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TWO SPIRITS, TWO ERAS, SAME SEX: FOR A TRADITIONALIST PERSPECTIVE ON NATIVE AMERICAN TRIBAL SAME-SEX MARRIAGE POLICY

Jeffrey S. Jacobi*

Recently, several states amended their constitutions to define marriage as only a union between a man and a woman. Many Native American Indian tribal governments thereafter also adopted laws prohibiting homosexual marriages. However, this new policy conflicts with traditional tribal values. This Note shows that historically many tribes accepted and even honored same-sex unions. This Note proposes that tribes consider their traditions as they existed before European contact, and argues that, for some tribes, same-sex civil unions are a historically and culturally appropriate answer to the modern objections to same-sex marriage.

INTRODUCTION

During the time of First Contact in the Americas, Europeans documented the existence of Native American individuals whose behavior did not comport with European gender norms.[1] Although commentators disagree on the appropriate classification of such individuals,[2] many agree that indigenous tribes often tolerated and even celebrated them.[3] Today, many commentators refer to these

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1. Sabine Lang, *Various Kinds of Two-Spirit People: Gender Variance and Homosexuality in Native American Communities, in* TWO-SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY 100, 100 (Sue-Ellen Jacobs et al. eds., 1997); WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 3–4 (1998); Henry Angelino & Charles L. Shedd, *A Note on the Berdache,* 57 AM. ANTHROPOLOGIST 121, 121 (1955).

2. *See* Carolyn Epple, *Coming to Terms with Navajo Nádleehi: A Critique of Berdache, "Gay," "Alternate Gender," and "Two-Spirit",* 25 AM. ETHNOLOGIST 267, 269 (1998) ("[M]any researchers, both Native and non-Native, have classified nádleehi (as well as their assumed counterparts in other cultures) as berdache, gay, alternate gender, or two-spirit.").

3. *See, e.g.*, SABINE LANG, MEN AS WOMEN, WOMEN AS MEN: CHANGING GENDER IN NATIVE AMERICAN CULTURES 313 (John L. Vantine trans., 1998) ("Traditionally, women-men and men-women were accepted in most Native American cultures—to some extent, even highly respected. . . . "); ROSCOE, CHANGING ONES, *supra* note 1, at 11; *but see* Robert Fulton & Steven W. Anderson, *The Amerindian "Man-Woman": Gender, Liminality, and Cultural Continuity,* 33 CURRENT ANTHROPOLOGY 603, 607 (1992) ("[A]ttitudes toward the 'man-woman' ranged from 'awe and reverence through indifference to *scorn* and contempt' and that in some societies the community's very existence was believed to depend upon the role."

Native American individuals as two-spirits.[4]

In recent years, federal and state courts and legislatures have grappled with the issue of homosexuality.[5] Specifically, the issue of homosexual marriage has engendered much debate.[6] Many states have amended their constitutions to prohibit homosexual marriages, while a few have legalized same-sex unions.[7] However, until 2004 when two Cherokee women applied for and received a mar-

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(emphasis added) (quoting Charles Callender & Lee M. Kochems, *The North American Berdache*, 24 CURRENT ANTHROPOLOGY 443, 453 (1983))).

4. This Note will, where possible, apply tribe-specific labels. When referring to such individuals on a broader level, this Note will apply the term "two-spirit."

Two-spirit individuals have several names in anthropological discourse. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 11 (utilizing men-women and women-men); ROSCOE, CHANGING ONES, *supra* note 1, at 16–19 (listing alternative genders, third genders, and berdache); Fulton & Anderson, *supra* note 3, at 604–08 (listing, *inter alia*, sissy, mama's boy, transvestite, homosexual, hermaphrodite, sodomite, inversion, lesbian, male/boy prostitute, amazon, gay, gender-crosser, and transsexual).

Indeed, there is much debate as to the proper label. *See* ROSCOE, CHANGING ONES, *supra* note 1, at 17. Traditionally, anthropologists referred to these individuals using the name given by the European invaders: berdache. Fulton & Anderson, *supra* note 3, at 604. Some anthropologists question the propriety of this term "that has its origins in Western thought and languages." ROSCOE, CHANGING ONES, *supra* note 1, at 17.

Some claim berdache meant kept-boy or male prostitute in Persian. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 6 (citing Angelino & Shedd, *supra* note 1, at 121). However, others contend that it actually meant lover or boyfriend. ROSCOE, CHANGING ONES, *supra* note 1, at 17. The French adapted the term and applied it to transvestite Native American males who they believed were passive homosexuals. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 7 (citing Angelino & Shedd, *supra* note 1, at 121). Later, berdache was applied to females who took on male social roles. *Id.* The Europeans came to apply the term to any Native American persons who did not conform to the expectations of their sex. *See id.*

Recently, anthropologists have made efforts to replace berdache with two-spirit. ROSCOE, CHANGING ONES, *supra* note 1, at 17. Some argue that two-spirit should be applied only to contemporary Native Americans. *Id.* at 18. However, many anthropologists find two-spirit more culturally appropriate than berdache, which they view as a derogatory product of Western culture. *Id.* at 17.

5. *See, e.g.*, Defense of Marriage Act of 1996, Pub. L. No. 104-199, 100 Stat. 2419 (codified in 1 U.S.C. § 7 (2000) and 28 U.S.C.A. § 1738C (West 2006)) (providing that no state shall be required to give effect to a same-sex marriage licensed by another state); Lawrence v. Texas, 538 U.S. 918 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional); Romer v. Evans, 517 U.S. 620 (1996) (ruling against an amendment to the Colorado Constitution that would have prevented the government from taking any legislative, executive, or judicial action to protect homosexual citizens from discrimination on the basis of their sexual orientation).

6. *See, e.g.*, Patrick Healy, *Gay Marriage Dominates Democratic Debate*, B. GLOBE, Feb. 27, 2004, *available at* http://www.boston.com/news/specials/gay_marriage/articles/2004/02/27/gay_marriage_dominates_democratic_debate/ (on file with the University of Michigan Journal of Law Reform); *Bush Wants Marriage Reserved for Heterosexuals*, CNN.COM, Oct. 28, 2003, http://www.cnn.com/2003/ALLPOLITICS/07/30/bush.gay.marriage/ (on file with the University of Michigan Journal of Law Reform).

7. Human Rights Campaign, *Marriage/Relationship Laws: State-by-State*, http://www.hrc.org/Template.cfm?Section=Federal_Constitutional_Marriage_Amendment&CONTENTID=20716&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66 (last visited July 1, 2006) (on file with the University of Michigan Journal of Law Reform).

riage license in Oklahoma,[8] many tribal governments were silent on this issue.[9] Following the Cherokee marriage, some tribes reacted by quickly enacting legislation outlawing same-sex marriage.[10]

The issue of homosexuality presents a particular conundrum for Native American tribes. Traditionally, many tribes allowed two-spirit individuals to have relationships with members of the same biological sex,[11] although most tribes still valued heterosexual relationships more than homosexual relationships.[12] Today, however, like other Americans, a large faction of Native Americans condemn homosexuality and completely reject same-sex unions largely because of the influence of European and American religion and culture.[13] Many Christian Native Americans view marriage as a religious union; others define marriage as an exclusively heterosexual union.[14] This conflict of tradition and modern interests complicates the task of devising a tribal same-sex marriage policy.[15] How can tribes reconcile their traditions with their modern religious and cultural values?

This Note argues that the marriage of two Cherokee women caught tribes off-guard, and that the response has largely conflicted with traditional tribal values. To illustrate the problem that modern tribes face, Part I of this Note explores the case of two

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8. Arnold Hamilton, *Marriage Fight Taken to Cherokees: Lesbian Couple with License from Nation Now Battling to File It*, DENTON REC.-CHRON., Aug. 16, 2005, *available at* http://www.dentonrc.com/cgi-bin/bi/gold_print.cgi (on file with the University of Michigan Journal of Law Reform).

9. *See* Christopher L. Kannady, Note, *The State, Cherokee Nation, and Same-Sex Unions: In Re: Marriage License of McKinley & Reynolds*, 29 AM. INDIAN L. REV. 363, 363 (2004–05) ("Only a few tribes, including the Creek Nation and the Iowa Tribe, specify that marriage can only be between a man and a woman.").

10. *See, e.g.*, Brenda Norrell, *Navajo President Vetoes Gay Marriage Ban*, INDIAN COUNTRY TODAY, May 3, 2005, *available at* http://www.indiancountry.com/content.cfm?id=109641&print=yes (on file with the University of Michigan Journal of Law Reform); *Cherokee Nation Council Votes to Ban Gay Marriage*, INDIANZ.COM, June 15, 2004, http://www.indianz.com/News/2004/002941.asp?print=1 (on file with the University of Michigan Journal of Law Reform).

11. *See* WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE 88 (1986) ("[Male-bodied two-spirits] usually participate in sex with men . . . .").

12. *See* LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 198–203; WILLIAMS, *supra* note 11, at 111–15.

13. Wyatt Buchanan, *Celebration, Setbacks for Gay Indigenous People: They'll Mark Parade Grand Marshal, Loss on Marriage Front*, S.F. CHRON., June 25, 2005, at B1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/06/25/BAGJJDEEHL1.DTL (on file with the University of Michigan Journal of Law Reform).

14. *Id.*

15. *Id.* ("[S]ame-sex marriage is dividing North America's native nations. The split in Indian country has pitted 'traditional' Indians—those who practice the spiritual and cultural customs of their ancestors—against tribal members who practice conservative Christianity, scholars and tribal members said.").

Cherokee women battling for the recognition of their same-sex marriage and argues that decisions concerning same-sex marriage rest completely with the tribe. Part II describes the histories of two-spirit people in North America and in selected Native American tribes, concluding that most tribes accepted life partnerships involving two-spirit individuals. Part III discusses modern attitudes toward two-spirit individuals and how tribal governments have responded to the Cherokee case of same-sex marriage. Also, Part III recommends that tribes consider pre-contact tradition when enacting new legislation and advocates a compromise to satisfy both the traditional acceptance of homosexuality and the conflicting modern desire to define marriage as between one man and one woman: same-sex civil unions.

In order to reconcile the conflict between tradition and contemporary religious and cultural values, all tribes should consider their traditions surrounding homosexuality and two-spirit individuals. Inquiry into historical views will likely motivate some tribes to incorporate tradition into their modern policies.

For some tribes, same-sex civil unions will effectively temper the discord between traditional and modern culture. First, same-sex civil unions are a traditionally appropriate corollary because, like traditional marriage-like same-sex relationships, they are not as solemnized as heterosexual marriages. Second, because civil unions, unlike marriage, are not rigidly defined, tribes can shape same-sex civil unions legislation so that it appropriately fits the culture of the tribe. Because they are not marriages, same-sex civil unions would not disturb the definition of marriage as between one man and one woman. Finally, same-sex civil unions require no religious sanction and could therefore partly satisfy those Native Americans who object to same-sex marriage on religious grounds.

Same-sex civil unions strike a compromise that resolves the conflict between traditional and modern interests. To illustrate this conflict and the depth of the problem faced by Native American tribes, Part I will discuss the legal battle surrounding the marriage of two Cherokee women.

I. THE CASE OF LESBIAN CHEROKEE MARRIAGE: AN EXCLUSIVELY TRIBAL ISSUE

A. In Re: The Marriage of McKinley and Reynolds

After five years of commitment, in May of 2004,[16] Kathy Reynolds and Dawn McKinley, two Cherokee lesbians raising a child,[17] walked into the clerk's office at the Cherokee Nation Capital in Tahlequah, Oklahoma to obtain a marriage license.[18] Earlier that year, a hospital had barred Dawn from visiting Kathy's hospital room because Dawn did not qualify as Kathy's family.[19] A fellow Cherokee informed them that Cherokee law did not explicitly define marriage as between a man and a woman and recommended that they obtain a marriage license.[20] A clerk at the Cherokee Nation Capital issued the license without question and said, "You might have a hard time finding a minister, but I have no problem issuing it to you."[21] In a ceremony presided over "by a minister certified by the Cherokee Nation"[22] and attended by friends, family, and the media,[23] the couple wed at a park four days later.[24]

Unlike the Cherokee, not all federally recognized Native American tribes have the ability to issue marriage licenses, and those that can issue marriage licenses do so rarely.[25] In fact, most Cherokee couples in Oklahoma choose to obtain marriage licenses through the state, rather than through the tribe.[26] Nonetheless, the *Cherokee Nation Code* provided that "[e]very person who shall have attained the age of eighteen years shall be capable in law of contracting marriage."[27] When McKinley and Reynolds received the license, the *Cherokee Nation Code* did not explicitly limit marriage to opposite-sex couples. Further, the marriage vows, written in Cherokee, used

16. Hamilton, *supra* note 8.
17. Lois Romano, *Battle over Gay Marriage Plays out in Indian Country*, WASH. POST, Aug. 1, 2005, at A2.
18. Hamilton, *supra* note 8.
19. Romano, *supra* note 17, at A2.
20. *Id.*
21. Hamilton, *supra* note 8.
22. *Id.*
23. Romano, *supra* note 17, at A2.
24. Hamilton, *supra* note 8.
25. *See, e.g.*, Sheila K. Stogsdill, *Tribe Mulls Their Laws on Marriage*, DAILY OKLAHOMAN, May 18, 2004, at 3A (reporting that in nineteen years the Kickapoo and Sac & Fox tribe issued only forty-one marriage licenses).
26. *See id.*
27. 43 CHEROKEE NATION CODE § 2 (1892).

two facially gender-neutral terms: cooker and companion.[28] Both the Cherokee marriage statute and wedding vows contained ambiguous language.

In contrast, the tribal government's position was unambiguous and unequivocally opposed to same-sex marriage. Todd Hembree, the lawyer for the Cherokee Tribal Council,[29] appealed to both the legislature and the judiciary to prevent the marriage of McKinley and Reynolds, and the marriages of any other same-sex couples.

Hembree drafted an amendment to the Cherokee marriage statute and submitted it to the legislature.[30] On June 14, 2004,[31] the Cherokee Tribal Council voted fifteen to zero in favor of defining marriage as between one male and one female.[32] Because rulings made by the Cherokee Tribal Council cannot be retroactive,[33] the amendment did not affect the marriage license of McKinley and Reynolds, which was obtained under the previous, gender-neutral marriage law.[34] However, according to Linda O'Leary, one of the members of the Cherokee Tribal Council, even one gay marriage is one gay marriage too many: "We don't want gay marriages in the Cherokee Nation. It's that simple."[35]

To prevent the marriage of McKinley and Reynolds, Hembree filed a series of legal papers in the District Court of the Cherokee Nation opposing the marriage "as a private citizen of the Cherokee Nation."[36] The perceived gender-neutrality of the code was, according to Hembree, nothing more than a "loop-hole in [the] statute that, if successful, would fly in the face of the traditional definition and understanding of marriage of the Cherokee people."[37] Hembree explained to the district court that "Cherokees have a strong

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28. Kannady, *supra* note 9, at 367 ("In the Cherokee language the word for husband means 'companion that I live with,' and the word for wife means 'cooker.'"); Gabriel Duncan, *Native Americans Shouldn't Be Wed to Battle Against Same-Sex Marriage*, S.F. CHRON., Aug. 21, 2005, at B3, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/08/21/INGQEEA5RF1.DTL (on file with the University of Michigan Journal of Law Reform).

29. Kannady, *supra* note 9, at 369.

30. *Id.* at 367–68.

31. *Id.* at 367.

32. Buchanan, *supra* note 13, at B1. The amendment also outlawed adultery in tribal lands. Teddye Snell, *Councilors Join Cherokee Gay Marriage Controversy*, TAHLEQUAH DAILY PRESS, Aug. 10, 2005, *available at* http://www.tahlequahdailypress.com/articles/2005/08/10/news/top_stories/agay.prt (on file with the University of Michigan Journal of Law Reform).

33. Snell, *supra* note 32.

34. Kannady, *supra* note 9, at 369.

35. *New Move to Block Gay Cherokee Marriage*, 365GAY.COM, Aug. 9, 2005, http://www.365gay.com/newscon05/08/080905cherokee.htm (on file with the University of Michigan Journal of Law Reform).

36. *Id.*

37. Snell, *supra* note 32.

traditional sense of marriage," and "[t]hroughout [Cherokee] history, there's never been a tribal recognition of same-sex marriage."[38] Hembree then argued that the words used in the *Cherokee Nation Code*, companion and cooker, actually meant husband and wife, respectively.[39] Hembree urged the court to consider the intent of the drafters, who composed the language of the statute in 1892: "Same sex marriages were not part of the Cherokee history or tradition. Cherokee society in 1892 did not allow nor [sic] contemplate same-sex marriage."[40]

McKinley, employed by a video store, and Reynolds, a graduate student in criminal justice,[41] did not anticipate a legal battle when they married, and, consequently, had not secured legal representation.[42] Of the thirty-five lawyers qualified to argue in the Cherokee court, many opposed the marriage whereas others had concerns that taking the case would alienate the tribe and rule out lucrative opportunities to represent the tribe in the future.[43] They struggled unsuccessfully for months to find a lawyer to take their case[44] and were forced to proceed *pro se*.[45]

Without a lawyer, McKinley and Reynolds defended their marriage by arguing that the only parties harmed by the issuance of an injunction would be McKinley and Reynolds themselves.[46] In response to Hembree's argument appealing to the intent of the drafters, they argued that the "court . . . had no opportunity to hear evidence on whether or not same sex marriages have ever existed in the Cherokee Nation."[47] Taking an offensive stance, McKinley and Reynolds filed a Motion to Dismiss, claiming that Hembree had suffered no legally cognizable harm and therefore

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38. Hamilton, *supra* note 8.

39. Duncan, *supra* note 28, at B3.

40. Kannady, *supra* note 9, at 370.

41. Hamilton, *supra* note 8.

42. *See* Romano, *supra* note 17, at A2 ("We thought we'd get married under Cherokee law and that would be the end of it. We never thought it would turn into this.").

43. *See id.*

44. *Id.*

45. Interview by Amy Goodman with Joe Shirley, Navajo President, Dawn McKinley, and David Cornsilk, the minister who married Dawn McKinley and Kathy Reynolds (May 31, 2005), http://www.democracynow.org/print.pl?sid=05/05/31/1349225 (on file with the University of Michigan Journal of Law Reform) ("Up to the present time, Kathy and Dawn have been in tribal district court unrepresented. And so that case has been handled by them writing their own briefs and motions. . . ."). *See* Kannady, *supra* note 9, at 369 ("McKinley and Reynolds represented themselves pro se;").

46. Kannady, *supra* note 9, at 371 (referencing Response to Application for Temporary Injunction, *In re* Marriage License of Dawn L. McKinley & Kathy E. Reynolds, No. CV-04-36 (Cherokee D. Ct. 2004)).

47. *Id.* at 372 (quoting Response and Motion to Quash, *In re* Marriage License of Dawn L. McKinley & Kathy E. Reynolds, No. CV-04-36 (Cherokee D. Ct. 2004)).

lacked standing.[48] They asserted that Hembree filed the lawsuit not on behalf of the Cherokee Nation, but in furtherance of his own "sinister and bigoted agenda" fueled by personal political motivations.[49] The Cherokee District Court, however, declined to dismiss the case.[50]

Up to this point, McKinley and Reynolds had represented themselves without the aid of an attorney.[51] Finally, the San Francisco-based National Center for Lesbian Rights offered to represent the couple.[52] Represented by Lena Ayoub,[53] McKinley and Reynolds appealed to the Judicial Appeals Tribunal.[54] On August 3, 2005, over a year after the case began, the Judicial Appeals Tribunal granted McKinley and Reynolds's Motion to Dismiss.[55] The tribunal ruled that Hembree had indeed suffered no individualized harm and thus lacked standing to proceed.[56]

Refusing to back down, Hembree and nine of the fifteen members of the Cherokee Tribal Council filed a second lawsuit, asking the Judicial Appeals Tribunal to rule that the *Cherokee Nation Code* disallowed same-sex marriages.[57] After almost two years, the legal battle ended. On December 22, 2005, the Judicial Appeals Tribunal dismissed the second lawsuit because the tribal councilors had "failed to show they were individually harmed by the Cherokee marriage" and thus lacked standing to proceed.[58] Following this

48. *Id.* at 373.

49. *Id.* at 375 (quoting Motion for Summary Judgment, *In re* Marriage License of Dawn L. McKinley & Kathy E. Reynolds, No. CV-04-36 (Cherokee D. Ct. 2004)). Hembree was running for the Oklahoma Senate when he filed the initial claim. *See id.* at 374.

50. Respondent's Motion to Dismiss Petitioner's Amended Petition for Declaratory Judgment at 4, Baker v. McKinley & Reynolds, JAT-05-11 (Cherokee Judicial Appeals Trib. 2005), *available at* http://www.nclrights.org/cases/pdf/090805Baker_v_McKinley_MotionToDismiss.pdf (on file with the University of Michigan Journal of Law Reform).

51. *Id.* at 3 n.3.

52. Romano, *supra* note 17, at A2.

53. Snell, note 32.

54. Motion to Dismiss of Respondent, *supra* note 50, at 4.

55. *Id.*

56. *Id.*

57. Nat'l Ctr. for Lesbian Rights, *Reynolds and McKinley: Initial Victories!*, http://www.nclrights.org/cases/reynolds.htm (last visited July 1, 2006) (on file with the University of Michigan Journal of Law Reform); *New Move to Block Cherokee Marriage*, *supra* note 35.

58. Donna Hales, *Top Court Scraps Tribe's Attempt to Block Gay Marriage*, MUSKOGEE PHOENIX, Jan. 5, 2006, *available at* http://www.muskogeephoenix.com/apps/pbcs.dll/article?AID=200660104032 (on file with the University of Michigan Journal of Law Reform); Press Release, National Center for Lesbian Rights, Cherokee High Court Rules in Favor of NCLR and Same-Sex Couple: Holds that Tribal Council Members Lack Standing to Challenge Couple's Marriage (Jan. 4, 2006), http://www.nclrights.org/releases/pr-cherokee_010406_print.htm? (on file with the University of Michigan Journal of Law Reform) ("The Court rejected the council members' argument that permitting the marriage to stand would injure 'the reputation' of the Cherokee Nation.").

ruling, Hembree stated that the tribe would end its role in the legal battle.[59] In dismissing this case, the court removed any legal obstacles to filing the marriage license.[60]

Because these cases failed to meet procedural requirements, the Cherokee Judicial Appeals Tribunal did not address the substantive issues involved. The court declined to state whether McKinley and Reynolds should be allowed to marry under Cherokee law.

B. An Isolated Tribal Issue

If the Cherokee Judicial Appeals Tribunal had addressed the substantive issues of the lawsuits, the decisions would have been guided solely by tribal law.

State law outlawing same-sex marriage does not affect tribes. The Cherokee tribal lands lie within the borders of Oklahoma, yet Oklahoma law, which has provided for opposite-sex marriage only since 1910,[61] does not prevent the tribe from legalizing same-sex marriage. Under the Doctrine of Tribal Sovereignty, tribes can legislate marriage freely because tribes have extensive power over domestic relations of their members.[62] Although no statute or case addresses this issue directly, the Cherokee Nation's sovereignty appears to prevent state marriage law from affecting the laws of the tribe.[63]

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59. Adam Tanner, *Top US Indian Court Upholds First Gay Marriage*, BROCKTOWN NEWS, Jan. 5, 2006, *available at* http://www.localnewsleader.com/brocktown/stories/news-00120412.html (on file with the University of Michigan Journal of Law Reform) (quoting Hembree as saying, "As far as the Tribal Council is concerned, that is the end of the legal proceeding.").

60. Hales, *supra*, note 58. Of course, the staff members of the court could continue to refuse the license if they so desired.

61. OKLA. STAT. ANN. tit. 43, § 3 (West 2006) (noting that, as originally enacted, the statute implicitly limited marriage to heterosexual couples by declaring that "any unmarried male of the age of twenty-one years or upwards, or any unmarried female of the age of eighteen years or upwards and not otherwise disqualified, is capable of contracting and consenting to marriage"). Declaring that "marriage is [a] civil contract between one man and one woman," a 2004 opinion by the Oklahoma attorney general made this requirement explicit and denied the recognition of same-sex marriages "performed in another *state*." *Id.* (emphasis added) quoting Op. Att'y Gen. No. 04-10 (Okla. Mar. 19, 2004)).

62. Montana v. United States, 450 U.S. 544, 564 (1981) (declaring that tribes have the power to regulate domestic relations among members.); *see also* CHRISTOPHER REINHART, OFFICE OF LEGISLATIVE RESEARCH, INDIAN TRIBES AND SAME-SEX MARRIAGE (2002), *available at* http://www.cga.ct.gov/2002/olrdata/jud/rpt/2002-R-1007.htm (on file with the University of Michigan Journal of Law Reform) (discussing whether tribal legislation concerning domestic relations has any affect on non-members).

63. REINHART, *supra* note 62; Adam Tanner, *Ain't This America: Indians Debate Gay Marriage*, CAPITOL HILL BLUE, Mar. 19, 2005, http://www.capitolhillblue.com/artman/

Conversely, if a tribe legalized same-sex marriage, states would not have to recognize it. Federal law, the Defense of Marriage Act of 1996 (DOMA),[64] unequivocally states that no state, territory, or Indian tribe "shall be required to give effect" to laws that treat "a relationship between persons of the same sex that is treated as marriage."[65] DOMA, if constitutional,[66] allows Oklahoma to choose whether to recognize a Cherokee same-sex marriage. A decision to allow McKinley and Reynolds to file their marriage license would not affect Oklahoma or any other state or tribe.

Over one thousand federal benefits, ranging from hospital visitation rights to tax exemptions, hinge on marital status.[67] However, because DOMA commands courts to interpret the word marriage as it appears in "any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States" as "only a legal union between one man and one woman as husband and wife,"[68] federal protections, benefits, and obligations would likely not apply to same-sex couples united under tribal law. Indeed, partners in same-sex civil unions, authorized by the state legislatures of Vermont[69] and Connecticut,[70]

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publish/printer_6429.shtml (on file with the University of Michigan Journal of Law Reform) ("Robert Williams, a University of Arizona professor of law and American Indian studies, said as sovereign nations tribes can set their own family rules, so they could ban or allow gay marriage."); *Tribal Challenge to Same-Sex Marriage Dismissed*, INDIANZ.COM, Aug. 4, 2005, http://www.indianz.com/News/2005/009657.asp (on file with the University of Michigan Journal of Law Reform) (" 'It's clear that, under federal law, tribes have a long history of being able to regulate domestic relations as a matter of their inherent tribal sovereignty,' said Wenona Singel, a professor at the University of North Dakota School of Law. . . . ").

64. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 100 Stat. 2419 (codified in 1 U.S.C. § 7 (2000) and 28 U.S.C.A. § 1738C (West 2006)).

65. *Id.* ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

66. *See* Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2005) (discussing DOMA's conflict with the Full Faith and Credit Clause of the U.S. Constitution and arguing that under the Constitution and for various policy reasons states should recognize the same-sex marriage laws of other states).

67. Letter from Barry R. Bedrick, Assoc. Gen. Counsel, United States Gen. Accounting Office, to Henry J. Hyde, Chairman, Comm. on the Judiciary of the H.R. 2 (Jan. 31, 1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf (on file with the University of Michigan Journal of Law Reform).

68. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 100 Stat. 2419 (codified in 1 U.S.C. § 7 (2000) and 28 U.S.C.A. § 1738C (West 2006)).

69. VT. STAT. ANN. tit. 15, § 1204(a) (2002).

70. An Act Concerning Civil Unions, 2005 Conn. Acts 05-10, *available at* http://www.cga.ct.gov/2005/act/Pa/2005PA-00010-R00SB-00963-PA.htm.

and same-sex marriage, authorized by the courts in Massachusetts,[71] receive none of the legal rights and responsibilities from the federal government that opposite-sex couples enjoy.[72] Thus, tribal recognition of a same-sex union would also likely have no effect on federal law.[73]

Because tribal same-sex marriages will not reach beyond tribal borders, decisions concerning marriage rest completely with the tribe. In the case of McKinley and Williams, in addition to interpreting the *Cherokee Nation Code*, the court could freely consider Cherokee-specific policy considerations, including whether Hembree was correct in asserting that "[s]ame sex marriages were not part of the Cherokee history or tradition."[74] To address the element of tradition and inform policy considerations, Part II will discuss the history of two-spirits in North America.

II. TWO-SPIRIT HISTORY IN NORTH AMERICA

Many Native American tribes accepted two-spirit individuals; however, each tribe had distinct cultural practices relating to two-spirits.[75] Despite their varied cultures, many, if not most, tribes allowed two-spirits to have long-term sexual relationships with members of the same sex.[76] Generally, however, tribes valued these homosexual relationships less than heterosexual relationships.[77]

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71. Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that the State of Massachusetts violated the State's constitution by refusing to marry seven gay and lesbian couples).

72. *See, e.g.*, Robyn Cheryl Miller & Jason Binimow, *Marriage Between Persons of Same Sex—United States and Canadian Cases*, 1 A.L.R. Fed. 2d 1 § 23 (2005) (discussing cases where courts held that federal statutes did not apply to same-sex unions); Ian Ayres, Editorial, *Separate, Unequal: How Civil Unions Fall Short of Marriage*, HARTFORD COURANT, June 10, 2005, at A13, *available at* http://www.law.yale.edu/news/2432.htm.

73. Because of DOMA, if McKinley and Reynolds filed a marriage certificate with the tribe, a federally funded Indian Health Service hospital still might not allow hospital visitation—the benefit that initially drove them to seek a tribal marriage license.

74. Kannady, *supra* note 9, at 370.

75. ROSCOE, CHANGING ONES, *supra* note 1, at 4, 6–7.

76. *Id.* at 4 ("Same-sex marriages flourished . . . . "); Angelino & Shedd, *supra* note 1, at 122 ("The literature is replete with accounts of berdache who are married . . . to individuals of the same physiological sex . . . . "); Callender & Kochems, *supra* note 3, at 450; Lang, *Various Kinds of Two-Spirit People*, *supra* note 1, at 107–08 ("[T]wo-spirit individuals and their same-sex relationships seem to have been freely accepted . . . . "). *See* LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 189–95 (categorizing two-spirit partner relationships by gender among selected tribes).

77. *See* Callender & Kochems, *supra* note 3, at 450 ("Although direct evidence for this conclusion is scanty, we suspect that homosexual relations with berdaches were generally

A. Two-Spirit History Generally

Even though their presence was not universal,[78] ethno-historians assert that two-spirit peoples existed in most Native American tribes.[79] Alternative gender roles have been documented in approximately 155 tribes[80] from "every region of the continent, among every type of native culture."[81] They have been described as one of "the most widely shared features of North American societies."[82] Europeans observed Native American males doing women's work, wearing women's clothes, and entering into sexual relationships or marriages with men.[83] Later, reports increasingly described the existence of females occupying the social roles of men.[84] But, social scientists have documented females living partly or completely as men in only approximately one-third of the tribes known to have two-spirits.[85] While two-spirits are widely believed to have existed in many Native American societies, anthropologists cannot ascertain the absolute frequency of these roles within Native American cultures because Europeans disrupted or eradicated many Native American societies before anthropologists could study them.[86]

The influences of Christianity and European culture greatly affected the cultural acceptability of two-spirit people, and as a result anthropologists have found it difficult to characterize the traditional status given to two-spirit individuals in some tribes.[87] Researchers posit that Native American informants told white social scientists what they thought the researchers wanted to hear: they denied the existence of two-spirit individuals within their tribes because their "Indians were good and taught their children

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accepted as long as they did not obstruct 'normal' marriages or, in some cultures, take the form of these.").

78. *See id.* at 444–46.

79. *See* ROSCOE, CHANGING ONES, *supra* note 1, at 7.

80. In 1968, Sue-Ellen Jacobs cited over sixty sources which documented the existence of two-spirits in twenty-one tribes. Fulton & Anderson, *supra* note 3, at 606. In 1983, Charles Callender and Lee M. Kochems estimated that two-spirits existed in 113 tribes. Callender & Kochems, *supra* note 3, at 444–45. In 1991, Will Roscoe estimated that two-spirits were present in over 130 tribes. WILL ROSCOE, THE ZUNI MAN-WOMAN 5 (1991). In 1998, presumably after more research, Roscoe estimated that two-spirits were documented in over 155 tribes. ROSCOE, CHANGING ONES, *supra* note 1, at 7.

81. ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 5.

82. ROSCOE, CHANGING ONES, *supra* note 1, at 7.

83. Lang, *Various Kinds of Two-Spirit People*, *supra* note 1, at 100.

84. *Id.*

85. ROSCOE, CHANGING ONES, *supra* note 1, at 7.

86. *Id.*

87. *Id.* at 11.

right."[88] By the 1930s, acculturation and assimilation had dissuaded Native Americans from talking about two-spirits and inhibited much of the gender role change that had been common in earlier times.[89] Consequently, attaining a truly reliable assessment of the traditional acceptance of two-spirits has been difficult.

Despite these difficulties, anthropologists have asserted that the original peoples in North America "saw no threat in homosexuality or gender variance."[90] Instead, in most instances, Native American societies valued the contributions of two-spirit individuals.[91] Two-spirits faced scorn in their society only when the society had reasons unconnected to gender difference.[92] Among individual tribes, two-spirits were "accepted and sometimes honored."[93] According to one Crow tribal elder, to do otherwise would be inefficient: "We don't waste people the way white society does. Every person has their gift."[94]

Today, in non-academic discourse, the term two-spirit usually denotes any lesbian, gay, bisexual, or transgender Native American,[95] but traditionally many tribes did not classify two-spirit people simply as homosexual.[96] Instead, tribes categorized two-spirits according to both their sexual and non-sexual behaviors, which, in part or completely, matched with the opposite sex.[97] Two-spirits performed other-gender roles by adopting the attire, occupations, and sexual-partner preference of the opposite sex: biological males behaved as women; biological females behaved as men.[98] Two-spirits of a particular biological sex also often engaged in sexual relations with persons of the same biological sex.[99] Thus, generally

88. Lang, *Various Kinds of Two-Spirit People*, *supra* note 1, at 102.

89. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 296; *see also* Callender & Kochems, *supra* note 3, at 443 ("[B]erdaches began to disappear soon after European or American control was established.").

90. ROSCOE, CHANGING ONES, *supra* note 1, at 4; *see* ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 5 ("[Two-spirits] were integral, productive, and valued members of their communities."); Callender & Kochems, *supra* note 3, at 450.

91. ROSCOE, CHANGING ONES, *supra* note 1, at 4.

92. *Id.* at 11 (explaining that "[i]n a few cases, berdaches were feared because of their supernatural power" and that "[i]f they were scorned, hated, or ridiculed, it was usually for individual reasons and not because of their gender difference.")

93. *See, e.g.*, *id.* at 3.

94. *Id.* at 4.

95. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at xiii-xv.

96. *Id.* at 208.

97. Epple, *supra* note 2, at 267.

98. ROSCOE, CHANGING ONES, *supra* note 1, at 6–8; Angelino & Shedd, *supra* note 1, at 122 (citing A.L. Kroeber, *Psychosis or Social Sanction*, 8 CHARACTER & PERSONALITY 204, 209–10 (1940)).

99. *See* WILLIAMS, *supra* note 11, at 88.

two-spirit sexual relations were homosexual, but hetero-gendered.[100]

Even though most two-spirits typically engaged in some homosexual behavior, two-spirit sexual partner preferences varied between tribes.[101] Whereas two-spirit individuals usually entered sexual relationships with persons of one sex, in some cases two-spirit individuals had sexual relationships with both men and women.[102] Two-spirits in other tribes never had lasting relationships.[103] Perhaps because male-bodied two-spirits in some tribes regarded each other as sisters,[104] male-bodied two-spirits never had relationships with each other.[105] Two-spirits sexual behavior was largely, but not exclusively, homosexual.[106]

Anthropological researchers have documented marriages or marriage-like relationships involving two-spirit individuals;[107] however, tribes usually valued marriages involving two-spirit individuals less than they valued heterosexual marriages.[108] In fact, most accounts are unclear as to whether these relationships were solemnized marriages or mere co-habitation.[109] Some tribes provided full-fledged marriage and allowed two-spirits to develop a complete family by adopting orphans.[110] Other tribes recognized two-spirit marriages, but two-spirit weddings involved fewer rituals

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100. Lang, *Various Kinds of Two-Spirit People*, *supra* note 1, at 104–05 ("Thus, a relationship between a male two-spirit and a man, or between a female two-spirit and a woman, may be seen as homosexual on the physical level but not on the level of gender: 'If you are a man and you have a sexual relationship with a 'berdache,' you're not having sex with another man. You're having sex with a 'berdache.' And if you're a woman who has sex with a 'berdache,' you're not having sex with a man, you're having sex with a 'berdache,' you're not having sex with a woman, you're having sex with a 'berdache.' So the partners of the 'berdache' technically are never homosexual because they're not having sex with their same gender.'" (quoting Videotape: Two-Spirit People (Lori Levy, Michel Beauchemin, & Gretchen Vogel 1991))).

101. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 185.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*; Fulton & Anderson, *supra* note 3, at 607.

106. *See* Callender & Kochems, *supra* note 3, at 449 ("Yet if often accurate, the assumption that berdaches were homosexual is oversimplified. Like other attributes, sexual behavior was variable and very complex.").

107. Lang, *Various Kinds of Two-Spirit People*, *supra* note 1, at 107 ([T]wo-spirit individuals and their same-sex relationships seem to have been freely accepted . . . . "); ROSCOE, CHANGING ONES, *supra* note 1, at 4 ("Same-sex marriages flourished . . . . "); Angelino & Shedd, *supra* note 1, at 122 ("The literature is replete with accounts of berdache who are married . . . to individuals of the same physiological sex."); Callender & Kochems, *supra* note 3, at 450. *See* LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 189–95 (categorizing two-spirit partner relationships by gender among selected tribes).

108. *See* Callender & Kochems, *supra* note 3, at 450.

109. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 201.

110. Callender & Kochems, *supra* note 3, at 450.

and formalities than opposite-sex marriages.[111] Heterosexual marriages were often born of alliance politics between families and included bride wealth and implications on social status.[112] On the other hand, some tribes viewed two-spirits unions as "special instances of nonprocreative sexuality and romantic love."[113] Though social recognition given two-spirit relationships varied from tribe to tribe, generally, tribes afforded two-spirit unions less esteem than heterosexual marriages.

Male-bodied two-spirits most often entered into partner relationships with men.[114] These relationships varied from short-term relationships to formal marriages.[115] In most tribes, two-spirit relationships generally did not last as long as opposite-sex marriages and separations from male-bodied two-spirit individuals were simpler than separations from females.[116] In other tribes, adult male-bodied two-spirits never left the homes of their families of birth and, therefore, did not marry.[117] Some two-spirits lived alone for the duration of their adult lives, and in other tribes, they founded separate households with their life partners.[118] Additionally, biological men were reluctant to enter lifelong monogamous marriages with male-bodied two-spirits because marriage partners typically wanted children to provide them support in old age.[119] However, because male-bodied two-spirits had a greater work capacity than women,[120] male-bodied two-spirits were frequently highly desired members of polygynous marriages.[121] Female-bodied two-spirits also entered into a broad array of partner relationships that often were similarly less esteemed and lasting than heterosexual life partnerships.[122]

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111. *See* LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 200.

112. ROSCOE, CHANGING ONES, *supra* note 1, at 10. *See e.g.*, ANN MARIE PLANE, COLONIAL INTIMACIES: INDIAN MARRIAGE IN EARLY NEW ENGLAND 24 (2000) (describing the payment of bridewealth as a custom of heterosexual unions among the Montauk Indians).

113. ROSCOE, CHANGING ONES, *supra* note 1, at 10.

114. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 198; WILLIAMS, *supra* note 11, at 2.

115. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 198.

116. WILLIAMS, *supra* note 11, at 117. *See* LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 199 (explaining that separations from Ojibwa two-spirits were "possibly simpler than separations from women, since [two-spirits] did not have the same backing and support from their families of birth").

117. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 212.

118. *Id.* at 212.

119. *Id.* at 199. *But see* WILLIAMS, *supra* note 11, at 112 ("But with adoption being so commonly accepted, children may even be gained by the berdache. Thus, the same advantages of heterosexual marriage also accrue to the man who marries a berdache.").

120. Callender & Kochems, *supra* note 3, at 447-48.

121. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 199.

122. *Id.* at 289, 294.

B. Two-Spirits Among Selected Tribes

Broad descriptions of two-spirit individuals in North America, while helpful in illuminating majority cultural practices among indigenous peoples, are by themselves insufficient to support a policy argument. Individual tribes are apt to ask, "Why should we concern ourselves with what other tribes do?" Such a response is appropriate. To avoid lumping tribes together under the broad racial category *Native American Indian*, which obscures the distinct legal, political, and cultural identities of individual tribes, it is appropriate to address the cultures of a selection of specific Native American tribes and their specific cultural practices relating to two-spirit individuals.

The culture of the Cherokee, from which the case of lesbian marriage arose, is especially germane to this Note. However, because the Cherokee originally resided in the eastern coast of the United States,[123] little is known of Cherokee two-spirits.[124] Academics did not focus on studying two-spirits until the twentieth century, well after Europeans had infiltrated the easternmost parts of the continent and disrupted many of the Native American tribes therein.[125] Thus, most information about Cherokee two-spirits merely succinctly asserts their existence.[126] Modern informants add that the Cherokee culture "embraced what has come to be known as a two-spirit tradition" prior to 1894 and referred to people who could be considered gay, lesbian, bisexual, and transgender as

123. *History of the Cherokee, Historical Maps*, http://cherokeehistory.com/map1.html (on file with the University of Michigan Journal of Law Reform).

124. WILLIAMS, *supra* note 11, at 4.

125. Callender & Kochems, *supra* note 3, at 446 (positing that on the east coast two-spirit "status might have been widespread in the past, disappearing soon after [white] contact"); Fulton & Anderson, *supra* note 3, at 606 (noting that the first comprehensive review of two-spirit data in North America occurred in 1968 and explaining that while two-spirits have been described as uncommon in the East, "earlier accounts suggest" that two-spirit presence "was more unexceptional . . . and that their numbers greatly decreased following contact with white culture").

126. *See, e.g.*, WILLIAMS, *supra* note 11, at 4 ("Supposedly . . . the Cherokees did not have a berdache status, yet Raymond Fogelson has discovered a document in which Cherokees told a white traveler about 1825, 'There were among them formerly, men who assumed the dress and performed all the duties of women and who lived their whole life in this manner.' If such memories were accurate, then berdachism may have existed but it disappeared quite early among eastern Indians.").

Brian Joseph Gilley, assistant professor of Anthropology at the University of Vermont, filed an Affidavit with the Cherokee Judicial Appeals Tribunal which asserts his belief that, based on the quote in parentheses above, the Cherokee allowed two-spirit unions. Affidavit of Brian Joseph Gilley, Baker v. McKinley & Reynolds (Cherokee Judicial Appeals Trib. Dec. 20, 2005), *available at* http://www.nclrights.org/cases/pdf/cherokee_gilley-statement.pdf (on file with the University of Michigan Journal of Law Reform).

asegi, meaning extraordinary.[127] Nevertheless, the available historical literature on the Cherokee reveals nothing more than the existence of two-spirits.[128]

Fortunately, we know much more about other tribes that have already or may in the near future react to the case of the Cherokee same-sex marriage: the Navajo, the Zuni, and the Lakota Sioux.

1. The Navajo Nádleehé

You must respect a nadle. They are, somehow, sacred and holy.[129]

With significant populations in Arizona, New Mexico, and Utah, the Navajo had "laws that brought order, beauty, peace, and harmony to the People and their world" prior to European arrival.[130] The Navajo considered two-spirits, whom they called nádleehé or "he changes,"[131] valuable members of society.[132] By affording nádleehé elevated social status, the Navajo legitimated the role of the nádleehé,[133] who generally performed the roles of both men and women.[134] Although many families considered themselves "very fortunate" to have a nádleehé within the family,[135] parents allowed

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127. Paula Sophia, *Women Marry in Cherokee Nation*, THE GAYLY OKLAHOMAN, Oct. 25, 2005, *available at* http://gayly.com/articleprintview.ASP?articleid=53961499320040531220307 (on file with the University of Michigan Journal of Law Reform) (quoting David Cornsilk, the certified minister who performed the traditional Cherokee wedding of Kathy Reynolds and Dawn McKinley); *see also* Joyce Rock, *Baptists Taught Cherokee Bigotry*, S. VOICE ONLINE, Oct. 1, 2004, http://www.southernvoice.com/2004/10-1/view/columns/babtists.cfm (on file with the University of Michigan Journal of Law Reform) (discussing a visit to a Cherokee elder who reported that same-sex couples among the Cherokee "existed, were recognized, and were an accepted part of society").

128. *See, e.g.*, ROSCOE, CHANGING ONES, *supra* note 1, at 12 ("Unfortunately, these early reports are the most detailed available for Southeast tribes, although alternative gender statuses appear to have been present among the Creek, Chickasaw, Choctaw, Caddo, and Cherokee."); WILLIAMS, *supra* note 11, at 4 ("Supposedly the Iroquois and their relatives the Cherokees did not have a berdache status, yet Raymond Fogelson has discovered a document in which Cherokees told a white traveler about 1825, 'There were among them formerly, men who assumed the dress and performed all the duties of women and who lived their whole life in this manner.' ").

129. WILLIAMS, *supra* note 11, at 64 (quoting W. W. Hill, *The Status of the Hermaphrodite and Transvestite in Navaho Culture*, 37 AM. ANTHROPOLOGIST 273, 274 (1935)).

130. Bidtah N. Becker & Paul Spruhan, *Profile of the Law of the Navajo Nation*, 3 TRIBAL L.J. (2002/2003), http://tlj.unm.edu/articles/volume_2/navajo/content.php (on file with the University of Michigan Journal of Law Reform) (quoting Nelson Gorman, Jr., *Preface to the* NAVAJO NATION CODE, at ix (1995)).

131. Midnight Sun, *Sex/Gender Systems in Native North America*, *in* LIVING THE SPIRIT: A GAY AMERICAN INDIAN ANTHOLOGY 40 (Will Roscoe ed., 1988).

132. WILLIAMS, *supra* note 11, at 126.

133. Midnight Sun, *supra* note 131, at 41.

134. *Id.* at 40.

135. WILLIAMS, *supra* note 11, at 63 (quoting W. W. Hill, *supra* note 129, at 24).

children to choose the role, rather than forcing the role upon them.[136]

As adults, nádleehés headed the household.[137] Male-bodied nádleehés performed every characteristically feminine activity, including weaving, making pottery, and even midwifery.[138] At the same time, the men allowed male-bodied nádleehés to participate in all but two masculine activities: hunting and warfare.[139] Female-bodied nádleehés were similarly able to combine feminine and masculine activities.[140] In the words of one Navajo woman whose uncle was a nádleehé healer: "They are seen as very compassionate people, who care for their family a lot and help people."[141] Nádleehé "are not seen as an abstract group, like 'gay people,' but as a specific person, like 'my relative so-and-so.' People who help their family a lot are considered valuable members of the community."[142]

Traditionally, the Navajo allowed marriage and other relationships involving nádleehé,[143] but at the same time they discouraged nádleehé from marrying.[144] Male-bodied nádleehé generally formed partner relationships with non-nádleehé biological males who were otherwise heterosexual; female-bodied nádleehé generally partnered with non-nádleehé biological females who were otherwise heterosexual.[145] However, when nádleehé married, they lost certain nádleehé privileges, including being referred to with opposite-sex kinship terminology and wearing the attire of the opposite sex.[146] Although two-spirit marriages generally did not last as long as heterosexual marriages, nádleehé marriages were subject to the same rules of conduct.[147] Families arranged marriages involving two-spirits.[148] The Navajo knew nádleehé relationships were homosexual, but, according to a Navajo informant, their "sexuality [was] never mentioned; it [was] just taken for granted."[149]

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136. *Id.* at 49.
137. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 69.
138. *Id.*
139. WILLIAMS, *supra* note 11, at 60.
140. *Id.*
141. *Id.* at 54.
142. *Id.*
143. Callender & Kochems, *supra* note 3, at 450.
144. *See* LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 73 (noting that married nádleehé lost "the privilege of carrying out both gender roles").
145. Lang, *supra* note 1, at 105.
146. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 73.
147. WILLIAMS, *supra* note 11, at 95.
148. *Id.*
149. *Id.* at 126.

2. *The Zuni Lhamana*

The Indian governor of the Zuni and other members of the community seemed to accept the [two-spirit] without criticism, although there was some joking and laughing about his ability to attract the young men to his home.[150]

On the border of New Mexico and Arizona, the Zunis were an extremely isolated community before white contact.[151] Described as "the strongest character and the most intelligent of the Zuni tribe," the Zuni two-spirit, or lhamana, occupied an important role.[152] When they became lhamana, males adopted women's attire[153] although they also continued to wear some men's garments to show that they were neither men nor women.[154] Often lhamana never left the homes of their parents,[155] where they did almost double the work of a woman,[156] a superior work capacity that the family and Zuni society highly valued.[157] Lhamana "were typically homosexual, although perhaps not exclusively so."[158]

The lhamana maintained long-term sexual and emotional relationships with same-sex partners,[159] and they sometimes married.[160] Male-bodied lhamana never married women and only rarely maintained sexual relations with them.[161] However, anthropologists have documented the marriage of male-bodied lhamana to biological males.[162] Additionally, male-bodied lhamana frequently had nonmarital sexual and emotional relationships with men that often lasted "many years."[163] Still other lhamanas preferred mostly casual sexual relationships.[164]

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150. *Id.* at 100 (quoting Omer Stewart, *Homosexuality Among the American Indians and Other Native Peoples of the World*, 6 MATTACHINE REVIEW 13 (1960)).

151. ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 11.

152. Will Roscoe, *Strange Country This: Images of Berdaches and Warrior Women*, *in* LIVING THE SPIRIT: A GAY AMERICAN INDIAN ANTHOLOGY 55 (Will Roscoe ed., 1988) (describing We'Wha, "'one of the most noted and prominent' members of the tribe").

153. ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 22.

154. WILLIAMS, *supra* note 11, at 72.

155. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 215.

156. WILLIAMS, *supra* note 11, at 57–58.

157. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 215.

158. ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 26.

159. *Id.*; WILLIAMS, *supra* note 11, at 185.

160. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 200 (noting there is documentation of male-male marriages); ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 26.

161. WILLIAMS, *supra* note 11, at 185.

162. Lang, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 200.

163. WILLIAMS, *supra* note 11, at 185.

164. ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 26.

3. The Lakota Sioux Winkte

Winktes were both joked about and respected at the same time.[165]

Before the influence of European settlers, the Lakota Sioux practiced nomadism on the North American plains.[166] Lakota culture respected winktes, who were mostly biological males,[167] and accorded them spiritual power.[168] Lakota religion, which viewed winkte as "magical holders of unique ritual instructions," sanctioned the two-spirit role and allowed them to follow different rules of conduct.[169] As in other tribes, the Lakota defined the role primarily by gender change, "not sexual behavior per se."[170] Specifically, the Lakota have defined winkte as "a halfman-halfwoman; a man who acts like a woman," who "does not have breasts or female genitals" and "was born that way."[171] Winktes perceived both male and female spirits within their bodies,[172] but male-bodied winktes mostly wore men's clothing.[173] Anthropologists also reported that tribe members publicly maligned winktes;[174] however the culture of playful teasing common in many Indian societies might explain this apparent cultural ambivalence toward the winkte role.[175] Lakota culture reportedly had no objections to homosexual behavior.[176] Instead, the tribe discouraged permanent relationships with winktes because these unions would produce no offspring.[177]

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165. WILLIAMS, *supra* note 11, at 40-41.

166. *Cheyenne River Sioux Tribe, More History*, http://www.sioux.org/more_history.html (on file with the University of Michigan Journal of Law Reform).

167. *See* Beatrice Medicine, *Changing Native American Sex Roles, in* TWO-SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY 146 (Sue-Ellen Jacobs, Wesley Thomas, & Sabine Lang eds., 1997) ("In 1993, when I discussed this, I heard the term *winkte winyan*, for some of the elder females had seen [a female winkte] .... *Winkte*, the Lakota/Dakota term for 'gay or homosexual male.... "). *See also* WILLIAMS, *supra* note 11, at 49 ("A Lakota traditionalist says, 'It is obvious from infancy that one is a *winkte*. He is a beautiful *boy*, and the sound of *his* voice is effeminate.' ". (second and third emphases added)).

168. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 312.

169. WILLIAMS, *supra* note 11, at 32.

170. *Id.* at 112.

171. *Id.* at 77.

172. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 208.

173. *Id.*; WILLIAMS, *supra* note 11, at 74.

174. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 312; WILLIAMS, *supra* note 11, at 39.

175. WILLIAMS, *supra* note 11, at 39, 118–19.

176. *Id.* at 118–19.

177. *Id.*

Traditionally, Lakota culture allowed winktes to marry, but often only to already-married men who had wives and children.[178] Lakota chief Crazy Horse, who married one or two winktes in addition to his female wives,[179] serves as a renowned example. Among the Oglala Lakota, the marriage of a winkte as a second or third spouse occurred "within the framework of a marriage ceremony."[180] Lakota culture allowed "higher class winktes" to practice polyandry, and some winktes took up to twelve husbands.[181] In some instances, winkte married women and had children, but this behavior was forbidden to most winkte.[182] Still other winktes never married.[183] Unmarried winktes often erected separate tipis, where they either openly received numerous male visitors or lived with life partners and sometimes children.[184] Although the Lakota allowed winktes to marry, the terms of winkte marriage differed from heterosexual marriages.

Even this small sample of three tribes demonstrates the diversity of attitudes toward two-spirits among tribes that recognized the two-spirit role. Whereas the Navajo allowed two-spirit same-sex marriages that were substantially similar to heterosexual marriages except in their duration, the Lakota provided two-spirit same-sex with fewer marriage privileges than heterosexual counterparts. The Zuni sanctioned two-spirit marriage less heartily than the Navajo and the Lakota, although researchers maintain that the Zuni allowed two-spirits to enter some form of marriage. With over 155 tribes reported to have two-spirit individuals,[185] this survey, though illustrative, is incomplete.[186]

The examples above, in addition to showing the diversity of culture, provide a simple framework on which to build a general

178. *Id.*

179. *Id.* at 112.

180. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 198.

181. *Id.*

182. *Id.* at 186.

183. *Id.* at 204.

184. *Id.* at 204, 213.

185. In 1968, Sue-Ellen Jacobs cited over 60 sources which documented the existence of two-spirits in 21 tribes. Fulton & Anderson, *supra* note 3, at 606. In 1983, Charles Callender and Lee M. Kochems estimated that two-spirits existed in 113 tribes. Callender & Kochems, *supra* note 3, at 444–45. In 1991, Will Roscoe estimated that two-spirits were present in over 130 tribes. ROSCOE, THE ZUNI MAN-WOMAN *supra* note 80, at 5. In 1998, presumably after more research, Roscoe estimated that two-spirits were documented in over 155 tribes. ROSCOE, CHANGING ONES, *supra* note 1, at 7.

186. Admittedly, the selected tribes do not represent tribes from every region of North America. I selected two sedentary pueblo tribes and one plains tribe because the information on these tribes was abundant and readily available. A full survey including information from a larger number of tribes, while helpful to individual tribes in devising same-sex marriage policy, is beyond the scope of this Note.

solution for the modern issue of same-sex marriage. From the examples, we can begin to generalize that, among tribes with two-spirits, some, if not most, allowed two-spirits to marry persons of the same-sex under different terms than their heterosexual counterparts, as among the Navajo and the Lakota. Of those tribes that did not often marry two-spirits, we can generalize that long-term marriage-like relationships were tolerated. At the very least, we can conclude that modern attitudes toward two-spirit and homosexual relationships among Native American tribes that recognized two-spirit individuals conflict with traditional views. To address this conflict, Part III will discuss contemporary tribal views and a contemporary solution.

III. MODERN SOLUTION FOR MODERN TIMES

Over the years, the influence of Europeans and European Americans affected the cultures of many Native American tribes, and, hence, the status of the two-spirit changed. Two-spirits status went from respected to inferior because "white people thought [two-spirits were] amusing or evil."[187] Despite the present animosity toward homosexuality, tribes can eliminate much of the conflict between traditional and modern interests by considering traditional two-spirit culture when devising marriage policy. For some tribes, same-sex civil unions are an especially appropriate solution.

A. From Respect to Reprehension: The Shift in Two-Spirit Status

The influence of European culture diminished the status of two-spirits. Indeed, over a long history of relations, "[f]ew aspects of European and American Indian cultures conflicted as much as they did in this."[188] The European presence changed the ideals of Native Americans themselves. After internalizing European ideals, many Native Americans rejected traditional culture.[189] Europeans accomplished this change in attitude largely through two vehicles: religion and education.

Not long after they established power, representatives working for the Christian church began dictating how Native Americans

187. Callender & Kochems, *supra* note 3, at 453.
188. ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 5.
189. WILLIAMS, *supra* note 11, at 187–88.

should behave.[190] Christian missionaries were among the first to interact with many North American tribes, and, although many attempted to understand native cultures, they uniformly condemned the culture of two-spirits.[191] Among the Lakota, missionaries often persuaded families to ostracize winkte children by warning that associations with winkte would lead to bad luck.[192] Missionaries also denied winktes burial in Christian cemeteries, saying "their souls are lost."[193] Among the Navajo, missionary condemnation led many Navajo to regard the nádleehé as laughable.[194]

In the 1920s, the American government attempted to assimilate Native American children through education. Government schools degraded and punished the practice of Native American culture.[195] The teachers and government employees at the schools quelled two-spirit behaviors as quickly as possible.[196] Androgynous males were forced to play boys' games and to dress like other boys.[197] At perhaps the most renowned Indian boarding school, the Carlisle Indian School in Pennsylvania, a male-bodied nádleehé dressed as a girl lived undetected in a girl's dormitory until a lice outbreak compelled the white teachers personally to scrub all the girls.[198] After his sex became known, the nádleehé "was taken from the school, and he never returned again."[199] His family "still does not know if the boy was sent to another school, or to prison, or was killed."[200] Government education degraded and assimilated two-spirits.

Although two-spirits lost their traditional status among virtually every Native American tribe, European culture did not succeed in completely eliminating transgender and homosexual persons from Native American culture. Indeed, contemporary homosexual and transgender Native Americans cite the pre-contact history of two-spirits when arguing against homophobia in tribal communities.[201]

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190. *Id.* at 138.
191. *Id.* at 181–82.
192. *Id.* at 183.
193. *Id.*
194. WILLIAMS, *supra* note 11, at 183.
195. ROSCOE, THE ZUNI MAN-WOMAN, *supra* note 80, at 199.
196. *Id.*
197. WILLIAMS, *supra* note 11, at 180.
198. *Id.*
199. *Id.*
200. *Id.*
201. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 322. *See, e.g.*, Buchanan, *supra* note 13, at B1 (quoting Corey Taber, co-director of Native Out: "Traditional Native American culture was more accepting of people who had what was considered a different sexuality . . . . So it's an assimilationist perspective to think of homosexuality as taboo or an evil we should protect ourselves against . . . . "); Duncan, *supra* note 28, at B3; Sherrick

They claim two-spirits as their predecessors and argue that tribal culture should revive the traditional respect for two-spirit people.[202] Contemporary two-spirit people argue that anti-homosexual attitudes only divide already fractured tribal communities and that the recognition of traditional values relating to two-spirits would provide validation and "a heritage to Indian gays."[203] Ostracized by their tribes, many modern two-spirits have created separate spaces and activities to practice traditional culture and simultaneously express their gender differences.[204] Participants in separate-space activities cross-dress[205] and take opposite-sex roles in traditional tribal dances.[206] These gatherings "allow free expression of sex and gender" and "challenge mainstream Native control over access to cultural experience and identity."[207] Despite the efforts of the Europeans and Americans, the two-spirit tradition has persevered in a limited capacity, separated from the tribe.

The recent history of Native American tribes in North America and the current views of contemporary two-spirit individuals suggest that many Native American tribes have disregarded the traditional respect given two-spirits, and adopted European American and Christian views on homosexuality and gender difference. Tribal reactions to the marriage of Dawn McKinley and Kathy Reynolds corroborate this suggestion.

In response to the publicity surrounding the marriage of McKinley and Reynolds,[208] the Navajo Nation Council introduced the Diné Marriage Act,[209] which defined marriage, among other things, as between one man and one woman.[210] The bill's sponsor, Larry Anderson, claimed that the bill's purpose was "to strengthen traditional Navajo values."[211] On April 22, 2005, the Navajo Nation

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Roanhorse, *A Traditional Navajo*, THE ADVOCATE, Sept. 27, 2005, *available at* http://www.advocate.com/currentstory1_w.asp?id=20444 (on file with the University of Michigan Journal of Law Reform).

202. LANG, MEN AS WOMEN, WOMEN AS MEN, *supra* note 3, at 322.

203. Ben the Dancer, *Gay American Indians*, *in* LIVING THE SPIRIT: A GAY AMERICAN INDIAN ANTHOLOGY 131, 132 (Will Roscoe ed., 1988).

204. *See* Brian Joseph Gilley, *Making Traditional Spaces: Cultural Compromise at Two-Spirit Gatherings in Oklahoma*, 28 AM. INDIAN CULTURE & RES. J. 81 (2004).

205. *Id.* at 86–87.

206. *Id.* at 88–89.

207. *Id.* at 93.

208. *Tribal Challenge to Same-Sex Marriage*, *supra* note 63.

209. Dine Marriage Act of 2005, Legis. No. 0416-04 (amending NAVAJO NATION CODE tit. 9 (2005)).

210. Jim Maniaci, *Council Overrides Veto: Vote Makes Same-Sex, Plural Marriages Illegal in Navajoland*, INDEP., June 4, 2005, http://www.gallupindependent.com/2005/june/060405overrides.html (on file with the University of Michigan Journal of Law Reform) ("Plural marriages, marrying close relatives, and homosexual marriages all were outlawed . . . .").

211. *Tribal Challenge to Same-Sex Marriage Dismissed*, *supra* note 63.

Council unanimously approved the bill in a sixty-seven-to-zero vote.[212] Despite clear legislative support for the bill, on May 1, 2005, Navajo Nation President Joe Shirley Jr. vetoed the Diné Marriage Act. Recognizing that the bill would deny Navajo people rights,[213] President Shirley said "[t]he legislation veiled a discriminatory aspect in the guise of family values, which goes against the Navajo teaching of non-discrimination and doing no psychological or physical harm."[214] After a public campaign to rally support against the bill,[215] Shirley succeeded in summoning fourteen of the Navajo Nation Council's delegates to his side, but the sixty-two other delegates voted again to approve the bill. Shirley's veto was overridden by three votes.[216]

The legislative actions of the Cherokee and Navajo tribes have not gone unnoticed by other tribes. Following the marriage of McKinley and Reynolds, other tribes in Oklahoma began to consider their marriage policies.[217] Wenona Singel, a professor at the University of North Dakota Law School and an enrolled member of the Little Traverse Bay Bands of Odawa Indians,[218] reported that her tribe recently asked her to draft a marriage statute.[219] Additionally, Native American Peoples have discussed tribal same-sex marriage over the internet on web logs.[220] With so much attention surrounding the case of McKinley and Reynolds, other tribes will likely take a definitive stance on this issue by passing legislation.

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212. Maniaci, *supra* note 210.

213. *Tribal Challenge to Same-Sex Marriage Dismissed*, *supra* note 63.

214. Norrell, *supra* note 10.

215. Interview by Amy Goodman, *supra* note 45 (quoting Joe Shirley as stating: "I vetoed the legislation, because it's not an issue, we're not talking about it. The elderly, the medicine people are not talking about it. Nobody is coming forward to say that, you know—gay people, they're not coming forward to say, we want to get married in the tribal courts. It's not an issue. . . . There are other issues that they really ought to be concerned about. . . . ").

216. Maniaci, *supra* note 210.

217. *Tribal Challenge to Same-Sex Marriage Dismissed*, *supra* note 63; Stogsdill, *supra* note 25, at 3A.

218. University of North Dakota, *Faculty Biography of Wenona Singel*, http://www.law.und.nodak.edu/LawFaculty/singel.php (on file with the University of Michigan Journal of Law Reform).

219. *Tribal Challenge to Same-Sex Marriage Dismissed*, *supra* note 63.

220. *See, e.g.*, Postings to http://www.aptn.ca/forums/index.php?showtopic=92 (on file with the University of Michigan Journal of Law Reform); Postings to http://www.indianz.com/board/topic.asp?TOPIC_ID=5917 (on file with the University of Michigan Journal of Law Reform).

B. Toward a Solution for Modern Times

Before discussing solutions, a more basic question must be answered: why is tradition important? The answer varies from tribe to tribe. Some tribes consider cultural traditions the common law of the tribe, and some Native Peoples believe that traditions, such as those described in creation stories, can never change.[221] Other tribal members believe that "traditional law is subject to manipulation or has fallen into disuse and is no longer in existence or applicable. . . ."[222] However, generally, tribal members value tradition in their laws because tradition allows tribes to maintain their sovereign identities. Where tribes change legislation to mirror state and federal law, the end result is assimilation with general American identity and arguably a consequent loss of tribal identity.[223] Furthermore, tribal members might resist the adoption of Western law, which does not derive from their belief systems. This adoption creates a disconnect between the law and the people to whom it applies.[224] In sum, for many tribes tradition is law, and perhaps more importantly, tradition helps tribes maintain identities as sovereign entities and is fundamental to all tribal law.

Completely outlawing same-sex unions disregards the traditions of many tribes. Native American tribes are more than government entities and racial groups; tribes are communities of people with distinct cultures. As explained in Part II, many tribes had a documented tradition of accepting individuals whose social and sexual behaviors did not comport with the expectations of their biological sex. Much of the present animosity toward two-spirit people resulted from European and European American assimilationist tactics and the imposition of Christian ideals. Outside influence continues to play a role as an increasing number of states pass amendments defining marriage as exclusively between a man and a woman.[225] Armed with the sovereignty to make independent decisions on this matter, tribes should be wary of disregarding their traditions, which are integral to tribal identity.

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221. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. (2000–2001), http://tlj.unm.edu/articles/volume_1/zuni_cruz/text.php.

222. *Id.*

223. *Id.*

224. *Id.*

225. *See* Human Rights Campaign, *supra* note 7 (showing that many states have passed constitutional amendments banning same-sex marriage within the past three years).

Of course, contemporary interests should also play an important role in making policy. Today many Christian Native Americans believe that the Bible unequivocally condemns homosexual behavior, while others believe that the institution of marriage and the American family can only survive if reserved for couples of one male and one female. Tribal culture must adapt to changing circumstances. However, tradition need not entirely give way to modern mainstream culture. Tribes should give weight to both traditional tribal culture and modern religious and cultural values.

Same-sex civil unions provide an attractive compromise by partially satisfying both traditional and modern interests. First, same-sex civil unions would satisfy the concerns relating to adherence to traditional culture. As discussed in Part II, few tribes regarded two-spirit marriages as identical to non-two-spirit marriages. Most tribes, like the Navajo, the Lakota, and the Zuni treated two-spirit relationships with less reverence than that given to opposite-sex marriages. Analogously, most people view civil unions, which provide many of the same legal benefits as marriage (such as hospital visitation rights), with less deference than full-fledged marriages. Among tribes that traditionally recognized two-spirit unions, same-sex marriage could serve as an appropriate modern corollary.

Second, same-sex unions could accommodate the varied cultures of individual tribes. There is no pre-existing traditional tribal definition of same-sex civil unions. Consequently, tribes may design same-sex civil union legislation that aligns with their particular traditional practices. If a tribe traditionally allowed two-spirit unions that were substantially similar to heterosexual marriages, that tribe could design same-sex civil unions that conferred many of the same rights and responsibilities as heterosexual marriages. Tribes that traditionally viewed two-spirit unions with comparably less deference could create civil unions that confer relatively few rights and responsibilities. Tribes can shape same-sex civil unions legislation until they create an appropriate historical fit.

Third, same-sex civil unions are not marriages, and therefore they would not disturb the definition of marriage as between one man and one woman. Todd Hembree asserted that same-sex marriage would "fly in the face of the traditional definition and understanding of marriage of the Cherokee people."[226] Although the available literature on the Cherokee reveals nothing more than the existence of two-spirits among the Cherokee, Hembree may be correct in stating that Cherokee marriage traditionally took place only between one woman and one man. Same-sex civil unions

226. Snell, *supra* note 32.

avoid the problems of traditional definitions by avoiding the label "marriage." Tribal legislatures could freely bestow same-sex civil unions with as many rights and as much deference as would have been appropriate for two-spirit unions in pre-European times.

Finally, same-sex civil unions would partly assuage the concerns of those who practice Western religion, which considers homosexuality immoral. They are civil—not religious—unions.[227] Some fundamentalist Christians cling to the biblical view that homosexuality is an abomination. Although those with the deepest religious convictions might reject any legislation that falls short of complete prohibition of homosexuality, other more moderate Christian Native Americans might accept same-sex unions so long as they do not receive the sanction and rites of the church. Unlike heterosexual marriages, same-sex civil unions would not require a minister's approval; only the tribal government need sanction them. Because they would not be associated with religion, same-sex civil unions could satisfy some of those who object to same-sex marriage on religious grounds.[228]

CONCLUSION

The marriage of two Cherokee lesbians caused many tribes to reconsider their tribal marriage laws. Legislative responses to this marriage thus far have conflicted with traditional culture, which in some tribes permitted two-spirit persons to enter into marriage or marriage-like relationships with persons of the same-sex. Tribes that recognized two-spirit relationships should seek alternatives to the complete prohibition of same-sex marriage where appropriate, namely same-sex civil unions.

227. For discussion of the popularity of civil unions as opposed to same-sex marriage, *see* Rob Moll, *Civil Unions: Would a Marriage by any Other Name Be the Same?*, CHRISTIANITY TODAY, Mar. 8, 2004, http://www.christianitytoday.com/ct/2004/110/11.0.html (on file with the University of Michigan Journal of Law Reform) and Paul Johnson, *Bush: Civil Unions OK*, 365GAY.COM, Oct. 26, 2004, http://www.365gay.com/newscon04/10/102604bushMarr.htm (on file with the University of Michigan Journal of Law Reform).

228. However, as stated above, tribes could, if traditionally appropriate, require that same-sex civil unions be performed by a minister or other religious figure. Tribes could create a sacred version of civil unions if they so desired.