

Issue Three

# Beyond Religious Liberty: Undermining Nature Just When We Most Need It

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In a [recent critique](#) of the new “Catholic integralist” movement, *The Spectator*’s Damian Thompson observed that the integralists have about as much chance of bringing their vision to bear as Civil War reenactors do of altering the outcome of that war.

My topic is religious liberty, and I would like to discuss some qualms about the way religious liberty is used and conceived today. But Thompson’s sharp rebuke causes me some trepidation because what I have to offer may seem vulnerable to this sort of scorn. While my purpose is primarily diagnostic rather than prescriptive, even diagnoses may gesture at least vaguely to some path, which might appear as impractical in our immediate historical context as changing the outcome of the Civil War by reenactment.

## Religious Liberty at a Crossroads

My wild-eyed claim is this: The use of religious liberty as a refuge by social conservatives, left among the ruins of the “culture wars,” signals the arrival of a kind of cognitive dissonance in our civic life. We can see the nature of this confusion when we consider that the conflicts in which religious liberty is now often evoked—battles over sex and the sexes—are *not* fundamentally about “religion,” or more precisely, *they are not about religion as it is conceived in these debates*. Rather, the real conflict is over the nature of human beings and of the sexes, a topic which is profoundly influenced by, but is not simply reducible to, religion. It is first and foremost a debate about the meaning of our common human experiences of the natural things of this world and what we can know about them. It is simultaneously a debate about what is knowable in civic life and therefore also the meaning and role of reason itself in political and legal thought. In fact, the real cultural and social debate—obscured by ubiquitous proxy arguments and only hazily perceived by the combatants themselves—is between clashing metaphysics or anthropologies. This clash has now born its bitterest fruits in the current “trans” debates, in which the very intelligibility of sex and the sexes has been cast into doubt.

I certainly do not mean to imply a genuine division between religion, faith, or revelation and the meaning of sex, human nature, or for that matter anything else in this wide world. Rather, it is American liberalism that separates “religion” from public or legal rationality and therefore treats it as publicly non-rational. Once Christian ideas about human nature and the real existence and distinction between the sexes are tossed into the bin of “religious belief” so understood, they too are treated as deposits of non-rational faith, as though we only know that men and women really do exist because the Good Book has told us so.

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*particularly strong claim to at least minimal rational legitimacy, given its procreative potential and the importance of both the mother and father to a child. If such arguments are not at least minimally rational, the question inevitably arises as to the sort of rationality the courts are trading in.*

Christians, and especially Catholics, draw on a conception of human nature as preceding and giving rise to individual personal existence. They view persons as organic wholes. They think that nature precedes and gives shape to authentic acts of freedom. This “givenness,” at once theological and philosophical, phenomenological and symbolic, does not make human nature any less rationally grounded. Indeed, it vouchsafes and sustains its rational character. The Christian understanding of the sexes therefore does not dissolve into a purely “religious” doctrine or belief. Just as clearly, the question has never been a merely “private” matter. Only a thoroughly a decadent, consumerist culture could think that childbearing and the secure continuation of society over time should be thought of as a happy externality of individual lifestyle choice.

Yet, Christian anthropology runs up against current political and legal rationality’s imperviousness to rational accounts of the real things of the world. The result is that Christians’ stubborn insistence on the real existence of the sexes must be shoehorned into private religious liberty claims. Adding to the irony, the mediation of competing rights claims, the currency of modern, liberal political and legal rationality, nevertheless implies a submerged if fragmented anthropology, and, indeed, one that in fact promotes a disordered and incoherent understanding of the sexes.

Ominously, the wave of new laws and court decisions presupposing this disordered understanding amount to a legal requirement that we repudiate our fundamental human experiences of nature, indeed that we verbally deny what our eyes and ears tell us is true. In this way, it enforces a dual, and essentially dishonest, form of discourse: an external, public mode of coerced denial of an internal recognition of what stands before us.

My thesis in a nutshell is this: The Christian proposal for public reason is rejected as public because it is a reason founded on real things. In other words, Christian rationality is not rejected because it is Christian, but because it is rational.

### The Paradox of Religious Liberty

There is, of course, a bitter irony in all of this. Christians have long struggled with the insinuation, and often direct charge, that their legal arguments concerning sex, the sexes, procreation, and so on, are in fact nothing more than religious doctrine masquerading as political and legal reason, contrary, at least in spirit, to the First Amendment. Now, as the legal and social environment has become increasingly hostile, they find themselves in the odd position of employing religious liberty claims as the most plausible defense against legislative and regulatory impositions of the new sexual paradigm, thus seeming to concede the point.

Take, for example, *Roe v. Wade*’s 1973 declarations that the Court “need not resolve the difficult question of when life begins” and that Texas “may not override the rights of the pregnant woman” by adopting one such theory.<sup>[1]</sup> These claims reject even the possibility of arriving, for purposes of law, at a reasoned consideration and judgment about the ontological status of unborn life. But a judgment about this status is, at the end of the day, the one and only basis for an adequate resolution of the social, cultural, and moral issue at stake. In effect, the Court rejected the idea that a rational, philosophical look at the things of our world—such as the unborn child—can form a foundation or principle for legal

rationality. It is a rejection of a realist metaphysics, or a metaphysics of nature, as relevant to legal rationality. The case is instead decided exclusively as a contest of competing interests, those of the mother and her unborn child or those of the mother and the state. The paradox, of course, is that in prohibiting Texas's "theory" of life, and in demurring from its own explicit engagement with the question, the Court nevertheless silently *decides* the question. First, it imposes its own tacit metaphysics rooted in the principles of autonomous choice and separateness, represented in the concept of "viability," as the moment when the state's interest in "potential life" becomes "compelling." More importantly, in claiming not to decide when "life" begins, the Court in fact *did* decide that "life" begins at live birth. Yet, the Court's substantial but dubious metaphysics remains tacit because it presents itself as an empty or substance-less mediation of individual rights.

It is interesting in this connection to consider Justice John Paul Stevens's separate opinion in another important abortion decision, *Webster v. Reproductive Health Services* (1989).[2] There Justice Stevens argued, in part by alluding to St. Thomas's "infamous" doctrine of delayed animation, that claims about the personal nature of the unborn can only be theologically grounded and are therefore precluded as legitimate forms of public or legal argument.[3] Stevens's argument has been echoed many times, most recently by Justice Sotomayor in the oral arguments for *Dobbs v. Jackson Women's Health Organization*, currently before the Supreme Court.[4] Here we have a perfect example of the idea that any substantive claim about *what* an unborn life is must be merely religious in nature and therefore outside legitimate public rationality. Again, the irony lies in the argument's presupposition that a mere mediation of interests does not itself effectively decide the question of what the fetus is, even as the preservation of the "right" silently implants an anthropology founded on separateness and will, rather than relation and nature.

A similar rejection of rational accounts of nature characterized the debate leading up to *Obergefell v. Hodges*'s constitutional redefinition of marriage to include "gay marriage." [5] A pattern emerged in the many court decisions of the period, beginning with Massachusetts's *Goodridge v. Department of Public Health* (2003), of declaring that arguments supporting the challenged state marriage laws failed even the lowest "standard of review," the so-called "rational basis" standard.[6] This most deferential standard is really only a requirement that laws under review possess at least minimal legal rationality. One might suppose that marriage's basic male-female structure would have a particularly strong claim to at least minimal rational legitimacy, given its procreative potential and the importance of both the mother and father to a child. If such arguments are not at least minimally rational, the question inevitably arises as to the sort of rationality the courts are trading in. Yet, these courts treated the question solely as one of competing interests, detached from any serious consideration of the nature of the sexes themselves. The states' arguments were therefore treated as little more than dressed up religious doctrine, both illegitimate as a form of legal or political discourse and hateful as a kind of moral posturing.[7]

Given this general devaluation of the possibility of rational engagement with real things, it is perhaps understandable that the Little Sisters would turn to First Amendment religious liberty rights to defend themselves from the Obama administration's attempt to force them to offer their employees insurance coverage for contraceptives. Yet this invocation created a certain tension, at least from the point of view of Catholic self-understanding. The Catholic Church has never thought that *Humanae Vitae* (1968) announced a specifically *Catholic* discipline. Nor did it ever consider its teaching against contraception as specifically *religious* in nature, particularly if "religious" is understood as essentially non-rational. Nor has the Church ever considered the teaching to be merely "private," without vast social implications. On the contrary, the Church has always understood its teaching against contraception to reflect a truth of natural law, indeed a truth for all human beings precisely as human, *grounded in*

*reason* rather than faith, and serving as an element of a much larger social doctrine. While natural law and the teaching on contraception are profoundly shaped within a theological horizon, they are strictly speaking philosophical rather than “religious.” Ultimately, the teaching must live or die on this rational, natural law basis.

It is therefore telling that the adjudicative context of the debate, and the nature of legal rationality in our day, meant that the Little Sisters were constrained to call on the legal doctrine of religious liberty to defend their ability to act on their belief, even though doing so tended to undermine the *basis* for that belief.

We have a similar and more important example in *Burwell v. Hobby Lobby* (2014),<sup>[8]</sup> which addressed the question of *abortifacient* contraceptives. Is the question of abortion an essentially religious one? The Green and Hahn families presumably thought so. But on further reflection, is it not rather a question of the ontological status of embryos and of justice toward all persons? Are these not questions for rational reflection and judgment, questions which must be confronted as profoundly important for the political and legal orders, as well as for civil society? But, as we have seen, *Roe* cut off the possibility for such a rational engagement.

To be sure, the treatment of the Little Sisters’ and the Green and Hahn families’ claims as matters of “deep religious conviction” rather than “philosophy” was a precondition of their qualification for First Amendment protection.<sup>[9]</sup> My concern, however, is conceptual. It has to do with the longer-term implications of cabining claims about the natural things of the world in the category “religious doctrine.” As we have seen, the effect of conceiving the issue as “religious” is to convert what is at its heart a claim concerning the possibilities of public knowledge about the real things of this world—about the nature of sexual love and unborn human life—into a claim of “sincerity” about a publicly non-rational bit of theological positivism, both distorting the basis for the belief and sacrificing its relevance as a matter of public importance. We have here a perfect affirmation of Chesterton’s prophetic remark that the propositions “two and two make four” or “leaves are green in summer” will one day become matters of religious conviction.<sup>[10]</sup>

We find a similar use of religious liberty in the legislative proposal known as “Fairness for All” (FFA). Introduced by Rep. Chris Stewart of Utah in 2021, FFA seeks a compromise between the LGBT movement and religious people by mediating between concerns for equality and religious freedom. While FFA may seem like moderation itself when compared to the far more authoritarian Equality Act, it would at best have the effect of conceding that for purposes of the vast bulk of our social life we will accept the LGBT movement’s fragmented conception of the nature of sexuality. It would concede, in other words, that the whole of society outside a narrow band of religious exemptions should be shaped *as if* that understanding were valid.

It is true that religious liberty litigation has seen some recent successes, albeit mostly in cases decided on narrow or technical grounds.<sup>[11]</sup> Indeed, at least some members of the Court have indicated the desire to offer a more expansive reading of the Free Exercise Clause.<sup>[12]</sup> But if this more expansive reading offers an obvious strategic and practical advantage, it would also effectively codify the confusion I am highlighting.

It is true that litigants, such as the Little Sisters, the Greens and Hahns, and the bakers, florists, and others caught up in the gender wars, generally explain their beliefs in religious terms. Just as certainly, however, they also think that the real existence of men, women, and unborn children is part of our fundamental human experience, fully intelligible without immediate recourse to religious doctrines or beliefs. Yet, our political, cultural, and intellectual environment conditions litigants and others to think

of their belief in the intelligibility of human nature in immediately “religious,” and therefore essentially non-rational, terms.

### Religion and Reason

Christians’ and others’ background belief in creation commits them to recognizing the integral reality and meaningfulness of things in the world, especially of the human body with its division into male and female. Christian revelation, especially as mediated through the Catholic sacramental economy, dramatically deepens how we understand this division of the sexes. Yet, if revelation shows us the otherwise hidden depths of the things of the world, the things of the world also show us the meaning of revelation. If we believe there is an analogy, for example, between marriage and the God-world relationship, particularly as consummated in the Incarnation and the union of Christ and the Church, we must also believe that mundane human marriages share in and reveal the higher reality. The reality and integrity of both analogates are necessary for the analogy to work. Only our experience of fathers of flesh and blood can make God the Father intelligible to us. Only our knowledge of sons can make the eternal Son intelligible to us. Only the experience of mothers can make the Church intelligible. Only the experience of blood relations, of natural brothers and sisters, aunts, uncles, and cousins, can make ecclesial communion real for us. And it is only because we know all these natural things from the earliest moments of our coming into awareness of ourselves and our world that we can know the higher realities that lay claim to us in the most intimate possible way. But this means that the things of the world, including the sexes, must have their own “autonomous” natural standing in worldly reality.

So, the commitment to the integrity of worldly reality is not simply reducible to the prior belief in creation. The religious atmosphere of our recognition of worldly things does not convert our earliest and most fundamental knowledge of human nature into a kind of positivistic theology. It certainly does not make that knowledge non-rational. It does not turn it into a quaint private belief. If the things of the world are structured as they are because God created them, they are nevertheless really structured that way, and this fact is open for all to see.

These reflections raise a point that has been latent in my discussion up to now. If the idea of “religion” in our understanding of religious liberty were more wholesome, the recourse to religious liberty in the gender wars would be less problematic. But as it is, our political and legal orders, as witnessed in both legislation and court decisions, regard religious belief and practice as lying outside the domain of rationality. Religious liberty claims, therefore, demand respect for beliefs that in effect defy public or legal intelligibility or understanding.[13]

An objection may have come to mind. Saying that religious rationality cannot be thought of as public rationality is not the same as saying that the category “religion” is “non-rational.” It is only to make the more limited claim that religious rationality has been put out of play for public purposes. Hence, it might be countered, nothing has been said one way or the other about religious claims’ inherent rationality. This objection misses the point. Reason depends on rational principles, whether we make these explicit or not. The removal of religious reasons from public rationality is, in effect, the removal of religious rational principles from public rationality. But this is just a way of saying that religious reasons do not count as rational principles for public purposes. And this, in turn, means that, from the public point of view, religious rationality is without principle and is therefore non-rational.

While this public non-rationality of religion is itself highly problematic, my purpose here is to point out that under these circumstances recourse to religious liberty claims in the context of sex and the sexes only cements the pernicious concession of the basic non-rationality of beliefs concerning human nature, as though belief in the reality of sex and the sexes is only a matter of private and sincerely held

religious conviction.

It is this position of non-rational belief that is improbably pitted against *publicly rational* equality-based claims, such as the claim to fair and equal access to employment, goods, and services. Hence, an opening is created for declarations such as that of [Pete Buttigieg](#) during his abortive 2020 presidential run: “The right to religious freedom ends where religion is being used as an excuse to harm other people.” If we can no longer advance a publicly rational argument concerning the nature of sex and the sexes, then our position must be, at least publicly, bigoted. As a non-rational check on public rationality’s work, religious liberty’s employment in this area must boil down to the following claim: “Look, I don’t ask you to understand my non-rational belief, but only to respect it because I sincerely hold it. And, by the way, please also disregard its discriminatory implications.”

This tendency toward a positivistic understanding of religion haunts American political and legal discourse. The paradox we face is that legal ordination of the sexes and their role in society is fundamental to civilization itself. Indeed, the possibility for a truly human civilization is at stake in this one issue. Yet, America’s legal and political epistemology is incapable of engaging the topic intelligibly. To do so, we would need first to know what sex and the sexes are. But this question turns on the even more fundamental one of what a human being *is*. And that discussion is not something legal or political discourse is prepared to handle or even consider.

### Science and Mysticism

At first sight, this last claim—my leitmotif—may seem patently wrong. Our way of understanding what things are, it would seem, is modern science, and indeed courts and legislators have constant recourse to science in their discussion of gender, life, and other such issues. Regarding our present topic, then, scientific rationality serves as a realist antipode to religious non-rationality.

Yet, science has clouded rather than brought light to the question. This can be seen in the very influential early work of John Money, who in the 1950s coined the word “gender” as applicable to persons, and Robert Stoller, who in the 1960s coined the phrase “gender identity.” Money’s methodological analysis of “sex” into seven components (morphology, gonads, chromosomes, endocrinology, and so forth) plus “gender,” the psycho-social aspect, is a prime example of science’s typically reductive approach.<sup>[14]</sup> Crucially, Money claimed that his study of hermaphroditism, for whom the various components do not “align,” provided a way to understand sexuality universally, even where the components *do* align. In other words, the anomalous conditions of his patients were consciously and explicitly used to understand the *nature* of human sexuality as such. Indeed, Robert Stoller referred to his transsexual patients—believe it or not—as “natural experiments,”<sup>[15]</sup> as though their non-alignment was a naturally occurring equivalent of laboratory dissection.

This pattern, of fragmenting sexuality into its constitutive parts, trying to understand healthy sexuality through the lens of this fragmentation, and the principled division of sexuality into its mental and bodily aspects, continues today, including for example in expert testimony.<sup>[16]</sup> It is common to invoke the variants studied by Money and Stoller in an attempt to show that human sexuality should not be thought of as essentially “binary” or human inclination as naturally directed to the opposite sex.

Even this thumbnail sketch suggests the problematic character of the proposition that science can tell us what sex is. Money’s and Stoller’s categorizations unavoidably involve assumptions and judgments concerning, for example, the relationship between the body and subjectivity (i.e., a variant of the “body-mind problem”), how *elements* of sexuality relate to sexuality *as a whole* (i.e., the problem of parts and wholes), and the question of whether the nature of sexuality can be understood by looking to anomalous instances (i.e., the problem of nominalism and nature). These are not scientific questions

but metaphysical ones. Indeed, they are *classic* metaphysical questions. Gender science's tacit presupposition of their resolution in one direction can hardly be viewed as unproblematic or as either metaphysically or religiously neutral. The close relationship of these underlying questions to scientific judgments brings into relief the fact that science is not without its metaphysical commitments.[17]

The question "what is sex?" is dissolved rather than answered under a Money's or a Stoller's hand. By attempting to make sexuality intelligible through its aberrant instantiations, the resultant science begins with the very assumption—the fragmentary understanding of the human person—that fuels the gender movement.

### Gender's Aporia

What, then, is the proper response to the issues I have raised? It is here that my "prescriptive" gesture may appear to be an exercise in "reenactment."

Nevertheless, we can at least say that, as a general matter, the nature of something may be found by seeking the core element of its intelligibility. To see natural form, we must ask ourselves: What is that conceptual and ontological element without which the thing in question could not exist or would simply be unintelligible? In relation to sex, that core element is clearly the so-called "binary," the organic complementarity of the two sexes, man and woman, precisely what is undermined by the concept of "sexual orientation" and ultimately denied by "gender identity." Without this, there simply is no "sex," as the rapid devolution of the gender identity movement in the direction of "non-binariness" (and, therefore, also of the erosion of its own basis for being and intelligibility) has shown.

Until we develop a mode of legal discourse that can account for this core element, our civil conceptions of sexuality will grow increasingly incoherent. Sexuality is only intelligible in view of the two sexes, and these are only intelligible in their ordination to each other, along with this ordination's procreative potential. The concepts of "sexual orientation" and "gender identity" both rely on and undermine the intelligibility of this ordination. They render the relationship between personal subjectivity and the sexually dimorphic body arbitrary. In this way, they externalize and materialize the body. Yet, they attempt to build a sense of personal subjectivity that logically relies on this de-personalized body. They are, in other words, parasitic on the natural ordination of the sexes to each other and their relationship to procreation, even as they drain their host of its life-force.[18]

In this way, the dual concepts of "sexual orientation" and "gender identity" have rendered modern sexuality internally incoherent, precisely by obliterating the core element of its intelligibility. This rejection of the bases for a rational account of the things of the world, in favor of a mediation of rights and interests, is the direct source of the civilizational crisis presented by modern legal rationality. Again, Christian public rationality is not rejected because it is Christian, but because it is rational.

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[1] 410 U.S. 113, at 160, 162 (1973).

[2] 492 U.S. 501 (1989).

[3] *Ibid.*, at 563ff. See also Ronald Dworkin's famous and influential article, "Unenumerated Rights:

Whether and How Roe Should Be Overruled,” in *The University of Chicago Law Review*, vol. 59 (1992): 381-432, at n. 36. Interestingly, Justice Stevens falsely supposes that Thomas’ doctrine concerning delayed animation is “theological” in nature, when in fact it is a philosophical doctrine and indeed one inherited from Aristotle. This misapprehension, however, suggests the very tendency I am trying to highlight in this paper.

[4] Oral Argument Transcript (Dec. 1, 2021), Docket No. 19-1392: 29-30.

[5] 576 U.S. 644 (2015).

[6] *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 958-68 (Mass. 2003). See also, for example, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994–1003 (N.D.Cal. 2010). See Katie R. Eyer, “The Canon of Rational Basis Review,” 93 *Notre Dame Law Review* 1317 (2018) for a discussion of the growing use of rational basis review.

[7] E.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[8] 573 U.S. 682 (2014).

[9] *Wisconsin v. Yoder*, 406 U.S. 205, at 216 (1972).

[10] G.K. Chesterton, *Heretics* (New York: John Lane Company, 1905): 304-5.

[11] E.g., *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_ (2018); *Fulton v. City of Philadelphia*, 593 U.S. \_\_\_ (2021).

[12] At least six of the justices in *Fulton* expressed skepticism concerning *Employment Div. v. Smith’s* rather stingy treatment of the Free Exercise Clause (494 U.S. 872 [1990]). Moreover, the Court seemed to hint that it would have been favorably disposed toward a religious liberty claim in *Bostock v. Clayton County* 590 U.S. \_\_\_ (2020).

[13] E.g., *Thomas v. Review Board*, 450 U.S. 707 (1981): “Religious beliefs *need not be* acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection” (714); *Employment Div. v. Smith*, 494 U.S. 872 (1990): “Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim” (887).

[14] E.g., John Money, Joan Hampson, and John Hampson, “Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism,” 97 *Bulletin of the John Hopkins Hospital* 301, 302 (1955); Money, Hampson, and Hampson, “Imprinting and the Establishment of Gender Role,” 77 *A.M.A. Archives of Neurology and Psychiatry* 333 (1956).

[15] Stoller, *Sex and Gender: The Development of Masculinity and Femininity* (Karnac Books, 1968): vii, 5, 14.

[16] E.g., *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2008) (testimony of Dr. Walter Bockting, of the University of Minnesota and World Professional Association of Transgender Health (“WPATH”)). Sharon M. McGowan, “Working with Clients to Develop Compatible Visions of What It Means to ‘Win’ a Case: Reflections on *Schroer v. Billington*,” 45 *Harv. C.R.-C.L. L. Rev.* 205, 234-5, citing tr. of Bench Trial at 402-03, *Schroer*, 525 F. Supp. 2d 58 (D.D.C. 2005) (No. 05-1090).

[17] This would seem to be the ineluctable conclusion to be drawn from T.S. Kuhn, *The Structure of*

*Scientific Revolutions* (University of Chicago Press, 1962, 4<sup>th</sup> ed., 2012), however much Kuhn himself might want to qualify it. See Henry Veatch, *Human Rights: Fact or Fancy?* (Louisiana State University Press, 2007), 236.

[18] For a more complete discussion of this problem, see my “Gender Identity and Nihilism: Some Anthropological Implications of Recent Caselaw,” *SSRN* (October 7, 2019) and “Liberal Androgyny: ‘Gay Marriage’ and the Meaning of Sexuality in Our Time,” *Communio* 33 (Summer 2006).

