14 May 2012

Dear Adam Curry,

This note is in regards to *No Agenda Show* #408 and your discussion that imbricated subjects of gay marriage, rights, the Bill of Rights, and privileges.[1]

Essay on Rights, Privileges, and the Problematics of Marriage under American Common-law

Borrowing from the writings of Alexander Hamilton, co-author of the U.S. Constitution, a lawyer, and perhaps Rothschild shill / agent, as well as my own review of legal issues in gay marriage (aka same-sex marriage) as found in the common-law courts of the UK, US, and Australia since the 1960s, in this message I will lay out and explain a few points:

(1) privileges and rights ARE the same thing – these terms are to be distinguished in law from the concept of freedom (also called liberty);
(2) privileges and rights are given FROM government rulers (e.g., monarchs) to subjects, not things given from government office holders (e.g., servants, working as fiduciaries) to free citizens;
(3) because non-commercial, consensual sex between adults is legal, there is no legal justification for marriage – but because governments sanction marriage formally, this grant (aka right or privilege) must be granted to any and all adults – in any form including polygyny, polyandry, and group marriage.

A. Privileges and Rights are the same thing

In *Federalist #84*[2] (1788), Hamilton argues, among other things, that the U.S. Constitution needs no Bill of Rights (BoR). He has many arguments. One is that such is unnecessary because those things that some people wanted to be listed and protected in a BoR, were already implied in law and government was legally bound to protect said freedoms/rights under the British Common Law and laws of the State of New York.

> "though the constitution of [the State of] New York has no bill of rights prefixed to it, yet it contains, in the body of [the NY Constitution], various provisions in favor of particular privileges and rights, which, *in substance amount to the same thing*; ... the [proposed American] Constitution adopts, in their full extent, the common and statute law of Great Britain, by which many other rights, not expressed in it, are equally secured

1 The author of this piece is John Calvin Jones, PhD, JD. He is a frequent listener to the *No Agenda Show* the value for value, Media Assassination efforts of MTV legend Adam Curry and curmudgeon John C. Dvorak. This letter was written on May 14, 2012, from Tampico, Mexico.

2 http://www.constitution.org/fed/federa84.htm

Of note, 80 years later, Hamilton's understanding – that rights and privileges are the same thing – was codified in Section 1 of the 14th Amendment of the U.S. Constitution (1868).

> **Section 1**. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Observe, the term *rights* is absent in this text. Instead the authors use the language of ***privileges and immunities***.

Jumping ahead to connect ideas about marriage – and what is really a sexual relations issue – think about the case of *Loving v. Virginia* (1969).[3] In 1958, a White man and Black woman, who lived in Virginia, went to Washington, DC, to get married. Part of the reason they did that was because having sex without being married was a crime! Of course, at that time, they could not get married in Virginia – which prohibited a clerk of court from issuing a marriage certificate to such a couple. When the couple returned to Virginia – they WERE arrested. The Lovings were prosecuted for the crime of *cohabitation as man and wife*. From the U.S. Supreme Court opinion, read:

> "The Lovings were convicted of violating § 20-58 of the Virginia Code:
>
> > "Leaving State to evade law. -- If any white person and colored person shall go out of this State ... and [get] married ... and afterwards return to and reside in it, ***cohabiting as man and wife***, they shall be punished [by confinement in the penitentiary for not less than one nor more than five years] ... The fact of their cohabitation here as man and wife shall be evidence of their marriage."".

Thus the State of Virginia attempted to *abridge* the legal immunity from prosecution that was granted to other adults. That is, the marriage certificate gave immunity to its holders to be free from prosecution for the crime of illegal sexual relations.

In this sense, the terms privilege (the privilege of having sex) and immunity (legal protection to void or avoid criminal prosecution) and right (as in "the right to have sex and not get sent to prison for it") are legal equivalents.

None of these terms have the same legal definition as *freedom* or *liberty*, however. Concepts of *freedom* and *liberty* exist *outside* of government jurisdiction and hence outside government

3 http://law2.umkc.edu/faculty/projects/ftrials/conlaw/loving.html

sanction. There is a simple explanation as to why producers ask you for getting laid karma and do NOT ask their government for same. Government cannot provide sex – even Secret Service agents have to out-source party favors. Conversely, acting under the cover of right-privilege-immunity, to avoid legal sanction, a person must first obtain permission or grant from government.

B. Rights (Privileges and Immunities) are given from Sovereigns to Subjects (and hence are inapplicable under the U.S. Constitutional – Common-law system)

According to *Federalist #84*, rights are grants from sovereigns to the people. But in the American form of government, the People ARE Sovereign hence neither surrender freedoms nor need to request any from a ruler.

> "It has been several times truly remarked that *bills of rights* are … stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was *Magna Charta*, obtained by the barons, sword in hand, from King John. ... Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, [Bills of Rights] have no application to constitutions [like this one] professedly founded upon the *power of the people*, and executed by their immediate representatives and servants. Here [through the proposed Constitution], in strictness, the [American] people surrender nothing; and as they retain every thing they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Returning to the topic of marriage – which is actually a legal discussion about sex, cohabitation, and those other liberties tied to control over property – under American law, no person is bound to ask for permission to exercise control over their body or possessions. Hence, marriage (in the form of cohabitation) is not a right or privilege, it is not that which is a necessary grant from the government in order to gain legal immunity, it is a FREEDOM.

One obvious objection in the marriage debate centers on questions of tax, spousal-insurance, legal liabilities with step-children, and more, but all of those issues can be fixed via the European civil union model. That is, the American Common-law marriage practices are anachronistic. The state should not be involved in the marriage business which is really the business of creating monies for lawyers in something called Divorce and Child Custody proceedings.

C. Marriage laws were once intimately linked to Criminal prohibitions on Homosexuality and Other Acts

If you review the case law, early court prohibitions of same-sex marriage often made reference to the term "consummate" (as in male-female penis-vagina penetration). Given that one person did not have the right parts (most often a pre-operative transsexual), a man could have a marriage voided on the grounds of fraud or that the spouse [sic] was "unable to perform." (Note: older case law, courts justified divorce on the grounds that a woman could not conceive a child).

But to reinforce the point, all 13 colonies, and formerly most States had criminal laws against masturbation, and so-called unnatural acts. The only legal way to have sex was via marriage and or prostitution (where that was legal). And though the U.S. Supreme Court sanctioned laws against homosexuality in 1986 (*Bowers v. Hardwick*), by that time many states had repealed their laws. But even with the Supreme Court ruling in *Lawrence and Gardner v. Texas* (2003), state laws against *soliciting* (*i.e*., talking about) **unnatural acts** have been upheld. See cases involving Joel Singson and Andy Tjan.[4]

Nevertheless, given that people can cohabitate, make porno movies, join sex clubs, form communes, give away their property, etc., all the trappings of marriage are already legal and freely available to adults. So, there is no justification, if the state wants to sanction adult contracts, to bar or void a marriage contract *ab initio* simply because some people in a legislature, or wearing robes do not like it.

Last point, same-sex marriage IS legal in Texas – under one condition: one of the parties must have been born with different genitals. The example is from *Littleton v. Prange*. There, a woman (born male), Christie Cavasos married John Littleton. Mr. Littleton died in surgery and the wife sued for wrongful death. But the court granted the *doctor's motion to dismiss* on the grounds that Christie Lee Littleton (born male) was not, and could not be, the legal spouse of a man!

AFTER that case was upheld on appeal (and the U.S. Supreme Court refused to review the case), on September 16, 2000, Ms. Jessica Wicks and Ms. Robin Manhart Wicks, *demanded and received* a marriage license from the Clerk of Court in Bexar County (San Antonio). Read more about the effects of the *Littleton* ruling here.[5] Also see more about the problematics of same-sex marriage in Texas here.[6]

4 http://www.glapn.org/sodomylaws/usa/virginia/vanews138.htm
5 http://www.transgenderlegal.com/albanylr1.htm
6 http://www.abajournal.com/news/article/despite_male-to-female_sex_change_woman_is_still_a_man_under_texas_marriage/

The worst part about gay/hetero/homosexual marriage is that there is no reliable or valid legal definition of male or female. Please see the presentation on intersex and note that at least 1 in 1,500 is neither an XX female, or XY male.[7]

I hope this helps to clarify things from the perspective of American and Common-law.

Sincerely,

John Calvin Jones, PhD, JD

7 http://www.jotto.info/presentations/Transgenderism_and_Intersexuality.pdf