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ABSTRACT BOOKLET CONTENTS

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JOURNAL CONTENTS

FREE BIRD: NO RIGHT TO QUALIFIED IMMUNITY FOR POLICE WHO RETALIATE AGAINST THE MIDDLE FINGER GESTURE

Samantha Orovitz

The Supreme Court recognized that First Amendment right to freedom of speech extends to nonverbal communication. Expressive nonverbal communication sometimes occurs when an individual is confronted with police action. Protesting police action is a prototypical example of a citizen exercising the right to freedom of speech. Directing the middle finger gesture at police is a legal means of criticizing the government and presents this Article's focus. This Article argues that case law establishes directing symbolic speech at police officers, namely "shooting the bird," as a protected First Amendment right. As an established right, police officers who retaliate against citizens exercising this right should not be entitled to qualified immunity.

Part II surveys the history of the middle finger gesture and the evolution of the meaning of the gesture. Part III describes why the middle finger gesture is not subject to the fighting words limitation on free speech. Part IV defines the qualified immunity defense for police officers, and argues that police officers improperly use the defense in freedom of speech cases to avoid repercussions for otherwise illegal actions. Part V sheds light on how qualified immunity in this context erodes First Amendment rights, and explains why the right to display the middle finger gesture is worth fighting. Additionally, Part V also argues that police training properly curbs police activity that infringes on freedom of speech. Finally, Part VI concludes that police who retaliate against citizens who exercise their right to "shoot the bird" should not be entitled to qualified immunity. To decide otherwise conveys unchecked power to the police, like a totalitarian state.

NONCONSENSUAL INSEMINATION: BATTERY

Carmen M. Cusack

When a man ejaculates inside of another person without that person's consent, that act constitutes a criminal battery. If the other person, male or female, does not consent to the contact with semen, then the ejaculation is offensive and against the person's will. Ejaculation has consequences. Nonconsensual insemination harms people through the nonconsensual transmission of disease. In most states, the nonconsensual sexual transmission of disease is specifically prohibited by state statute. When insemination does not cause or transmit a disease, this act can still lead to serious bodily harm through pregnancy. Because nonconsensual insemination may cause an unwanted pregnancy, the government has an important interest in preventing nonconsensual insemination. Pregnancy, childbirth, and abortion are commonly known to

have serious and permanent effects. Inflicting serious bodily harm, such as pregnancy, on an unwilling person is illegal. In fact, punishing rapists who impregnate their victims is not a new facet of the law. Defending a woman's right to have unprotected sex without blaming her if she is victimized by nonconsensual insemination, however, is a relatively new idea. Because ejaculation carries serious consequences and ejaculation is an independent and separate act from intercourse, the law requires a person expressly consent to ejaculation. Otherwise, the man has committed a criminal battery.

Section II of this article provides working definitions of criminal, aggravated, and sexual battery. Section III discusses generally some ways that pregnancy damages the female body and explains briefly why both childbirth and abortion cause bodily harm when resulting from reproductive coercion. Section IV discusses the possible levels of general intent scienter for battery. Section V

analyzes why expressed consent must be required prior to insemination. Section VI explains how insemination can be distinguished from ejaculation/unprotected sex and Section VII discusses victim-blaming. These sections address why nonconsensual insemination is not the woman's fault. Section VIII applies Sections II through VIII synergistically to the overreaching theme of this paper, that nonconsensual insemination is a battery. Further, Section IX advocates for therapeutic justice, rather than incarceration, to deal with nonviolent, nonconsensual insemination. Finally, Section X concludes that reproductive coercion is illegal as a general intent crime, and society cannot blame a victim for her unwanted pregnancy caused by unwanted insemination.

IN SUPPORT OF CREATING A LEGAL DEFINITION OF PERSONHOOD

John Niman

The words "person" or "people" appear twenty-four times in the original version of the U.S. Constitution, and thirty-four times in the amendments to the Constitution, including the Bill of Rights. People have rights granted by these documents: guarantees of protection inviolable by the federal and, often, state government. Innumerable laws provide other protections, rights and responsibilities for people. Yet, nowhere in these sources did the drafters articulate what, specifically, a "person" is. Generally, where the statute is unclear, case law clarifies. In this instance, case law has created a confusing and varying sense of personhood; a fuzzy conception without so much as a multi-factor balancing test. Philosophers, psychologists, and ethicists also explore the boundaries of personhood. Many legal critics argue

that the definitions of personhood created by courts and academics are incorrect or inadequate. Battles, both in and out of court, have been fought over whether this or that entity is a person under the law. When the definition is wrong, as when slaves were alternately considered partial persons or property, we eventually realize that behavior that seemed sensible at the time was, in fact, shameful. Some argue that we will again feel this way if the conception of person comes to include the unborn. Others feel that our conception that corporations are people is also shameful. Advances in technology suggest that our definitional confusion may lead to more problems in the future. Thus, it is important to get the definition right now.

To set the stage properly, I will first describe how the courts have defined personhood in the context of abortion, slavery, and corporations. Then, I will describe various definitions offered by philosophers, psychologists, and ethicists. Finally, I will suggest a definition of personhood that will provide guidance for future decisions.

GOD WILL NOT PROVIDE: HASIDIC JEWS AND FRAUD

Michael Rosen

Though uncommon, the occurrence of welfare fraud in Hasidic Judaism—a small, unassimilated sect of Judaism—is apparent because of these families' tendency to be large and for the parents to be uneducated. These sociological characteristics may incentivize this group of people to look for alternative modes of gaining income, and therefore, rationalize some members' participation in rings, as well as smaller-scale frauds.

These frauds cause substantial harm to the Hasidic community and society at-large. As long as these types of frauds occur, society may characterize all Hasidic Jews as responsible for this fraud, thus reflecting negatively on this generally moral and law-abiding group. Additionally, those individuals who commit welfare fraud palm onto

the rest of society the responsibility of paying for welfare and the burdens of their crimes. Because of welfare fraud, the government may raise taxes to handle the overwhelming welfare requests, and the state bears the costs of prosecuting fraudulent defendants, as well as potentially housing them in jail.

Part I begins with a brief history of the Hasidic Jewish Community and their way of life in the United States. We shall see that this unassimilated community's sociological groundwork provides an incentive to participate in fraudulent activities. Part II provides an overview of some of the fraudulent activities taking place in the Hasidic community as well as related religions and cults. Lastly, Part III presents a solution to these problems. Society needs a different legal approach to curbing welfare fraud. Ultimately, the current laws unsuccessfully limit these activities, and laws aimed at religion will not pass constitutional muster. Therefore, a change in welfare laws is necessary.

CONFUCIAN ORIGINALISM: TRADITION IN KOREAN AND AMERICAN LAW

Andrew W. Keller

In both South Korea and the United States, traditional attitudes and religious cultural norms have influenced the development of constitutional law and the expansion of constitutional rights. In South Korea, many of these customs and attitudes can be traced back to traditional ways of thinking rooted in patriarchy and Confucianism. In America, Christian cultural norms have affected developments in American family law and constitutional jurisprudence. In addition to political and cultural factors, methods of interpretation have been the key to results in major cases decided by appellate courts. Judges applying originalism as a method of interpretation have been more likely to reach outcomes that preserve tradition while judges employing the living constitution approach have decided cases in ways that challenge tradition.

Part I of this Article demonstrates that in South Korea, the Traditionalist lobby opposed increasing women's rights and opposed expanding the permissibility of marriage to same-surname couples, yet feminists and other progressives succeeded in reforming Korean law. Part II examines issues disputed among conservative Christians and gay rights' activists in contemporary America and compares and contrasts the effect of traditional customs on the development of Korean family law with the effect of Christian cultural norms on the development of American law. In both South Korea and the United States, traditional values have often conflicted with (i) international and foreign law, (ii) evolving understandings of scientific facts, (iii) modernization and (iv) government's inability to enforce public morality. Progressive thinkers have seized on these factors to win legal battles and modernize Korean family law. In America, it is less clear whether and to what extent these factors present significant challenges to traditionalist values. This uncertainty is in part due

to how radical the American experiment in progressivism has become, as will be discussed below.

Part III of this Article analyzes these factors in the context of legal theory and methods of constitutional interpretation including "originalism" and the "living constitution" approach. Part IV recommends, based on the American experience, that Korean judges exercise judicial restraint with regard to interpreting a document as fundamental as a Constitution. This Article presents a critique of judicial power in the United States, arguing that judges have overstepped their bounds and attempted to transform society in a manner that is inconsistent with the democratic principles that should guide a constitutional republic. This Article examines judicial activism in connection with gay marriage and suggests that Koreans may want to view the American example with caution, less they enable judges to fundamentally transform the most important institution in the history of human civilization, the nuclear family, in a manner which

is contrary to the will of the people, against the religious teachings of all major faiths and against the traditions of Korean culture. A change as fundamental as expanding the definition of marriage to include same-sex unions should be debated among the people and enacted by the people's representatives in the legislature, if so decided, and should not be imposed upon the people by judges.

MODERN MARRIAGE AND JUDGMENTAL LIBERALISM: A REPLY TO GEORGE, GIRGIS, AND ANDERSON

Matthew Clemente

The political question of whether same-sex marriage ought to be permitted is inextricably linked with a more fundamental philosophical question—why is the government in the marrying business at all? Simply put, why does the state sanction and encourage marriage? At stake in the same-sex marriage debate is not only the legitimacy of same-sex relationships, but also the legitimacy of the modern institution of marriage itself.

I will show that the extent of the right to marriage is interwoven with the question of marriage's social purpose. If marriage is purposeless, then the state ought not to be involved in marriage at all, and marriage should be left to private institutions and treated like typical private contracts. If, on the other hand, marriage serves a

social function, then a further question arises—does the rationale for heterosexual marriages apply to same-sex couples?

Conservative natural law theorists, specifically Robert George, Gerard Bradley, and John Finnis, traditionally answer the first question affirmatively, maintaining that marriage has a purpose: the intrinsic good of marriage. However, they hold that this purpose is unique to heterosexual couples. With regard to marriage licenses, homosexual couples need not apply.

In the mid-1990s, Stephen Macedo answered these conservative critics of same-sex marriage, arguing that their criticisms stem from a "cramped" conception of sexual morality and marriage. As a result, Macedo concludes that although they present a coherent argument against same-sex marriage, it is ultimately unconvincing. In a recent article, Robert George, Sherif Girgis, and Ryan Anderson responded to Macedo and criticized his conception of marriage.

Their argument is twofold. First, they defend their traditionalist definition of marriage. Second, they argue that the standard liberal justification of same-sex marriage rests on an incoherent, "revisionist" conception of marriage. George, Girgis, and Anderson posit that the same-sex marriage debate "hinges on one question: *What is marriage*?" However, rather than attempting to identify marriage's social purpose in modern Western democracies, George, Girgis, and Anderson discuss the essence of natural marriage instead. Their paper examines two competing conceptions of marriage. The first conception, "conjugal view" of marriage, which underpins their argument against same-sex is the exclusive, permanent, reproductive union of a man and a woman.

In contrast, the second conception of marriage, one commonly utilized by gay marriage advocates, conceives marriage as a union of two people's hearts and minds, enhanced by sexual intimacy. George, Girgis, and Anderson defend the

former. In essence, they argue that marriage is fundamentally linked to procreation and childrearing—a sophisticated version of a standard conservative argument against same-sex marriage. They argue that the second conception of marriage is not "internally coherent" since it is inconsistent with the standard liberal justification of same-sex marriage.

This paper agrees with George, Girgis, and Anderson in several areas. First, they correctly discern that the same-sex marriage debate turns on how marriage is defined. Second, the modern institution of marriage has inherent normative elements. Third, standard liberal justifications of same-sex marriage are inconsistent with tenets of certain strains of legal liberal theory because these normative elements are engrained into the modern marriage.

In Part I, I explain these inconsistencies by analyzing the political and legal theoretical framework where standard liberal justifications of same-sex marriage are rooted. First, I explore John

Rawls' liberalism circa *Political Liberalism*. Rawls discusses how debates about fundamental rights (such as the right to marry) ought to unfold. Second, I assess the standard liberal justification of same-sex marriage within Rawlsian liberalism.

In Part II, I demonstrate why Rawlsian liberalism offers an insufficient theoretical foundation for supporting George, Girgis, and Anderson's "revisionist" conception of marriage; I define this concept as "modern marriage." However, unlike George, Girgis, and Anderson, I argue that these inadequacies are superficial and the standard liberal justification of same-sex marriage suffers from only artificial limitations. Therefore, rather than abandoning the modern conception of marriage or the liberal legal framework entirely, we should adapt Rawlsian liberalism slightly. By re-enforcing the foundations of liberal theory, I intend to construct a sturdier argument for gay marriage.

Part III focuses on George, Girgis, and Anderson's traditionalist conception of marriage and their argument against same-sex marriage. This

article suggests that although their opposition is ultimately unconvincing, their claims are coherent. Their position is rooted in a controversial conception of the good. To refute their arguments, however implausible, requires engaging with comprehensive doctrines, something a neutral liberal cannot do.

Although this article holds that the negative portion of George, Girgis, and Anderson's argument raises significant objections to the traditional arguments for same-sex marriage, this article posits that the positive portion of their paper is flawed. George, Girgis, and Anderson challenge same-sex marriage advocates to criticize their argument on its merits, "for example, by showing that it rests on a false premise or a fallacious inference." In Part IV, this article argues that these traditionalists' reliance on a pre-political notion of marriage is fundamentally misguided. Moreover, the article contends that their argument against same-sex marriage rests on counterintuitive premises within

the modern Western world, which run counter to everyday experience.

George, Girgis, and Anderson also challenge same-sex marriage advocates to construct an argument for same-sex marriage to explain the normative features of modern marriage (its commitments to monogamy and fidelity) and answer their objections to standard liberal justifications of marriage. In Part V, this article provides an argument to same-sex marriage that overcomes the traditionalists' criticisms. While Rawlsian liberalism cannot support a modern conception of marriage, Stephen Macedo's "judgmental liberalism" can support this modern view. Judgmental liberalism holds that justice-respecting conceptions of the good can be ranked, insofar as certain ones can be "gently encouraged" by the state. In turn, the same-sex marriage debate demonstrates how a judicial liberal would tackle a thorny social issue without infringing on people's rights or inhibiting their conceptions of the good.