Genetics, Canadian Marriage, and the Law

and

Gedankenzug:

on the Legalities of Canadian Marriage: Yesterday, Today and Tomorrow

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Hypothesis: the new marriage definition is unworkable (whether in prose or in rhyme).

Genetics, Canadian Marriage, and the Law

(In prose)

The importance of genetics, particularly at the molecular level, has almost become a given in the work of virtually all of our laboratories. At the most fundamental level DNA is sequenced, DNA is mutated, DNA is cut, and DNA is spliced. At a higher level of complexity, genes are eliminated from cells; genes are added to cells. Higher still, genes are knocked out in animals; genes are transferred to animals and plants. Elsewhere, whole animals have been created by cloning, and fertilization in vitro has been used to create desired offspring, as has artificial insemination, the latter widely used in animal husbandry.

As scientists, we have created these techniques, and continue to create them, with the basic faith that what we do will ultimately be good for mankind and the world. Yet how many of us think about the profound impact that our work has on society around us, and the decisions that are made without us in the non-scientific milieu of society on the basis of, or in utter disregard of, the science of that work.

This disregard was brought home to me be one of my genetics professors citing the paternity case launched by actress Joan Barry against Charlie Chaplin in 1943. Blood tests showed that it was impossible for Chaplin to be the father of Barry's child, but they were ruled inadmissible by the Court. Chaplin was ordered to pay support until the child's 18th birthday.

That was ancient history, and California. In modern times, DNA analysis has been used in a number of high profile cases in law to overturn wrongful murder convictions, and in others it has helped to implicate the correct felon. But science, and the impact of science still has a fair way to go, as illustrated in a recent Canadian judgment in British Columbia (1) on a challenge based on the equality provision in the Canadian Charter of Rights and Freedoms (Constitution Act, 1982). There one reads: "The analysis does not necessarily require scientific evidence. .... the civil standard of proof on a balance of probabilities at all states of the proportionality analysis is more appropriate" and "Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, ..." (1, section186). That judgment, in 2001, upheld the common law definition of marriage as assumed in the Constitution Act of 1867, that "in Christendom" (2) marriage is the union between a man and a woman to the exclusion of all others. On reading the judgment, one finds a goodly number of "in my opinion" statements (e.g. 1, s.161, s.168, s.179), so an appeal seemed a logical sequel. An appeal was indeed launched.
and in 2003 that judgment was overturned (3), as was a similar judgment in Ontario (4). As a result, the common law definition of marriage was reformulated to be "the lawful union of two persons to the exclusion of all others" in British Columbia (3, s.159), and in Ontario as "the voluntary union for life of two persons to the exclusion of all others" (4, s.156(2)). This seemed to settle the matter, with the Canadian House of Commons putting forth a similar definition in Bill C-38, currently up for discussion and passage.

But do these simple definitions really provide the intended equality and retention of human dignity?

In the definitions for marriage, what does the phrase "to the exclusion of all others" mean? For heterosexual couples, the marriage definition, and that phrase in it, has the same impact as the old definition. For same-sex couples, however, that phrase forbids them to procreate offspring of their own within their marriage, as they cannot, in the phrasing of the judgment, "procreate as between themselves" (3, s.124). That certainly does not appear to be the equality that was the desired outcome of the court battles. Yet at the current stage in the evolution, mankind does not reproduce by fission, like bacteria, nor by budding like yeast, nor hermaphroditically like snails. We are genetically at a stage where a sperm from a male still has to meet the ovum from a female to begin to create a child.

Both Justice McMurtry in the Ontario case and Justice Prowse in British Columbia recognize that same-sex couples during their marriage could have children by "surrogacy, donor insemination" (4, s.122) or "by means of medically-assisted procreation" (3, s.121). Neither judge addresses the question how such approaches and techniques impinge on the phrase "to the exclusion of all others".

In my view (to paraphrase the judges), the judges' statements indicate that same-sex couple procreation is expected, and that it clearly requires a genetic "other". Such action negates the marriage vows based on the new definitions. I think in surrogacy the "other" is obvious, but how far down on the way into the test-tube or Petri dish will you agree with me that the essence of mankind, of humanness, in a sperm or ovum still constitutes an "other"?

It is my conclusion that the new definition of marriage is unworkable, since, while attempting to create equality of access to the institution of marriage, it enshrines and enforces a different, natural inequality. Moreover, at the solemnization of the marriage, even just the prenuptial intent to procreate during marriage forces same-sex couples to perjure themselves on accepting and entering marriage under the new definition. Neither, inequality or perjury, should be the consequence of any definition of as important a societal institution as marriage.

But how do we achieve equality, when the three possible pairings, man-man, woman-woman, and man-woman, have biologically different capacities? Do our genetic techniques help us out of this societal quandary, or do those techniques merely lead us closer to a "Brave New World"?

I do not have the answers. Do you?

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Nevertheless, to lighten the discussion of such heavy societal values, we can look at the subject in rhyme, with apologies to any and all real poets:

**Gedankenzug (In rhyme)**

**YESTERDAY AND TODAY**

1 "Marriage" in the Constitution Act
   Was assumed to be a pact
   'Twixt man and woman to the joint exclusion
   Of all and any others in the fusion.

2 The meaning, backed by common law, was neat,
   Strengthened by laws 'gainst other couplings sweet
   That were between two women or man-man,
   Till '67, when a change began.

3 When Trudeau spoke in fine oration:
   "The state's no business in the bedrooms of the nation",
   All couples coupled legally, their kind being three:
   There's "he-she", "she-she", and then there's "he-he".

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4 In law, he-she was "marriage", --- that's no mystery.
    The others had no name in law or history.
    So, should the pairings new, and true in love,
    Not too be "marriage", as he-she, above?

5 The meaning of the word said, "no",
    But she-she, he-he claimed, "It can't be so".
    Beneath the joy of three-fold dual frivolity,
    "Marriage" denied to some, is not equality.

6 How can one "marriage" equal render,
    When it's defined: "one of each gender"?
    There's equal access to that state;
    Woman and man both pass its gate.

7 No "none-kin" individual is denied,
    Yet one of two must be the other kind.
    If pairing partners are in sex the same,
    It is not "marriage", but it has no name.

8 Such definition should on balance stand
    The challenge of the Charter’ of the land,
    Which, in law and before, without residual
    Equals each one and every individual.²a

9 It aims to mitigate, correct, past wrongs
    For individuals of disadvantaged throngs.²b
    Still, under it, inequities have stood,
    If otherwise more harm befalls than good.²c

10 So what of "marriage", did it stand or fail,
    When every individual has avail
    To its good state? --- In the opinion
    Of some Appeal Courts of this fair Dominion

11 It failed.³,⁴ --- The reading that the judges heard
    Was: "Marriage" is not just a word,
    It is a state, a law, an institution,
    That must be fair to all in execution.

12 They ruled not on each person, but on "two's";
    So "marriage" with its meaning could but lose.
    Its definition rings for only one,
    But pairs are three. So "marriage" was all done.

13 Do miracles occur? Do judges sing?
    Just like: "The king is dead! Long live the king!",
    "Marriage" was resurrected, in rendition
    Of "New-Speak": saved in name, changed definition.

14 The judges ruled: by common law
    They can make changes as they saw
    Fit so to make. One judge demurred
    A change so large and rash to make.³a No one concurred.³,⁴

15 And so Canadian marriage now is written
    As union of two persons, who are smitten,
    To the exclusion of all others, short
    Of their death, or not. So said the Court.³a,⁴a

TOMORROW

16 Is "marriage" Charter-strong now, not to falter,
    And merely waiting for the State to alter
    Ancillary laws? --- I think not so!
    The definition will be grief and woe.

17 I see the definition's sequel
    Result in pairs that are not equal.

18 To bring the couples to the fold
    "Exclusiveness" is marriage gold.
    That is the essence of the law,
    The crux that our fore-fathers saw
    Of prime importance, so the gene-
    line could be counted to be clean.

19 While sex was joy, it was the scion
    That called for "marriage" from the lion:
    Protect the offspring, shield the mother,
    And guard from sperm of any other.

20 Faithfulness is still vogue today
    To keep the stranger's sperm at bay.
    So small that sperm is, 'most elusive,
    But shatt'ring to that word "exclusive".

21 To humans in our evolution
    For offspring there's but one solution:
    One male, one female gets it right,
    Because we’re not hermaphrodite.

22 For woman-man this is the norm,
    And with some luck, some change in form,
    After nine months, not without fail,
    One joys to hear a baby's wail.
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23 For man-pairs, and for woman-two's,
There'll never be post-partum blues.
It's biologic, and it is the law
Of "marriage", that, as writ' above, we saw.

24 Only one pair of three by law makes kids.
The others may adopt; but law forbids
Their making offspring of their own:
Because they cannot do it all alone.

25 This essence, this requirement:
"Exclusion", can't be the intent
Of "marriage" for a same-sex pair!
Surely the Charter helps us there!

26 By Charter-tests\textsuperscript{1b} it's true in history,
And by biology not mystery,
This is a disadvantaged throng.
So "marriage", new-defined, must still be wrong!

27 Each same-sex pair by rights must be permitted
To find another partner that's committed
To help them break \textit{those} vows of marriage,
And serve to fill their baby carriage

28 With offspring of the genes of whom-e'er of the pair, needs, fills the womb.
And ask not if in fact the manly genes
Are transferred "manly" or by other means.

29 But now the "other" aids, for all to see,
Create a child 'betted by 'dultery.

30 And similarly, all pre-nuptial desire
An offspring of their very flesh to sire
While married, \textit{this law disallows}: It's perjury when speaking wedding vows.

31 So first, to lawful make this action,
Let's define "marriage" to our satisfaction
By common law: – a judge, it's done;
It's incremental\textsuperscript{10}, and it's fun.

32 To scotch adultery and perjury
Marriage, defined, has need of surgery.
Equality is the authority,
And dignity, for the minority.

33 "Marriage" will be, when this day is behind,
The lawful union \textit{twixt} two of mankind.
"Exclusiveness" need not concern,
Because "equality" we earn.

34 Bliss, peace, equality! But woe, alas!
"Equality", so sought, turns, bites our ass.
Man-woman pair now ups our dander:
"Equal" is good for goose, and so for gander.

35 Faithfulness, as they tend to read it,
For marriage is in law no longer needed.
By law, equality now reigns.
"Restraints are loosed", go the refrains.

36 Now marriage is a bacchanalia;
Permitted is \textit{"et alter"}; so's \textit{"et alia"}.
Adultery's passé, perhaps divorce:
The State allows riding another horse.

\textbf{EPILOGUE}

37 We surely need a wiser common law
Ere all is chaos, and our butts are raw
From marriage-sanctioned sex, both out and in.
We'll need restraint in law, or else in sin.

38 "Equal" is good, and love shall set you free;
But Charter, "HELP!", in this calamity!
Wisdom has flown away in judges' courts!
We've loosed a process that, one prays, aborts.

39 From this \textit{Gedankenzug}, in steps, it's shown:
"Judged" part-solutions cannot live alone.
Since Einstein/Solomon is dead, one can
At most for wisdom lean on common man,

40 Then alter slowly in one's haste, and test
Which of two new ways, or the old, is best.
The grail is not "The Charter", but to see
How best we better our humanity.

\textbf{References:}

1a. Ibid. (s. 89-93)
1b. Ibid. (s. 89)
3a. Ibid. (s. 159)
4a. Ibid. (s. 156(2))
5. Constitution Act, 1867 (s. 91(26))
7. Constitution Act, 1982 (Canadian Charter of Rights and Freedoms)
7a. Ibid. (s. 15(1))
7b. Ibid. (s. 15(2))
7c. Ibid. (s. 1)