POLITICAL SCIENCE 352 MOOT COURT PAPER

Holm v. Utah

The ACLU's amicus curiae brief in support of the petitioner Rodney Hans Holm

IN THE

Supreme Court of the United States

SPRING TERM, 2009

RODNEY HANS HOLM,

Petitioner,

-v-

STATE OF UTAH,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UTAH SUPREME COURT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PETITIONER

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TABLE OF AUTHORITIES

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is nationwide organization with over 300,000 members, that is devoted to protecting and advancing the freedom and liberty that is guaranteed to citizens of the United States by the Constitution. This case, *Holm v. Utah*, brings about questions that relate to the proper limits of state power in relation to personal liberty. It is of the opinion of the ACLU that polygamy, the principle issue in this case, should not be prohibited by the state, as this would be an encroachment into the realm of personal liberty, not sanctioned by the Constitution. The ACLU has long held the stance that "intimacy" of both sexual and intellectual nature, so long as it is consensual, is not in the territory of behavior that the government has a legitimate right to be involved in. In consistent with this view the ACLU has argued in briefs before the court in cases such as *Lawrence v. Texas* (4), which ruled that citizens have the right of privacy in matters of sexual intimacy, and it is not in the government's realm of jurisdiction to regulate such action. With *Lawrence v. Texas* currently precedent, the ACLU argues that the same principles of the right of privacy in sexual intimacy that are acknowledged in *Lawrence v. Texas*, should without obscurity translate to the issue of intimacy in the intellectual or marital sense. With that being said, we would be negligent in our duty of preserving freedom, to let this case go by and not take a stand for liberty. This brief will center on the principle of privacy in intimate matters.

STATEMENT OF THE CASE

According to the decision in *State v. Holm* (9), the petitioner, Rodney Hans Holm, a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints, legally married Suzie Stubbs in 1986. After this marriage, while still legally married to Susie Stubbs, he participated in

a marriage ceremony to Wendy Holm. After this, when Holm was thirty two, he took part in another marriage ceremony to Ruth Stubbs, the sister of Susie Stubbs. Ruth Stubbs then took up residence with Holm, where both Susie Stubbs and Wendy Holm resided, along with their children. Ruth eventually conceived two children with Holm; her second child was born three month after she turned eighteen. After these events had taken place, Holm was arrested on the charge of three counts of unlawful sexual conduct with a minor in violation of Utah Code section 76-5-401.2 (2003), one of which was later dropped, and one count of bigamy, in violation of Utah Code section 76-7-101 (2003), in spite of Holm's claim of the constitutional invalidity of the bigamy statute. In the jury trial Holm was convicted of all three charges and sentenced to up to five years in prison and a $3000 fine. Later this was exchanged for one year in jail with work release, and two hundred hours of community service. Holm then appealed all charges to the Utah Court of Appeals, which upheld all the charges, then to the Utah Supreme Court, which also upheld all the charges and finally to the Supreme Court, where it was granted Cert. [All of the above information was taken from citation 9].

SUMMARY OF ARGUMENT

As it stands now the state of Utah has a law in place that bans polygamy (11). The element of the law that is at issue in *Holm v. Utah* is the part that prohibits unlicensed marriage. Utah Code section 76-7-101 provides that: "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person" (11). This law states that it is illegal to marry or cohabit with another person, if already married. However, the "purports to marry" prong of Utah's bigamy statute does not define what marriage is, whether it is just

licensed marriage or whether it also extends to private religious institutions of marriage. The Utah Supreme Court ruled that it recognizes both, and that it was not unconstitutionally vague (9), a ruling that the ACLU does not believe to be just. This means that Holm will be tried for participating in a private unlicensed marriage ceremony that does not have legal administrative implications.

The foremost reasons for our disagreement are that 1) the United States was founded on and has a history of personal freedom from government intrusion, 2) that the United States Supreme Court has established a line of case precedents that strongly support the right of privacy in the home, 3) the arguments that are presented by the government do not provide a compelling reason to prohibit that practice of polygamy, and 4) that the abuses that are associated with polygamy are not caused by polygamy, they are separate actions that can be dealt with through separate legislation.

What makes this case especially significant is the Supreme Court's decision in *Lawrence v. Texas*. The precedent set in the this case cemented the notion that consensual sexual intimacy in the privacy of ones home, is not an area that the government has the right to exercise control over, the Constitution grants us freedom from government intrusion in this realm (4). Although there were those on the court that stated that this decision did not carry over to any other area such as polygamy, the logic outlined points directly towards it, and it would be inconsistent to rule against polygamy in this case.

The overwhelming evidence that is outlined by the very history of our nation, coupled with precedent set by the Supreme Court, leave no other option but to rule in favor of Holm. To do otherwise would require the Court to ignore the principles of freedom that are historic to this country, and overrule past Supreme Court precedent.

ARGUMENT

Government Regulation in Unlicensed Marriage is Unconstitutional

A. THE HISTORICAL PRINCIPLES OF FREEDOM THAT HAVE BEEN ESTABLISHED IN THE CONSTITUTION BY OUR FOUNDERS SUPPORT THE ARGUMENT THAT THE STATE SHOULD NOT REGULATE HOW MARRIAGES SHOULD BE ARRANGED.

1. It is hard to begin a section on the historical principles of American freedom, when there are so many areas where we enjoy such freedom. At the very founding of our nation we were motivated by the oppression of the British government, the excessive taxes on every item imaginable, the intrusion into the colonists private lives by forcing them to quarter soldiers, and even the massacre of innocent civilians (18). Although the issues stated above are in many ways not seemingly analogous to the polygamy issue that we are facing today, in some respects they are. The reason being is that those issues became the motivation for our founders to establish a government that respected the rights of its citizens in a very broad sense, and the blueprint for those rights brought along more than just freedom from excessive taxes.

The founders intended for it to be a government that for the most part stayed out of people's personal business. They where adamant about protecting everybody's choice as to what religion or creed they wished to follow, and also protecting personal belief (19). They established the provision in the 4th amendment that requires the federal government to have

reasonable cause, and obtain a warrant before officials can enter private residences (20), and in so doing instituted a basic value for privacy in the home, personal belief, and association.

2. Behind all of these established rights is a common respect for the authority of the individual in his or her personal domain. This "domain" that I speak of, is the area of belief and action that does not harm anyone other than the individual. Based on the writings of a number of the founders, it has been all but concluded that many of the principles in our constitution came out of the writings of John Locke, especially his *Second Treatise on Civil Government* (13). Locke argued the notion that all people have "natural" and "inherent" rights, and that in a civil government we only give up those rights that we agree on that will facilitate a peaceful society. All other rights are retained by the people, those rights being the ones that when acted upon, do not cause harm to others (17). It was from this view of the "social contract" form of government that the founders drew up our constitution. The parts of the Constitution that this principle is most visibly laid out are the 9th and the 10th amendments. The 9th states that: "The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (21), this acknowledges that there are other rights other rights not mentioned in the first eight amendments that are just as sacred and protected. The 10" amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, **or to the people**" (22). This clearly lays out the principle that the governments' power extends ONLY to those areas that the people consent to, and as far as state governments are concerned, the 14th amendment guarantees liberty and the equal protection of the law to citizens of every state (23), and the Supreme Court has a long history of applying the rights in the bill of rights to the state level, as we will see throughout this brief.

Based on the priority in the Constitution to limit government, to only list those few powers that it can wield, and the Constitution's main concern with the individual's rights; is it not reasonable to assume that those areas of human existence that involve intimacy, whether sexual or intellectual, would be in the category of rights retained by the people?

B. THE SUPREME COURT RULINGS HAVE REINFORCED THE PRINCIPLE OF PRIVACY THAT IS PRESENT IN THE HISTORY OF THE CREATION OF THE CONSTITUTION.

1. In its rulings in *Griswold v. Connecticut* (2), *Eisenstadt v. Baird* (1), *Roe v. Wade* (8), *Planned Parenthood of S.E. Pa., Inc. v. Casey* (7), and *Lawrence v. Texas* (4), the Court has set an unmistakable precedent of recognizing the right of privacy from government intrusion, in activities relating to reproduction and family planning, and privacy in the home.

a) In *Griswold v. Connecticut*, the Supreme Court held that the right of privacy is a Constitutional right and that it is "fundamental". The court also understood that if the government is to infringe on the right of privacy, it has to show a compelling interest. In this particular case, it protected married couples from government intrusion in their decision on whether or not to use contraceptives and in essence plan a family (2).

b) In *Eisenstadt v. Baird*, the Court ruled that the government could not restrict the sale of contraceptives to single people. What is significant about this case is that it extends the right of privacy to non-married individuals, this is important to Holm because the individuals that Holm "married", where NOT married legally, they just had a religious ceremony and exchanged personal vows. This precedent would give Holm and his partners the right to plan a family, even if they were not married which legal they were not (1).

c) In *Roe v. Wade*, the Court further extended the right of privacy by ruling that an individual has the right to terminate a pregnancy, and thus gave a person the ultimate right over her/his body. The Court stood their ground on this issue in Casey, although they did allow some state restriction, but the underlying issue was upheld. What came out of these cases in regards to privacy and personal liberty is that ultimately the individual has the right to choose whether to expand his or her family. This principle translates to the issue of polygamy, because it has to do with consenting individuals, choosing to arrange their family in a way that best suits them (8).

d) In *Lawrence v. Texas*, the Court established that private sexual intimacy is protected by the Constitution under the right to privacy through the Due Process Clause in the 14th amendment (4). Why this case is so important to *Holm* is that if the right to privacy protects private sexual intimacy, why would it not protect private pledges or vows or other intimate matters between consenting individuals? The "marriages" that Holm is being charged for, where merely the association of several people making private religious "intimate" pledges to each other, and with their own free will, carrying those pledges out. To restrict this would invade not only into the area of the right of privacy, but into the field of association and speech as well (6)(19).

2. The implications of the Courts rulings in the area of the right of privacy, point directly to the extension of that right to allow an individual to make extra legal marital pledges to whomever he/she chooses, and to as many individuals as she/he chooses, as long as the pledges and ceremonies are consensual.

a) The principles that have been established in the Courts privacy rights cases protect: Number one, the right of the individual to be free from government intrusion in the bedroom, in regards to the use of contraceptives, and without regard to the marital status of the individual.

They also established the notion that it is contrary to the liberty granted to us in the Constitution, to intrude into the confines of a person's home and regulate private matters relating to reproduction (2)(1). Number two, the right of an individual to have utmost control over the individual's body, as a result of the right to choose whether or not to bear a child (8). And number three, the Court established that private, consensual, sexual acts are free from government intervention, based on the fundamental right of privacy that has been established by previous Supreme Court decisions (4).

b) These privacy rights that the Supreme Court has established have laid out a clear line of logical reasoning that should not be artificially halted by allowing restrictions on human behaviors that in no way harm any other individual, and in no way substantially effect anybody but those involved in the private, consensual contract of marriage. To illustrate this, in the words of Justice Kennedy, in his majority opinion in *Lawrence v. Texas*, he states: "This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons" (4). What this precedent is implying, is that when there are relationships that are not violent or abusive by their nature, it is not in the authority of the state to regulate them, much less criminalize them. The issue in the Utah statute is that it criminalizes "marriage" relationships that do not even go through the legal marriage licensing process; the law prohibits marriages that are completely private, and involve only the consenting individuals and their private religious practices, and are in no way tied to the governmental system (11).

c). Based on the Supreme Court's clear ruling outlined above, it is plain the right of privacy is fundamental, and there is no reason that it should not apply to Holm in his situation.

C. THE ARGUMENTS FOR WHY POLYGAMY SHOULD BE ILLEGAL, ARE NOT COMPELLING ENOUGH TO MAKE THIS PRACTICE ILLEGAL.

1. Based on the precedents lined out earlier, in order to make this practice illegal, you would first need to prove that 1) it is some way harmful to society and 2) that it is harmful enough to society to have a compelling governmental interest in its prohibition, compelling enough to override the fundamental right of privacy that has been established by the Court (1)(2)(4)(7)(8).

a) The first question then is: Is this law based on protecting society? Or is it based on "somebody's" concept of morality? In Justice Kennedy's majority opinion in *Lawrence v. Texas* he stated that: "The obligation of the United States Supreme Court is to define the liberty of all, not to mandate its own moral code" (4). So therefore it is clear that if this law is not based on protecting "society", but instead based on the advancement a single set of opinions on the nature of morality, which in effect is the equivalent to religion, then it cannot be considered a legitimate law, see *Lemon v. Kurtzman* (5). To answer this question we will need further examination, which is provided in the later sections.

b) The Supreme Court of Utah tries to justify provision in the Utah statute that prohibit even non licensed marriages by stressing the fact that in Utah there is a provision for common law marriages. This would allow the government to enforce "marriage like" obligations, which if an individual was legally married, and then also involved in a non licensed marriage; he could then qualify for common law marriage, and thus bring both marriages into the legal sphere (9). The flaw in that argument is that it is a fundamental right that is at issue, the whole legal system is

based on “weighing the facts”, it is a fact that Utah has common law marriage (9); it is also a fact the Supreme Court has recognized the right of privacy (2)(1)(4)(8); the question is which one is more substantial. To say that a provision for common law marriage in the state of Utah, trumps a fundamental right handed down by the Supreme Court, is absolutely absurd. Is there a fundamental need for common law marriage in Utah? Is there a fundamental need for the right of privacy in ones home and intimate affairs? To the second question yes, according to the Supreme Court it is necessary to preserve the freedom that is provided to us in the Constitution (2)(1)(4)(8), as for the first question, we do not believe that there is.

To deny a fundamental right to an individual, based on some petty legal provision, is not consistent with the very purpose of the legal system, to weigh the facts, as illustrated by the symbol of our profession, the scales of justice.

c) Let us assume for a moment that non licensed marriages are not protected by the Constitution. What rights, if this was the case, would we give up? The components of the unlicensed marriage involve: 1) association with another individual, usually involving extended periods of time in the same residence, 2) the exchanging of promises, which are usually pledges to be faithful to one another, to love and cherish one another, etc., and 3) usually sexual activities between the individuals involved.

Do we as Americans have the right to associate with individuals of our choosing for either long or short periods of time? Do we have to right to stay in the same residence as other individuals for either short or extended periods of time? Do we have the right make promises to other individuals that have an intimate nature? Do we have the right to be sexually intimate with other individuals if we so choose, regardless of our marital status? The answers to these questions, to any legal expert, should raise little misunderstanding, we do, as a matter of fact,

have the right of association according to the 1st and 14th amendments (19)(23), we do have the freedom of speech, which is requisite in the making of intimate promises, and we do have the right to engage in sexual activities in the privacy of our own home, identified by the Court in *Lawrence v. Texas* (4). All of the above elements, taken together make up the "institution" of unlicensed marriage. If we do not have the right to engage in unlicensed marriages, then in all reality, the rights of speech, association, and privacy are not fundamental.

Based on the above information, the State of Utah's claim that unlicensed polygamous marriages should be banned, is not consistent with the principles that are lined out in the Constitution

D. ABUSES THAT ARE ASSOCIATED WITH POLYGAMY ARE NOT CAUSED BY POLYGAMY, THEY ARE SEPARATE ACTIONS THAT CAN BE DEALT WITH THROUGH SEPARATE LEGISLATION.

1. The question that the ACLU has issue with is the Utah statute that outlaws polygamy. We do not appose the states prosecution of Holm on the charge of unlawful sexual conduct with a minor under Utah Code section 76-7-101 (9). The Utah Supreme Court in their decision on this case stated that it was distinctive from Lawrence because of the fact that a minor was involved (9). The Utah Supreme Court tried to justify this in their decision by stating that "The practice of polygamy…often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support" (9). The flaw in this argument is that it assumes that you cannot separate polygamy and the various crimes that according to the Utah Supreme Court, some researchers have associated with the practice of polygamy (9). They also do not look at the

reasons for why these crimes are associated with polygamy. During the prohibition, you could have said that alcohol should be illegal because it is associated with organized crime, this is flawed argument because it was because alcohol was illegal, that those other crimes were associated with it. The fact that it was illegal, pushed the practice underground where it was hard to regulate, and was taken over by those already controlling the underground black market, who made it part of their regular business and became just as dubious (16). Similarly with polygamy it could be that the very reason that it is associated with other crimes is that fact that it is illegal, and forced underground where it is hard to regulate.

2. So why does that fact that it is illegal and hard to regulate, make abuse more likely to happen in a polygamist family or sect? One reason is that because polygamy is illegal, it discourages the abused individuals from coming forward to the authorities because of fear that they will be imprisoned for violating the polygamy laws, which could then destroy their family unit (15). This is a real concern, what person in their right mind would go to the authorities to report a crime, when that same person is a felon?

Also, a common sense analysis of this issue might say that because the law even on its surface seems to disregard personal liberty, it is not, on a basic subconscious level considered a just law, and is therefore much easier to break without the feeling of guilt. There are other laws that are very similar to this such as drinking laws. If you have talked to average twenty year old college students, I can bet that only a fraction of them abstain from alcoholic beverages, despite the fact that they are illegal for them to consume. The point that we are trying to make is that some laws go so far into the personal realm of individual liberty, that it is perfectly reasonable to assume that most people do not even feel guilty when they break them, or at least do not feel obligated to report those who do break them, and the end result, we feel comfortable to assume,

is a mass scale disregard for the law, either by practicing the illegal action, or not reporting other who do. With that said, if a law is of this nature, the violation of it will most likely go either unreported or underreported, due to the fact that there may not be many people who believe that it is any of their business to intervene.

To illustrate this point, imagine yourself living next door to a household that seemed to have on grown man, and several grown women living there, with a few children among them. All the individuals were clearly living under the same roof and seemed to possess "family like" behavior. So what? Would you turn them in for living together? There are a lot of people that have extended family living together under the same room. How would you know if they were not just extended families? The reality is that you could not know that unless they told you, or you peaked into their bedroom, which is an invasion of privacy. Most people would feel like a Nazi to "report" them to the authorities, and for good reason. It does not affect them, they cannot know for sure what is going on, and most people probably don't care. How then, when basis common sense tells us otherwise, can the government argue that they have a compelling reason to prohibit this behavior? The answer to that is: they do not, and it is in nobody's jurisdiction to regulate intimate relationships such as the marriage relationship.

CONCLUSION

Based on the evidence provided throughout this brief, we believe that the history of our constitution supports the notion of the right of privacy in marriage; we believe that the Supreme Court's decisions in privacy rights cases clearly define the right of privacy in the home and in personal matters, we also believe that the arguments put forth by the State of Utah are not compelling, and that the issues associated with polygamy, cannot be viewed synonymously with

polygamy itself. For these reasons, we respectfully call for the Supreme Court of the United States to rule in favor of Holm, and continue the tradition of freedom that this country has so long enjoyed.

AN ECONOMIC ANALYSIS OF ***ALCOHOL PROHIBITION***.

Authors:

Miron, Jeffrey A.[1,2]

Source:

Journal of Drug Issues; Summer98, Vol. 28 Issue 3, p741-762, 22p, 2 charts, 4 graphs

- **Between History and Nature: Social Contract Theory in Locke and the Founders**
- Joshua Foa Dienstag
- *The Journal of Politics*, Vol. 58, No. 4 (Nov., 1996), pp. 985-1009
- Published by: Cambridge University Press on behalf of the Southern Political Science Association

- "The Constitution of the United States," Article 1, Section 8, Clause 5.
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Of the components of this law, some have been instated for the purpose of protecting “society” as a whole, and others have even been established that go beyond even the legal confines of marriage, to social and religious institutions that have no legal implications. It is the opinion of

the ACLU that all of these forms of polygamy laws are unconstitutional and go well beyond the legitimate limits of governmental authority.