



The Myth of Sexual Liberty

How Lawrence v. Texas Threatens Families and Freedom

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ON JULY 12, 2011, KODY BROWN AND HIS “WIVES” STOOD BEFORE THE CAMERAS TO ANNOUNCE THAT THEY WERE FILING A LAWSUIT CHALLENGING UTAH’S ANTI-POLYGAMY LAW.¹ PROUD POLYGAMISTS, KODY AND COMPANY STAR IN THE HIT REALITY SHOW “SISTER WIVES,” WHICH FOLLOWS THE LIVES OF THIS MORMON CLAN. RECENTLY, THE STATE OF UTAH BEGAN INVESTIGATING THEIR POLYGAMOUS RELATIONSHIP, AND THE BROWNS FLED TO NEVADA TO AVOID PROSECUTION. THEY ARE NOW SUING THE STATE OF UTAH, CLAIMING THAT THE ANTI-POLYGAMY STATUTE IS UNCONSTITUTIONAL. THEY HAVE HIRED JONATHAN TURLEY, A HIGH-POWERED CONSTITUTIONAL LAWYER AND LAW PROFESSOR AT GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, TO PURSUE THEIR CASE AGAINST THE STATE AND TO DEFEND THEM IF THEY ARE PROSECUTED.

In response to the Brown lawsuit, Americans barely seemed to stir from a deep sleep. Perhaps they just do not believe that a case like this will actually go anywhere. After all, polygamy is illegal in every state and has been illegal under federal law

since the mid-1800s.² The thought of legalizing may just seem beyond the pale.

Sadly, it is not. Kody Brown’s case is a logical step down the slippery slope our nation embarked on 50 years ago. Encouraged by the legal elite, the judiciary has advanced the social agenda of this country’s few to the detriment of many. It has weakened the moral fiber of this country and has abandoned its job to protect the fundamental rights of its citizenry. Eight years ago, waving the banner of liberty, the Supreme Court, in *Lawrence v. Texas*, for the most part nullified state anti-sodomy laws and opened the legal floodgates for future legal attacks on “morality laws.” Most recently, the logic of *Lawrence* has been used to legalize same-sex “marriage,” and now, with the skillful pen of Jonathan Turley, *Lawrence* is being employed to promote the legalization of polygamy.

Americans need to wake up. Kody Brown’s victory, should the case prevail, could spell liberty’s defeat. To change course, Americans need to appreciate the proper foundation of law, the appropriate role of government, and the role that traditional marriage serves in preserving freedom. If Americans remain asleep, freedom now enjoyed will be a thing of the past.

A Foundation in Natural Law

The *Merriam-Webster Dictionary* defines law as “a binding custom or practice of a community.”³ Law is, and always has been, a method to regulate human behavior in civil society.

As noted by the late Notre Dame Professor Ralph McInerny, natural law provides foundational values which are critical for a society’s survival.⁴ Natural law teaches “that there is an absolute right and wrong and that God is the ultimate source of law.”⁵ Fairness, goodness, and justice are founded in divine law.⁶

Furthermore, natural law recognizes “natural rights” bestowed on man by God.⁷ Government’s role is to protect these rights. These fundamental rights include, but are not limited to, the right to life, the right to liberty, the right to ownership of property,⁸ the right to marry.⁹

Natural law is reflected in our founding documents. Thomas Jefferson, a student of classical thought, embraced natural law in the Declaration of Independence when he wrote, “all men are created equal. They are endowed by their Creator with certain inalienable rights, that among these rights are life, liberty and the pursuit of happiness.” The Bill of Rights, first introduced by James Madison at the first Congress, adopted and ratified by the states in 1791, encapsulated these rights in the U.S. Constitution.¹⁰

Historically, legislative enactments and court decisions have reflected the principles of natural law. Rights were recognized as emanating from the Creator—the right to life, the right to freedom of religion, speech, press, the right to private property, the right to marry, the right to educate and rear one’s own children free of government interference—and when threatened, were protected by the courts.¹¹ “Morality laws,” enacted by state legislatures, reflected natural law.

Legal Positivism

Legal positivism dictates that God and the moral law serve no role in governmental law. Law is a separate and distinct creation of man and a product of force, not conscience or human reason. The courtroom, in the mind of the legal positivist, is a “laboratory” where law is “discovered.” Jurists embracing this theory view their role not as determining the founding fathers’ intent in the Constitution, but as interpreting a “living and breathing” document that should evolve as society needs change. As pointed out by Paul Rickert at the Helms School of Government at Regent University, legal positivism shifts power away from the individual to the state and the “elevation of personal freedom over accepted morality.”¹²

Legal positivism reached the highest levels of the American judicial system with the confirmation of Oliver Wendell Holmes to the U.S. Supreme Court

in 1902. While it continued to grow in popularity on the Court during the early part of the 20th Century, legal positivism did not hold a consensus on the Court until the 1960s.

Removing God from Public

The social and legal consequences of this newly adopted jurisprudence soon became painfully evident. In 1961, in *Torasco v. Watkins*,¹³ the Court struck down a Maryland state statute requiring individuals holding the position of notary publics to acknowledge the existence of God. In 1962, in *Engle v. Vitale*,¹⁴ the Court struck down a 10-year-old non-denominational prayer recited in New York public schools. In 1963, in *Abington Township v. Schempp*,¹⁵ the Court struck down a state statute requiring daily Bible reading in public schools.

This reverse discrimination of removing God from public policy, according to Charles Rice, an eminent constitutional law professor, did not simply create “neutral” public policy but, by default, resulted in “a governmental preference of agnostic secular humanism.” Agnostic secular humanism takes no position on the existence of God and holds that man, not God, is the final arbiter of right and wrong. Ultimately, as Professor Rice points out, that authority will be seized by the State.¹⁶

The Court’s Assault on Morality

With God ushered to the exit door of public policy, the dismantling of “morality laws” soon followed. The opportunity arose in 1965, when the Court addressed the constitutionality of “Comstock Laws” that had enjoyed a long history in the United States. In 1873, the U.S. Congress enacted the Comstock Act, which outlawed the “interstate mailing, shipment or importation of articles, drugs, medicines and printed materials of ‘obscenities,’ which applied to anything used ‘for the prevention of conception.’”¹⁷ By 1920, according to one source, 45 states had enacted laws to regulate “obscene” or “immoral” information. By 1960, 30 states explicitly outlawed the distribution of information or advertising about articles, instruments, and medicine concerning contraception, and 24 states explicitly banned the sale of such articles, instruments, or medicines. Several states had exceptions to this

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law for physicians, pharmacists, or “legitimate businesses.”¹⁸

Amidst this political and legal backdrop, in 1961, Estelle Griswold, an Executive Director of Planned Parenthood in Connecticut, opened a Planned Parenthood clinic that provided contraceptives and contraceptive counseling to married couples. Griswold was arrested, prosecuted, and found guilty of violating Connecticut’s Comstock law. In turn, Griswold filed a lawsuit against the state challenging the law’s constitutionality. In 1965, the Supreme Court overturned the conviction and, in effect, nullified Connecticut’s Comstock law.¹⁹

Griswold served as a legal launch pad for an all-out assault on fundamental rights traditionally protected by the courts. While some of these rights have been repaired in subsequent decisions, they were never fully restored:

- In 1973, the Supreme Court gutted the fundamental right to life.²⁰
- In 1976, it weakened parents’ rights to make medical decisions for their children by denying parents the right to consent to their child’s abortion.²¹
- In 1977, it denied parents the fundamental exclusive right to consent to their child’s use of contraceptives.²²

Griswold paved the way for legal positivism in American courts. The courts, both federal and state, abandoned their traditional role of Chief Guardian of fundamental rights and became, instead, Chief Creator of “rights.” In effect, Griswold stole from the people the power of self-governance through representation and gave it to the courts. The courts could now overturn laws reflecting accepted morality under the guise of the “freedom” of the few.²³ Secondly, as pointed out by Professor Rice, the case set into law an important tenet of secular humanism—that there is no inherent connection between the unitive and procreative aspects of sex and that man is the final determiner of whether sex will have any relation to procreation.²⁴

The cultural collapse that coincided with the court’s newfound role in American jurisprudence cannot be denied. According to William Bennett in

his book, *The Index of Cultural Indicators*, between 1960 and 1990:

There has been more than a 500 percent increase in violent crime; more than a 400 percent increase in illegitimate births a tripling of the percentage of children living in single-parent homes; a tripling in the teenage suicide rate, a doubling in the divorce rate and a drop of almost 80 points in SAT scores²⁵. . . The social regression of the last 30 years is due in large part to the enfeebled state of our social institutions and their failure to carry out a critical and time-honored task: the moral education of the young.²⁶

Although few would blame the courts for this moral decay, their hand in aiding and abetting the culture’s decline cannot be refuted.

A “Right” to Sex

Before 1986, the Supreme Court had tacitly approved of non-marital sexual activity by finding a fundamental right to privacy for minors to obtain abortions and contraceptives without parental approval, but had never addressed the issue head-on. In 1986, the opportunity arose, and the Court upheld a state statute prohibiting sodomy.²⁷ In 2003, in *Lawrence v. Texas*, the Court did an about-face. Refusing to call it a “fundamental right,” the court used a distorted view of “liberty” to declare a Texas anti-sodomy law unconstitutional.²⁸ Justice Anthony Scalia warned in his dissent that the case could spell the end to all “morality laws.” His words have proven prophetic.²⁹

Almost immediately, law professors and their students began opining about *Lawrence’s* impact on the constitutionality of statutes outlawing incest, adultery, bigamy, and prostitution.³⁰ Surely, many gleefully argued, *Lawrence* would serve to justify same-sex “marriage,” and “free” Americans from the archaic legal restraints on all private consensual sexual behavior.

A few state courts subsequently used the *Lawrence* decision to impose same-sex “marriage” on their citizens. In fact, the ink was barely dry on the *Lawrence* decision when State Supreme Court Justice C.J. Marshall applied it to legalize same-sex “marriage” in Massachusetts in 2003.³¹ In total, since the *Lawrence* decision, six states and the District of Columbia, have legalized same-sex “marriage.”³²

Broadening *Lawrence*

Attempts to overturn other laws restricting sexual behavior soon followed the *Lawrence* decision. Most notably, in 2005 in *Muth v. Frank*,³³ petitioners asked the U.S. Court of Appeals for the Seventh Circuit to find a Wisconsin law prohibiting incest unconstitutional. In this case, a brother

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and sister married. In 1997, the couple was charged and convicted of incest. During the court proceedings, using *Lawrence* to justify their position, the couple argued that the *Lawrence* case prohibited all legislative proscriptions on sexual activity between consenting adults. Writing for the majority, Judge Daniel Manion, a Reagan appointee and a strict constructionist, refused to find that *Lawrence* granted a fundamental right to engage in incest. Later that year, the Supreme Court refused to review the case and so the Manion decision stood. Perhaps, the Supreme Court, by denying review of the circuit court's decision, was unwilling, just yet, to face the logical consequences of its previous actions. The blistering response from the legal community over the Manion decision indicates that this issue is far from over.³⁴ At least one other circuit court has refused to find that *Lawrence* recognized a “fundamental right” to sexual intimacy.³⁵

A Blessing in Disguise?

Marriage between a man and a woman, intended for a lifetime, while recognized by the government, is ultimately a God-given institution. It has pre-existed and survived government. It has served the purpose of funneling sexual desires into an institution that provides the best environment for raising children.³⁶ Traditionally, government has protected the rights of fit parents to rear children as they deem appropriate.³⁷ Overall, the family unit has escaped the meddling hand of government control.

Legally protecting the right to engage in sexual activity—homosexual and heterosexual—outside of marriage devalues marriage as a critical institution for the rearing of children. Legalizing institutions that mimic marriage and legally creating rights that emanate from those institutions threaten parental autonomy traditionally enjoyed within the walls of marriage. Legalizing polygamous marriage undercuts a key component of marriage—sexual fidelity to one person—and could be the knock-out blow to marriage as a social institution protecting freedom.

The Court may still face the consequences of its decision in *Lawrence*. Notwithstanding a legal hurdle in September, most legal scholars anticipate that a battle to stop same-sex “marriage” in California may soon reach the U.S. Supreme Court.³⁸ The Court will then be forced to face whether to constitutionally justify same-sex “marriage.” While that case winds its way through the legal maze, however, Kody Brown and his lawyers may be on a faster track. If the *Brown* polygamy train reaches the Court first, the collective conscience of the court may see the legalization of polygamy as just too great a leap and jeopardize the legalization of same-sex “marriage.” Indeed, Kody Brown's lawsuit may not spell the end of traditional marriage, but instead prove to be its saving grace.

Preserving Freedom



Seeking justice should be the highest goal of American jurisprudence. By routinely renouncing natural law in favor of legal positivism, the courts have abandoned their preeminent duty. Mortimer Adler, an American philosopher, has suggested that by rejecting absolute good and absolute truth, the legal positivists “can find no basis for the distinction between what ‘ought’ to be desired or done and what is desired or done... Just and unjust is determined solely by whoever has the power to lay down the law of the land.”³⁹

Historically, the movements against slavery, segregation, and genocide were driven by natural law and scriptural ideals, rather than temporal culture. Without natural law's impetus, these valid movements would have lacked justification and would have been snuffed out by the will of the majority.

Since its inception, America has always been the shining beacon of hope for millions around the world thirsting for freedom. Her civil institutions have been constrained by the belief that their role is to preserve fundamental rights given by a gracious God. Her people have understood and cherished their independence and self-government and the understanding that enduring freedom rests in the pursuit of truth. Marriage between one man and one woman has served the critical role of providing the best environment for the rearing of children, the nation's future citizens.

Of late, with the judiciary at the helm, our nation has taken a different path, which will only lead to its demise as the freest nation in the world. But it is not too late to correct the error. Americans can reclaim their nation's liberties by using the ballot box. They must elect legislative and judicial candidates who believe in absolute moral truth and that the government's role is to preserve, not create, fundamental rights, and that justice should be the highest goal of American law. If legislators and judges hold these beliefs, blessings of liberty will be preserved for America's posterity. If they do not, the world

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ENDNOTES:

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