will always be relevant. "Marriage is a man and a woman with a life commitment," he says. "The commitment of two persons of the same gender to each other just doesn't fall within this historical concept of marriage, which is the cornerstone of families and which is the cornerstone of society."

The Hawaii Supreme Court did find that, historically and today, marriage is a relationship between a man and a woman. But it also said that is discrimination based on sex, and so left open the question of whether legal marriage could be a relationship between two men or two women. On September 10 the state of Hawaii argued Lynn Wardle's point: that gender goes to the core of the reasons the state regulates marriage and that the state of Hawaii has a compelling interest in banning same-sex marriage.

