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Herbert W. Titus

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# DEFINING MARRIAGE AND THE FAMILY

Herbert W. Titus\*

## I. INTRODUCTION

For nearly two decades, marriage and the family have occupied center stage in an ever intensifying battle over the place of sex in American society. At the heart of this battle are the legal definitions of marriage and the family, liberty, and order. At the center of this legal debate is the nature of law—common, statutory, and constitutional.

Those who seek to redefine marriage and the family claim that a variety of sexual relationships serve the sociological and psychological functions of the traditional family. Law, to these reformers, is only an instrument to bring about the desired social changes. No questions are asked whether any proposed change, e.g., same-sex marriage, violates any legal or moral order imposed on mankind by God or nature.<sup>1</sup>

Likewise, those who defend the heterosexual, monogamous status quo from these assaults assume that law is determined solely by those in authority in civil society, without regard to any preexisting, transcendent law of nature. They simply contend against changing the traditional marriage and family order on the ground that any other system would not be in the best interest of society.<sup>2</sup> While the two contending parties come to different conclusions about sex, and marriage and the family, they agree that law is merely a means to be used by human beings to achieve a desired societal end. They just differ on the desirability of the end.

One voice has been raised, however, to challenge this legal orthodoxy. In 1990 Harry V. Jaffa, Professor Emeritus of Political Philosophy at Claremont McKenna College, argued that sodomy—and presumably same-sex unions—must be condemned because it violates a natural order of heterosexual monogamy.<sup>3</sup> In support of his view, Jaffa reasoned by analogy from the prohibition of slavery in the United States.<sup>4</sup> Slavery was

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\* B.A., University of Oregon; J.D., Harvard University. Editor and Publisher, THE FORECAST.

<sup>1</sup> See, e.g., Mary Patricia Treuthart, *Adopting A More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91 (1990-91).

<sup>2</sup> See, e.g., Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests,* 81 MICH. L. REV. 463 (1983).

<sup>3</sup> HARRY V. JAFFA, *HOMOSEXUALITY AND THE NATURAL LAW* 1 (1990).

<sup>4</sup> *Id.* at 28-31.

not outlawed, he claimed, because public opinion was against it, or because it had become economically and socially unacceptable.<sup>5</sup> Rather, Jaffa recalled that “slavery, by denying human equality, denied the slaves’ nature as members of the human species, and therewith of their moral personality under ‘the laws of nature and of nature’s God.’”<sup>6</sup>

Is there a “law of nature and of nature’s God” that binds human beings in civil society? Or may human beings make lawful or unlawful whatever they choose? This was the central question in the slavery debate in nineteenth century America. It is the key question to be asked in the current debate over the legal definition of marriage and the family. It cannot be finessed.

## II. THE LAW OF NATURE AND OF NATURE’S GOD

In Chapter Two of Book One of his *Commentaries on the Laws of England*, Sir William Blackstone defined law as a “rule of action, which is prescribed by some superior, and which the inferior is bound to obey.”<sup>7</sup> To illustrate this definition, Blackstone called the reader’s attention to the rules governing the inanimate and animate worlds.<sup>8</sup> All creatures, including mankind, were bound by the rules of motion and the rules of nutrition.<sup>9</sup> If a creature did not conform to these rules, then it would cease to exist.<sup>10</sup> And no creature had any choice about the matter, for the rules had been prescribed by the creatures’ “superior,” the Creator.<sup>11</sup> Consequently, all creatures were “bound” by them.<sup>12</sup> From this observation about the laws governing the inanimate and animate worlds, Blackstone drew a straight line to the “human” world, that is, to the rules governing mankind’s “reason and freewill.” In this world, Blackstone claimed, mankind was also a creature, and as such, was bound by “the laws of his creator, for he is entirely a dependent being.”<sup>13</sup> From this proposition, Blackstone concluded that while an individual human being was able to choose to act contrary to the rules governing one’s humanity, one could not claim the legal right to do so:

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<sup>5</sup> See *id.* at 28.

<sup>6</sup> *Id.* at 30-31.

<sup>7</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*38.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at \*38-39.

<sup>13</sup> *Id.* at \*39.

For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.<sup>14</sup>

The duty of mankind, according to Blackstone, is to employ one's reason to discover the laws of human nature, and to state and apply them.<sup>15</sup> Blackstone contended that these laws of human nature were to be found in the natural world through observation and in the Holy Scriptures.<sup>16</sup> The former was called the "law of nature," and the latter the "law of revelation."<sup>17</sup>

Both the law of nature and the law of revelation were, Blackstone asserted, superior to any "law" invented by human beings; and "no human laws are of any validity, if contrary to [the law of nature]; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."<sup>18</sup> Because all human laws were dependent upon both revelations of the Creator, the law of nature and the law of revelation, Blackstone concluded that "no human laws should be suffered to contradict these."<sup>19</sup> If Blackstone is correct, then the task of defining the rules governing sexual behavior, including marriage and the family, is first to discover the law of nature and the law of revelation of human sexuality, and marriage and the family. Once that law is discovered and stated, then one must conform the civil rules accordingly. Otherwise, the civil order is illegitimate.

Whether or not Blackstone is correct about the nature of law depends upon whether he was right about the origin of the universe and of mankind. He simply assumed that the Biblical account of the origin of the physical world was historically true: "[W]hen the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be."<sup>20</sup> Blackstone also assumed that the Genesis

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<sup>14</sup> *Id.* at \*39-40.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at \*42.

<sup>17</sup> *Id.* at \*39, 42.

<sup>18</sup> *Id.* at \*41.

<sup>19</sup> *Id.* at \*42.

<sup>20</sup> *Id.* at \*38.

account of the origin of mankind was equally true, including the account of Adam and Eve in the Garden of Eden:

[I]f our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task [of discovering the law of nature] would be pleasant and easy . . . . But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.<sup>21</sup>

Finally, Blackstone affirmed the entire Biblical account of God as One who superintends the affairs of mankind, by continuously revealing His laws through the written word, as well as in nature:

[D]ivine providence . . . in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers [sic] manners, to discover and enforce it's [sic] laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures.<sup>22</sup>

For the past one hundred years American legal scholars, judges, and lawyers have simply ignored this common law heritage as stated by Blackstone.<sup>23</sup> Following the lead of such men as Christopher Columbus Langdell, Oliver Wendell Holmes, and Roscoe Pound, they have discarded God and the Holy Bible from discussions about law, as if they were no longer salient.<sup>24</sup> They have done so because of an assumption that Darwin's theory of evolution has been proved true and, thereby, made the account of origins in the Bible either false or no longer relevant to the formation of civil law in a scientific age.<sup>25</sup> But Darwin's theory has never been scientifically proved; nor has the Genesis account of origins ever been scientifically refuted. To the contrary, Phillip E. Johnson, a law professor at the University of California at Berkeley, has demonstrated that modern scientists who insist on the Darwinian hypothesis as the only

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<sup>21</sup> *Id.* at \*41.

<sup>22</sup> *Id.* at \*41-42.

<sup>23</sup> Herbert W. Titus, *God, Evolution, Legal Education, and Law*, 1 J. CHRISTIAN JURISPRUDENCE 11, 22-25 (1980).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

empirically plausible theory of origins are neither scientific nor honest.<sup>26</sup> The evolutionary hypothesis has become an axiom of faith which, by definition, cannot be empirically falsified any more than can any other faith assertion, including that of the Book of Genesis.<sup>27</sup>

How, then, does one resolve this conflict of faiths? One must go to the founding legal and political documents of the nation's civil order to determine the official world view that has been adopted by the nation's charter. In the case of the United States of America, it is unmistakably clear. The official legal and political faith of her founding charter is that of Blackstone, not that of Langdell, Holmes, and Pound.

### III. AMERICA'S TRUE LEGAL HERITAGE

By the time the United States Constitution was written, the United States of America had entered its twelfth year as an independent nation-state. Thus, the delegates to the Constitutional Convention subscribed to the proposed new Constitution on "the Seventeenth Day of September, in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth."<sup>28</sup> That the nation preexisted the Constitution is also evident in the text. A person was eligible for election to the House of Representatives only if he shall have "been seven years a citizen of the United States."<sup>29</sup> A person, to be eligible for the Senate, was required to have been "nine years" a United States citizen.<sup>30</sup> The purpose of the Constitution was not to constitute a new nation, but, as the preamble stated, "to form a more perfect union."<sup>31</sup>

When, then, was the nation formed and by what act? If 1787 was the nation's twelfth year, as stated in the Constitution's subscription clause, then 1776 was the date of the nation's birth. That was the year in which the Declaration of Independence was signed by "the Representatives of the UNITED STATES OF AMERICA, in General Congress, Assembled."<sup>32</sup> The Declaration not only announced the dissolution of "the Political Bands, which have connected" the English colonies in North America to the Mother Country, but the creation of a "separate and

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<sup>26</sup> PHILLIP E. JOHNSON, *DARWIN ON TRIAL* 144-54 (1991).

<sup>27</sup> *Id.*

<sup>28</sup> U.S. CONST.

<sup>29</sup> U.S. CONST. art. 1, § 2, cl. 2.

<sup>30</sup> U.S. CONST. art. 1, § 3, cl. 3.

<sup>31</sup> U.S. CONST. pmbl.

<sup>32</sup> THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

equal” people with free and independent status as the United States of America.<sup>33</sup>

Upon what legal foundation did these representatives claim the right to become an independent nation-state in the international family of nations? The answer is found in the Declaration’s first paragraph: “When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and Nature’s God entitle them . . . .”<sup>34</sup>

The laws of nature referred to in the Declaration are those found in nature as revealed by God. The laws of nature’s God are those revealed by God in the Holy Scriptures. As Gary Amos has so ably demonstrated in his book, *Defending the Declaration*, these terms are not from the Eighteenth Century Enlightenment nor from Deist or Stoic sources, but are rooted in a Christian philosophy of law, beginning with the Apostle Paul in Romans 1 and 2 through the writings of the Reformers up to John Locke and William Blackstone.<sup>35</sup> Not only is America’s charter as a nation rooted in a Christian philosophy of law, but it is founded upon the Biblical account of origins, as chronicled in the Book of Genesis. This foundation, in turn, determines the definition of rights for the purposes of the civil legal order.

First, the Declaration affirms that “all Men are created equal,” thereby providing the basis upon which governments are instituted—the consent of the governed.<sup>36</sup> This compact theory of the origin of civil government was made possible by the Biblical account that no individual human being could claim the right to exercise power over any other human being.<sup>37</sup> Because all human beings were equal before God, no one could claim the right to rule because of superior intellect, strength, name, or other human trait, but only by mutual consent.<sup>38</sup>

Second, the Declaration affirms that all men are “endowed by their Creator with certain unalienable Rights.”<sup>39</sup> Rights are given by God, not by men, whether they be philosopher or king. Because rights are a gift of God, they cannot be taken away by men, whether they be philosopher or king. Thus, they are unalienable. Nor can they be subtracted from, or

<sup>33</sup> *Id.* para. 1; see John Quincy Adams, *The Jubilee of the Constitution*, reprinted in 6 J. CHRISTIAN JURISPRUDENCE 1, 4 (1986-87).

<sup>34</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>35</sup> GARY T. AMOS, *DEFENDING THE DECLARATION* 35-74 (1989).

<sup>36</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>37</sup> JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 3-5, 39-40, 49-51 (J.W. Gough ed., 1976).

<sup>38</sup> AMOS, *supra* note 35, at 127-50.

<sup>39</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

added to, for they are certain. Indeed, God-given rights are “self-evident,” as the Declaration, itself, puts it.<sup>40</sup> Finally, the Declaration lists three illustrative categories of rights, “Life, Liberty, and the Pursuit of Happiness.”<sup>41</sup> Moreover, the Declaration asserts that the purpose of civil government is to “secure” these and other God-given unalienable rights.<sup>42</sup>

Thus, the common law secures the right to life by declaring homicide to be a crime and providing punishments for those who violate its prohibitions.<sup>43</sup> At the same time, the common law preserves liberty by requiring proof of an act of causing the physical death of another human being, not just a heart’s desire or a mental inclination to bring about the death of another. While one may have a moral duty to refrain from hating another, one does not have a civil duty to forbear such thoughts or desires.

But the common law is not the only means available to the civil ruler to secure the rights God has given to man. Legislatures may enact statutes to make more clear and certain the interest protected and the punishment provided. Such enactments cannot, however, “abridge or destroy” the rights of life or liberty as God has established them.<sup>44</sup> Under the English system of Parliamentary sovereignty, however, there was no effectual means to check the legislature when it abrogated its duty to secure such rights.<sup>45</sup>

To this end, the people in America formed a written constitution more effectually, among other things, to “secure the blessings of liberty to ourselves and our posterity.”<sup>46</sup> As Chief Justice John Marshall stated in *Marbury v. Madison*:<sup>47</sup>

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected . . . .

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

<sup>40</sup> AMOS, *supra* note 35, at 75-126.

<sup>41</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>42</sup> *Id.*

<sup>43</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*176-204.

<sup>44</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*54.

<sup>45</sup> *Id.* at \*46-52.

<sup>46</sup> U.S. CONST. pmb1.

<sup>47</sup> 5 U.S. (1 Cranch) 137 (1803).



The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.<sup>48</sup>

The very essence of a written constitution, Marshall continued, is to establish a rule of law paramount to that of the legislature or the executive or the judiciary.<sup>49</sup> That rule of law must, therefore, be found in the written document itself, lest the people's servants become their masters and thereby "subvert the very foundation of all written constitutions."<sup>50</sup> The question now becomes how to read the language of the Constitution in order to discover the limits on legislative, executive, and judicial power that are contained in that document.

#### IV. SOCIOLOGICAL LAW—EXISTENTIAL LIBERTY

For over fifty years, most judges, legal scholars, and lawyers have assumed that the words in the Constitution are to be understood as changing in meaning with the changing times.<sup>51</sup> This evolutionary philosophy took hold first in the development of the meaning of liberty and due process in the application of the due process clauses of the Fourteenth and Fifth Amendments.<sup>52</sup>

In the first half of the twentieth century the concepts of liberty and due process were determined by the common law heritage, as it had been received through Blackstone and the Declaration of Independence. Thus, the Supreme Court announced in *Meyer v. Nebraska*<sup>53</sup> that the liberties protected by the due process clauses generally included all "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>54</sup> By the late 1940s and 1950s, under the leadership of Justices Felix Frankfurter and John Marshall Harlan, the Court moved away from this fixed meaning of liberty and due process to one shaped by evolving legal standards.<sup>55</sup> This view of due process was

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<sup>48</sup> *Id.* at 176.

<sup>49</sup> *Id.* at 178.

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1036, 1068-69, 1071 (1981).

<sup>52</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302-14 (2d ed. 1988).

<sup>53</sup> 262 U.S. 390 (1923).

<sup>54</sup> *Id.* at 399.

<sup>55</sup> See, e.g., *Rochin v. California*, 342 U.S. 165, 171-72 (1952).

summarized in 1961 by Justice Harlan in his dissenting opinion in *Poe v. Ullman*:<sup>56</sup>

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.<sup>57</sup>

As for liberty, Justice Harlan claimed that it could not be found in any written document.<sup>58</sup> Rather, liberty was a "rational continuum," to be found in a series of court opinions reflecting "reasonable and sensitive judgment[s]" securing the rights of individuals to be free "from all substantial arbitrary impositions and purposeless restraints."<sup>59</sup>

If liberty may not be found in the fixed principles of the common law or in the Constitution, then where was it to be found? The answer to this question came in 1973 in Justice Harry Blackmun's majority opinion in *Roe v. Wade*.<sup>60</sup> Instead of laboring mightily to find the right of a woman to terminate her pregnancy in positive common law, or even in an evolving common law tradition, Justice Blackmun eschewed legal analysis and definition altogether. A woman has the right to be free, Blackmun wrote, from "a distressful life and future" that could be caused by having to bear a child that she does not want: "Psychological harm may be imminent. Mental and physical health may be taxed . . . . There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."<sup>61</sup> Justice Blackmun cited no authority for defining liberty in purely sociological and psychological terms. He simply trumped the legal approach to liberty with a paragraph

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<sup>56</sup> 367 U.S. 497 (1961).

<sup>57</sup> *Id.* at 542 (Harlan, J., dissenting).

<sup>58</sup> *Id.* at 543 (Harlan, J., dissenting).

<sup>59</sup> *Id.* (Harlan, J., dissenting).

<sup>60</sup> 410 U.S. 113 (1973).

<sup>61</sup> *Id.* at 153.

about the existential realities of motherhood and won for the pregnant woman the right to choose.

Nineteen years later, Justice Sandra Day O'Connor preserved this pro-choice legacy in *Planned Parenthood v. Casey*,<sup>62</sup> giving liberty an existential philosophical base apart from any empirical setting: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>63</sup> Having so defined liberty, Justice O'Connor has adopted the existential premise that there is no preexisting right or wrong, no objective truth, that informs or limits individual choice. She has in the name of constitutional law borrowed a page from Jean-Paul Sartre's *Being and Nothingness* in which Sartre claims that each individual human being has absolute freedom of choice without regard for consequences or for societal norms.<sup>64</sup> Having laid down such an open-ended definition of liberty, Justice O'Connor has not only provided the basis for reaffirming the essential holding in *Roe v. Wade*, but will give new life to earlier unsuccessful efforts to extend the Court's existential liberty doctrine to encompass the right to commit sodomy and other sex acts, long condemned at common law.<sup>65</sup>

As Justice Byron White pointed out in his majority opinion in *Bowers v. Hardwick*,<sup>66</sup> there is no room for claiming that sodomy or any other sexual activity outside monogamous marriage was a privilege recognized at common law.<sup>67</sup> Even Justice Harlan found no room for such a liberty claim in his more expansive reading of the due process clause.<sup>68</sup> Only by following the existential model of *Roe*, divorcing liberty from law, was Justice Blackmun able to find a plausible claim for constitutional protection for an act of sodomy. Chiding the majority for having stated the privacy claim as one by a homosexual male wanting recognition of a right to have sex with another male, Justice Blackmun redefined the claim in the broadest possible terms: "This case is [not] about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare . . . . Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely 'the right to be let alone.'"<sup>69</sup> From this specious premise, Blackmun then articulated what has popularly

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<sup>62</sup> 112 S. Ct. 2791 (1992).

<sup>63</sup> *Id.* at 2807.

<sup>64</sup> JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY* 524-26 (Hazel E. Barnes trans., 1956).

<sup>65</sup> Herbert W. Titus, *Existential Liberty*, *THE FORECAST*, Feb. 1, 1994, at 1, 2.

<sup>66</sup> 478 U.S. 186 (1986).

<sup>67</sup> *Id.* at 192-94.

<sup>68</sup> *Poe v. Ullman*, 367 U.S. 497, 545-46, 552-53 (1961) (Harlan, J., dissenting).

<sup>69</sup> *Bowers*, 478 U.S. at 199 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

become the right of "individual autonomy," the beginning of all constitutional claims to engage in the sexual activity of one's own choosing:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.<sup>70</sup>

Because such choices do have consequences in society, Justice Blackmun's supporters have tempered his claim for individual sexual autonomy with a list of "overriding" state interests lest his existential premises lead to anarchy.<sup>71</sup> Likewise, Justice O'Connor tempered her expansive view of individual liberty in the case of abortion by approving a number of state-imposed limits on the woman's right to choose.<sup>72</sup> But such accommodation in the interest of societal order would neither be required nor permitted if the Blackmun/O'Connor existential definition of liberty is in error.

#### V. OBJECTIVE LAW—TRUE LIBERTY

Those who assert that human beings may choose for themselves how to express their sexuality presuppose that human beings are self-defining projections in a universe devoid of purpose with the power to control their own destinies. This claim is demonstrably untrue. Human beings are limited by their genetic structures, their environment, their finiteness, and their mortality. They are governed by the law of gravity and the laws of nutrition. While they may imagine themselves free of such laws, and thereby free to develop their own concepts of "existence, meaning, the universe, and the mystery of human life," those imaginings are vain indeed, when one comes face to face with AIDS and certain death.

No individual human being is autonomous, that is, subject only to one's own laws. The claim of autonomy must be dismissed for what it is,

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<sup>70</sup> *Id.* at 205.

<sup>71</sup> See *TRIBE*, *supra* note 52, at 1431-34 (citing the prevention of non-consensual sex, adultery, and polygamy as overriding state interests).

<sup>72</sup> *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2822-26, 2832-33 (1992). Those state-imposed limits were an informed consent requirement, a twenty-four hour waiting period, parental consent for minors (with an optional judicial bypass), and certain reporting requirements imposed on clinics. *Id.*

a legal fiction that has absolutely no relation to reality. This is especially true when the claim of autonomy is applied to the arena of sex. Human beings cannot free themselves from the laws governing promiscuous sexual behavior; such activity does cause a variety of venereal diseases. While human beings may hope to find a cure, preventive or otherwise, for all such diseases, there is only one sure way to avoid them: one male, one female engaging in sex as the body is designed and for a lifetime.

While individual human beings are able to have sex outside the monogamous marriage bond, that does not mean that they have the liberty or right to do so. Just because one is able to do something, does not mean that one is free to do it. True freedom comes from channeling one's ability in accordance with one's design. A person may be able to run a vacuum over his front lawn, but it would not be correct to say that he is "free" to do so. Otherwise, freedom loses all of its normative meaning. One may be able to kill one's spouse, but is one free to do so? One would surely answer that question in the negative, not only because one is in danger of being detected and punished by the civil authorities, but also because of the intrinsic significance of the life of another human being.

To claim that one has the right to define one's own meaning, existence, universe, and the mystery of human life is to claim that one is God. Human beings have been tempted from the beginning to play God, only to find reality staring them in the face. Adam and Eve ate of the fruit of the tree of the knowledge of good and evil in response to the promise that they would be as gods.<sup>73</sup> Just the opposite happened. They lost touch with their Creator and, in the process, lost their lives, liberties, and property.<sup>74</sup> The lesson of the Biblical account of the fall of man in the Garden of Eden is that one cannot act contrary to God's law and live a life of liberty and prosperity. The reason is simple. Liberty has been defined for mankind by the Creator and true liberty comes only when one obeys the will,<sup>75</sup> the word,<sup>76</sup> and the plan<sup>77</sup> of God for each individual's life.

Likewise, true liberty in the civil realm must conform to the will, the word, and the plan of God. As Creator of all nations,<sup>78</sup> God has ordained that the civil ruler exercise only limited authority.<sup>79</sup> Some duties are, for example, owed exclusively to God and, therefore, outside the jurisdiction

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<sup>73</sup> *Genesis* 3:5.

<sup>74</sup> *Genesis* 3:14-24.

<sup>75</sup> *1 Peter* 2:13-16; *Matthew* 4:10.

<sup>76</sup> *James* 1:22-25; *Matthew* 4:5-7.

<sup>77</sup> *1 Corinthians* 9:1; *Matthew* 4:3-4.

<sup>78</sup> *Acts* 17:26-27.

<sup>79</sup> *Romans* 13:4, :6; *1 Samuel* 8.

of the state.<sup>80</sup> For example, God has commanded mankind not to hate nor to lust, but those commands are for God alone to enforce, not the civil authorities.<sup>81</sup> On the other hand, there are duties that God has ordained for civil rulers to enforce. Those who act out their hate and murder another, and those who act out their lust and commit rape, are subject to being punished by the state.<sup>82</sup>

The key to liberty, then, is just the opposite of that stated by modern legal scholars, judges, and lawyers. Liberty is not found by each individual's exercising a nonexistent power of self-actualization. To the contrary, true liberty is found in discovering God's design and conforming oneself to that design. In the case of human sexuality, God's design has been clear from the beginning—one male, one female, in covenant for a lifetime.<sup>83</sup>

## VI. LEGITIMATE LAW

In modern pluralist America, however, most would find the preceding discourse on law and liberty unthinkable. For example, one writer who supports same-sex marriage has asserted that any view precluding homosexual marriages is "irrational hatred and bigotry."<sup>84</sup> Another has concluded that any definition of marriage and the family that does not include unions of two members of the same sex is "arbitrary."<sup>85</sup> A third writer has attributed a "near primordial hostility" towards homosexuals to the influence of "precepts absorbed from scripture, canon law and natural law."<sup>86</sup> A fourth is more charitable, dismissing orthodox Christian family values as "[s]omewhat antiquated."<sup>87</sup>

What all of these writers, and others like them, hold in common is the belief that human beings are at liberty to have sex with whomever they

<sup>80</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in 2 THE WRITINGS OF JAMES MADISON, 1783-1787, at 183-84 (Gaillard Hunt ed., 1901).

<sup>81</sup> See *Matthew* 5:20-22, :27-28.

<sup>82</sup> See *Genesis* 9:6; *Deuteronomy* 22:25-26; *Romans* 13:3-4.

<sup>83</sup> See *Genesis* 2:18-24; *Matthew* 19:1-6.

<sup>84</sup> Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 1034 (1991).

<sup>85</sup> Lisa R. Zimmerman, Note, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 706 (1990).

<sup>86</sup> Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOW. L.J. 173, 224 (1992).

<sup>87</sup> Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539, 544 (1991).

choose, so long as the choice is mutual, and to associate with others in the form of their own choosing in order to find sexual fulfillment. Ivy Young of the National Gay & Lesbian Task Force summarized this view of law and reality well when she predicted that the 1993 Census Bureau report would add support for homosexual domestic partnership laws by providing “another indication that families are what people create, not what a few individuals fantasize about. We can’t turn back the clock. This is not pre-World War II. And families, for any number of reasons, are structuring themselves in different ways.”<sup>88</sup> What makes the Biblical precepts unthinkable is the unproved presupposition that there is no objective law binding human sexual behavior. But that is the question, and it cannot be dismissed by the kind of pejorative statements that permeate the current literature.

Indeed, if current sexual practices should determine law, as so many are now contending to justify same-sex marriage and other sexual activities between consenting adults, then why should not current sexual harassment and racial discriminatory activities determine the content of anti-discrimination laws? It was precisely this kind of sociological law that led the Supreme Court in *Dred Scott v. Sandford*<sup>89</sup> to conclude that negroes “had no rights [that] the white man was bound to respect . . . .”<sup>90</sup> Sociological law ought to be rejected as illegitimate for the simple reason that it is not law at all, but only power politics masquerading as law. The only escape from this legal charade is to return to the principles of the Declaration of Independence as Abraham Lincoln did when he cited the principle of human equality in opposition to *Dred Scott*.<sup>91</sup> Those who argue in favor of sodomy and same-sex marriage rely upon a concept of liberty that is as antithetical to the Declaration’s definition of that term as the slave owner’s depiction of the slave was to the Declaration’s definition of the equality of the human race. Because the Declaration continues to be the legal and political charter of the nation, any definition of liberty that contradicts that of the founding document is illegitimate.

The Declaration states that liberty is one of the three major categories of rights endowed by the Creator upon His human creatures.<sup>92</sup> This alone refutes the assumption that liberty can be construed to encompass the right to self-determination. Mankind’s nature is not self-determined, but God-determined. Whatever liberty is, it must be defined in relationship to the One who has created it, not as if the Creator did not exist. This is the legal

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<sup>88</sup> *Domestic Partners*, 33 CQ RESEARCHER 761, 778 (Sept. 4, 1992).

<sup>89</sup> 60 U.S. (19 How.) 393 (1857).

<sup>90</sup> *Id.* at 407.

<sup>91</sup> HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED 313-16 (1959).

<sup>92</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

and political philosophy endorsed by the nation's charter. And it is binding on the American people and their representatives in the formulation of public policy, including the policy governing sexual activity, and marriage and the family.

In the name of "separation of church and state," however, some would contend that "religious doctrine," even if found in the Declaration of Independence, has no place in the formulation of public policy. Justice Harry Blackmun's dissenting opinion in *Bowers v. Hardwick*<sup>93</sup> is illustrative of this view:

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, cannot provide an adequate justification for [the sodomy statute]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.<sup>94</sup>

The first amendment religion clauses, however, do not preclude the application of religious doctrines to the forming of public policy. Thomas Jefferson, one of the architects of freedom of religion in America and author of the phrase—wall of separation of church and state—relied on the Biblical creation account and the ministry of Jesus Christ to formulate his state's policy disestablishing the church.<sup>95</sup> As for the Book of Genesis, it gave to Jefferson the legal principle upon which he based his fundamental claim to be free from a civilly enforced tithing to support the teaching mission of the church: "Almighty God hath created the mind free . . ."<sup>96</sup> As for the ministry of Christ, Jefferson recited it as evidence supporting his claim of liberty from a state-enforced tithing:

[T]hat all attempts to influence [the mind] by temporal punishments or burthens [sic], or by civil incapacitations . . . are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind . . . chose

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<sup>93</sup> 478 U.S. 186 (1986).

<sup>94</sup> *Id.* at 211 (Blackmun, J., dissenting) (citation omitted).

<sup>95</sup> Herbert W. Titus, *No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion*, 22 CUMB. L. REV. 505, 506-08, 515, 517, 520 (1991-92).

<sup>96</sup> An Act for Establishing Religious Freedom, in 12 Hening 84 (1786).



not to propagate it by coercions on either, as was in his Almighty power to do . . . .<sup>97</sup>

The First Amendment, itself, rests upon this Virginia legacy, as the Supreme Court has consistently stated since 1948.<sup>98</sup> It would be ironic, indeed, to claim that the doctrine of no establishment and free exercise of religion, both resting upon Biblical truth, should be construed to preclude the use of Biblical truth to settle other public policy matters, including sex, and marriage and the family.

## VII. TRUE FAMILY LAW

Throughout the centuries, people have contended over the teachings of the Bible regarding marriage and divorce, husbands and wives, parents and children, both regarding the substantive rules governing family relationships and the jurisdiction of the state. Whatever differences of opinion there have been on such matters, there has been a strong consensus that sex between people of the same gender is wrong, both morally and civilly.<sup>99</sup>

In his *Commentaries*, Blackstone treated the common law prohibition of sodomy without even naming it or describing its elements. Instead, he used the traditional common law descriptive phrase, "crime against nature," as if the offense were self-evident.<sup>100</sup> And so it was among a people familiar with the account of the destruction of Sodom and Gomorrah in Genesis 19, to which Blackstone referred to prove his point that the prohibition was "an universal, not merely a provincial, precept."<sup>101</sup> The New Testament echoed the Old as it likened the judgment visited on Sodom and Gomorrah to that experienced by the whole world in the time of Noah.<sup>102</sup> The point here is that the legality of homosexual conduct is not ultimately determined by what a particular society may choose to do or say. The law of the created order will be enforced by the Creator and any nation that disregards that law does so at its peril.<sup>103</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1948); *see also* Titus, *supra* note 95, at 505-07.

<sup>99</sup> ROUSAS JOHN RUSHDOONY, *THE INSTITUTES OF BIBLICAL LAW* 333-447 (1973).

<sup>100</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*215.

<sup>101</sup> *Id.* at \*216.

<sup>102</sup> 2 *Peter* 2:4-8.

<sup>103</sup> *Leviticus* 18:22, :24-26.

From the beginning, the law governing sexual behavior between human beings has been established by the Creator. It is one male, one female, for a lifetime. This family order has been established in order to promote life, for the heterosexual relationship is the only one that may procreate without having to be dependent upon any person or thing outside the union, itself. While a male/male or a female/female union could raise children, it cannot conceive without help from outside. Such dependency reveals that a homosexual union cannot serve as an independent unit within which the members are free from outside regulation, especially from the state. The monogamous, heterosexual family honoring the Biblical covenant of a lifetime partnership is a buffer against state power. Any relationship short of that invites state intrusions compromising the freedom of families to educate and nurture children. Any relationship short of a lifetime commitment nips in the bud the liberty of spouses to live vulnerably before one another.

Finally, the family as defined in the holy scriptures has been designed as the basic economic unit of all societies and, therefore, is uniquely suited for the pursuit of happiness.<sup>104</sup> Had there been only Adam and Eve, the command to exercise dominion over the whole earth would have been impossible. It was too big a job for just two people. Thus, God coupled the dominion mandate with a command to bear children. It is, therefore, within the family that children are taught the virtues of work and stewardship. It is also within the family that children learn the compassionate use of wealth as they watch their parents make the necessary sacrifices to each other and to their offspring.

The heterosexual monogamous family ordained by the Creator, serves to foster the three unalienable rights of the Declaration of Independence. Any other sexual liaison threatens the family which the state, as ordained by the Creator, must foster and protect. This is the law of nature and of nature's God, the bedrock of life, liberty, and the pursuit of happiness.

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<sup>104</sup> *Genesis* 1:26-28.