

On the Moral Purposes of Law and Government

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The obligations and purposes of law and government are to protect public health, safety, and morals, and to advance the general welfare—including, preeminently, protecting people's fundamental rights and basic liberties.

At first blush, this classic formulation (or combination of classic formulations) seems to grant vast and sweeping powers to public authority. Yet, in truth, the general welfare—the common good—requires that government be limited. Government's responsibility is primary when the questions involve defending the nation from attack and subversion, protecting people from physical assaults and various other forms of depredation, and maintaining public order. In other ways, however, its role is subsidiary: to support the work of the families, religious communities, and other institutions of civil society that shoulder the primary burden of forming upright and decent citizens, caring for those in need, encouraging people to meet their responsibilities to one another while also discouraging them from harming themselves or others.

Governmental respect for individual freedom and the autonomy of nongovernmental spheres of authority is, then, a requirement of political morality. Government must not try to run people's lives or usurp the roles and responsibilities of families, religious bodies, and other character- and culture-forming authoritative communities. The usurpation of the just authority of families, religious communities, and other institutions is unjust in principle, often seriously so, and the record of big government in the twentieth century—even when it has not degenerated into

vicious totalitarianism—shows that it does little good in the long run and frequently harms those it seeks to help.

Limited government is a key tenet of classic liberalism—the liberalism of people like Madison and Tocqueville—although today it is regarded as a conservative ideal. In any event, someone who believes in limited government need not embrace libertarianism. The strict libertarian position, it seems to me, goes much too far in depriving government of even its subsidiary role. It underestimates the importance of maintaining a reasonably healthy moral ecology, especially for the rearing of children, and it misses the legitimate role of government in supporting the nongovernmental institutions that shoulder the main burden of assisting those in need.

Still, libertarianism responds to certain truths about big government, especially in government's bureaucratic and managerial dimensions. Economic freedom cannot guarantee political liberty and the just autonomy of the institutions of civil society, but, in the absence of economic liberty, other honorable personal and institutional freedoms are rarely secure. Moreover, the concentration of economic power in the hands of government is something every true friend of civil liberties should, by now, have learned to fear.

There is an even deeper truth—one going beyond economics—to which libertarianism responds: Law and government exist to protect human persons and secure their well-being. It is not the other way round, as communist and other forms of collectivist ideology suppose. Individuals are not cogs in a

social wheel. Stringent norms of political justice forbid persons being treated as mere servants or instrumentalities of the state. These norms equally exclude the sacrificing of the dignity and rights of persons for the sake of some supposed “greater overall good.”

But since we are going back to first principles, we might ask: Why not subordinate the individual to the ends of the collectivity or the state?

Here we see how profound is the mistake of supposing that the principle of limited government is rooted in the denial of moral truth or a putative requirement of governments to refrain from acting on the basis of judgments about moral truth. For our commitment to limited government is itself the fruit of moral conviction –

conviction ultimately founded on truths that our nation’s founders proclaimed as self-evident: namely “that all men are created equal, that they are endowed by their Creator with certain unalienable rights, and among these are life, liberty, and the pursuit of happiness.”

At the foundation is the proposition that each human being possesses a profound, inherent, and equal dignity simply by virtue of his nature as a rational creature—a creature possessing, albeit in limited measure (and in the case of some human beings merely in root or rudimentary form) reason and freedom—powers that make possible such human and humanizing phenomena as intellectual inquiry, aesthetic appreciation, respect for self and others, friendship, and love. This great truth of natural law, which is at the heart of our civilizational and civic order, has its

theological expression in the biblical teaching that man, unlike the brute animals, is made in the very image and likeness of the divine creator and ruler of the universe.

It is critical to bear this great truth in mind. We must not adopt a merely pragmatic understanding or speak only of practical considerations in addressing the pressing issues of our day. Sound positions cannot be effectively advanced and defended by citizens and statesmen who are unwilling or unable to engage moral arguments. That is why we should, in my opinion, rededicate ourselves to understanding and making the moral argument for the sanctity of human life in all stages and conditions, and the dignity of marriage as the conjugal union of one man and one woman.

Please do not misunderstand me. I am not saying that practical considerations should or even can be left out of the argument. In a proper understanding of morality, practical considerations are not “merely” practical. The moral case for the reform of unilateral-divorce laws, for example, includes reference to the devastating, poverty-inducing, crime-promoting social consequences of the collapse of a healthy marriage culture and the role of unilateral divorce in contributing to the collapse. The moral argument for restoring legal protection to the unborn includes reference to the adverse psychological and, in some cases, physical consequences of abortion on many women who undergo the procedure. Our task should be to understand the moral truth and speak it in season and out of season. We will be told by the pure pragmatists that the public is too far gone in moral relativism or even moral delinquency to be reached

by moral argument. But we must have faith that truth is luminously powerful, so that if we bear witness to the truth about, say, marriage and the sanctity of human life—lovingly, civilly, but also passionately and with determination—and if we honor the truth in advancing our positions, then even many of our fellow citizens who now find themselves on the other side of these issues will come around.

To speak of truth frightens some people today. They evidently believe that people who claim to know the truth about anything—and especially about moral matters—are fundamentalists and potential totalitarians. But, as Hadley Arkes has patiently explained, those on the other side of the great debates over social issues such as abortion and marriage make truth claims—moral truth claims—all the time. They assert their positions with no less confidence and no more doubt than one finds in the advocacy of pro-lifers and defenders of conjugal marriage. They proclaim that women have a fundamental right to abortion. They maintain that “love makes a family” and make other strong and controversial moral claims. The question, then, is not whether there are truths about such things as the morality of abortion and the nature of marriage; the question in each case is, What is true?

What is centrally and decisively true about human embryos and fetuses is that they are living individuals of the species *Homo sapiens*—members of the human family—at early stages of their natural development. Each of us was once an embryo, just as each of us was once an adolescent, a child, an infant, and a fetus. Each of us developed from the embryonic into and through the fetal, infant, child,

and adolescent stages of our lives, and into adulthood, with his or her distinctness, unity, and identity fully intact. As modern embryology confirms beyond any possibility of doubt, we were never mere parts of our mothers; we were, from the beginning, complete, self-integrating organisms that developed to maturity by a gradual, gapless, and self-directed process. Our foundational principle of the profound, inherent, and equal dignity of every human being demands that all members of the human family be respected and protected irrespective not only of race, sex, and ethnicity but also of age, size, location, stage of development, and condition of dependency. To exclude anyone from the law’s protection is to treat him unjustly.

And so it seems to me that justice demands our resolute opposition to the killing of human embryos for biomedical research and to elective abortion. If we would do unto others as we would have them do unto us, then we will insist that law and public policy respect the lives of every member of the human family, including those at what the late Paul Ramsey called, the edges of life—the unborn, the severely handicapped, the frail elderly.

Of course, politics is the art of the possible. And, as Frederick Douglass reminded us in his tribute to Lincoln, public opinion and other constraints sometimes limit what can be done at the moment to advance any just cause. The pro-life movement has in recent years settled on an incrementalist strategy for protecting nascent human life. So long as incrementalism is not a euphemism for surrender or neglect, it can be entirely honorable. Many lives have been saved, and many more can be saved, by laws

forbidding the public funding of abortion, requiring parental consent or at least notification for abortions performed on minors, mandating full disclosure to women contemplating abortions of factual information regarding fetal development and the possible physical and mental health consequences of submitting to abortion, forbidding late-term abortions and particularly gruesome methods of abortion, such as partial-birth abortion, banning the production of human beings by cloning or other methods for purposes of research in which they are destroyed in the embryonic or fetal stages. Moreover, planting premises in the law whose logic demands, in the end, full respect for all members of the human family can be a valuable thing to do, even where those premises seem modest.

Let me turn to the other great moral question we confront today: marriage. The institution of marriage is battered in our culture, but it is not lost. Private pro marriage forces, such as Marriage Savers, are doing important work through churches and other institutions. Much damage was done by bad legislation and policy, almost always in the name of reform. That legislation and policy is now itself in need of reform.

If we are to restore and secure the institution of marriage, we must recover a sound understanding of what marriage is and why it is in the public interest for law and policy to take cognizance of it and support it. Marriage is a pre-political form of association—what might be called a natural institution. It is not created by law, though law recognizes and regulates it in every culture. Nowhere is it treated as a purely private matter.

Some on the libertarian fringe toy with the idea that marriage could be privatized, and even some who are not on the fringe wonder whether that might be the best solution to the controversy over same-sex marriage. I understand why someone would consider this idea, but it strikes me as a bad one. There is a reason that all cultures treat marriage as a matter of public concern and even recognize it in law and regulate it. The family is the fundamental unit of society. Governments rely on families to produce something that governments need—but, on their own, they could not possibly produce: upright, decent people who make honest, law-abiding, public-spirited citizens. And marriage is the indispensable foundation of the family. Although all marriages in all cultures have their imperfections, children flourish in an environment where they benefit from the love and care of both mother and father, and from the committed and exclusive love of their parents for each other.

Anyone who believes in limited government should strongly back government support for the family. Does this sound paradoxical? In the absence of a strong marriage culture, families fail to form, and when they do form they are often unstable. Absentee fathers become a serious problem, out-of-wedlock births are common, and a train of social pathologies follows. With families failing to perform their health, education, and welfare functions, the demand for government grows, whether in the form of greater policing or as a provider of other social services. Bureaucracies must be created, and they inexorably expand—indeed they become powerful lobbyists for their own preservation and expansion.

Everyone suffers, with the poorest and most vulnerable suffering most. The effective defense of marriage against the current onslaught will require an understanding of marriage as a matter of moral truth. Practical or pragmatic arguments are legitimate and important. But too few pro-marriage politicians are willing to say much about what marriage actually is. This gives those who would abolish the conjugal conception of marriage an important advantage in public debate. They hammer away with their rhetoric of “love makes a family” and demand to know how anyone’s marriage would be threatened if the same-sex partners next door were also allowed to marry.

Everyone agrees that marriage, whatever else it is or does, is a relationship in which persons are united. But what are persons? And how is it possible for two or more of them to unite? According to the view implicit in sexual-liberationist ideology, the person is understood as the conscious and desiring aspect of the self. The person, thus understood, inhabits a body, but the body is regarded (if often only implicitly) as a subpersonal part of the human being—rather than part of the personal reality of the human being whose body it is. The body is viewed as serving the interests of the conscious and desiring aspect of the self by functioning as an instrument by which the individual produces or otherwise participates in satisfactions and other desirable experiences and realizes various objectives and goals.

For those who formally or informally accept this dualistic understanding of what human beings are, personal unity cannot be achieved by bodily union as such. Persons unite by

uniting emotionally (or, as those of a certain religious cast of mind say, spiritually). And, of course, if this is true, then persons of the same sex can unite and share sexual experiences together that they suppose will enhance their personal union by enabling them to express affection, share the uniquely intense pleasure of sex, and feel more intensely by virtue of their sex play.

The alternate view of what persons are is the one embodied in both our historic law of marriage and what Isaiah Berlin once referred to as the central tradition of Western thought. According to this view, human beings are not nonbodily persons (consciousnesses, minds, spirits, what have you) inhabiting and using non-personal bodies. Rather, a human person is a dynamic unity of body, mind, and spirit. The body, far from being a mere instrument of the person, is intrinsically part of the personal reality of the human being. Bodily union is thus personal union, and comprehensive personal union—marital union—is founded on bodily union. What is unique about marriage is that it truly is a comprehensive sharing of life, a sharing founded on the bodily union made uniquely possible by the sexual complementarity of man and woman—a complementarity that makes it possible for two human beings to become, in the language of the Bible, “one flesh,” and for this one-flesh union to be the foundation of a relationship in which it is intelligible for two persons to bind themselves to each other in pledges of permanence, monogamy, and fidelity.

So, then, how should we understand what marriage is? Marriage, considered not as a mere legal convention or cultural artifact, is a one-flesh

communion of persons that is consummated and actualized by acts that are procreative in type, whether or not they are procreative in effect. It is an intrinsic human good, and, precisely as such, it provides a more than merely instrumental reason for choice and action.

The bodily union of spouses in marital acts is the biological matrix of their marriage as a comprehensive, multilevel sharing of life: a relationship that unites the spouses at all levels of their being. Marriage is naturally ordered to the good of procreation (and is, indeed, uniquely apt for the nurturing and education of children) as well as to the good of spousal unity. At the same time, it is not a mere instrumental good whose purpose is the generating and rearing of children. Marriage, considered as a one flesh union, is intrinsically valuable.

To understand how it can be the case that, on the one hand, the generating and rearing of children is a perfection of marriage and not something merely incidental to it, and, on the other, marriage is not a mere means to the good of generating and rearing children, it is important to see that the procreative and unitive goods of marriage are tightly bound together. The one flesh unity of spouses is possible because human (like other mammalian) males and females, by mating, unite organically—they form a single reproductive principle.

It is a plain matter of biological fact that reproduction is a single function, yet it is carried out not by an individual male or female human being, but by a male and female as a mated pair. So, in respect of reproduction, albeit not in respect of other activities (such as locomotion or digestion), the mated pair is a single

organism; the partners form a single reproductive principle: They become one flesh. Some people desperately want to deny this. But consider this thought experiment: Imagine a type of bodily, rational being that reproduces, not by mating, but by some individual performance. Imagine that for these beings, however, locomotion or digestion is performed not by individuals, but only by biologically complementary pairs that unite for this purpose. Would anybody acquainted with such beings have difficulty understanding that in respect of reproduction the organism performing the function is the individual, while in respect of locomotion or digestion the organism performing the function is the united pair? Would anybody deny that the unity effectuated for purposes of locomotion or digestion is an organic unity? Precisely because of the organic unity achieved in marital acts, the bodies of persons who unite biologically are not reduced to the status of extrinsic instruments of sexual satisfaction or expression. Rather, the end, goal, and intelligible point of sexual intercourse is the intelligible good of marriage itself as a one-flesh union.

On this understanding, the body is not treated as a mere instrument of the conscious and desiring aspect of the self whose interests in satisfactions are the putative ends to which sexual acts are means. Nor is sex itself instrumentalized. The one-flesh unity of marriage is not a merely instrumental good, a reason for acting whose intelligibility as a reason depends on other ends to which it is a means. This unity is an intrinsic good, a reason for acting whose intelligibility as a reason depends on no ulterior end. The central and justifying point of sex is not pleasure, however much sexual pleasure

is rightly sought as an aspect of the perfection of marital union; the point of sex, rather, is marriage itself, considered as an essentially and irreducibly bodily union of persons—a union effectuated and renewed by acts of sexual congress conjugal acts. Because sex is not instrumentalized in marital acts, such acts are free of the self-alienating qualities that have made wise and thoughtful people from Plato to Augustine and from the biblical writers to Kant, treat sexual immorality as a matter of the utmost seriousness.

In truly marital acts, the desire for pleasure and even for offspring, are integrated with and, in an important sense, subordinated to the central and defining good of one-flesh unity. The integration of subordinate goals with the marital good ensures that such acts effect no practical dualism that separates the body from the conscious and desiring aspect of the self and treats the body as a mere instrument for the production of pleasure, the generation of offspring, or any other extrinsic goal.

But one may ask, what about procreation? On the traditional view of marriage, is not the sexual union of spouses instrumentalized to the goal of having children? It is true that St. Augustine in certain writings seems to be a proponent of this view. The conception of marriage as an instrumental good was rejected, however, by the mainstream of philosophical and theological reflection from the late Middle Ages forward, and the understanding of sex and marriage that came to be embodied in both canon law and civil law does not treat marriage as merely instrumental to having children. Western matrimonial law has traditionally and universally understood

marriage as consummated by acts fulfilling the behavioral conditions of procreation, whether or not the nonbehavioral conditions of procreation happen to obtain.

By contrast, the sterility of spouses—so long as they are capable of consummating their marriage by fulfilling the behavioral conditions of procreation (and, thus, of achieving true bodily, organic unity)—has never been treated as an impediment to marriage, even where sterility is certain and even certain to be permanent. Children who may be conceived in marital acts are understood not as ends extrinsic to marriage but rather as gifts—fulfilling for the couple as a marital unit and not merely as individuals—that supervene on acts whose central defining and justifying point is precisely the marital unity of spouses. I and others have elsewhere developed more fully the moral case for the conjugal conception of marriage as the union of one man and one woman pledged to permanence and fidelity and committed to caring for children who come as the fruit of their matrimonial union. I have argued that acceptance of the idea that two persons of the same sex could actually be married to each other would make nonsense of key features of marriage and would necessarily require abandoning any ground of principle for supposing that marriage is the union of only two persons, as opposed to three or more. Only a thin veneer of sentiment, if it happens to exist (and only for as long as it exists), can prevent acceptance of polyamory as a legitimate marital option once we have given up the principle of marriage as a male-female union.

To those arguments, I will here add an additional reason to reject the idea

of same-sex marriage: The acceptance of the idea would result in a massive undermining of religious liberty and family autonomy as supporters of same-sex marriage would, in the name of equality, demand the use of governmental power to whip others into line. The experience of Massachusetts as well as foreign jurisdictions is that once marriage is compromised or formally redefined, principles of nondiscrimination are quickly used as cudgels against religious communities and families who wish to uphold true marriage by precept and example.

Part of the trouble pro-marriage politicians and others have in defending marriage follows from the fact that these pathologies that afflict the marriage culture are widespread, and supporters of marriage, being human, are not immune to them. This is not to excuse anyone from personal responsibility.

But the fact is that sustaining a marriage despite the collapse of many of its social supports is difficult. In trying to stand up for marriage, political leaders, intellectuals, and activists who have had marital problems of their own are subjected to charges of hypocrisy. Many therefore censor themselves. As a result, the pro-marriage movement loses the leadership of some of its most talented people. The question of same-sex marriage is critically important, but rebuilding and renewing the marriage culture goes far beyond it. By abolishing the basic understanding of marriage as an inherently conjugal union, legal recognition of same-sex marriage would be disastrous. But many would say that such recognition would simply ratify the collapse of marriage that followed from widespread divorce, non-marital sexual

cohabitation, and other factors having nothing to do with homosexual conduct. It is certainly true that the origins of the pathologies afflicting marriage lie in such factors. Rebuilding the marriage culture will require careful, incremental legal reforms to roll back unilateral divorce, accompanied by herculean efforts on the part of nongovernmental institutions—especially churches and other religious bodies—to prepare couples more adequately for marriage, help them nurture strong marital relationships, and assist those who are dealing with marital problems. Public-private partnerships will be essential, in my view, to cutting the divorce rate. This won't be easy. If marriage weren't so important, it wouldn't be worth trying.

As with abortion, same-sex marriage is being advanced by socially liberal activist judges who exercise creative powers of constitutional interpretation. The three US states that currently have same-sex "marriage" have it, not as the result of democratic deliberation, but as a direct imposition by the judiciary. That gives us reason to pursue with new dedication the larger fight against the judicial usurpation of democratic legislative authority—another profound abuse of governmental power.

Despite extraordinarily broad support for same-sex marriage in the universities and the media, initiatives to preserve marriage as the union of one man and one woman have prevailed, usually by decisive margins, when they have been put on the ballot. Even in the deep blue state of Wisconsin, a marriage initiative prevailed in a near-landslide on election day in November 2006—in the course of what was around the country a big night for liberals and Democrats. With

the Federal Marriage Amendment stalled, state marriage initiatives and constitutional amendments are vitally important. The issue should be taken to the people at every possible opportunity. Even in the bluest states, marriage will have a stronger chance with the people than with the judges or even with the legislators.

Some people have wondered whether the best way to handle the conflict over marriage in our politics is a federalist solution, one that eschews a national policy on marriage and leaves it to each state to define marriage as it sees fit. This, too, I think is a bad idea. Just as the nation could not endure half slave and half free but eventually had to go all one way or all the other, we will not be able to get by with a situation in which some couples are “married” in one state, not married when they move to or travel through the next, and married again when they reach a third. If same-sex “marriage” is legally recognized in a small number of states, it will spread throughout the nation, either through judicial action under the Constitution’s Full Faith and Credit Clause or by the working of informal cultural pressures. Some states may try to hold out, but they will sooner or later be forced into line. That is why we need a national resolution of the issue, and probably a constitutional one. Believers in marriage did not start this fight, and we are loath to interfere with traditional state powers—precisely because we view federalism as serving limited government and embodying our belief in the principle of subsidiarity.

But judicial usurpation has put into operation a chain of events that will result in the radical redefinition of marriage unless action is taken at the

national level—going beyond the Defense of Marriage Act (which may yet be struck down by the courts)—to preserve the conjugal conception of marriage.

Finally, there is the question of civil unions. Some politicians and others say that they are against same-sex marriage but in favor of legal recognition of same-sex partnerships, with all or most of the rights and responsibilities of marriage, only falling under a different rubric. If law and policy are at least to do no harm to marriage, it is critical that they avoid treating non-marital conduct and relationships as if they were marital. There are clear moral lines—and not merely semantic ones—between what is marital and what is not, and the law should respect them. If they are blurred or erased, the public understanding of the meaning of marriage will erode. Some of the benefits traditionally associated with marriage may legitimately be made more widely available in an effort to meet the needs of people who are financially interdependent with a person or persons to whom they are not married. Private contracts between such people should be sufficient to accomplish all or most of what they consider desirable. If, however, a jurisdiction moves in the direction of creating a formalized system of domestic partnerships, it is morally crucial that the privileges, immunities, and other benefits and responsibilities contained in the package offered to non-married partners not be predicated on the existence or presumption of a sexual relationship between them. Benefits should be made available to, for example, a grandparent and adult grandchild who are living together and caring for each other. The needs that domestic-partnership schemes seek to address have nothing to do with whether the partners share a bed and

what they do in it. The law should simply take no cognizance of the question of a sexual relationship. It should not, that is, treat a non-marital sexual relationship as a public good.

The defense of life against abortion and embryo destructive research calls America back to the founding principles of our regime and to reflection on the justifying point and purposes of law and government. The defense of marriage, meanwhile, shores up the cultural preconditions for a regime of democratic

republican government dedicated to human equality, fundamental human rights, and principled limits on governmental powers. These causes should not be regarded as distractions from other pressing goals, such as economic growth, assistance to the needy, environmental protection, and the defense of the nation against terrorism. They are, rather, causes that spring from the foundational moral purposes of law and the state. They are today among the most urgent causes.