

Sexuality and the “System of Liberty”: Comment on Stolzenberg

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I begin my commentary on Stolzenberg's beautifully crafted paper with the question of this conference: What is the state's interest in marriage? As phrased, this question is underspecified. There is no reason to believe that different kinds of states will have the same interest in marriage. (Recall the conceptions of marriage and family in Plato's *Republic* or, if you prefer a real-world example, the kibbutzim of the mid-twentieth century.) So let us rephrase the question before us: What is the interest of the *liberal democratic* state in marriage?

The traditional answer begins by noting that liberal democracy is a system of “ordered liberty,” standing between anarchy and oppression.¹ Libertarian critics see liberal democracy as an infringement on true liberty, while traditionalist critics see it as disordered. Similarly, marriage is often understood as a form of ordered liberty, standing between sexual license and asceticism. For advocates of sexual liberty, such as Philip Roth's protagonist, marriage is the negation of liberty, rightly understood.² For those at the other extreme, such as Tolstoy's protagonist, marriage is a veneer of conventional respectability covering the reality of sexual relations indistinguishable in principle from licentiousness.³

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1. See Viet D. Dinh, Assistant Attorney General, Harold Leventhal Talk, (June 7, 2002), <http://www.usdoj.gov/olp/leventhalthalk.pdf> (last visited Aug. 30, 2005). See also *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

2. PHILIP ROTH, *THE DYING ANIMAL* (2001).

3. Leo Tolstoy, *The Kreutzer Sonata*, in *THE DEATH OF IVAN ILYCH AND OTHER STORIES* (Signet Classic 2003) (1886).

Let us inspect the critique of marriage from the standpoint of sexual liberty, which for better or worse is more accessible to us than asceticism. For Roth's David Kepesh, philandering represents the ideal of true liberty. As Kepesh sees it, says Stolzenberg, "sex is liberty unmodified, . . . the only liberty worth its name. To indulge in sexual promiscuity . . . is thus to be the true champion of liberty."⁴ Conversely, Kepesh contends, marriage, love, or indeed any form of attachment is a form of emotional dependency that represents a surrender of freedom. Although Stolzenberg does not put it quite this way, Kepesh may even be said to deny the adequacy of our conference question: the state's interest in marriage may not coincide with the individual's interest, and in cases of conflict there is no compelling reason to prefer the interests of the state. After all, doesn't liberalism, rightly understood, mean that the state is merely an instrument to the satisfaction of individual desire? And why stop at consumerist desire when sexual desire is so much more urgent, and fundamental?

For the purposes of this Comment, I will set aside the question whether Kepeshian sexual liberty is an adequate depiction of male desire (for the record, I think not). The more pertinent issue is the relation between his stance and liberal democracy.

The liberal democratic project, from Milton and Locke to Mill and Rawls, has always been to identify principled limits to the scope of personal freedom. Four classic strategies have emerged. The first is the argument made by advocates of the minimal state (and also in a way by Kant) that to sustain social relations, a system of freedom requires mutual limitations on individual liberty: We can determine the content of individual liberty by asking whether a particular individual's claim to freedom is consistent with the like claims of other individuals.⁵ Second, liberals (Mill, for one) have often argued that individual liberty is the space for unimpeded action defined by the legitimate limits of public power.⁶ Third, there is a tradition of liberal inquiry into the relation between the attributes of individuals and the maintenance of liberal institutions.⁷ Tocquevillians place this inquiry in the context of civil society, which for them includes

4. Nomi Maya Stolzenberg, *Liberals and Libertines: The Marriage Question In the Liberal Political Imagination*, 42 SAN DIEGO L. REV. 949 (2005).

5. See IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 30 (John Ladd trans., 2d ed., Hackett Pub. Co. 1992).

6. The locus classicus of this position is JOHN STUART MILL, *On Liberty*, in *THE PHILOSOPHY OF JOHN STUART MILL: ETHICAL, POLITICAL AND RELIGIOUS* (Marshall Cohen ed., 1961) (1863).

7. See WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 213–17, 263–64 (1991).

the family;⁸ Madisonian liberals have their own version of the thesis that the public good depends on private character.⁹

We now come to the fourth strategy, namely, limits on individual conduct rooted in conceptions of personal development or perfection. There are several variants. For those who believe that liberal democracy rests on theological foundations, liberal individualism rightly understood is a form of *imitatio dei*.¹⁰ There is as well a secular version of this thesis—a liberal normative psychology of intellect or will as standing above and limiting desire.¹¹ Stolzenberg offers another variant, based on the proposition that love and desire, rightly understood, point us away from Kepesh's view of emotional attachment as a trap and toward a "theory of limits that can explain when and why the condition of emotional dependency that attachments entail is consistent with the value of freedom."¹² It is in a "theory of love," she argues, that we find the most satisfactory liberal account of restraints on individual conduct; most satisfactory because it asks us to locate limits by affirming our desires, once clarified through self-reflection, rather than denying them outright.¹³

This is a classic (indeed, Platonic) move. Recall the ring of Gyges story in the *Republic*: at first blush, it appears that if we could break all rules of conduct with impunity, we would discard all restraint, sexual and otherwise, and claim unfettered freedom for ourselves while denying to others to the extent needed to gratify our desires.¹⁴ In short, we would become tyrants. A standard response of moral philosophers is to insist that such conduct is unfair or unjust. But this is a stance that Socrates and his interlocutors cannot embrace. After all, why be just if it is not to one's personal advantage? The Platonic response is that properly understood, unrestrained erotic desires turn out to be self-limiting: What

8. See Michael S. Joyce, *Citizenship in the 21st Century: Individual Self-Government*, in BUILDING A COMMUNITY OF CITIZENS 3, 4–5 (Don E. Eberly ed., 1994).

9. See James Q. Wilson, *The Rediscovery of Character: Private Virtue and Public Policy*, 81 PUB. INT. 3, 15–16 (1985).

10. See SOLOMON SCHECTER, ASPECTS OF RABBINIC THEOLOGY 199–202 (1961) and Solomon Schechter, *Imitatio Dei: To Be or Not to Be*, <http://www.jhom.com/topics/envy/imitatio.html> (last visited Aug. 23, 2005).

11. See ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 30 (1985).

12. Stolzenberg, *supra* note 4, at 973.

13. *Id.*

14. See THE REPUBLIC OF PLATO 41–44 (John Llewelyn Davies & David James Vaughan trans., London: MacMillan & Co. 1888).

we really want is not tyrannical domination over others, but rather forms of connection with them that enable us to glimpse, perhaps even participate in, a higher good while sustaining orderly social relations and a decent polity.

Stolzenberg's proposal has the merit of linking liberal freedom to psychological considerations far richer than the thin self-interest of *homo economicus*, and also of connecting liberal thought to the themes of literature and the philosophical tradition. It must be said, however, that other accounts seem considerably closer to the real world of liberal politics and more likely to pertain to the state's specific interest in marriage. For example, it is hard to see how the minimum conditions of social order could be secured in circumstances of unrestrained sexual competition. The alternative to "thou shalt not covet thy neighbor's wife" is not only sin but violence. It is also hard to see how a society could sustain itself over time without effective ways of raising children. As Stolzenberg herself observes, Kepesh walks away, not just from his wife, but also from his son, who cannot forgive him and is thus psychologically wounded and deformed.¹⁵ It is not moralism, but political prudence, to invoke some version of Mill's principle: In the pursuit of personal gratification, I may be at liberty to harm myself, but I am not at liberty to harm others.¹⁶ Kepesh wants to "turn freedom into a system,"¹⁷ a classic liberal ideal. But he cannot do that by turning those around him into casualties.

Stolzenberg's effort to rest ordered sexual liberty on a theory of love is bold, not the least because it exposes her to a high standard of psychological realism. She must grapple with challenges such as the riposte of Tolstoy's protagonist: "To love one person for a whole lifetime is like saying that one candle will burn a whole life."¹⁸ Rather than suggesting that sexual limits and the fulfillment of desire coincide, it seems more plausible to acknowledge that order always contains an element of renunciation. You do not need to be a Freudian to believe that there is no civilization without its attendant discontents. Indeed, they are the price we pay for civilization, much as we pay taxes to support public institutions. The ultimate test of any form of social organization is whether its members can bear the sacrifices its survival requires.

15. Stolzenberg, *supra* note 4, at 962.

16. See MILL, *supra* note 6, at 145, 156, 158.

17. Stolzenberg, *supra* note 4, at 962; PHILIP ROTH, *supra* note 2, at 64.

18. Stolzenberg, *supra* note 4, at 956, *citing* Leo Tolstoy, *supra* note 3, at 155, 161.