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Rights without Limits: Legal-Political Reason and the Shared Logic of Same-Sex ‘Marriage’ and ARTs

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Introduction

My thesis involves the following points: First, the emergence of “gay marriage” and Artificial Reproductive Techniques (ARTs) as realities and ethical, political, and legal issues in our current cultural situation is simply the fruition of a much older cosmological, anthropological, political, and jurisprudential logic, which is now becoming ever more visible as praxis. The development of these two current issues, and the dominant ways of conceiving them, therefore share a common root. To put it more polemically: the current debate about “gay marriage” is already “technological” in its structure and implications; the explosive advent of ARTs is already structurally “gay”; and the dominant ways of conceiving the human person and his world have been implicitly “gay” and “technological” for a very long time.

Second, and as a consequence, the dominant form of public reason—that is to say, political and legal reasoning—in the United States and other Western liberal societies possesses an inner logic that is impervious (and presumably will remain so for the foreseeable future) to the sorts of arguments that would be necessary to explain intelligibly why the civil recognition of same-sex marriage and the technologizing of the begetting and bearing of children are harmful to people and to society. The most impressive evidence for this unintelligibility is the decade-long tendency of U.S. courts to decide that these arguments are not simply weaker than their competitors, but that they lack the first and most essential characteristic of any valid argument, viz. its basic cogency. This is precisely because the dominant form of public reason *itself* reflects the “gay” and technological logic just mentioned. Indeed, this is why the arguments put forward by Catholics and others contrary to these developments increasingly fail not only to win the debate but even to retain public rationality.

Third, therefore, public debate requires that we probe very deeply into the problematic of the person and his place in the world today and that we thoroughly interrogate their meaning for public reason.It is not enough simply to repeat traditional arguments about the proper role of marriage in society (although these arguments are of course crucial), but rather it is necessary to challenge the inner logic and philosophical assumptions that give rise to a problematic form of rationality, effectively nullifying the intelligibility of natural relations, such as those of the sexes and the family.

What follows can only constitute the most cursory outline of these points and some of their implications, but it is important at least to attempt to throw light on them.

Common Underlying Logic

To set us on our way, consider a few words of Benedict XVI, given in an address to the German Bundestag in 2011. He tells the German lawmakers, quoting legal positivist Hans Kelson, that modernity views the world as "an aggregate of objective data linked together in terms of cause and effect."But where this is the case, he continues, the conception of nature is "purely functional, in the way that the natural sciences explain it, . . . producing only functional answers." As such, he tells us, it cannot produce "any bridge to ethics and law."

The passage highlights several notable ideas for our thesis here, but which need to be unpacked. The first of these is the way modernity, in seeking to understand the world, characteristically has abandoned the classical forms of causality, in particular form and finality for natural beings. Regarding the loss of form, the result has tended to be that "parts" rather than "wholes" become the fundamental unit of intelligibility in trying to understand the world. We understand things by understanding the parts that compose them. When the individual parts themselves become the objects of interest, they too are understood in terms of their parts, and so forth, *ad infinitum*. Hence, any given nature is best grasped in terms of a compilation of its parts, the elements, dynamics and pieces that make it up. As Hans Jonas puts it, modernity replaces "the aristocracy of form" with "the democracy of matter." He writes, "If, according to this 'democracy,' wholes are mere sums, then their seemingly genuine qualities are due to the quantitatively more or less involved combination of some simple substrata and their dynamics."[1]But if things are most intelligible when viewed in terms of the parts that make them up, what things *are* must be viewed in the limited terms of the functional relationships of those parts.This is of course where we meet up with Benedict's point.

There are further implications. The conception of reality in terms of functional relationships also introduces a logic of exchangeability into the basis for grasping reality. If something is, or can be made to be, functionally equivalent to something else, then the equivalents are essentially no different from each other in the functional relations making up the whole.

Correlating with this reduction to the functional relation of parts, the object of knowledge is also a project for technical activity. "The simultaneously cognitive and sexual significance of the Hebrew word 'jadah,' 'to know,'" Robert Spaemann tell us, "stands . . . in opposition to the instrumental power to control things, which is how Thomas Hobbes understands this paradigm: 'to know' something means for Hobbes 'to imagine what we can do with it when we have it.'"[2] In other words, the logic of exchangeability is also a logic or invitation to technological dominance. Here then, we also have the tendency to reduce *praxis* to *poiesis*, action to making. Here, then, we see also the loss of final causality at play; in order for us to know by domination we must give things their ends. But this possibility requires that they not already have their own immanent ends. For us to dominate our world, its parts and pieces must be understood as pure facticity.[3] However, if this reduction begins in the idea of a human subject operating on an external object, the human subject quickly becomes an object him- or herself. As such, the person is reduced to his or her parts and functional relations and is therefore subjected to the logic of exchangeability, progressive technological improvement, and production.

The foregoing is also closely related to the characteristically modern division between fact and value.The material object of human understanding, as brute fact and as the sum of its mechanical properties, is valueless until value is added by the human mind and will. If, as Leo Strauss tells us, the basic posture of the ancients is contemplative while that of the moderns is active charity, we presumably have to understand that "charity" has taken on a new cast.[4] It is no longer a grace that structures knowledge and action from its beginning, an interior demand for knowledge and action to be authentic, but becomes an externally imposed moral obligation for an otherwise neutral technical progress. As Jonas says, the moral is no longer part of the structure of knowledge, let alone written into

nature, but rather, it is an external imposition or obligation placed on the way in which physical bits and pieces of the world are used.[5]

Buried not too deeply within this account of nature, of course, is a fundamental angst. It is an angst that what is not produced and in principle controlled by human reason and will is *in*human and at least potentially a heteronomous imposition on freedom and dignity: either by what is lower (the world as brute facts and deterministic mechanism) on what is higher (man's rational organization of his world in freedom); or alternatively, by what is higher (God's externally imposed will) on what is lower (man's autonomy). Rather than experiencing himself and the world within a philosophical and theological horizon of gratuity and gift, man finds himself in an isolated struggle between mastering his world or being mastered by it.

The Problematic of Public Reason

This view of reality underlies and shapes political and legal thought—and therefore what are considered legitimate forms of "public reason"—in decisive ways. In order to see this point, we might begin by considering basic starting points of Thomas Aquinas' theory of law and the political order. When Thomas speaks of human law, he does so in the context of his larger doctrine of law.If civil law is to possess the fullness of law, in fact if it is to *be* law at all, it must be derived from natural law either by what Thomas calls conclusion or determination. Natural law itself is rooted in inclinations: wanting to remain alive, wanting to join with one of opposite sex for the sake of children, etc. As these principles of natural law show, such inclinations presuppose powers of the human soul precisely insofar as this soul is embodied. Hence, we might say, practical reason, which ultimately issues in natural and then civil law, presupposes a robust anthropology, an anthropology that takes within its scope human embodiedness as an expression or presence of the soul in time and space. My simple point here is that civil law, as traced back through natural law and Thomas' anthropology, takes the body into its purview not only as a fact of human existence but as a foundation and principle. We might say that this classical view places the body radically *inside* what we think law, and by extension the political order, *are*.

There is another implication. The starting point of inclination or desire correlates with the idea of perfection or fulfillment, that is to say, with natural ends and finally the natural end of the person as a whole. But to know what perfects or fulfills us requires knowing something about what a human being is. Hence, the central problem for ethics—knowing the human *truth* to which our experience of desire points—demands that we pay attention to anthropology, to what is given. It is not just the *fact* that we have various desires that is important, as the current debate typically assumes. Rather, what is crucial is understanding what those desires stand for, what their proper ends are, and how they can be rationally integrated into life as a whole. Being a man or a woman, for example, offers a universally "visible" starting point for understanding inclination or desire. In other words, the body serves as a sign of the inner human truth of desire. For Thomas, this knowledge constitutes the beginning of law and the political order.It means that law, stripped to its simplest, is nothing other than *a rational order toward human ends presupposing everything properly human.*

Now consider the Oxford legal positivist, H.L.A. Hart. While rejecting natural law, Hart famously allows that there must be what he calls a "minimal content," that is to say, that minimal part of "natural law" that would be acceptable—if only natural law theorists would be chaste enough to so confine themselves. This "minimal content" is itself rooted in the minimalist starting point of modern political reason, that of Hobbes and Locke, seeing the basis of the political in the avoidance of death, either by violence or want.The *raison d'être* of the political and the legal are in other words the facts of human

vulnerability. Hence, the legal and the political orders look to the avoidance of the *summum malum*—death, either through violence or the loss of one's property—rather than the achievement of the *summum bonum*. Beyond this minimum, Hart tells us, the reasons men have for living in society are too diverse to be ranged under one idea of the good.

He briefly engages in science fiction to illustrate his point.What if, he asks, humans were one day to evolve into giant land crabs, with an impenetrable carapace and the ability to synthesize food from the air?Then there would be no reason for law; the lack of vulnerability would render it needless.One might add that, given his starting point, there would also be no reason for political society. Unlike vulnerable humans, such invulnerable crabs would have no reason to quit a Hobbesian or Lockian state of nature. Of course, they could conceivably band together for common projects, but doing so would presumably depend on various sets of them deciding voluntaristically on a contingent goal above and beyond survival. Other than this, what would any of them have to do with each other?

What Hart does not mention, but what we realize upon reflection, is that his science fiction *is* his anthropology; we *are* in fact the land crabs, albeit lacking the invulnerability afforded by the carapace and synthetic capabilities. In fact, to follow the logic, we provide ourselves in the form of law and political order with functional equivalents or substitutes for the carapace and synthetic abilities. Beyond the fact of vulnerability, the basis of society is the contingent purposes of individual men and their particular wants and goals. But because these particular goals are not necessary ones in the way that survival is, they are also not themselves part of the "minimal content." Law, then, is a set of rules necessary to deal with the problem of vulnerability and in addition these further wants and social facts. The anthropology is not so robust as that of Thomas, but it is nevertheless an anthropology, and perhaps it is more robust than Hart and we might at first think.In any case, by implication and tacitly, Hart is telling us what human beings are. But to say what human beings *are* is inevitably to imply *what is good for them*. For Hart, like many other political and legal philosophers of our day, what is good for people is to decide for themselves what is good for them: it is the sheer exercise of freedom in a world of determinisms. The human vocation is to give oneself a vocation. Indeed, Hart shares this basic anthropology with other eminent thinkers of our day, such as John Rawls and Ronald Dworkin.

What more can we say about this anthropology? Our discussion of Hart shows that liberal public reason is not rooted in an anthropology that includes the body as a principle necessary to understand what civil law is, but only as a factual and in principle contingent reality with which law must deal. In effect, legal reasoning can then only see the body as part of the sum total of social facts, as one of its contingent objects. We could put it this way: if the classical theory of Thomas sees the order manifested within the body as a principle radically immanent within the idea and order implied by human law, the political order, and therefore any adequate form of "public reason," Hart sees the body as a contingent and factual matter standing "outside" the idea of law, albeit as an important aspect of the sum total of social facts making law necessary and desirable. Similarly, if for Thomas man's final destiny can only occur in an eschatologically elevated body without which he cannot be whole, for Hart man's destiny may very well be in technological substitutes for the body in its parts and functions.

What difference does this seemingly subtle distinction make for legal and political reason? The difference is that between nature and facticity. For Thomas, human law is only law insofar as it gives rational order based on everything that it is to be human. For Hart, law most fundamentally serves as protection in view of vulnerability. But for Hart, everything else we might say about the essentially human is up for grabs. Clearly this vulnerability is related to our embodiedness, but only in a contingent and factual way. The body does not offer us signs of what is essentially true about humans and their destiny. The difference in other words is the difference between seeing physicality as offering

ethical foundations, and seeing physicality as offering merely the material conditions with which ethics, law, and the political order must deal as external objects and projects. But such a notion of public reason cannot deal with the body as indicating anything more than its functional relations. That the body would be this way or that way makes no difference to what law is as a form of public reason, but only to the factual or empirical conditions with which it must deal. The sort of functional equivalency mentioned a moment ago is therefore tacitly endemic in this form of public reason. Hence, when it comes time to make publically intelligible arguments that depend for their foundations on being able to say what a human being is or what the meaning of human desire or the significance of the body's sexual dimorphism are we can only speak in terms that presuppose a framework of the contingently factual and functional.

Those social facts do of course—as things perhaps stand now, or as at least as they stood in Hart's day—include that human beings are divided into male and female, that children normally or often result from their union, that some sort of stable relationship should be provided for the extended period of nurturing and education humans need. But again, these are only social facts and are therefore, in principle, contingent, functional, exchangeable with equivalents.

If human goals are too diverse to be ranged under a single conception of the good, the purpose of law and the political, beyond the minimal content, is to offer a social context in which these diverse goals may be realized insofar as doing so is not parasitic on others' vulnerabilities. Dworkin calls this notion of freedom, "freedom as independence," and it is the basis for rights. Likewise Rawls defines political freedom as "an equal right to the most extensive basic liberty compatible with a similar liberty for others."[6] Human welfare, then, must be rooted in the rights of the individual to develop these goals, to self-legislate. The functionalist view of nature, by its very logic, is only the flipside of human freedom as indifferent spontaneity. Such rights are necessarily without limits because they are necessarily without interior order. On the other hand, perhaps they are *not* without limits! Rather, the limits are only externally imposed ones, those of competing external positivisms. Indeed, this notion of freedom leaves us with a series of positivisms. There are the positivisms of individual wills and freedoms to self-legislate, and there is the positivism of law and the political order. It is public reason's destiny, then, to mediate between these in increasingly fine and detailed ways. In doing so, law must also increasingly legalize or regulate natural relations, such as those of the family, in view of protecting freedom as independence. It is these natural relationships and communities that constantly threaten to order freedom prior to the individual's autonomous act of choice. They threaten to give us a vocation before we are able to give one to ourselves. They become therefore sources of oppression. But if the human and personal relations signified by the body are only factually contingent, the artifacts of evolutionary biology, then they also to that extent are drained of their genuinely human significance insofar as human consciousness and freedom rise above the mindless interplay of force and matter. Such relationships, and the natural communities to which they give rise, can then be legitimately policed by the state. These relations and communities—for example, the marital and familial communities—are then fragmented into two parts, the biological and the legal halves. But neither of these, nor both together, constitutes natural relations or communities.[7]

Of course, the whole purpose of this positivist approach is to promote well-being for society and people.This is especially true of those whose rights must be exercised on their behalf, due to incompetency, such as children. But how do we know what well-being is? According to the anthropology we have been discussing, the answer would have to come in the form of the empirical and functional; we would look for a quantifiable measure of outcomes. But how do we know that we are measuring the right things or that what we are measuring is susceptible to measurement? There is no way to answer that question, except to fall back on the functional and empirical, which of course

begs the question.[8]

In sum then, if the body is merely a contingent reality, an aspect of human life, with which law must deal, then it is also infinitely plastic as a social fact. It can have no inherently or given human meaning, but only the meanings we choose to give it through our acts of freedom. Prior to these acts of freedom, it just is. Technological manipulations of or even replacements for the body and its parts have no further implications for law than their generating new social facts with which law must deal, policing competing freedoms and interests. But the law's central meaning and purpose are not implicated by these manipulations or substitutions. These results have profound implications for what we think legitimate modes of public discourse are—that is to say, what appears to be intelligible as public reason.

Unintelligibility of the Arguments

Where does this leave us with respect to our narrower question of the advent of same-sex marriage and ARTs and their relationship? Consider the arguments that have been put forward on either side of the debate concerning same-sex marriage. To the argument that marriage has always had something to do with procreation, the answer is that traditional legal views of marriage are both overly broad (opposite-sex couples who are sterile or simply choose not to have children are allowed to marry) and under-inclusive (same-sex couples who do have children by means of modern ARTs or otherwise are excluded from marriage). In other words, a same-sex couple is no different from a *sterile* opposite-sex couple, just as a same-sex couple using ARTs is no different than a *fertile* opposite-sex couple.

To the argument that the state has an interest in using its marriage laws to promote the optimal family context for nurturing children, which includes both a mother and a father, the response has been that this argument perpetuates antiquated views of gender roles, that the sexes as a matter of state policy are interchangeable, and that such an argument effectively implies a reinstitution of the common law doctrine of coverture.

Again, it is worth pondering for a moment what the courts actually have and have not said: over the last decade-plus, they have not said that these traditional arguments are valid but weaker than their competitors, but rather that these traditional arguments fail to meet even the most minimal standard of legal and political argumentation, its basic rationality. The courts are saying that these arguments are essentially incoherent as valid forms of public reason. The implications are, needless to say, breathtaking.

Supporting these responses is an ideology—in fact a definite and radical anthropology—that has replaced the polarity between male and female with a new polarity, that between "orientations." As the courts' treatment of the traditional arguments indicates, the central feature of this shift is to emphasize sameness, exchangeability, or indifference between the orientations themselves and between men and women. Even the conceptual duality of homosexual/heterosexual or same- and opposite-sex couples expresses this shift. What the concept of orientation cannot but help to express is that the order inscribed in the body as male or female is indecisive in terms of the development of social and personal identity. Rather this identity is given by the orientations themselves, either by an act of freedom set over and against a biologically deterministic world of functionality or (more commonly now) by a deterministic fixing of the orientation itself as an ersatz nature. In either case, the body is unavailable precisely as evidence for discovering the truth of desire.

Rather, the concept of orientation necessarily functionalizes the body, because the sexual desires and acts that define the orientation must nevertheless depend on the body's sexual order, which is the order of the male and female to each other. Therefore the body's natural ordination must be drained of

its personal meaning; it must be seen as a merely physical or material or biological substrate for action, which is only the necessary condition for sexual acts of whatever type to occur.If the male and female bodies are then functionally equivalent in the sexual act, and therefore also in the development of personal and social identity, then it is only fitting that this functional equivalency would further express itself—would be augmented—by the technical functionality brought to bear on human relationships by ARTs.

On the other hand, if the functional equivalencies brought to bear by ARTs tell us that the body can be reduced to functional relations, then it is only consistent that we would be indifferent to male and female as a matter of public reason. To say that the techniques of the lab are equivalent to the conception and bearing of a child by means of the union of husband and wife is also to say that the natural union of man and woman is the equivalent of the techniques of the lab. Or rather, we are then committed to a logic that suggests that the natural union of man and woman is a technically inferior version of ARTs, a version without the same potential for quality control, for example. To say that mothers and fathers are simply interchangeable is to say that their obvious differences are unimportant and contingent features of a subpersonal material context for human being and action. Or to once again state it more provocatively, the logic of same-sex marriage is already structurally technological and the logic of ARTs is already "gay," and the dominant strands of liberal western thought concerning the legal and the political are both.

Again none of this allows for an intrinsic "bridge to ethics," in the words of Benedict quoted above.The legal, the ethical, and the political can only come as external standards, to be applied from the outside to new technical processes, regulating how they are used, rooted in a mediation of the positivisms of competing rights. In fact, a technological domination of the body and the world becomes a kind of moral imperative, since the inevitable emergence of drawbacks to our techniques and manipulations only provokes us to their further refinement.

Deepening Responses

If the line of argument up to this point holds true, then it has deep implications for the way that we should respond not only to the precise issues of gay marriage and ARTs, but to many, many other issues as well.Repetition of the standard arguments is unlikely to do much good. Such arguments will simply fall on deaf ears, or appear uncivil and bigoted, as we are seeing throughout the West and westernized countries, and particularly in our courts, the media, and public discussion. Our objections are bound to appear only as an expression of private opinion, having little to do with genuine public debate, or in fact appearing as an unwelcome intrusion into what is conceived as neutral public discourse.

More insidiously, however, if we simply fall back on arguments that subtly share in the empirical/functionalist starting points of modern public reason, then, while we may win a battle here or there, we will also invite an acceleration of the current reconstitution of the social understanding of sexuality and the begetting and bearing of children.For example, if we begin by saying, in relation to an ethical assessment of ARTs, that "embryo science tells us two important things about human embryos: what they are, and when they begin,"[9] we have already given significant ground to the idea that an embryo can be understood in terms of the functional relationships of its parts. Once this occurs, our further arguments concerning the technical manipulation of those same embryos will have taken on a significant liability. We will be left arguing our point on the basis of a logic of rights, which remains nevertheless unsupported by a metaphysics of the person. Or when we try to find common ground with our dialogue partners by arguing that the preservation of marriage as the life-long union of a man and woman ordered to the family ought to garner support even from within very different comprehensive

doctrines of the good because the "*the nature of society* and, therefore, [of] what *naturally* makes human persons to be social beings . . . are not genuinely 'metaphysical' but empirical questions,"[10] we are staking our claim on an insufficiently solid foundation to support the important differences we seek to establish with the doctrine of those dialogue partners and therefore insufficient grounds for why anyone should think that our position is the better one. Or again, when we seek to make what is obvious to us seem obvious to our opponents as well by framing the social significance of marriage and family as "basic empirical truths," or "the basic facts of our existence as real human beings," or "basic empirical facts about the reproductive nature of the marital union and about the family," we risk strengthening functionalism and its implications for functional interchangeability.[11]

In short, where our starting points do not take the debate to the deeper level, by which I mean a more robust anthropology and a more profound metaphysics, then the response to our empirical findings of harm is likely to be renewed commitment to further technical development to mitigate those harms and, simultaneously, new initiatives, policies and laws intended to mitigate the harms now conceived as the product of bigotry and privatistic incursions into legitimate public reason.In other words, we risk being reduced to silence.

[1]*The Phenomenon of Life: Toward a Philosophical Biology* (Evanston, Ill: Northwestern University Press, 1966), p. 201.

[2] "Ende der Modernität?" in *Philosophische Essays* (Stuttgart: Reclam, 1994),

232–60, quotation taken from an unpublished English translation by D. C. Schindler, "The End of

Modernity," 4.

[3] Cf., e.g., Leo Strauss, *Natural Right and History* (Chicago, 1965), pp. 174-75.

[4]Cf. *The City and Man* (University of Chicago Press, 1978), p. 3.

[5]*Phenomenon of Life*, pp. 195ff.

[6] *A Theory of Justice*, p. 60.

[7] One ironic result is that individual rights tend in fact to become more and more limited by further and further extrinsic definition, as the state increasingly attempts to relativize what are now conceived as merely "biological" relations.

[8] To be very clear, my point is not at all that statistical and other empirical evidence is not valuable for understanding what is going wrong with the sexes, marriage, and the family in our current social situation. Rather, my point is only that, at the end of the day, empirical knowledge—that is to say, our systematic experience and observation of the world—will always end up begging the most important human questions, so long as it is severed from a deeper metaphysics of the person.

[9] Robert George and Cristopher Tollefsen, *Embryo: The Defense of Human Life* (Doubleday, 2008), p. 7.

[10] Martin Rhonheimer, "The Political Ethos of Constitutional Democracy and the Place of Natural Law in Public Reason: Rawls's 'Political Liberalism' Revisited," *The American Journal of Jurisprudence* 50 (2005): 25.

[11] Ibid, at 43, 30, and 28.

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