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DEATH OF MORALITY: DOES IT PORTEND DEATH OF AMERICA?

Gerald Walpin

THE ISSUE

How many times have you heard that government should not be involved in legislating morality? One representative libertarian objector to government involvement wrote that “if one really cares about morality, why would we let government anywhere near it,” because “[w]hen society turns its aspirational morality over to the state, the state makes a mess of it.”¹

Until 1992, the Supreme Court repeatedly rejected that libertarian view. For example, in as late as 1991, the Court upheld a state public indecency statute as within “[t]he traditional police power of the States . . . to provide for the public . . . morals.”² That ruling reaffirmed many similar rulings by the Court, for example, in 1986: “[t]he law . . . is constantly based on notions of morality”³ Then, suddenly, in 1992, the Court did a 180 degree reversal to declare that the Government had no right “to mandate our own moral code.”⁴

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¹ G. Marcus Cole, *What is the Government's Role in Promoting Morals? . . . Seriously?*, 31 HARV. J.L. & PUB. POL'Y 77, 84, 83 (2008).

² *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). While this was a plurality opinion, two concurring justices expressly agreed on this point. (“[O]ur society prohibits . . . certain activities . . . because they are considered . . . immoral.”) *Id.* at 575 (Scalia, A., concurring). (“[M]oral opposition to nudity supplies a rational basis for its prohibition”) *Id.* at 580 (Scalia, A., concurring). (“[I]t is certainly sound in such circumstances to infer general purposes ‘of protecting societal order and morality’”) *Id.* at 582 (Souter D., concurring).

³ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992).

This new Supreme Court doctrine, that adopted the libertarians' (and liberals') view, is not only a recent reversal of a long-time line of Supreme Court decisions, but it is contrary to the view held by those who created this country, and wrote our Declaration of Independence, our Constitution, and our Bill of Rights.⁵

Are we or are we not a nation that continues to live by accepted moral rules? If this Country's morality is no longer an objective of our Government, whether declared by the President, Congress, or the Courts, or all three branches of our Government, what is the likely effect of that void on the continued life of our Country?

In Point I, I discuss our Founding Fathers' view of the importance of the Government's role in maintaining morality. In Point II, I discuss the historical record concerning the decline of earlier world powers that discarded morality. In Point III, I discuss the issue of slavery and the virtual current unanimity of support for our Government's imposition of its morality to end immoral slavery. In Point IV, I deal with the assertion that visible injury to another is a prerequisite for Government attention to immoral conduct. In Point V, I do likewise regarding the asserted sanctity of conduct in one's home from sanction for conduct criminalized by the Government to prohibit immoral conduct. Point VI reflects my conclusion that Government has an important role in protecting morality. Then, in Point VII, I report on eight separate subject areas of our life in which morality has been sidelined in favor of individual's hedonistic objectives.

I. OUR FOUNDING FATHERS' VIEW

The Pennsylvania Constitution in 1776⁶ and the Vermont Constitution of 1786⁷—both adopted shortly before the enactment of our national Constitution—typified the States' view on the government's role in morality. They both expressly provided that “[l]aws for the encouragement of virtue and prevention of vice and immorality ought to be kept constantly in force and duly executed”⁸ The

⁵ *Id.* at 834.

⁶ P.A. CONST. (1776).

⁷ V.T. CONST. (1786).

⁸ V.T. CONST. § XXXVIII (1786); P.A. CONST. § 45 (1776) (“Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution”).

reason for this constitutional declaration was expressly set forth in the Virginia Constitution of 1776: “no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to . . . virtue”⁹

Our country’s founders uniformly voiced this view in favor of government’s involvement in ensuring morality. Here are but a few of the hundreds of examples to be found by only cursory research:

Our First Continental Congress, on October 12, 1778, “earnestly recommended to the several states, to take the most effectual measures for the encouragement” of “good morals [which] are the only solid foundation of public liberty and happiness.”¹⁰

Our country’s Second Continental Congress, on July 13, 1787—just shortly before it sent the Constitution to the States for ratification—enacted the Northwest Ordinance, with the following declaration:

“[M]orality . . . being necessary to good government”¹¹

Thomas Jefferson, credited with authoring the Declaration of Independence and our third President:

“[T]he interests of society require the observation of those moral precepts . . . in which all religions agree”¹²

John Adams, signer of the Declaration of Independence, and second President:

“It is religion and morality alone, which can establish the principles upon which freedom can securely stand. The only foundation of a free constitution is pure vir-

⁹ V.A. CONST. § 15 (1776).

¹⁰ *The Founders on Gambling*, WALL BUILDERS, <http://www.wallbuilders.com/libissues/articles.asp?id=79> (last visited May 3, 2016).

¹¹ *Northwest Ordinance of 1787*, OUR DOCUMENTS, <http://www.ourdocuments.gov/doc.php?doc=8&page=transcript> (last visited May 3, 2016).

¹² THOMAS JEFFERSON, *THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON* 593 (John P. Foley ed., 1900).

tue”¹³

and

“Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”¹⁴

and

“[W]ithout national morality a republican government cannot be maintained.”¹⁵

Charles Carroll, another signer of the Declaration of Independence:

“Without morals a republic cannot subsist any length of time . . . the solid foundation of morals, [is] the best security for the duration of free governments.”¹⁶

Benjamin Franklin, signer of both the Declaration and the Constitution:

“Only a virtuous people are capable of freedom.”¹⁷
Richard Henry Lee, another Declaration signer:

“[A] popular government cannot flourish without virtue in the people.”¹⁸

¹³ 9 CHARLES FRANCES ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, 401 (Brown Little, 1854).

¹⁴ *John Adams Quotations*, WE STILL HOLD THESE TRUTHS, <http://westillholdthesetruths.org/quotes/author/john-adams> (last visited May 3, 2016).

¹⁵ *Id.*

¹⁶ Steve Straub, *Charles Carroll, Letter to James McHenry of November 4, 1800*, THE FEDERALIST PAPERS PROJECT, <http://www.thefederalistpapers.org/founders/charles-carroll/charles-carroll-letter-to-james-mchenry-of-november-4-1800> (last visited May 3, 2016).

¹⁷ *Benjamin Franklin*, PONDERING PRINCIPLES, <http://ponderingprinciples.com/quotes/franklin/> (last visited May 3, 2016).

¹⁸ Steve Straub, *Richard Henry Lee, On Virtue, Letter to Colonel Martin Pickett on Mar.*

Benjamin Rush, also a Declaration signer:

“[W]ithout virtue there can be no liberty, and liberty is the object and life of all republican governments.”¹⁹

Samuel Adams, another Declaration signer:

“Religion and good morals are the only solid foundation of public liberty and happiness.”²⁰

The Father of Our Country, George Washington:

“[R]eligion and morality are indispensable supports” of “political prosperity,”²¹

And

“[T]he foundations of our National policy will be laid in the pure and immutable principles of private morality.”²²

Gouverneur Morris, a signer of the Articles of Confederation and known as the “Penman of the Constitution.”²³:

5, 1786, THE FEDERALIST PAPERS PROJECT, <http://www.thefederalistpapers.org/founders/richard-henry-lee/richard-henry-lee-letter-to-colonel-mortin-pickett-on-march-5-1786> (last visited May 3, 2016).

¹⁹ *Epilogue: Securing the Republic*, THE FOUNDER’S CONSTITUTION, <http://press-pubs.uchicago.edu/founders/documents/v1ch18s30.html> (last visited May 3, 2016).

²⁰ *Popular Quotes*, SAMUEL ADAMS HERITAGE SOCIETY, <http://www.samuel-adams-heritage.com/quotes/popular.html> (last visited May 3, 2016).

²¹ *Washington’s Farewell Address 1796*, THE RELIGIOUS LIBERTY ARCHIVE, <http://blog.lrrc.com/churchstate/historical-materials/washingtons-farewell-address-1796> (last visited May 3, 2016).

²² *George Washington’s Inaugural Address of 1789*, NAT’L ARCHIVES & REC. ADMIN., http://www.archives.gov/exhibits/american_originals/inaugtxt.html (last visited May 6, 2016).

²³ *Gouverneur Morris – Signer of the Constitution*, WOODBURY GAZETTE (Sept. 16, 2010), <http://woodburygazette.com/gouverneur-morris-signer-of-the-constitution-p397-114.htm>.

“Morals are the only possible support of free governments.”²⁴

Fisher Ames, an author of the First Amendment of the Bill Of Rights:

“Our liberty . . . is founded on morals and religion . . .”²⁵

Oliver Ellsworth, an early Chief Justice of the Supreme Court:

“[I]n a republican government, good morals are essential. Institutions for the promotion of good morals are therefore objects of legislative provision and support.”²⁶

Daniel Webster, early and famed U.S. Senator:

“[I]f we and our posterity . . . trifle with the injunctions of morality, . . . no man can tell how sudden a catastrophe may overwhelm us and bury all our glory in profound obscurity.”²⁷

While he was certainly not a Founding Father, it is worthwhile to recognize that Justice William O. Douglas, probably the most liberal Justice on the Supreme Court before contemporary times, referred to “the moral . . . wellbeing of the community,” as properly left to “legislative judgment.”²⁸ —necessarily involving our government in determining what is and what is not moral conduct.

Although these historical examples abound, one would search

²⁴ *Gouverneur Morris Letter to George Gordon*, WE STILL HOLD THESE TRUTHS, (June 28, 1792) <http://westillholdthesetruths.org/quotes/399/religion-is-the-only-solid-base>.

²⁵ Fisher Ames, *Framer of the First Amendment*, WALL BUILDERS, <http://www.wallbuilders.com/libissuesarticles.asp?id=63> (last visited May 3, 2016).

²⁶ Stephen Meeks, *Founding Fathers on Religion and Morality*, STEPHEN MEEKS, <http://stephenmeeks.org/founding-fathers-2/religion-and-morality/> (last visited May 3, 2016).

²⁷ Daniel Webster, *Address to New York Historical Society*, FOUNDERS WISDOM, <https://founderswisdom.wordpress.com/category/daniel-webster/> (last visited May 3, 2016).

²⁸ *Day-Brite Lighting, Inc. v. State of Mo.*, 342 U.S. 421, 424-25 (1952).

is vain for examples of the opposite proposition—a statement by a Founder that morality or virtue are only incidental or even unimportant to a well-functioning society, and of no business to government.

II. HISTORICAL LESSONS FROM WORLD POWERS THAT LOST MORALITY

Daniel Webster’s explanation of the resultant impact of immorality on the very existence of our country expressly stated what was in the minds of all our early American leaders: a recognition that a country that loses its moral compass will find itself destroyed. Some may have been led to this conclusion from biblical recitations of the great flood that only Noah, his family, and the chosen animals survived,²⁹ or God’s ordered destruction of Sodom and Gomorrah.³⁰ But biblical views were not a prerequisite to that conclusion. All of these Founding Fathers were aware of that reality from their knowledge of history, which establishes that, without morality within a country—no matter how large and strong that country has been—the country is unlikely to survive. Our early leaders well understood the axiom, as George Santayana put it: [t]hose who cannot remember the past are condemned to repeat it,³¹ and sought to maintain morality and thus avoid America’s following the path of earlier destroyed world powers to the same demise.

Look at the historical record well-known to our Founding Fathers: An early example was the Babylonian Empire that existed from 1600 B.C. to 500 B.C. It experienced a decline of morals, including Kings being murdered by their own children. As the historian Josephus reported, people became an affront to and in contempt of God.³² What happened to Babylon: It was sacked and the people placed into violent subjugation.³³

²⁹ *Genesis* 6:5-9: (“And Lord saw the wickedness of man was great . . . And the Lord said, I will destroy man whom I have created from the face of the earth.”).

³⁰ *Genesis* 18-19: (“The Lord informed Abraham that the “sin” of Sodom and Gomorrah is “so grievous,” that “the Lord rained down burning sulfur on Sodom and Gomorrah.”).

³¹ Mathew Caleb Flamm, *George Santayana*, INTERNET ENCYCLOPEDIA OF PHIL., <http://www.iep.utm.edu/santayan/> (last visited May 3, 2016).

³² John D. Morris, *What Happened at the Tower of Babel?*, INST. CREATION RES., <http://www.icr.org/article/what-happened-at-tower-babel/> (last visited May 3, 2016).

³³ *How the Decline of Moral Values Promote the Failure of Civilization*, BIBLE BLENDER (Aug. 11, 2012), <http://bibleblender.com/2012/biblical-lessons/modern-day-lessons/how-declining-morals-cause-civilizations-to-die>.

Egyptian Civilization, a power from 3100 B.C. to 500 B.C., started exhibiting an increase in crime, including the systemic murder of undesired children, with citizens turning away from religion in favor of cults. What happened to that Egypt: Alexander The Great invaded Egypt in 332 B.C. and took control.³⁴

The Greek Empire, a power from 7th century B.C. to 146 B.C.: During its successful beginnings, a strict moral code was imposed, including making homosexuality a capital offense.³⁵ Later, the moral code became ignored by many; homosexuality, pedophilia, and pederasty became acceptable and glorified in lewd and violent plays. What happened to the Greek Empire: conquered by the Roman Empire.³⁶

The Roman Empire, a world power from 750 B.C. to 476 A.D.: When it reached its peak of power, homosexuality and adultery became the norm, with even bestiality practiced in public, and contraception, abortion and infanticide all common.³⁷ As the famous historian Gibbon put it, morals collapsed in the Roman Empire.³⁸ Three Emperors exemplified that collapse.³⁹ Emperor Nero married two men.⁴⁰ Emperor Caligula made love with his sisters at public dinners and would often take other men's wives out of the room to make love.⁴¹ Emperor Commodus had a harem of 300 women and 300 boys for whom he combed the country.⁴² The collapse of the Roman Empire had begun.

³⁴ *A Timeline for Ancient Egyptian History*, ANCIENT EGYPT, <http://www.ancientegypt.co.uk/time/explore/time.html> (last visited May 3, 2016).

³⁵ Sherry Wolf, *The Roots of Gay Oppression*, INT'L SOCIALIST REV., http://www.isreview.org/issues/37/gay_oppression.shtml (last visited May 3, 2016).

³⁶ *Greece Timeline*, ANCIENT GREECE, <http://ancient-greece.org/resources/timeline.html> (last visited May 3, 2016).

³⁷ *Id.*; Hunter, *Family Research Guy Says America Now in Era of 'Pagan Sexuality'*, DAILY KOS (July 18, 2013), <http://www.dailykos.com/story/2013/07/18/1224761/-Family-Research-Council-guy-says-America-now-in-era-of-pagan-sexuality#>.

³⁸ Ellis Washington, *On Edward Gibbon: History of the Decline and Fall of the Roman Empire Part I*, RENEW AMERICA (Feb. 14, 2015), <http://www.renewamerica.com/columns/washington/150214>.

³⁹ *See infra* notes 40-42.

⁴⁰ Craig Turner, *Same-Sex "Marriage": The Roman Emperors*, FITZGERALD GRIFFIN FOUNDATION (Mar. 25, 2013), <http://www.fgfbooks.com/Turner-Craig/2013/Turner130323.html>.

⁴¹ *Suetonius on Caligula's Sex Life*, FASCINATING HISTORY (May 10, 2005), http://fascinatinghistory.blogspot.com/2005/05/suetonius-on-caligulas-sex-life_10.html.

⁴² *Lucius Aurelius Commodus*, THE ROMAN EMPIRE, <http://www.roman-empire.net/highpoint/commodus.html> (last visited May 3, 2016).

We don't have to limit our historical examination to ancient powers to find a relationship between the rejection of what society had previously considered moral conduct and the destruction of the society. In 1791, the Bourbon monarchy had ruled over France for 202 consecutive years.⁴³ Suddenly that year, France repealed all references to sodomy in its newly enacted Penal Code,⁴⁴ consistent with its Declaration of the Rights of Man, which proclaimed that "liberty consists in the freedom to do everything which injures no one else"⁴⁵—effectively a repeal of most imposed morality. Within a year, the monarchy was abolished, and what did the French people face: the horrible Reign of Terror, involving mass executions, that lasted until July 1794.⁴⁶

I do not suggest that the collapse of each of these world powers establishes that the moral decline *caused* the collapse; no one can reasonably conclude whether the moral decline is a symptom of the impending crisis or the cause. But neither can I find ready examples of great powers that did not experience a significant moral decline before their collapse. Only those who wish to ignore the lessons of history would be untroubled by a great nation—this country—losing its moral compass. Our country's early leaders sought to prevent this country from falling into immorality by expecting our government to require that morality continue to be the rule.

III. VIRTUAL UNANIMITY ON GOVERNMENT'S CORRECT IMPOSITION OF MORALITY

The issue of slavery is the simplest conclusive rebuttal to those who continue to assert that morality is not within the government's purview. No reasonable American would today dispute that slavery was (and is) immoral. Yet, it was our early government (for pragmatic reasons that, without it, this country could never have been

⁴³ *French History of the Bourbon Dynasty*, BONJOUR LA FRANCE, <http://www.bonjourlafrance.com/france-history/bourbon-dynasty.htm> (last visited May 3, 2016).

⁴⁴ Louis Crompton, *Homosexuals and the Death Penalty in Colonial America*, 3 J. OF HOMOSEXUALITY 277, 286 (1976).

⁴⁵ *Declaration of the Rights of Man*, YALE LAW SCHOOL, http://avalon.law.yale.edu/18th_century/rightsof.asp (last visited May 3, 2016).

⁴⁶ *French Revolution*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/French_Revolution (last visited May 3, 2016).

formed) that legislated that slavery was legal.⁴⁷ We continued to legislate immorality: Kentucky, Illinois, Indiana, and Oregon, for example, enacted legislation that effectively banned Blacks.⁴⁸ A referendum in Illinois in 1848, allowing the state legislature to enact a statute prohibiting free Blacks from entering the state, received 70 percent of the vote.⁴⁹

The slavery immorality became illegal only after our Government enacted various prohibitions against that immorality. First, Lincoln's Emancipation Proclamation ruled that slavery no longer was lawful in certain areas.⁵⁰ Then this Country codified the immorality of slavery by adoption of the Thirteenth Amendment that decreed that slavery shall not exist in this Country.⁵¹ And when that had not sufficiently forced all Americans to practice that moral rule against discrimination based on race, our Congress enacted the Civil Rights Act of 1964⁵² and the Voting Rights Act of 1965⁵³ to provide enforcement tools in outlawing discrimination based on race (as well as adding religion, sex and national origin).⁵⁴ Thus, it was the Government that forced this act of morality on all Americans. Does anyone seriously today believe that this law—government action enforcing morality—was a bad one? I doubt any respected slavery or racial discrimination proponent exists.

Abraham Lincoln understood that slavery was a moral issue that required the Government to impose morality on this country.⁵⁵

⁴⁷ *Constitution through Compromise*, U.S. HISTORY, <http://www.ushistory.org/us/15d.asp> (last visited May 3, 2016).

⁴⁸ *Illinois, Indiana, SLAVERY IN THE NORTH*, <http://slavenorth.com/northwest.htm> (last visited May 3, 2016).

⁴⁹ RICH LOWRY, *LINCOLN UNBOUND* 163 (2013).

⁵⁰ The Emancipation Proclamation declared "that all persons held as slaves' within the rebellious states 'are, and henceforward shall be free.'" See *The Emancipation Proclamation*, NATIONAL ARCHIVES, <http://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/> (last visited May 3, 2016).

⁵¹ "Neither slavery nor involuntary servitude . . . shall exist within the United States." *13th Amendment to the U.S. Constitution*, WEB GUIDES, <https://www.loc.gov/tr/program/bib/ourdocs/13thamendment.html> (last visited May 3, 2016).

⁵² Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1994) and scattered sections of 42 U.S.C.).

⁵³ Pub. L. No. 89-110, 79 Stat. 437.

⁵⁴ *The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NATIONAL ARCHIVES, <https://www.archives.gov/education/lessons/civil-rights-act/> (last visited May 3, 2016).

⁵⁵ Michael Burlingame, *Abraham Lincoln: A Life*, ABRAHAM LINCOLN ONLINE CLASSROOM, <http://abrahamlincolnclassroom.org/abraham-lincoln-in-depth/abraham->

This issue came up during the famous Lincoln-Douglas debates, when the two candidates were competing for the Illinois Senate seat.⁵⁶ Lincoln explained during the debate at Quincy, that “[w]hen Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot say that anybody has a right to do wrong.”⁵⁷ That is morality: the requirement not to do wrong as society has declared an act to be wrong. And Lincoln expressly called slavery “a moral . . . wrong.”⁵⁸ He continued at Quincy, “[w]e deal with it as with any other wrong, in so far as we can prevent its growing any larger”⁵⁹ In his final debate with Douglas in Alton, Illinois, he referred expressly to government having to decide the morality issue as a “struggle between two principles—right and wrong.”⁶⁰ That’s what this country did, by enacting a law, called the Thirteenth Amendment, which banned slavery.⁶¹

But morality-furthering laws are not limited to abolishing slavery. Given that morality is defined as “codes of conduct put forward by a society,”⁶² it is our government that determines and enforces the moral code for our country. The great majority of criminal laws are enacted to prosecute those who violate the moral code thereby enforced; examples: homicide,⁶³ robbery and burglary,⁶⁴ obscenity,⁶⁵ perjury,⁶⁶ fraud and false statements,⁶⁷ extortion, threats, and blackmail,⁶⁸ false personation,⁶⁹ bribery and graft,⁷⁰ and concealment

lincoln-and-slavery/ (last visited May 3, 2016).

⁵⁶ *The Lincoln-Douglas Debates of 1858*, NATIONAL PARK SERVICE, <http://www.nps.gov/liho/learn/historyculture/debates.htm> (last visited May 6, 2016).

⁵⁷ ABRAHAM LINCOLN ONLINE, <http://www.abrahamlincolnonline.org/lincoln/speeches/slavery.htm> (last visited May 3, 2016).

⁵⁸ TEACHING AMERICAN HISTORY, <http://teachingamericanhistory.org/library/document/the-lincoln-douglas-debates-7th-debate-part-ii/> (last visited May 3, 2016).

⁵⁹ LOWRY, *supra* note 49, at 159.

⁶⁰ LOWRY, *supra* note 49, at 163.

⁶¹ U.S. CONST. amend. XIII, § 1.

⁶² The definition of morality in the Stanford Encyclopedia of Philosophy. *See Morality Definition*, STANFORD, <http://plato.stanford.edu/entries/morality-definition/> (last visited May 3, 2016).

⁶³ 18 U.S.C. §§ 1111-1122 (2006).

⁶⁴ 18 U.S.C. §§ 2111-2119 (2006).

⁶⁵ 18 U.S.C. §§ 1460-1470 (2006).

⁶⁶ 18 U.S.C. §§ 1621-1623 (2006).

⁶⁷ 18 U.S.C. §§ 1001-1040 (2006).

⁶⁸ 18 U.S.C. §§ 871-880 (2006).

of assets and fraud in bankruptcy.⁷¹

Even Ayn Rand, regarded highly by many libertarians, described government as “an institution that holds the exclusive power to *enforce* certain rules of social conduct in” the government’s “geographical area.”⁷² What can possibly be the desiderata for “social conduct” other than society’s recognition of what is proper, *i.e.*, what is morally acceptable? Rand recognized the equation between rules of social conduct and morality when she taught that we must “not forgive or accept any breach of morality.”⁷³

IV. INJURY TO ANOTHER FROM IMMORAL CONDUCT IS NOT REQUIRED FOR GOVERNMENT INTERVENTION

Some find a limitation on society’s power to legislate morality in the last four words of Rand’s statement of “the proper purpose of a government: to make social existence possible to men, by protecting the benefits and combating the evils which men can *cause to one another*.”⁷⁴ Those who support that limitation suggest that society can legislate only against those social wrongs that adversely affect another person and that are against that person’s will.⁷⁵ What may sound superficially as a reasonable limitation on government involvement in morality does not withstand analysis.

Take an individual, in the privacy of his home, using proscribed heroin. With a duly issued search warrant that person could be arrested and convicted of the crime of using heroin on himself – not involving any third person. I recognize that some might say that society *should not* legislate against such private use, but that is a far cry from suggesting that society *cannot* so legislate, and thus, enforce that moral rule.

But let us go further with another hypothetical of supposedly victimless “immoral” conduct: a man and woman, without any coercion, engaging in voluntary love-making on a public street. No one is

⁶⁹ 18 U.S.C. §§ 911-917 (2006).

⁷⁰ 18 U.S.C. §§ 201-227 (2006).

⁷¹ 18 U.S.C. §§ 151-158 (2006).

⁷² AYN RAND, *THE VIRTUE OF SELFISHNESS* 102 (1964).

⁷³ AYN RAND, *ATLAS SHRUGGED* 970 (Signet 1996) (1957). She further equated the two in writing of the need for “subordinating society to moral law.” RAND, *supra* note 72, at 88.

⁷⁴ Ayn Rand, *The Nature of Government*, FOUND. FOR ECON. EDUC. (Mar. 1, 1964), <http://fee.org/freeman/detail/the-nature-of-government-by-ayn-rand> (emphasis added).

⁷⁵ *Id.*

physically hurt by that conduct. Yet, no one would seriously suggest that arresting them would violate the constitutional, or even some less-defined human, rights of the amorous pair. Whether the applicable statute preventing such conduct is called the crime of indecent conduct or indecent exposure, society has adopted it to protect against what society has determined is immoral when done in public.⁷⁶ Assuming that no one would seriously argue that such a law violates individual rights, this hypothetical conclusively refutes the libertarian assertion that “if one really cares about morality, why would one let government anywhere near it[.]”⁷⁷ The answer to that question is obvious: without government intervention to proscribe immoral conduct, it will, as the above history of past great powers demonstrates, become rampant.

V. IMMORALITY IN THE PRIVACY OF ONE’S HOME

Nor does the libertarian view of morality *laissez faire* concerning what is done by consenting persons within the privacy of one’s home withstand analysis. We have already seen that Government arrests for crimes within the privacy of one’s home are valid as long as protective procedures, such as obtaining a judge-issued warrant, are followed. But let’s go further. Would anyone seriously suggest that a man or woman engaging in animal sodomy inside the home should be immune to arrest? Or what about a father engaging in incest with his consenting adult daughter, again “privately” inside the home? Would anyone seriously suggest that society has no right to legislate against such incest?

VI. REQUIRED CONCLUSION: GOVERNMENT HAS A ROLE IN PROTECTING MORALITY

What these examples destroy is the shibboleth that government should not proscribe any conduct that society believes to be immoral, unless the conduct physically hurts someone else who did not consent. Physical harm is not the only harm that society has the responsibility to prevent. Immorality itself is a cancer that eats at the moral fiber of any society. As immoral conduct is accepted and pop-

⁷⁶ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991) (Rehnquist, CJ, plurality opinion) (Indiana public indecency statute upheld as “protecting societal order and morality”).

⁷⁷ *Cole*, *supra* note 1.

ularized, it affects how parents can exercise their parental rights to instruct and bring up their children. Imagine a child viewing the public copulation, whether standard, oral or anal, and how that could derail the parents' teachings about family, love, and sex. To allow consenting individuals to serve as spectacles for passers-by, in fact, injures those who reject such conduct by invading their privacy and popularizing conduct they reject—albeit without any physical impact.

Go one step further in this reasoning: I have never heard any libertarian suggest that an individual should be allowed to defecate in public streets, if that is what he prefers to do. The explanation undoubtedly given is that it could affect the physical health of the entire community. I doubt that human defecation in public view would become acceptable, even to libertarians, if total immediate clean-up minimized any likely physical harm. In this day of recognition of the importance of mental health, as well as physical health, and the many societal actions to help those suffering from mental illness, libertarians erroneously seek to totally obliterate the impact of conduct that adversely affects society's mental health, only because it is not physical injury.

VII. THE REDUCTION OF MORALITY IN OUR COUNTRY

How has this libertarian view affected our country? A great majority of Americans—72%—hold the view that our country's moral values are deteriorating, with more than twice the number of Americans rating our country's moral values as poor than those who opine they are excellent or good.⁷⁸ Compare the current moral image of America, with the moral views when this country was created, our Constitution and Bill Of Rights enacted, for the purpose of protecting the way of life that then existed. I hereinafter discuss several examples (there are many others) of the 180-degree change from imposed morality to effective *laissez faire*.

But first, let me be clear: the indisputable facts of the switching of this country from moral rules that governed this country for centuries to allowing conduct not previously allowed are not presented here to express a value judgment on whether the earlier rule or the current rule is better. Is modernity or old values better? That question is not one that necessarily divides our country between liberals

⁷⁸ Justin McCarthy, *Majority in U.S. Still Say Moral Values Getting Worse*, GALLUP (June 2, 2015), <http://www.gallup.com/poll/183467/majority-say-moral-values-getting-worse.aspx>.

and conservatives. Even Sen. Ted Kennedy, recognized as extremely liberal, spoke of the importance of the “moral issue,” and explained that “programs may sometimes become obsolete,” but it is “old values that will never wear out.”⁷⁹

Obviously, whether the historical view on these value-issues has worn out is a determination made by legislators, voters, or the courts under our system of government. But we would be sticking our heads in the sand to allow what we may believe to be political correctness to blind ourselves to the changes that have occurred, and not consider the extent, if any, to which these changes endanger our country and the freedom that we have thought protected by our Constitution.

Let’s look at the impact on our country of these (not exclusive) areas where morality in our country, as understood by our Founding Fathers, has been rejected by modern America.

A. Abortions

Abortions historically were prohibited; today abortions (at least in the first two trimesters) are legally protected, by ruling of the Supreme Court,⁸⁰ resulting in almost one million reported (and thus legal) abortions in 2014, and almost 53 million reported abortions in the period from 1973 through 2011.⁸¹ The immorality of abortions, from early days, was, until very recently changed, reflected in the Hippocratic Oath—specifying the morality of doctors’ conduct—that forbade doctors from giving “to a woman an abortive remedy.”⁸² The common law, which was brought to our shores from England, was variously described as considering abortions as either “homicide” or “a lesser offense” than homicide, but a criminal offense nonetheless.⁸³ And, in 1803, England explained its view of abortions by declaring the abortion of a quick fetus to be a capital crime (a death sentence), and a lesser-punishment crime if an earlier fetus was

⁷⁹ Senator Ted Kennedy, *The Cause Endures* (Aug. 12, 1980), <http://www.historyplace.com/speeches/tedkennedy.htm>.

⁸⁰ *See* *Roe v. Wade*, 410 U.S. 113 (1973); *see also* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁸¹ *U.S. Abortion Statistics*, ABORT73, www.abort73.com/abortion_facts/us_abortion_statistics/ (last visited May 3, 2016).

⁸² GERALD WALPIN, *THE SUPREME COURT VS. THE CONSTITUTION* 100 (2013) (quoting *Roe*, 410 U.S. at 131).

⁸³ *Id.* at 101.

aborted.⁸⁴

This Country had a long history of so treating abortions. “Beginning in the first half of the 19th century, most States enacted laws criminalizing abortions.”⁸⁵ Perhaps most indicative of the immorality of abortions is that 60% of Americans, including both pro-life and pro-choice believers, view abortion as “morally wrong.”⁸⁶ The same poll found that 84% would ban any abortion after three months of pregnancy.⁸⁷

Yet, the Supreme Court, in its very famous—some would say, infamous—*Roe v. Wade* decision,⁸⁸ in 1973, voided these centuries of holding abortion to be immoral, and declared unconstitutional all statutes prohibiting abortions. But that was only the door-opening to immorality, which has now fallen to much lower depths—approaching and in some ways, in making a business of it, perhaps surpassing the brutal infanticide of the Egyptian and Roman empires. Once the Supreme Court declared unconstitutional the prohibition of abortions, the conduct of many abortions has further demonstrated the decline in our society’s morality. Abortions now include grabbing and tearing apart the fetus, through holding the limbs in forceps and pulling, then grasping the head and crushing it.⁸⁹ The vile commercialism of the abortion “market” was recently uncovered in films showing top officials of Planned Parenthood, the largest abortion supplier, admitting selling (for money) intact body parts of partial birth aborted babies.⁹⁰ It is impossible to reconcile such conduct—now apparently acceptable—with any moral society. Perhaps even worse is that a majority in a Colorado State House committee rejected a bill prohibiting murder of a baby born alive after a failed abortion⁹¹—that, at times occurs,

⁸⁴ *Id.*

⁸⁵ *Id.* at 99.

⁸⁶ Charlie Spiering, *Poll: 60 Percent of Americans Say Abortion is Morally Wrong*, BREITBART (Jan. 22, 2015), <http://www.breitbart.com/big-government/2015/01/22/poll-60-percent-of-americans-say-abortion-is-morally-wrong/>.

⁸⁷ *Id.*

⁸⁸ *Roe*, 410 U.S. at 113.

⁸⁹ Nat Hentoff, *Damaging Effects of Gruesome Limb-Tearing Abortion*, WND (Apr. 21, 2015, 7:22 PM), <http://www.wnd.com/2015/04/damaging-effects-of-gruesome-limb-tearing-abortion/>.

⁹⁰ Steven Ertelt, *Shock Video Catches Another Top Planned Parenthood Doctor Selling Body Parts of Aborted Babies*, LIFENEWS (July 21, 2015 8:05 AM), <http://www.lifenews.com/2015/07/21/second-shock-video-catches-another-top-planned-parenthood-doctor-selling-body-parts-of-aborted-babies/>.

⁹¹ *Colorado Dems Kill Bill Protecting Babies Born Alive After Failed Abortions*, VISION

the Center For Disease Control reported almost 1300 infant deaths in 2011 for causes including failed abortions.⁹²

But it has not stopped with such inhuman means of abortions. If one can get rid of a forthcoming child shortly before birth, why not allow killing of unwanted children *after* birth? Shocking? A professor from Princeton University has proposed killing severely disabled infants to save money and, most presumptively Orwellian, “for moral reasons.”⁹³ This professor, Peter Singer, whom Princeton has ironically anointed with the title of “Professor Of Bioethics in the University Center For Human Values,”⁹⁴ rationalizes such murders by calling such proposed child victims as “it.”⁹⁵ According to him, post-birth, parents, in consultation with a physician, should be able to kill their newly born disabled child, if doing so would increase the parents’ happiness.⁹⁶ However, such verbiage does not vitiate the proposed immorality of implementing, in this country, the Hitler-like procedure of “disposing” of those who did not further the master race. No reasonable American would accept Hitler’s mass killing of “unacceptable” humans as moral conduct. Professor Singer’s proposal deserves death on the immorality heap. But, if present tendencies continue, it would likely, unfortunately, be accepted.

B. Pornography and Sex, Sex, and More Sex

Pornography, the scourge of any moral society, banned in every state since the beginnings of our country,⁹⁷ is now rampant, in view of Court decisions severely limiting Government’s ability to invade what has been converted into free speech.⁹⁸ That there was no

TO AMERICA (Apr. 14, 2015), <http://visiontoamerica.com/21683/colorado-dems-kill-bill-protecting-babies-born-alive-after-failed-abortions/>.

⁹² *Id.*

⁹³ Darren Pope, *Mainstreaming Infanticide: Ivy League Professor Calls for Killing Disabled Infants under Obamacare*, RESTORING LIBERTY (Apr. 21, 2015), <http://joemiller.us/2015/04/mainstreaming-infanticide-ivy-league-professor-calls-for-killing-disabled-infants-under-obamacare/>.

⁹⁴ PRINCETON UNIVERSITY CENTER FOR HUMAN VALUES, <https://uchv.princeton.edu/people/faculty.php> (last visited May 3, 2016).

⁹⁵ See Pope, *supra* note 93.

⁹⁶ Scott Klusendorf, *Peter Singer’s Bold Defense of Infanticide*, CHRISTIAN RESEARCH INST. (Apr. 16, 2009), <http://www.equip.org/article/peter-singers-bold-defense-of-infanticide/#christian-books-2>.

⁹⁷ See WALPIN, *supra* note 82, at 227-28.

⁹⁸ *E.g.*, *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Mass.*, 383 U.S. 413 (1966); *Roth v. United*

question about the constitutionality of those pornography-banning statutes was demonstrated in the late 19th century unanimous Supreme Court decision declaring that there was “no doubt” as to the “constitutionality” of statutes making it a crime to distribute any “obscene, lewd, or lascivious book [or] pamphlet”⁹⁹ Shortly thereafter, the Court explained its reasoning in allowing governmental imposition of morality: the need to communicate “decency, purity, and chastity in social life” and prevent the “obscene, lewd and lascivious.”¹⁰⁰ For that purpose, any matter that would “suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced” can be proscribed.¹⁰¹

Yet, less than a century later, a majority in the Supreme Court did a complete turnabout, to allow showing of the film “*Les Amants*” (“The Lovers”), thereby overruling thirteen different Ohio judges who had found it obscene.¹⁰² What was in the film: among other items, “an explicit love scene”—explicit sexual intercourse—by a married woman, “bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love.”¹⁰³

Two years later, the Supreme Court again reversed state court judges, this time Massachusetts, who had banned the mid-18th century book *Memoirs Of A Woman Of Pleasure* (“commonly known as *Fanny Hill*”) because it was obscene.¹⁰⁴ This heck-with-morality-in-favor-of-anything-goes Supreme Court majority agreed that the book may well “possess the requisite prurient appeal and . . . be patently offensive.”¹⁰⁵ Further, Justice Douglas, in a concurring opinion, wrote specifically that the book “concededly is an erotic novel.”¹⁰⁶ Of course it is, given that the book purports to be a 15-year-old girl’s detailed account of her sexual experiences:

States, 354 U.S. 476 (1957). The impact of these Supreme Court rulings caused lower courts to invalidate legislative attempts to ban pornography. See, e.g., *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

⁹⁹ *Ex Parte Jackson*, 96 U.S. 727, 736-37 (1877).

¹⁰⁰ *Rosen v. United States*, 161 U.S. 29, 42 (1896).

¹⁰¹ *Id.* at 43.

¹⁰² *Jacobellis*, 378 U.S. at 196; *State v. Jacobellis*, 179 N.E.2d 777, 781-82 (Ohio 1962); *State v. Jacobellis*, 175 N.E.2d 123, 123, 125-26 (Ohio Ct. App. 1961).

¹⁰³ *Jacobellis*, 378 U.S. at 195-96.

¹⁰⁴ *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure”*, 383 U.S. at 415, 417, 419-20.

¹⁰⁵ *Id.* at 419.

¹⁰⁶ *Id.* at 424 (Douglas, J., concurring).

From a lesbian encounter with a sister prostitute to all sorts and types of sexual debauchery in bawdy houses and as the mistress of a variety of men. These scenes run the gamut of possible sexual experience such as lesbianism, female masturbation, homosexuality between young boys, the destruction of a maidenhead with consequent gory descriptions, the seduction of a young virgin boy, the flagellation of male by female, and vice versa, followed by fervid sexual engagement, and other abhorrent acts, including over two dozen separate bizarre descriptions of different sexual intercourses between male and female characters [T]he most vivid and precise descriptions [are provided] of the response, condition, size, shape, and color of the sexual organs before, during and after orgasms.¹⁰⁷

The impact on our society of this repudiation of anti-pornography legislation: pornography is now acceptable and a big industry. Two-thirds of men between 18-34 years old make at least a monthly visit to one of the many pornographic web sites.¹⁰⁸ Between 1988 and 2005, the number of released pornographic videos and DVD titles increased over 1000 percent, from 1300 to 13,585 titles.¹⁰⁹ Four billion dollars are spent annually on pornography videos in the United States, with close to one billion pornographic media being rented.¹¹⁰ This amount is more than what is spent on baseball, football, and basketball!¹¹¹

It is not only mature adults who are given access to pornography; pornography has had a tidal wave impact on our youth. A 2004 Columbia University study found that 45 percent of teenagers “have friends who regularly view internet pornography and download it.”¹¹²

¹⁰⁷ *Id.* at 445-46 (Clark, J., dissenting).

¹⁰⁸ *Pornography Facts and Background*, ARCHDIOCESE OF ST. LOUIS, <http://archstl.org/page/pornography-facts-background> (last visited May 3, 2016).

¹⁰⁹ Katherine Kersten, *Katherine Kersten: We're Really All Victims of Porn Boom*, STARTRIBUNE (May 1, 2010, 4:56 PM), <http://www.startribune.com/katherine-kersten-we-re-really-all-victims-of-porn-boom/92552694/>.

¹¹⁰ Mary Eberstadt & Mary Anne Layden, *The Social Costs of Pornography* 13 (Witherspoon Institute 2010), <http://www.internetsafety101.org/upload/file/social%20costs%20of%20pornography%20report.pdf>.

¹¹¹ *Id.*

¹¹² *Id.* at 27.

Even more, “34% of adolescents reported being exposed to unwanted sexual content online . . . [and] 70% of youth ages fifteen to seventeen reported accidentally coming across pornography on line.”¹¹³ A 2014 survey reported that 63% of men between the ages 18 and 30 admitted to viewing “pornography at least several times each week,” and 76% of women in the same age group “view pornography at least once a month.”¹¹⁴ Even when youth are not searching for pornography, they see it because “pornographic references are frequently laced into popular video games, advertisements, television, and music, and also are ubiquitous in music videos.”¹¹⁵

Today, “suggest[ing] or convey[ing] lewd thoughts and lascivious thoughts to the young and inexperienced” —the Supreme Court’s 1896 test for allowing government banning¹¹⁶—is rampant in generally distributed media available to all ages.¹¹⁷ In fact, it is impossible to prevent the youngest in our society from being bombarded by such material, as sex, sex, and more sex is all over. A child standing in line with mother or dad at the check-out counter at most supermarkets or waiting at a doctor’s office cannot avoid magazines applauding and romanticizing sex. For example, I saw, while waiting at a doctor’s office, an April 2008 *Cosmopolitan* magazine headlined “Be A Sex Genius!: These Brilliantly Naughty Bed Tricks Will Double His Pleasure . . . And Yours,” and “Little Mouth Moves That Make Sex Hotter.”¹¹⁸ Television programs similarly highlight sex. In the first episode of “90210,” advertised as a *teen* drama TV series, two students engage in oral sex.¹¹⁹ Topless women market their naked wares (covered only by paint) in Times Square to be photographed with boys as young as 14 and below.¹²⁰

Sex has become so rampant on media observable by all, including children, that the American Academy of Pediatrics, in 2010,

¹¹³ *Id.* at 28.

¹¹⁴ *Pornography Statistics*, COVENANT EYES, www.covenanteyes.com/pornstats/ (last visited May 3, 2016).

¹¹⁵ Eberstadt, *supra* note 110, at 28-29.

¹¹⁶ *Rosen*, 161 U.S. at 43 (1896).

¹¹⁷ *Id.*

¹¹⁸ See COSMOPOLITAN MAGAZINE (April 2008).

¹¹⁹ Tim Graham, ‘90210’ Oral Sex Episode: The ‘Sarah Palin of TV Shows’?, NEWS BUSTERS (Sept. 5, 2008, 9:45 PM), <http://newsbusters.org/blogs/tim-graham/2008/09/05/90210-oralsex-episode-sarah-palin-tv-shows>.

¹²⁰ Michael Gartland & Jennifer Bain, *Topless Women Posing with Underage Kids in Times Square*, NEW YORK POST (Apr. 22, 2015, 12:00 AM), <http://nypost.com/2015/04/22/topless-women-posing-with-underage-kids-in-times-square>.

issued a flashing-red-light warning statement:

On television, which remains the predominant medium in terms of time spent for all young people, more than 75% of prime-time programs contain sexual content Talk about sex on TV can occur as often as 8 to 10 times per hour. Between 1997 and 2000 alone, the amount of sexual content on TV nearly doubled. . . . [M]usic . . . [is] a major source of sexual suggestiveness [A]n analysis of the 279 most popular songs in 2005 revealed that 37% contained sexual references and that degrading sexual references were common. [V]irtually every R-rated teen movie since the 1980s has contained at least one nude scene and, often, several instances of sexual intercourse. [T]een magazines are popular with preadolescent and adolescent girls . . . the overarching focus [of which] seems to be deciding when to lose one's virginity [A]dvertisements often use sex to sell. Women are as likely to be shown in suggestive clothing (30%), partially clad (13%), or nude (6%) as they are to be fully clothed [The] United States has some of the most sexually suggestive media in the world. American media makes sex seem like a harmless sport in which everyone engages.¹²¹

Clubs now exist to provide a “safe place” to act out erotic fantasies involving sadism/masochism, in which, for example, a man and woman engage in “fire play, which involved accelerant placed on strategic points of a woman's body and set ablaze in short dramatic bursts,” while, in another part of the club, “a middle-aged man was lashing a middle-aged woman's bare back with a single tail whip.”¹²²

Famed prestigious universities have joined the bandwagon. Harvard, which claims that it is dedicated “to the pursuit of excellence,”¹²³ recently gave accreditation to Harvard College Much, a

¹²¹ Victor C. Strasburger, *Sexuality, Contraception, and the Media*, AMER. ACADEMY OF PEDIATRIC NEWS, <http://pediatrics.aappublications.org/content/126/3/576.long> (last visited May 3, 2016).

¹²² Matt Haber, *A Hush-Hush Topic No More*, N.Y. TIMES (Feb. 27, 2013), <http://www.nytimes.com/2013/02/28/fashion/bondage-domination-and-kink-sex-communities-step-into-view.html>.

¹²³ About Harvard, *Academic Experience*, <http://www.harvard.edu/academic-experience>

student group focusing on “kinky interests.”¹²⁴ In addition, Harvard has an annual Sex Week, spotlighting, among other choices, “Anal Sex 101,” described as “[L]earn the facts about this exciting yet often misunderstood form of pleasure.”¹²⁵ Starting in the 1990’s, the student newspaper at Yale, the Yale Daily News, has a sex columnist whose column included a description about how she had lost her virginity as well as detailing methods of self-pleasuring.¹²⁶ Tufts College has a regular “Between The Sheets” column, written by a co-ed.¹²⁷ The University Of Tennessee had a campus “Sex Week,” with classes and workshops on such topics as “How Many Licks Does It Take” (oral sex), “Loud and Queer,” and “Transgender Sexuality.”¹²⁸ Other campuses featured a weekly column entitled “Wednesday Hump,” as well as articles on bestiality, erotic asphyxiation, and sex while dressed in animal costumes.¹²⁹ The University of Cincinnati authorized twelve billboard-sized photographs of vaginas to be exhibited outdoors on the campus, which the college President rationalized as nothing more than an “‘intellectual exchange . . . [P]rotect[ed by] the First Amendment’”¹³⁰—without identifying why and how it was intellectual.¹³¹ Even the very Catholic University of Notre Dame is not immune to being drowned in sex: despite the President’s objection to the “graphic descriptions” of sexual experiences and its portrayals of sex outside the traditional male/female relationship, Notre Dame allowed the play “Vagina Monologues” to be performed on

(last visited May 3, 2016).

¹²⁴ Haber, *supra* note 122.

¹²⁵ *Harvard University Offers Students ‘Anal Sex 101’ Class*, RUSSIA TODAY USA (Nov. 3, 2014, 9:42 AM), <http://rt.com/usa/201979-harvard-anal-sex-week>.

¹²⁶ Joseph Tartakovsky, *Never Mind Tolstoy*, WALL ST. J. (Aug. 13, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703589404575418390504172492>.

¹²⁷ Kristen Casazza, *From ‘Between the Sheets’ to the bookstore shelves*, THE TUFTS DAILY (Sept. 20, 2006), <http://tuftsdaily.com/archives/2006/09/20/from-between-the-sheets-to-the-bookstore-shelves/>.

¹²⁸ *University Pulls ‘Sex Week’ Funding After Outrage that State was Paying for Events Teaching Oral Sex Workshops and Putting on Drag Shows*, DAILY MAIL REPORTER (Mar. 21, 2013, 4:09 PM), <http://www.dailymail.co.uk/news/article-2297168/University-pulls-Sex-week-funding-outrage-state-paying-events>.

¹²⁹ Joseph Tartakovsky, *Bookshelf*, WALL ST. J., Aug. 13, 2010, p. A15, reviewing *Sex And The University*, by Daniel Reimold.

¹³⁰ *Vagina Billboard Controversy: Groups post 12 Vagina Photographs on University of Cincinnati Campus*, NEWSNET5 (Mar. 8, 2013), <http://www.newsnet5.com/dpp/news/education/Vagina-billboard-controversy-Groups-post-12-vagina-photographs-on-University-of-Cincinnati-campus> (quoting Ono’s statement).

¹³¹ *Id.*

campus.¹³²

A Carnegie Mellon University sex columnist, responding to the many who question this opening of the floodgates to sex, told objectors to “‘[I]ghten up a little bit’ [I]t’s just sex.”¹³³ But to whitewash it all with “it’s just sex,” is a simplistic view based on a failure to examine the impact that rampant sex bombardment has on our country, particularly on our youth.

Various professionals concur on the “links between pornography consumption and a wide number of psychological, social, and family pathologies.”¹³⁴ Testimony of one expert exemplifies the reasoning supporting that conclusion: “‘Those who claim pornography is harmless entertainment, benign sexual expression or a marital aid, have clearly never sat in a therapist’s office with individuals, couples, or families who are reeling from the devastating effects of the material.’¹³⁵”¹³⁶ [D]ata suggests that the habitual use of pornography can have a range of damaging effects on human beings of all ages and of both sexes, affecting their happiness, their productivity, their relationships with one another, and their functioning in society”¹³⁷ all necessary for a well-functioning Society. A 2004 “nationally representative study of 531 internet users . . . found that those who had an extramarital affair were more than three times more likely to have used internet pornography than were internet users who had not had an affair.”¹³⁸ No one can seriously believe that any inducement of extramarital affairs enhances society’s morality and is a good activity for upholding the family structure.

Raquel Welch, one of America’s most beautiful actresses, well described the impact of the bombardment of sex on all of us: “I

¹³² Neela Banerjee, *Notre Dame’s President Allows ‘Monologues’ and Gay films*, N.Y. TIMES (April 6, 2006), http://www.nytimes.com/2006/04/06/education/06notredame.html?_r=0.

¹³³ Joseph Tartakovsky, *Never Mind Tolstoy*, WALL ST. J. (Aug. 13, 2010), <http://www.wsj.com/articles/SB10001424052748703589404575418390504172492> (quoting sex columnist Janet Jay when reviewing DANIEL REIMOLD, *SEX AND THE UNIVERSITY* (2010)).

¹³⁴ MARY EBERSTADT & MARY A. LAYDEN, *THE SOCIAL COSTS OF PORNOGRAPHY* 9 (The Witherspoon Institute 2010).

¹³⁵ *Id.* at 10.

¹³⁶ *Id.* at 9 (quoting J.C. MANNING, *The Impact of Pornography on Women: Social Science Findings and Clinical Observations*, in *THE SOCIAL COSTS OF PORNOGRAPHY: A COLLECTION OF PAPERS* (2010)).

¹³⁷ *Id.* at 10.

¹³⁸ *Id.* at 24.

think we've gotten to the point in our culture where we are all sex addicts, literally. We have equated happiness in life with as many orgasms as you can possibly pack in, regardless of where it is that you deposit your love interest."¹³⁹

No periodicals, whether newspapers or magazines, published and read by our Founding Fathers, would have contained the slightest hint of the sex and pornography now rampant in our media. For example, Ben Franklin's Philadelphia Gazette, the antecedent of the long-lived (no longer) Saturday Evening Post, and similar contemporary publications, never contained the slightest hint of any sex or pornography of the type now regularly distributed.¹⁴⁰ Were our Founding Fathers wrong in what they accepted as their moral code? That is the question all of us must face. But that we have departed from their moral code is beyond question.

C. Child Pornography

Until very recently, any type of child pornography—conveying the images of young children engaging in all types of sexual activities—had been verboten, even to those who would allow adult pornography. For example, Justices Brennan and Marshall, both of whom often voted to allow adult pornography, agreed that the State has a special interest in protecting the “well-being of our youth,” that “afford[s] the State the leeway to regulate pornographic material, the promotion of which is harmful to children.”¹⁴¹

No one has ever seriously suggested that child pornography fits within any accepted moral code, and it certainly was not allowed in this country when created by our Founding Fathers. Aside from its torpedoing of the moral climate, its impact on our youth, when seen by them, is destructive. An Attorney General's Commission on Pornography said this about child pornography: “[c]hild pornography is often used as part of a method of seducing child victims,” in that a

¹³⁹ Interview by Eric Spitznagel with Raquel Welch, actress, CSI: Miami, in MEN'S HEALTH MAGAZINE (Mar. 8, 2012), <http://www.menshealth.com/guy-wisdom/raquel-welch>.

¹⁴⁰ See, e.g., Philadelphia Gazette, Jan. 2, 1750, at <http://www.earlyamerica.com/pages-past/ben-franklins-pennsylvania-gazette/>, and two other early American similar newspapers, Boston Gazette, Oct 7, 1776, at www.earlyamerica.com/pages-past/boston-gazette-oct-7-1776 and Massachusetts Sentinal, April 14, 1790, at www.earlyamerica.com/pages-past/massachusetts-sentinal-april-14-1790 (all last visited May 3, 2016).

¹⁴¹ New York v. Ferber, 458 U.S. 747, 776 (1982) (Brennan, J. & Marshall, J., concurring).

“child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children ‘having fun’ participating in the activity.”¹⁴²

With that reasoning in mind, Congress enacted, and the President signed, a law that banned “virtual child pornography” —defined to cover all means used to create sexually explicit images that appear to depict minors in lewd and obscene activities. Some in fact included innocent images of real children that had been altered to make them appear to be engaged in sexual activity, while some used adults who looked like minors or computer-created images that looked real-life.¹⁴³ Whatever means were used, the objective in making them was to sell them as child pornography, and when well made, viewers thought they were watching children in sexual activity.¹⁴⁴

Incredibly, in 2002, a six-justice majority held this statute to be unconstitutional,¹⁴⁵ thereby opening the floodgates to what appears to the naked eye—and certainly to other youth—to be children enjoying obscene sexual activities.

D. Public Profanity

In 1942, a unanimous Supreme Court, in an opinion written by Justice Francis Murphy—well-known for his defense of free speech—upheld, as a defense of morality, a conviction for addressing a city marshall as “a God damned racketeer” and “a damned Fascist.”¹⁴⁶ The statute thereby upheld as constitutional criminalization of the use against another of “any offensive, derisive, or annoying word . . . in any street or other public place.”¹⁴⁷ Justice Murphy declared that “the lewd and obscene, [and] the profane” words “are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit to them is clearly outweighed by the social interest in order and morality.”¹⁴⁸ Thus, the Court, *unanimously*, in 1942 expressly recognized that the Government had a Constitutional interest in protecting morality and, for that purpose, to

¹⁴² Osborne v. Ohio, 495 U.S. 103, 111 (1990) (quoting 1 Attorney General’s Commission On Pornography, Final Report 649 (1986)).

¹⁴³ Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241-42 (2002).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 256-58.

¹⁴⁶ Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 574 (1942).

¹⁴⁷ *Id.* at 569.

¹⁴⁸ *Id.* at 572 (emphasis added).

prevent public use of profane words (even though the words there used, “God damned” and “damned,” were insipidly profane as compared to, as we shall see, extremely profane language later held not allowed to be prohibited).¹⁴⁹

Only 29 years later, the Supreme Court found it unconstitutional for California to criminalize the use of the “F” word in a courthouse corridor in which women and children were present, as a protest against the draft.¹⁵⁰ Although conceding that “the particular four-letter word being litigated here is . . . more distasteful than most others of its genre,”¹⁵¹ the Court rationalized that the public display of that egregious word would not affect anyone’s morality because observers could avoid seeing it “simply by averting their eyes.”¹⁵² Of course, these justices did not explain how one can know to avert one’s eyes without having already seen it to know it is there. Nor do they explain how a Mother can ensure that her child’s eyes are averted not to see it. Amazingly, after the Court unanimously had previously held that protecting morality was an appropriate purpose of a similar statute, it rejected California’s assertion that it was entitled to “act . . . as guardians of public morality”¹⁵³ —a total turnabout.

This decision was an open invitation to language totally inconsistent with morality. Telling police officers, “White son of a bitch, I will kill you,” and “I’ll cut you to pieces,”¹⁵⁴ or calling a police officer “you god damn m. f. police,”¹⁵⁵ became protected free speech.

One might say that all that was being decided was that such unacceptable language cannot be the basis of criminal prosecution, but that government could still protect the public from immoral language. You would be correct if we were still in 1969, but the floodgates were opening in all venues to such language.

Congress had earlier enacted a statute that prohibited any licensed broadcaster on radio or television from allowing utterance of “any obscene, indecent, or profane language.”¹⁵⁶ Yet that statute was

¹⁴⁹ *Id.* at 569, 573-74.

¹⁵⁰ *Cohen v. California*, 403 U.S. 15 (1971).

¹⁵¹ *Id.* at 25.

¹⁵² *Id.* at 21.

¹⁵³ *Id.* at 22.

¹⁵⁴ *Gooding v. Wilson*, 405 U.S. 518, 534 (1972), (Blackman, J., dissenting).

¹⁵⁵ *Lewis v. City of New Orleans*, 415 U.S. 130, 138-39, 141-42 (1974) (Blackman, J., dissenting).

¹⁵⁶ 18 U.S.C. § 1464.

upheld only by a 5-4 vote, suggesting that “everything goes” may shortly rule our airwaves,¹⁵⁷ and serving as an invitation generally to the use of such language, despite the fact that most States have a law against using profanity in public.¹⁵⁸

And the floodgates have been opened where recently Robert De Niro in a commencement speech to NYU graduating students and guests (likely including young brothers and sisters of graduating students), used the “F” word resulting in a combination of laughter (unclear whether it was nervous laughter) and applause.¹⁵⁹

One of the dissenters in the Supreme Court asserted using such words in public is no crime since their use is prevalent when golfers shank a short approach.¹⁶⁰ I ask them, as well as all others who see nothing wrong or immoral in the use of such words in public, whether parents have the right to teach their children that use of such four-letter words in civil social conversation, including at the family dinner table or at church, synagogue or mosque, is unacceptable and immoral? If they do, and I believe that all would agree that is the parents’ right, then morality is not served by allowing the unwelcome invasion of such words in public.

E. Legitimizing Animal Cruelty and Torture

Gory, bloody, slow torturing killings of small animals such as cats, formerly verboten as immoral by overwhelming legislative action from the early days of our country, has suddenly been declared permissible.¹⁶¹ All major religions including Christian,¹⁶² Jewish,¹⁶³ Muslim,¹⁶⁴ Hindu,¹⁶⁵ and Buddhist¹⁶⁶ teach that cruelty to animals is

¹⁵⁷ FCC v. Pacifica Foundation, 438 U.S. 726, 744 (1978).

¹⁵⁸ David L. Hudson Jr., *Curses! Blasphemy, profanity laws still on the books*, FIRST AMENDMENT CTR. (Aug 11, 2009), <http://www.firstamendmentcenter.org/curses-blasphemy-profanity-laws-still-on-the-books>.

¹⁵⁹ Tyler McCarthy, *Robert De Niro’s 2015 Commencement Speech to NYU Tisch Graduates: ‘You’re Fucked’*, INT’L BUS. TIMES (May 25, 2015, 12:03 PM), <http://www.ibtimes.com/robert-de-neros-2015-commencement-speech-nyu-tisch-graduates-youre-f-ed-1935979>.

¹⁶⁰ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 543 (2009) (Stevens, J., dissenting).

¹⁶¹ United States v. Stevens, 559 U.S. 460, 474 (2010).

¹⁶² *Animal Cruelty*, OPEN BIBLE, http://www.openbible.info/topics/animal_cruelty (last visited May 3, 2016).

¹⁶³ *Judaism 101-Treatment of Animals*, JEWFAQ, <http://www.jewfaq.org/animals.htm> (last visited May 3, 2016).

¹⁶⁴ Huda, *What does Islam say about how Muslims should treat animals?*, ABOUT

immoral. Prohibition of animal cruelty dates from the early settlement of the American colonies.¹⁶⁷ For example, the Massachusetts Bay Colony outlawed “any Tirranny or Crueltie towards any brute Creature which are usually kept for man’s use.”¹⁶⁸ All 50 States and the District of Columbia have laws that prohibit animal cruelty.¹⁶⁹ And Congress enacted a statute that criminalized the creation, sale, or possession of depictions in which a living animal is “intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury” if it is illegal under federal or state law where the creation, sale, or possession takes place, and the depiction is devoid of any “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”¹⁷⁰ Those latter exceptions to criminalization certainly appeared to meet the standard earlier fixed by the Supreme Court. For any criminalization of speech or expression, that immunizes depictions (films) that are an “essential part of any exposition of ideas, and are of such [meaningful] social value as a step to truth that any benefit that may be derived from them is [not] clearly outweighed by the social interest in order and *morality*.”¹⁷¹

This statute was consistent with the moral standard inherent in our country from its beginnings. And considering the nature of “crush videos” —the label given to filmed depictions of animal torture and cruelty—it was difficult to believe that anyone would object and claim that such films must be allowed as protected by the First Amendment. Here is an example of the nature of these films:

A kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten’s eye socket and

RELIGION, <http://islam.about.com/od/islamsays/a/animalwelfare.htm> (last visited May 3, 2016).

¹⁶⁵ Jayaram V, *Treatment of Animals in Hinduism*, HINDU <http://www.hinduwebsite.com/hinduism/essays/animals.asp> (last visited May 3, 2016).

¹⁶⁶ *The Buddhist Attitude to Animal Life*, BUDDHASASANA, <http://www.budsas.org/ebud/whatbudbeliev/170.htm> (last visited May 3, 2016).

¹⁶⁷ *Stevens*, 559 U.S. at 469.

¹⁶⁸ *Id.* (quoting The Body of Liberties § 92 (Mass. Bay Colony 1641), reprinted in *American Historical Documents 1000-1904*, 43 HARV. CLASSICS 66, 79 (C. Eliot ed. 1910), <https://history.hanover.edu/texts/masslib.html>).

¹⁶⁹ *Stevens*, 559 U.S. at 466.

¹⁷⁰ 18 U.S.C. § 48 (2010); *Banning Entire Categories of Speech*, REPORTERS COMM. FOR THE FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/banning-entire-categories-speech-0> (last visited May 3, 2016).

¹⁷¹ *Chaplinsky*, 315 U.S. at 572 (emphasis added).

mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone.¹⁷²

Doesn't this sound like a totally immoral depiction? Yet, the Supreme Court, by a vote of 8-1, held the statute unconstitutional, throwing morality out the window.¹⁷³

F. Violent Video Games For Minors

It is difficult to imagine that anyone would think that it advances morality to allow minors, without parental consent, to purchase violent video games. Some of those games allow the minor to kill “[v]ictims by the dozens with every imaginable instrument, including machine guns, clubs, hammers, axes, swords, and chainsaws,” with victims being “dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces,” resulting in the victims’ “cry[ing] out in agony and beg[ging] for mercy.”¹⁷⁴ Other such video games induce the watching minor to “take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech.”¹⁷⁵ Then there are those that allow a minor “to rape a mother and her daughters, . . . rape Native American women, . . . engage in ‘ethnic cleansing’ . . . choose to gun down African-Americans, Latinos, or Jews, . . . [or to] fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.”¹⁷⁶

That one would unabashedly seek even to conceive of selling these videos to anyone, not to mention minors, says loads of the current generation’s torpedoing of morality in our country. But they are sold. California attempted to stop sales of such films to minors by making it a crime for anyone to sell to a minor a video in which, among other definitions, the operator of the game would have options

¹⁷² *Stevens*, 559 U.S. at 491 (Alito, J., dissenting).

¹⁷³ *Id.* at 481-82.

¹⁷⁴ Nate Anderson, *Puritans and Lady Godiva: why two justices voted to uphold California’s video game law*, ARSTECHNICA (Jun. 27, 2011 3:33 PM), <http://arstechnica.com/gaming/2011/06/puritans-and-lady-godiva-why-two-justices-voted-to-uphold-californias-video-game-law/>.

¹⁷⁵ *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 818 (2011) (Alito, J. & Roberts, CJ., concurring).

¹⁷⁶ *Id.* at 2749-50.

that included “killing, maiming, dismembering or sexually assaulting an image of a human being.”¹⁷⁷ But the Supreme Court stepped in to prevent enforcement of that law, by holding it unconstitutional¹⁷⁸—another hole in maintaining morality.

G. Same-Sex Marriage

Another old value, rejecting homosexuality, has done a 180-degree switch from criminalizing to legalizing. In 1776, homosexual conduct by males was subject to the death penalty in all 13 colonies, consistent with the law carried over from England.¹⁷⁹ The 13 States, following the adoption of our Constitution and even our Bill of Rights, continued both the criminalization and the death penalty.¹⁸⁰ While some of the States did not impose a death penalty on lesbians, their conduct was also declared criminal.¹⁸¹

Considering the morality evaluation of same-sex marital (and therefore sexual) relations, even the Supreme Court five-member majority that in June 2015 voided all laws proscribing homosexual or lesbian activity, recognized that “[u]ntil the mid-20th century, same sex intimacy” [was condemned] as immoral,¹⁸² and that opposite sex marriages—not same-sex marriage—“long have seemed natural and just.”¹⁸³ The pre-21st century’s world rejection of same-sex marriage was conceded by the pro-same-sex-marriage petitioners in the Supreme Court case, by their agreement that they were not aware of *any* society that permitted same-sex marriages before 2001.¹⁸⁴

True, the public view of same-sex marriage has radically changed: even before the Supreme Court decision, support had risen

¹⁷⁷ CAL. CIV. CODE § 1746(d)(1) (West 2006).

¹⁷⁸ *Entm’t Merch. Ass’n*, 564 U.S. at 802-04.

¹⁷⁹ Louis Crompton, *Homosexuals and The Death Penalty in Colonial America*, 1(3) J. OF HOMOSEXUALITY 277, 277 (1976).

¹⁸⁰ *Id.*

¹⁸¹ It is interesting to note that the criminalization of homosexual conduct in earlier United States did not create a liberal/conservative division: for example, Thomas Jefferson, who would be considered a liberal leader, proposed that the Virginia Criminal Code provide that a male found to have engaged in homosexual conduct be castrated, as part of the penalty, and, as to a convicted woman, she be subject to “cutting thro’ the cartilage of her nose a hole of one half diameter at the least.” Jefferson’s proposal was rejected in favor of legislation, in 1972, that provided for a mandatory death sentence. *Id.* at 286-87.

¹⁸² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

¹⁸³ *Id.* at 2590.

¹⁸⁴ *Id.* at 2612 (Roberts, C.J., dissenting).

from about 12% in 1988 to 56% in 2014, with only 40% of Americans opining that sexual relations between members of the same sex is always wrong.¹⁸⁵ But those figures, while reflecting public acceptance, do not prove morality, any more than the acceptance of slavery by a majority of Americans preceding the Civil War made slavery moral.¹⁸⁶ Nor does the Supreme Court's five-Justice majority decision upholding same-sex marriages establish its morality any more than the 1857 Supreme Court decision, in *Dred Scott v. Sandford*,¹⁸⁷ holding unconstitutional a legislative restriction on slavery, established the morality of slavery. Further, that the public in the Greek and Roman Empires accepted homosexual practices did not prevent their downfall or history's verdict of their immorality. We are therefore required to analyze further.

Few question that marriage, a commitment between persons who love each other, and express a formal willingness to "love, honor, and protect" each other "until death do us apart," symbolizes morality, while promiscuity and one-night or short-time stands are to the contrary. The issue of whether marriage between two persons of the same sex—having the same intention to stay together for their lives as does a heterosexual couple—presents admittedly a very difficult issue to analyze without emotion, on whether it furthers or depreciates morality as known by our Founding Fathers. Let us try.

Both sides of the issue describe a marriage between a man and a woman as a "traditional marriage."¹⁸⁸ Given that the meaning of "tradition" is "a way of thinking, behaving, or doing something that has been used by the people in a particular . . . society, etc., for a long time,"¹⁸⁹ there can be no argument on that label. But that still leaves the question of the impact on morality of breaking with tradition that members of our society frequently do without any impact on

¹⁸⁵ *Same Sex Marriage and Gay Rights: A Shift in American's Attitudes*, NAT'L OPINION RESEARCH CTR., <http://www.apnorc.org/projects/Pages/HTML%20Reports/same-sex-marriage-and-gay-rights-a-shift-in-americans-attitudes0305-8272.aspx> (last visited May 3, 2016).

¹⁸⁶ No polls then existed to measure public support for or opposition to slavery. But, that Article I, section 2, of the Constitution sustained the practice of slavery in the United States, in providing that only 3/5 of slaves would be counted for apportionment purposes, demonstrates substantial public acceptance of slavery, unchanged until Lincoln's Emancipation Proclamation in 1863 and the enactment of the 13th Amendment in 1865.

¹⁸⁷ 60 U.S. 393 (1856).

¹⁸⁸ *Obergefell*, 135 S. Ct. at 2614.

¹⁸⁹ MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/traditional> (last visited Mar. 4, 2016).

morality. For example, I know of a family that had a tradition of having turkey every Thanksgiving dinner for generations and suddenly broke with that tradition to have a goose—certainly not affecting the morality of that family. It is difficult to believe that anyone would reasonably equate that turkey-eating tradition with the tradition of a marriage being between a man and a woman. Therefore, we are still required to analyze this specific issue, which we should do without absurd attacks on one side or the other.

Proponents of same-sex marriage assert that it does nothing more than recognize a lasting bond of love and commitment between two people who happen to be of the same sex—nothing less than the morality-raising that is attributed to the traditional marriage.¹⁹⁰ But, the same lasting bond and commitment between two people would require legitimizing the “marriage,” as now demanded by two sisters, aged 93 and 98, who have lived together for many years;¹⁹¹ while these sisters happen to be in Israel, it portends similar applications in this country.

And, such lasting bond and commitment outside of a male/female relationship is not limited to two people of the same sex. As Justice Samuel Alito questioned during the Court’s argument on same-sex marriages, “why wouldn’t that [reasoning] apply to a group of four—two men and two women—who want to marry as a unit,”¹⁹² or to the above two siblings who have lived together for years sharing finances and chores—two different “marriages” that, so far, no one in our country has yet suggested would be consistent with a moral code. That four-in-marriage may, however, be forthcoming, given that three gay men in Thailand were recently married in a Buddhist marriage ceremony, in which the trio exchanged vows and “declared their love for each other,” following two having asked the third’s parents “for his hand in marriage.”¹⁹³ Can anyone say we, in America,

¹⁹⁰ *Background of the Issue: “Should Gay Marriage Be Legal?”*, PROCON, <http://gaymarriage.procon.org/view.resource.php?resourceID=006275> (last visited May 7, 2016).

¹⁹¹ Or Kashti, *Elderly Sister Fight To Be Legally Recognized as a “Couple”*, HAARETZ (July 3, 2015), <http://www.haaretz.com/news/israel/.premium-1.664250>.

¹⁹² Cheryl Wetizstein, *Supreme Court Asks Why it Should Redefine Marriage to Include Gays*, WASHINGTON TIMES (April 28, 2015), <http://www.washingtontimes.com/news/2015/apr/28/supreme-court-to-hear-historic-same-sex-marriage->

¹⁹³ Corey Charlton, *They Look Like a New Boy Band*, DAILY MAIL (Feb. 20, 2015), <http://www.dailymail.co.uk/news/article-2972542/They-look-like-new-boy-band-s-world-s-THREE-WAY-sex-marriage-Gay-Thai-men-tie-knot-fairytale-ceremony.html>.

are not heading to accepting such multiple person marriages in which all recognize a lasting bond of love and commitment—the measure applied by proponents of same-sex marriage? Already, one man and two women sought a marriage license to allow the man, already married to one of the women, to also marry the second woman.¹⁹⁴ While the relevant Montana county attorney’s office denied the license, the trio announced they would appeal to the courts to obtain a ruling allowing a polygamous marriage, as consistent with the Supreme Court’s ruling on same-sex marriage.¹⁹⁵

Another question raised by legitimating same-sex marriages is its impact on children, the protection of whom is a moral objective. The American College of Pediatricians called the decision to allow same-sex marriage “a tragic day for America’s children,” pointing to a wealth of information and scientific evidence that same-sex marriage is destructive to children because they do best in traditional families.¹⁹⁶ Supporters of the Court opinion correctly counter that a competing pediatric professional group, the American Academy of Pediatrics, disagrees with its supporting evidence.¹⁹⁷ Thus, these differences of view, even among professionals interested in children’s welfare, present a debatable issue respecting social affairs. Here is what the Supreme Court previously declared its role to be on such issues: we “leave debatable issues as respects business, economic, and social affairs to legislative decision,”¹⁹⁸ a declination of jurisdiction standard reiterated by a unanimous Court even more recently: “courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who were elected to pass laws.”¹⁹⁹ When previ-

¹⁹⁴ Lawrence Bonk, *The Man Who Sought A Second Marriage License In The Name Of Marriage Equality Finally Has His Answer*, IND. JOURNAL (July 15, 2015), http://www.ijreview.com/2015/07/372011-man-sought-second-marriage-license-name-marriage-equality-finally-answer/?utm_source=email&utm_medium=partner&utm_campaign=list-share.

¹⁹⁵ *Id.*

¹⁹⁶ Onan Coca, *American College of Pediatricians on Marriage Ruling: “A Tragic Day For American Children”*, FREEDOM OUTPOST (June 30, 2015), <http://freedomoutpost.com/2015/06/american-college-of-pediatricians-on-marriage-ruling-a-tragic-day-for-americas-children/>.

¹⁹⁷ Press Release, *American Academy Of Pediatrics Supports Same Gender Civil Unions*, AMERICAN ACADEMY OF PEDIATRICS (Mar. 21, 2013), <https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/American-Academy-of-Pediatrics-Supports-Same-Gender-Civil-Marriage.aspx>.

¹⁹⁸ *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952).

¹⁹⁹ *Ferguson v. Scrupa*, 372 U.S. 726, 730 (1963). This quotation appears in the opinion by eight justices, and the one dissenter did not voice disagreement on this statement.

ously faced with the same issue under the New York State Constitution, New York's highest court refused to second-guess its legislature, noting that "[t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."²⁰⁰ Yet, the Supreme Court here took upon itself to invalidate the contrary decision made by various legislatures.²⁰¹

The New York Times, in an editorial, recently invoked the type of absurdity that is inconsistent with a rational analysis. The Times threw the judgment words "absurdity" and "discriminatory" at those who oppose same-sex marriage because they believe in "the importance of biological ties and of motherhood and fatherhood."²⁰² It never reconciles that "absurdity" view with the fact, as it admits, that support for same-sex marriage is only a decade old and still unaccepted by great parts of the world. As the Supreme Court declared, "for centuries there have been powerful voices to condemn homosexual conduct as immoral."²⁰³

Likewise, labeling those who oppose same-sex marriage, due to religious beliefs, as discriminating or prejudicial is ironic since it would prevent religious people from exercising their freedom of religion—the freedom that was placed in our Constitution to prevent discrimination against people based on their religious beliefs, and, as detailed in Part I above, was most frequently paired with morality. England's contemporary human-rights barrister Aiden O'Neill said it well:

For the religious, their attitudes and judgments on right conduct are the very opposite of 'prejudice' which anti-discrimination law was supposed to be aimed at The State's imposition of a required conformity [amounts] to a new form of religious settlement, no longer Anglicanism, but a secularism which would banish religiously motivated action from the public square.²⁰⁴

²⁰⁰ Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

²⁰¹ *Id.* at 22.

²⁰² The Editorial Board, *The Victory For Same Sex Marriage in Ireland*, N.Y. TIMES (May 23, 2015), http://www.nytimes.com/2015/05/24/opinion/the-victory-for-same-sex-marriage-in-ireland.html?_r=0 (quoting Iona Institute).

²⁰³ Lawrence v. Texas, 539 U.S. 558, 571 (2003).

²⁰⁴ Quinn Hillyer, *A Marriage Controversy Causes Ire in Ireland*, NAT'L REV. ONLINE (March 30, 2015), <http://www.nationalreview.com/article/416155/baking-liberty-conscience->

Realizing that reality—that legitimating same-sex marriage is reversing what has been considered as moral conduct for centuries—cannot be ignored as all States are required to accept same-sex marriages. This complete turnaround by our Country is even more dramatic when over 91% of the 193 member States of the United Nations—the modern civilized world—continue to retain the definition of marriage as between a man and a woman.²⁰⁵ If our country is to accept what has been considered immoral for centuries, and set ourselves apart from most other countries, we must not ignore the history that establishes the downfall of great powers following their acceptance of homosexuality (discussed in Part II *supra*).

The campaign to accept homosexuality has evolved into demands to obliterate accepted ordinary (far from four-letter word categories) language. The nouns “husband” and “wife” have been accepted, everyday, language for the extent of modern and historical memory. Yet, only this year, 32 Democratic Congresspersons introduced legislation to remove those two words from all federal statutes, as discriminatory against gay people.²⁰⁶

Likewise, the pressure to prevent discrimination against gay persons has now resulted in demands *seeking discrimination* against non-gays.²⁰⁷ Could you even imagine in this day anyone seeking, *and obtaining*, restriction of a room at a university to “Blacks only” or “Whites only”? Not only would such a room be unconstitutional under the Fourteenth Amendment, academia’s (and, happily today, the general population’s) abhorrence of discrimination is so strong that no university should retain any employee who suggested it. Yet, the University of Oklahoma has bowed to the demand of a LGBTQ student group, called “Queer Inclusion On Campus,” to establish a student lounge for LGBTQ students only.²⁰⁸ Other demands made by this student group, apparently still under consideration, are scholar-

cake-quin-hillyer.

²⁰⁵ Lynn D. Wardle, *Judicially Mandating Same-Sex Marriage Would Put the US at Odds With the Western World*, PUBLIC DISCOURSE (April 21, 2015), <http://www.thepublicdiscourse.com/2015/04/14874>.

²⁰⁶ H.R. 2976, 114th Congress (July 8, 2015), <https://www.congress.gov/bill/114th-congress/house-bill/2976/text>.

²⁰⁷ Katie Lapotin, *Caving to Student Pressure, University Agrees to Build Study Lounge Segregated by This*, IND. JOURNAL (June 15, 2015), http://www.ijreview.com/2015/06/344374-caving-student-pressure-ou-agrees-build-study-lounge-segregated-sexuality/?utm_source=email&utm_medium=owned&utm_campaign=morning-newsletter/.

²⁰⁸ *Id.*

ships for LGBTQ students and “safer learning environments”²⁰⁹—whatever that latter demand means, given that the University is obligated to provide a safe learning environment for all students. These demands, while sought by students seeking, according to their group name, inclusion, in fact seek preference and discrimination against others by excluding them. This crusade thus is not only contrary to the morals of our Founding Fathers, but has become contrary to the moral principles of all anti-Jim Crow Americans, led initially by Rev. Martin Luther King. While all groups should be treated equally, one group should not be singled out for particularly favored treatment, for to do so is to illegally single out others for unfavorable, or at least less favorable, treatment.

Obviously, many people approve of this change in morality in America. But can anyone—should anyone—ignore that, in this subject area, this Country has moved away from the moral code that was accepted by our Founding Fathers and this Country from its birth until this century?

H. Family Structure

When it comes to critiquing President Obama, the one subject that appears to unify both Republicans and Democrats is almost unanimous admiration of the close-knit nature of his family, even in the dissecting microscope the media imposes. Certainly, President Obama’s early life was not an example that caused him to know how to do so—unless his diametrically opposite youth directed him to seek better for him, his wife, and his children. More likely, Michelle Obama has to be credited with the example the First Family has followed (not to ignore that the President was pleased to agree). She admitted that “everything that I think about and do is shaped around the life I lived” in her formative years in a one-bedroom apartment with her father, mother and brother.²¹⁰ While they were hardly well-off financially, they were very well-off family-wise, with her mother a stay-at-home Mom, raising the children. Family was most im-

²⁰⁹ Cabot Phillips & Kaitlyn Schallhorn, *University of Oklahoma Gives Gay Students Separate Study Lounge*, COLLEGE INSURRECTION (Jun. 12, 2015), <http://collegeinsurrection.com/2015/06/university-of-oklahoma-gives-gay-students-separate-study-lounge/>.

²¹⁰ Marilyn K. Howard, Ph.D., *Michelle Obama: A Life*, by Peter Slevin, COLUMBUS FREE PRESS (Jan. 16, 2016), <http://columbusfreepress.com/article/michelle-obama-life-peter-slevin>.

portant: they always had dinner together and played board games together on Saturday nights. Her brother Craig aptly described their family life as “the Shangri-La of upbringings.”²¹¹ Michelle’s biographer, Peter Slavin, summarizes Michelle’s family understanding “that no matter what obstacles Michelle or Craig faced because of their race or their working class roots, life possibilities were unbounded. Fulfillment of these possibilities was up to them. No excuses.”²¹² That family discipline worked well with Michelle and her brother: Craig was valedictorian and Michelle was salutatorian of their respective junior high school classes, and Michelle became First Lady of this land as well as a spokesperson for various causes.²¹³

That certainly exemplifies the importance of family in inculcating the next generation with solid moral principles—the same type of family life that was the accepted way of life when our country was born and through most of its life.

History warns us that when countries experience the decline in family as the mainstay of the moral way people live, it is as much of a warning signal as the death of the canary in the coal mine. For example, both ancient Greek and the Roman empires experienced substantially diminished acceptance of family structure in advance of their self-destruction.²¹⁴

Are we now at about the edge of the same cliff? The facts certainly suggest that the answer is yes. Nearly 40% of Americans view marriage as obsolete.²¹⁵ In approximately five decades, the percentage of American adults (18 and over) who were married declined from 72% to only 51%, with that percentage expected shortly to be under 50%.²¹⁶ The rejection of marriage appears to be growing with every new generation, as reflected in the newest marriageable 18-24

²¹¹ David Beard, *Before Barack Obama: The young Michelle Obama*, PRI, <http://www.pri.org/stories/2015-03-25/barack-obama-young-michelle-obama> (last updated Mar. 26, 2015).

²¹² *Her Father’s Daughter*, THEORIST MONK, <http://www.theoristmonk.com/node/352> (last visited May 3, 2016).

²¹³ Hillyer, *supra* note 204.

²¹⁴ John W. Whitehead, *The Decline of the Traditional Family and the Threat to Democracy*, THE RUTHERFORD INSTITUTE (Dec. 20, 1999), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/the_decline_of_the_traditional_family_and_the_threat_to_democracy.

²¹⁵ D’vera Cohn et al., *Barely Half of U.S. Adults Are Married—A Record Low*, PEW RESEARCH CTR. (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/>.

²¹⁶ *Id.*

age group, of which five decades ago 45% were married, but today only 9% are married.²¹⁷ That small percentage today is not surprising given the acceptance of co-habitation, instead of marriage²¹⁸—a relationship that is less structured than marriage and, therefore, provides less stability and continuity in the relationship, more easily destroyed at the emotional spur of the moment. In addition, non-marriage co-habitation provides the immediate sexual satisfaction that most people in earlier years looked to marriage to provide—another current inducement not to marry.

But even that smaller number who accept the marriage institution today too often discard marriage. Divorce rates, even for the smaller number of marriages, have doubled during the recent two decades for married persons over 35²¹⁹—an age appropriately chosen to allow for people to be married and experience marriage for a few years. Interestingly, this break-up of marriage is now occurring even in people who divorce after age 50: “in 1990, only one in ten divorces were of people over 50,” while today it is one in four.²²⁰

This general rejection of marriage has a greater impact on the family structure, the newer generation, and the well-being of family members than just a reduction in the number of marriages. Today 48% of all first births are to unmarried women, with more than three million mothers under 30 not living with the fathers of their children.²²¹ Does anyone really believe those children are better off than if they lived in a traditional family? Does anyone believe that America will be stronger in relying on such non-family children when they become adults? I certainly do not. And it is clear that this current American rejection of family stability is contrary to both our Founding Fathers’ moral standard and way of life.

²¹⁷ *Id.*

²¹⁸ Robert Hughes, Jr., *Is the US Divorce Rate Going Up Rather Than Going Down?*, THE HUFFINGTON POST (last updated May 6, 2014), http://www.huffingtonpost.com/robert-hughes/is-the-us-divorce-rate-go_b_4908201.html.

²¹⁹ Sheela Kennedy & Steven Ruggles, *Breaking Up Is Hard To Count: The Rise Of Divorce In The United States, 1980-2010*, SPRINGER LINK (Jan. 8, 2014), <http://link.springer.com/article/10.1007%2Fs13524-013-0270-9>.

²²⁰ Leslie Mann, *Divorce Rate Doubled Over Past 20 Years: Factors Include Aging, Loss of Stigma and Financial Concerns*, THE LEDGER (Mar. 8, 2013), <http://www.theledger.com/article/20130308/NEWS/130309261>.

²²¹ George F. Will, *What Patrick Moynihan knew about the importance of two parents*, THE WASHINGTON POST (Mar. 12, 2015), http://www.washingtonpost.com/opinions/what-patrick-moynihan-knew-about-the-importance-of-two-parents/2015/03/13/2cdf9bae-c9a4-11e4-aa1a-86135599fb0f_story.html.

Moreover, this reality has resulted in continuing inequality, both racial and economic, that is dividing and weakening America today. The recent racially motivated riots in Ferguson, Missouri, and Baltimore, Maryland, may each have been sparked by a police killing of a Black young man, but the incendiary propensity was due to poverty, unemployment and a feeling of non-attachment to the community. About a quarter of a century ago, NYU's Professor of Politics and Public Policy Lawrence Mead spotlighted the cancer that divided our society then—but applies in spades today: “The inequalities that stem from the workplace are now trivial in comparison to those stemming from family structure.”²²² Further, he wrote, “What matters for success is less whether your father was rich or poor than whether you knew your father at all.”²²³ At about that time, 24 percent of Black children were born out of wedlock; today that number is 72 percent.²²⁴

Years ago, Daniel Patrick Moynihan, even before he became the respected Democratic Senator from New York, presented data supporting his conclusion that children born into a fatherless household were likely to have lower IQ scores, and either not graduate from high school on time or at all, early on become entrapped in criminal prosecutions, and be damned to unemployment and lower income (if any).²²⁵ Moynihan was correct then, even considering the much lower percentage of black children born into fatherless homes; the impact today, with three times the percentage in such condition, is magnified in geometric proportions. Moynihan's view has been confirmed by recent studies reported in the *New York Times*, that found that (i) “states with more two-parent families . . . have higher rates of upward mobility,” (ii) “[b]oys who grow up with two parents . . . end up substantially stronger economically, and (iii) girls raised in two parent families are “less likely to become pregnant as teenagers.”²²⁶

Yet, we allow this societal cancer to grow, accepting and actually romanticizing young sex and sex without marriage. Little

²²² *Id.*

²²³ *Id.*

²²⁴ Francis Barry, *Baltimore's riots reflect family disintegration: Bloomberg View*, OREGON LIVE (May 5, 2015), http://www.oregonlive.com/opinion/index.ssf/2015/05/baltimores_riots_reflect_famil.html.

²²⁵ *Id.*

²²⁶ David Leonhardt, *The North-South Divide on Two-Parent Families*, N.Y. TIMES (Jun. 11, 2015), http://www.nytimes.com/2015/06/11/upshot/the-north-south-divide-on-two-parent-families.html?_r=0&abt=0002&abg=0.

wonder that we cannot stop the racial and economic divisions that weaken this country. After all, a moral code is colorblind.

CONCLUSION

Do you like this changed picture of morality in America? I don't.