

SYMPOSIUM

GROUP RIGHTS, VICTIM STATUS, AND THE LAW

THE EIGHTH ANNUAL FEDERALIST SOCIETY LAWYERS CONVENTION

OPENING ADDRESS

HOW SHOULD SOCIETY HANDLE INJUSTICE?

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What I mostly talk about these days is the crisis of character in the midst of which, or perhaps at the end of which, this nation finds itself. If we are at the end of it, then things are more hopeless than I think they are; if we are in the midst of it, then maybe there is some hope for the Republic.

This crisis of character has many consequences in every area of life, consequences which are obvious for family structure and for the whole range of problems related to the breakdown of family structure that we face in today's society. This crisis also has consequences on the growing obsession in this country with group rights and victimization—for example, sexual harassment in the workplace¹ and the gay rights agenda,² and a whole range

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1. See, e.g., John P. Furfaro & Maury B. Josephson, *Sexual Harassment: Five Evolving*

of other things that are entering our discourse, getting increased attention, and that are related to this very question of the moral condition of the country and of the people.

Let us consider the issue of sexual harassment, or more precisely, the codes of dating conduct that have emerged on some campuses.³ In one such instance, the school even proposed specific rules for how couples were to move from one level of intimacy to the next.⁴ Such a provision would cause matters to become chilled, having lost that element of mystery in the transition from one stage to another, in which a couple normally would arrive at a common and mutual agreement without the spoken word. This part of the mystery and romance would be removed, and it would be hard to see how anybody would go on a date without his lawyer.

This would make for some interesting dates. At each stage of the game, the two parties could sit it out while the lawyers talked, and once the lawyers had worked out the terms and the couple had signed the agreement, they could go on to the next stage. The question would be what the lawyers were supposed to do while each stage was taking place; perhaps they could write

Areas, N.Y. L.J., Mar. 13, 1996, at 3 (discussing recent developments of the law on workplace sexual harassment); Craig Dezern, *Harassed Workers No Longer Silent: The Number of Complaints Has Soared Because of Increased Awareness and Changes in the Federal Civil Rights Act*, ORLANDO SENTINEL, Sept. 14, 1992, at A1 (examining the rise in the number of sexual harassment claims in the wake of the Thomas-Hill hearings).

2. See, e.g., Lawrence Ingrassia, *Fighting Words: Gay, Lesbian Groups Seek to Expunge Bias They See in Language*, WALL ST. J., May 3, 1993, at A1 (describing how gays feel victimized by language such as "sexual preference" and "homosexual agenda" and gay activists' attempts to discourage such language); Edward Walsh, *Gay Rights Debate Leaves Iowans Angry and Divided; Paid Activist From California Helps Energize Des Moines*, WASH. POST, Feb. 18, 1995 (reporting on effects of the Des Moines school board's debate over a proposal to incorporate gay issues in the curriculum).

3. See, e.g., Kathleen Cheatham, *An Age of Consent, Confusion: Sexual Behavior Remains Hot Topic of Campus Debate*, RICHMOND TIMES-DISPATCH, Feb. 27, 1994, at G1 (discussing a number of campus sexual-conduct policies); *Education Guide: More Campuses Consider Policies on Sex Offenses*, CHI. SUN-TIMES, Nov. 16, 1993, at 14; Dave Ferman, *The U.S. is Excuse-Happy: But Don't Worry, It's Not Your Fault*, SAN DIEGO UNION-TRIB., Apr. 21, 1994, at E4 (reviewing a number of areas in which Americans attempt to transfer blame for their actions, including the Antioch College code for sexual conduct); *Sex Consent Policy Topic of MU Talk*, MILWAUKEE J. & SENTINEL, Mar. 10, 1994, at 8A (reporting on a talk at Marquette University on Antioch College's sexual conduct policy); Duane D. Stanford, *Will Sexual Codes Be Adopted on State's Campuses?*, ATLANTA CONST., Oct. 28, 1993, at A2 (reporting on the concern of some Georgians that prescriptive codes of sexual conduct will be enacted within the state's university system).

4. See Jane Gross, *College Code Sets Rules for Sexual Protocol*, PORTLAND OREGONIAN, Oct. 1, 1993, at A4; Laura Miller, *May I Touch You There? The Antioch College Sex Guidelines Have Been Widely Lampooned as a Politically Correct Cold Shower*, S.F. EXAMINER, Dec. 19, 1993, at D1.

out their bill.

This scenario is obviously absurd, because somewhere deep down, there is a belief that there ought to be certain human relationships that can be managed by individuals without the intervention of government, courts, law, the state, or any outside powers. That is a natural assumption we make. When a man gets up in the morning, he relates to his children. If the so-called children's rights movement gets its way, soon he will not even be able to get up and hug his daughter good morning without the presence of a lawyer or at least without taking videotape to make sure no unwarranted charges can be brought against him.⁵

All this is evidence not only of a kind of absurdity, but of a radical distrust—the sense that at a certain level we cannot be alone with each other anymore. It results from a certain alteration in our concept of the human person, and we can understand that alteration if we look at one of these areas in which group rights are being asserted: the gay rights agenda.

The gay rights agenda asserts that sexual orientation is like race, and thus discrimination on the basis of it should be disallowed. That leaves us with an interesting situation. When I awoke this morning, I was a black man. When I go to bed tonight, I still will be a black man. My race is something that is beyond my control. If sexual orientation is to be treated like race for purposes of discrimination, then must not sexual orientation and its attendant behaviors be a condition beyond the individual's control?

That concept of sexual behavior as beyond the individual's control undermines those concepts of sexual responsibility and accountability that are essential for relationships such as marriage. When a couple is married, they vow to be faithful. However, if man's sexual behavior is beyond his control, then when he sees an attractive woman and gives in to temptation and his wife complains, he could say, "You can't raise that issue, that's just my sexual orientation. I have an adulterous orientation, and that is something you have to accept." This makes sense if sexual

5. *But cf.* Mitchell Landsberg, *Boy's 'Divorce': A Precedent but Not Likely a Trend*, SACRAMENTO BEE, Sept. 27 1992, at A17 (reporting on the opinions of experts that predict that the landmark case allowing a boy to ask the court to terminate his mother's parental rights will have little effect on family law and probably will not encourage frivolous legal action by children against their parents).

behavior is beyond our control.⁶

Furthermore, if we are going to have equal protection, all sexual orientations should be protected, including adulterers, pedophiles, and other people who have uncontrollable sexual urges. We should all be able to demand that our uncontrollable sexual behavior be accorded the same respect and freedom from discrimination that is being demanded for gays.

Presumably, the same principle of equality would apply to other passions. What if someone is disposed to fly into a rage whenever anything does not go his way? One might say he has an anger orientation and that passion should be treated with respect. If someone is disposed to become uncontrollably jealous when somebody gets something, or envious when somebody gets something that he wants, one might say he has a jealousy orientation. Why would that not be subject to the same kind of respect?

If we accept this notion, we posit that, absent strict external regimentation, we have no control over ourselves. That may sound farfetched, but this society is moving in directions that suggest that that is exactly the concept of the human person that we have adopted. Examples range from the whole gay-rights agenda to gun control, which is premised on the idea that if someone were to bring a gun into this room and put it on the floor, someone in here would get an uncontrollable urge to kill everybody else. We laugh at that a little bit because we recognize that inherent in the gun is no such uncontrollable urge, but the premise of the gun-control movement is that there is some kind of ineluctable influence that is special to these things that operates over the human passions to produce uncontrollable violence.

That kind of a premise—whether it be the gay rights, gun control, or something else—is based on a certain concept of the human person which denies free will and responsibility. This premise says that we are not capable of controlling our passions and our reactions to circumstance. The only way in which we can be rendered safe for one another is if our behavior is externally controlled and surveyed, which presents the problem of

6. A recent cover article of *Time* magazine posed the question whether infidelity was a genetically-inherent trait. See Robert Wright, *Our Changing Hearts*, TIME, Aug. 15, 1994, at 44.

constructing the mechanisms for such external control.

For example, if I go into a job interview, there are two ways that I could approach that circumstance in terms of my fear. I can approach it the way we approach it these days, assuming that I am secure from discrimination of various kinds, because there are antidiscrimination laws on the books⁷ and because the individual I am dealing with knows that if I am not treated the way I am supposed to be treated, the legal structure will respond. That provides me with security. The external structure is substituted for any degree of trust.

There is another way, however. I could go in assuming that we as Americans share a common moral culture based on shared moral premises about how human beings are to treat one another. When I walk through the door I expect to find such an individual, and I know that I will be treated fairly based on that moral characteristic. This requires no external structure, but instead relies on a structure of character.

We have discarded the latter assumption and we are working on the former assumption, but the reason we do so is the prevailing concept of the human person, which is that, absent some kind of external mechanism of control and policing, we cannot trust one another. We need to examine this assumption because we have discarded the essential assumption of self-government, which means that we are now operating under a regime in which freedom and self-government, as they were understood, is impossible. We are substituting a regime of law that, in the end, will become the arbitrary rule, especially given that we are tending more and more these days to identify law with the decisions of the lawyers.

We trust this assumption because we cannot trust one another, and we cannot trust one another because we no longer can make assumptions about the common character of decency that we share as a people. That means that what will be discussed in this Symposium actually is a reflection of the deep-seated moral crisis that we face as a people, a crisis that manifests itself partly in principle and partly in practice.

In principle, it manifests itself as a rejection of the idea that there is a foundation in our lives for human justice and the ob-

7. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (1964) (codified as amended in scattered sections of 42 U.S.C.).

servance of human justice. We have such a foundation, but nobody wants to talk about it anymore because of the claim that it involves bringing religion into politics. The foundation is God as the source of inalienable rights⁸ and as the policeman stationed in every heart, a moral regime that is relatively universal. We do not believe that anymore, and therefore we are trying to substitute for that basic premise all kinds of structures of legal and external control.

There is no substitute for character that is compatible with freedom—all claimed substitutes are elaborate legal rationalizations for the imposition of an ever-increasing degree of totalitarian tyranny and control. This is very depressing, but it is the only alternative we have if we accept the premise that human beings are little more than beasts out of control.

8. See DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights . . .").