

Families Crumbling: Are the Courts to Blame? Understanding Liberty, Individualism and Family Breakdown

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Individualism and the rights that stem from that concept are part of the American identity. Individualism is such a fundamental concept that it makes bedfellows out of both sides of political debate and is endorsed by the courts – especially the liberty interest of the individual. In fact, as Christians we often identify freedom and liberty with being who God made us – being a free person – an individual free to be me - Gal 5:1 – “it is for freedom that Christ set us free.” Liberty is wonderful; liberty is freedom!

Indeed, individual rights are so American, so pre-textual, so transcendent as to exist in nature and be endowed inalienably by our Creator! And those individual rights mean that if I am unhappy with my spouse, I have a right to find another – or if I’m unhappy with the timing or circumstances of having children, I can change that - or if I’m a child who is unhappy with my parents I have a right to be free of their authority. Is such strong individualism is because of jurisprudence, or something else?

The assumption is that individualism and its appended rights must be one of the values that make America great. The irony is, however, that individual rights also permit a husband or wife to abandon the family unit without fault; they allow a mother to terminate her unborn child, they celebrate sexuality apart from its safest context. Individualism without boundaries, left unbridled and undisciplined lacks self government, or the spirit-filled and empowered life, and leads to license, and self-righteousness. That leads to sin, and destroys the foundations that liberty once rested on. This pattern cannibalizes the beauty of liberty.

A disconnect obviously exists from the individual rights that lend to the building and the sustaining of a free society and the individual rights that tear society apart and are devoid of moral truths. In order to understand this disconnect, we will explore the negative consequences of individualism as evidenced in the Supreme Court’s jurisprudence that has affected the family; how the protection of the rights of individuals, which seems positive, has progressed so terribly off the mark; and how the law of liberty as espoused by the only righteous judge and lawgiver, God, is explored in the source of absolute truth, the Word itself (Bible). Let’s ask God to reveal what we, our country, and our legal system must do to restore the proper understanding of a healthy individualism that builds society and restores the family.

Individualism: The Effect on the Family

You may have noticed that family values have eroded to a point of somewhat serious crisis in America. The family unit is vital to sustain society - healthy marriages foster happiness in individuals, while simultaneously perpetuating the state with responsible individuals for future generations. Yet despite this clarity, the legal system in America has possibly aided, possibly unwittingly, in the breakdown of the family; that process has been a subtle devaluing of the family unit, particularly as less significant than the individual right.

This subtle process is most readily seen in judicial jurisprudence. It arguably began with the most well-quoted of cases on marriage – *Maynard v. Hill* in 1888. A man had left his wife and children back in Ohio to gain a land stake in the new Oregon territory. If that married man

farmed it for 2 years, ownership in that land vested in him and his family. But Mr. Maynard never sent for his family; instead he found a new family, and divorced his first wife by a legislative territorial act. The case became what we know today because when Maynard died 2 widows claimed the land – the one from Ohio, and the one in Oregon. Ruling that the Oregon family should prevail, the SCOTUS's language was inspiring.

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects on the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.¹

Heralding marriage, the Court ignored the claims of a first wife who never had notice of her divorce, and thus divestiture. A renowned case on marriage was actually about divorce.

This subtlety has affected the Court's jurisprudential shaping of other family matters – like parental rights. In *Meyer v. Nebraska*² the Supreme Court recognized the parental right to direct the upbringing of children, declaring "the individual has certain fundamental rights that must be respected."³ Two years later the Court extended individual rights of parents to include the individual liberties of children in *Pierce v. Society of Sisters*.⁴ However, the Court subsequently elevated those liberties of the child greater than the familial right of parents to direct the upbringing of their child in *Prince v. Massachusetts*.⁵ In *Prince*, the parental choice to allow a child to distribute religious leaflets was held to be a criminal act under child labor laws.⁶ Thus, what started out as the Court strengthening the family with endowed parental rights in *Meyer* and *Pierce* quickly progressed to the Court construing individual rights in *Prince* to weaken the family by allowing greater state interference in the rearing of children,⁷ all in the name of liberty.

The process of family strengthening and weakening came again in marriage jurisprudence in 1967. The Court began by strengthening the family in declaring unconstitutional a statute making miscegenation a crime in *Loving v. Virginia*,⁸ thereby recognizing the fundamental individual right to marriage, particularly regardless of race. Less than ten years later the Court began an assault on the family by declaring an individual right in *Zablocki v. Redhail* to marry another as supreme over an individual's financial responsibility to his or her children.⁹ Wisconsin's legislature had determined that unpaid child support was an impediment to subsequent marriage. The SCOTUS stated, however, that such an abridgment of the fundamental right to marry was unconstitutional. What the Court started well in *Loving*, began to weaken the family unit by declaring individual rights supreme to marital responsibility in *Zablocki*. Following *Lawrence v. Texas*, the 2003 case providing fundamental rights to sexual privacy, some state legislatures began confidently redefining marriage to allow same sex marriage, expanding and abating marriage as a societal foundation.

Though the pattern of the Court's initially strengthening and subsequently weakening the family is clear, the context of procreative rights perhaps provides the greatest example. In 1965 in *Skinner v. Oklahoma* the SCOTUS declared unconstitutional a statute mandating forced sterilization for habitual criminals because the right of the individual to "procreat[e] ... [is] fundamental."¹⁰ While individual procreative rights did not strengthen the family *per se*, it did uphold the fundamental nature of those liberties. Then in 1966 in *Griswold v. Connecticut*¹¹ the Court recognized the traditional notion of marital privacy when it concluded that married couples not only have the right to procreate but the right *not* to procreate by using contraceptives. A

decision that respected marriage, but one that was not brought by a wife and her husband, but rather by a woman and her doctor. Just seven years later, then, the Court weakened the family by declaring that there is no difference between a married and an unmarried couple when it comes to the individual right of privacy in the use of contraception.¹² The Court extended the logic of its holding in *Griswold* (for married couples) to *Eisenstadt v. Baird* (for single individuals) by declaring an individual right to privacy contraception under the Equal Protection Clause of the Fourteenth Amendment, finding that individuals who wish to use contraceptives are similarly situated to married couples who wish to do so.¹³

This same individual privacy right to procreate and not to procreate being firmly rooted in *Eisenstadt* led the Court to declare the individual right of mothers to terminate their unborn children in *Roe v. Wade*¹⁴ as a fundamental right of individual privacy. In eight short years, using individual privacy, the Court went from protecting marital privacy to allowing parental pre-natal infanticide. There can be no greater example of the disconnect between individual rights that build society and strengthen families and the individual rights that destroy the family and weaken society than the individual privacy right to terminate one's own child.

The inevitable question is how can the Court, construing the Constitution, declare fundamental individual rights that strengthen the family and then subsequently declare individual rights that bring outcomes injurious to the family? The irony is that the family is fundamental to the existence of our society arguably in a greater degree than individual rights.

The answer rests in the absence of a fixed standard to guide in the definition of individual rights. The Supreme Court has used the liberty interest found within the Fourteenth Amendment to be the vehicle that applies the federal Bill of Rights and other individual rights that apparently emanate from the Bill of Rights to the States through the doctrines of substantive due process, equal protection, and selective incorporation. The Court is tasked, on a case by case basis, with determining which individual rights are fundamental or are so significant that no state may take them away. To signal when rights are found to be fundamental certain language is employed by the Court, for example, fundamental individual rights are those that are essential to "a scheme of ordered liberty [such that] [t]o abolish them is ... to violate a principle of justice so rooted in the traditions and conscience of our people ... [that an] enlightened system of justice would be impossible without them."¹⁵ This standard indicates that individual rights must be found in the traditions of America and in the conscience of its people. The problem is the Court does not always follow its own standard to root individual rights in anything consistent. Instead the Court looks vaguely at the liberty interest of the Fourteenth Amendment and through substantive due process declares certain individual rights fundamental. Furthermore, once the Court identifies a right, that right can be subsequently defined in such a variety of ways that dilute the right of any fixed meaning.

The Court itself recognized the dangers in redefining rights when it said that "the Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."¹⁶ The Court has also said, "the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground" in defining individual fundamental rights located in the liberty interest of the Fourteenth Amendment.¹⁷ Ironically, the Court exercised judicial restraint in *Bowers v. Hardwick* (holding that states could regulate sodomy) only to overrule it by declaring a fundamental privacy right to engage in private consensual sodomy in *Lawrence v. Texas*.¹⁸

The negative effect of the creation and expansion of individual rights is the increase of state interference.¹⁹ This subtle erosion occurs in the context of the family when individualism is inserted into the equation. When the Court steps in to strengthen a right using individualism that methodology has acted to weaken the very institution it previously strengthened, revealing the corruption of individualism, highlighted in the context of the family. The effect of establishing individualism and redefining the meaning of rights ends in a process that initially strengthens and subsequently weakens the value of the family as an institution.

The Fixed Standard of the Law of Liberty

Individualism has been happily and effectively used to erode the foundations of the family, and of society, endorsing harmful selfish actions in the name of an individual right to liberty. This observance should be a clarion call that we cannot rely on the law for freedom. We must seek something more substantial to limit this jurisprudence and encourage a reversal of the damage.

Self-government is the key to true freedom for the individual. This principle of self-government offers insight into establishing meaning for the liberty and individual rights that Courts struggle to consistently define.

While the Court may not look to principles of Natural Law or the Bible for help in defining the liberty interest of the Fourteenth Amendment, you can. And Christian lawyers can offer clear guidance and sound principles that could correct the lost meaning of liberty and individualism.²⁰ Law can be informed by truth to restore meaning to individual rights found to exist within the Constitution. The Bible provides infinite guidance to the individual regarding the liberty interest that has been so widely construed by the Court to have lost any tangible meaning.

The Bible discusses the law of liberty in the book of James, offering solid guidance to restoring meaning to our legal system. James exhorts us to “receive with meekness the implanted word, which is able to save your souls ... [so you can look] into the perfect law, the law of liberty ... and persevere ... [then you are] no longer a hearer who forgets but a doer who acts ... [and you] will be blessed in ... [your] doing.”²¹ James places a condition precedent to being able to look into the law of liberty: receiving with meekness the implanted word. James’ audience is Jewish converts to Christ who were scattered all over the Roman world.²² This is instructive because the Jews were a people rooted in the rule of law. They were dedicated to strict adherence of the Mosaic Law and James instructs that morals cannot be disconnected from law. The connection of morals and law is again made by James when he says, “[s]o speak and so act as those who are to be judged under the law of liberty. For judgment is without mercy to one who has shown no mercy. Mercy triumphs over judgment.” When there is a moral connection to law exemplified here in meekness and mercy, then the law is actually one of liberty and freedom. This was shocking for the Jews who followed the Law of Moses,²³ which was viewed as extremely burdensome, yet they were being encouraged in liberty in Christ.

The law when connected with morals produces liberty and freedom according to James and other parts of Scripture, and the practical application to the individual within the law of liberty was expounded upon by Paul. In his letter to the Galatian Church Paul says that Christians “have been called to liberty ... [o]nly do not use liberty as an opportunity for the flesh, but through love serve one another.”²⁴ The freedom here is not one that is selfishly asserting individualism, which is an opportunity for the flesh, but the freedom Paul speaks of is liberty and

freedom from the bondage of sin and selfish individualism. This freedom allows a Christian to benefit another without seeking his own benefit. This sort of liberty would make a parent want to be financially responsible for his children even if that meant delaying his individual desire to marry again. This kind of freedom supports a spouse in working at his or her marriage, even through tough times of unhappiness, looking for restoration. This kind of freedom supports the beautiful context for sexuality and parenting in marriage. This type of family restoration is only possible because of the freedom from self found in Christ alone.

When this liberty to love is rejected then the Christian and non-Christian alike enter into bondage and slavery to sin, which is so clearly revealed in selfish individualism. C.S. Lewis makes sense of these concepts well. He makes sense of the world, the law, and the self:

There are three kinds of people in the world. The first class is of those who live simply for their own sake and pleasure, regarding Man and Nature as so much raw materials to be cut up into whatever shape may serve them. In the second class are those who acknowledge some other claim upon them – the will of God, the categorical imperative, or the good of society - and honestly try to pursue their own interests no further than this claim will allow. They try to surrender to the higher claims as much as it demands, like men paying a tax, but hope, like other taxpayers, that what is left over will be enough for them to live on. Their life is divided, like a soldier's or a schoolboy's life, into time "on parade" and "off parade," "in school" and "out of school." But the third class is of those who can say like St. Paul that for them "to live is Christ." These people have got rid of the tiresome business of adjusting the rival claims of Self and God by the simple expedient of rejecting the claims of Self altogether. The old egoistic will has been turned round, reconditions, and made into a new thing. The will of Christ no longer limits theirs' it is theirs. All their time, in belonging to Him, belongs also to them, for they are His.²⁵

We all need to examine where we stand in relation to the law of liberty. A critical examination of the reality of the world and its brokenness can certainly lead to despair and hopelessness. Jesus Christ, however, has brought hope to the hopeless.²⁶ Christians must examine ourselves to ensure we are not living under the bondage of sin. Am I living according to the worldly system of freedom that enslaves, or am I living free by the Spirit of God, which offers infinite liberty to love others more than myself? Be the third kind of person – "to live is for Christ."

Neither Courts nor governments can restore the family or civil society. Only when individuals turn from selfish freedom to a true freedom in Christ will change be possible. Don't let your selfish individualism destroy your family. Rather, set it aside for Christ, as He strengthens your family.

¹ 125 U.S. 190, 193 (1888). This case marked the introduction of the "Constitutionalization of Family Law" as I have set forth in greater detail in L. M. KOHM, FAMILY MANIFESTO: WHAT WENT WRONG WITH THE MORAL BASIS FOR THE FAMILY AND HOW TO RESTORE IT 29-30 (William S. Hein & Co. 2006).

² 262 U.S. 390 (1923).

³ *Id.* at 401.,

⁴ 268 U.S. 510 (1925).

⁵ 321 U.S. 158 (1944).

⁶ See L.M. KOHM, FAMILY MANIFESTO, *supra* note 1, at 31.

⁷ *Id.*

⁸ 388 U.S. 1 (1967).

⁹ *Zablocki v. Redhail*, 434 U.S.374 (1978).

¹⁰ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹¹ 381 U.S. 479 (1965).

¹² *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹³ *Id.*

¹⁴ 410 U.S. 113 (1973).

¹⁵ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

¹⁶ *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

¹⁷ *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

¹⁸ The Supreme Court overruled *Bowers*, where the Court previously exercised restraint in upholding a state law prohibiting sodomy.

¹⁹ *Id.* at 318.

²⁰ The liberty interest in the Fourteenth Amendment originally probably meant a person could not be imprisoned without the due process of law, but the Court has expanded that liberty interest to lose the original meaning so the proposition is to define liberty as found in Scripture.

²¹ James 1:21-25 (English Standard Version).

²² James 1:1.

²³ James 2:8-12.

²⁴ Galatians 5:13 (New King James Version).

²⁵ C. S. Lewis/Walter Hooper, ed., *PRESENT CONCERNS* (London: Fount Paperbacks, 1986) p. 21-22, reprinted as *Three Kinds of People*, in *Reflections*, for C.S. LEWIS INSTITUTE, Dec. 2011.

²⁶ 1 Timothy 4:10 (English Standard Version).