

PUBLIC REASON AND THE
ANTHROPOLOGY OF ORIENTATION:
HOW THE DEBATE OVER “GAY MARRIAGE”
HAS BEEN SHAPED BY SOME UBIQUITOUS
BUT UNEXAMINED PRESUPPOSITIONS

DAVID S. CRAWFORD

“To already be something before an act of freedom
suggests to the modern mind a loss of freedom rather
than its ordination.”



INTRODUCTION

With the US Supreme Court’s *Obergefell* decision,¹ arguments in opposition to the civil recognition of “same-sex marriage” have lost the legal debate in America. They also seem to be losing or to have lost the political debate both in America and other liberal societies.

The problem is not that there are no arguments. It is that judges, legislators, journalists, and regular citizens have increas-

1. *Obergefell v. Hodges*, 576 U.S. ___ (2015) (hereafter cited as *Obergefell*).

ingly found those arguments not only weak but in fact *incoherent* from the standpoint of public reason. That the arguments are incoherent then leads to the further conclusion that they must be based on bigotry and hateful intolerance. This development naturally puts defenders of the traditional idea of marriage on the defensive. It is especially unsettling for Catholics, who feel they have a long tradition of reasoned public discourse based on natural law principles. Typically, they respond with increasing frustration, often by means of a simple repetition of the usual arguments, but with greater stridency.

The whole situation may seem a bit surreal. Granted, if the state establishes an institution, with benefits and burdens, it must determine the requirements for access on a rational basis from the standpoint of valid or legitimate state interests. And of course the bar is raised where the institution acknowledges fundamental rights, such as access to civil marriage. Nevertheless, few would have doubted until recently at least the general cogency of the traditional arguments. Those arguments at first blush appear sound enough: the man-woman couple is the basis of the continuation of society over time; it generates the familial environment in which the child can best flourish; the child should optimally have both a mother and a father to develop a healthy and balanced relationship to both sexes; and so forth. For these reasons, these arguments conclude, the state has a strong interest in regulating and preserving marriage's traditional meaning. Indeed, some argue, the state would have no interest in regulating marriage were it not for its connection with the child. All of these arguments were in fact reintroduced by the dissenting justices in *Obergefell*.² It is striking, then, that

2. For example, Justice Roberts: "This universal definition of marriage as the union of a man and a woman is no historical coincidence. . . . It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. . . . The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond" (*Obergefell*, 45).

these are precisely the arguments that have been found—repeatedly at this point—to fail at the basic level of public and legal rationality, despite the fact that they seemed so irrefutable just a short while ago.

How have we come to this impasse? How could such reasoning fail the most basic test—its legal cogency? What are the controlling principles and assumptions of the reasoning that cannot see this? Complete answers to these questions are no doubt complex. My discussion will be limited to some anthropological implications of the “gay marriage” debate for the meaning of sexuality, desire, and love for personal and social identity.

1. THE SAMENESS ARGUMENT

Clues for approaching our dilemma may be garnered not only from *Obergefell* itself, but also from the many court decisions that paved its way. Of these, two of the most instructive are the 2010 *Perry* decision of a Federal District Court in California³ and the 2003 *Goodridge* decision of the Massachusetts Supreme Court.⁴

In rejecting the traditional arguments mentioned above, both courts begin by observing that it has never been a requirement of marriage that couples actually have or plan to have children, or even that they are capable of doing so. At the same time, they note, some households headed by “same-sex partners” do have children, whether from previous relationships, legal adoptions, or various sorts of “reproductive technologies,” such as surrogacy or artificial insemination. Further, some “opposite-sex” couples do not have children, either by choice or from infertility. Hence, drawing a legal demarcation for purposes of marriage around “opposite-sex couples” because of their potential ability or decision to have children generates a simultaneously under-inclusive and over-inclusive legal classification. Consider the *Perry* case’s way of addressing this question:

3. *Perry v. Schwarzenegger*, 721 F. Supp. 2d 921 (2010) (hereafter cited as *Perry*), invalidating the referendum vote in favor of Proposition 8, which had defined marriage as between a man and a woman.

4. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (hereafter cited as *Goodridge*), overturning the state marriage law limiting marriage to the man-woman couple.

The court asked the parties to identify a difference between heterosexuals and homosexuals that the government might fairly need to take into account when crafting legislation. . . . Proponents pointed only to a difference between same-sex couples (who are incapable through sexual intercourse of producing offspring biologically related to both parties) and opposite-sex couples (some of whom are capable through sexual intercourse of producing such offspring). . . . Proponents did not, however, advance any reason why the government may use sexual orientation as a proxy for fertility or why the government may need to take into account fertility when legislating. . . . No evidence at trial illuminating distinctions among lesbians, gay men and heterosexuals amounting to “real and undeniable differences” that the government might need to take into account in legislating.⁵

The conclusion then seems inevitable: while the state has a valid interest in stabilizing familial relations for the sake of children, this concern would be better met by opening marriage to all couples heading households with children, regardless of the parents’ “orientation.”

However, this question of the relationship between marriage and children is filtered through a more basic part of the courts’ arguments, viz. that in fact marriage can no longer be considered ordered to the child. Rather, marriage is ordered to the enduring relationship of the spouses and their life together, which may or may not include children, as the spouses choose. The *Perry* trial court records extensive expert testimony concerning the evolution of marriage’s meaning over time, while no acceptable or believable expert testimony could be produced to show procreation’s continuing essential link to marriage. Professor Nancy Cott, a Harvard historian and expert on marriage in America, testified that if marriage was previously considered a way of linking parents and children or to assure paternity, it now centers on the formation of a household and the common life of a couple.

Why would the state have an interest in licensing, regulating, and promoting marriage if it no longer possesses a necessary or intrinsic link to the child? Because it stabilizes households

5. *Perry*, 997.

and the intimate relations on which they are founded, and this in turn promotes economic prosperity, personal and social well-being, and security in times of vulnerability, whether or not children are part of the picture. Indeed, the *Goodridge* court tells us that the “‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.”⁶

As the foregoing suggests, once procreativity is no longer essential to the idea of marriage, a crucial element of the argument for “gay marriage” is made available. This is the apparent sameness of “opposite-sex” and “same-sex” couples. Because “same-sex couples” are essentially like “opposite-sex” couples, they are also similarly situated for civil and legal purposes. Evidence of this sameness runs throughout the courts’ opinions. The *Perry* court cites extensive expert testimony, from a parade of sociologists, psychologists, and others to support the idea. Both courts note that the gay or lesbian plaintiffs before them have remained in long-term, “committed” relationships. Both courts emphasize a commonality of the hopes and desires between “same-sex” and “opposite-sex” couples. Both courts regard love and enduring companionship as the basis of the relationship. The *Goodridge* court, at least, emphasizes the common middle-class standing of the two types of couples. The argument concludes that the question of “gay marriage” can be understood primarily in terms of the assimilation of so-called same-sex couples into existing social structures and institutions. Indeed, it implies that the assimilation can occur without substantially changing the authentic meaning or significantly disrupting those structures and institutions. As the *Goodridge* court put it, “the plaintiffs seek only to be married, not to undermine the institution of marriage.”⁷ These points are recapitulated in *Obergefell*.

This idea of sameness then mediates further consideration of the meaning and place of procreativity. While “same-sex couples” cannot produce offspring genetically related to both of them through their sex acts, this fact in no way distinguishes them

6. *Goodridge*, 962.

7. *Ibid.*, 965.

from sterile “opposite-sex couples.” Or alternatively, “same-sex couples” who do employ reproductive technologies are in no pertinent way different from fertile “opposite-sex couples.” Once this essential sameness is accepted, it becomes clear that the two types of couples really are just that: two parallel types. They are therefore essentially equivalent and similarly situated with respect to their social meaning and the status of their interests.

But what about the argument that the optimal conditions for raising children requires the presence of both a mother and a father? Importantly, the argument from sameness feeds back into this question as well. For the concept of sameness is not only brought to bear on the differing but equivalent types of couples, but more fundamentally on the sexes themselves. This point is part of the deeper logic of the entire debate: the relationship between two men or two women is equivalent (anthropologically) to a relationship between a man and woman precisely because the sexes are essentially the same (anthropologically). The sexes differ only in outward, biological aspects. Hence, to the claim that children need both a mother and a father for ideal development, the *Goodridge* court responds that such an argument smacks of “gender stereotyping,” of the false prejudice that men and women have different roles in the family, which the state long ago rejected as a matter of policy. As *Perry* concludes,

Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted.⁸

Again, extensive expert testimony was offered to support this proposition, while hardly any expert testimony was offered for the opposite viewpoint. According to *Perry*, the argument that having both a mother and father is optimal implies also a return to the legal differentiation between the roles of husband and wife under the universally rejected common law doctrine of coverture.⁹ In short, to say that men and women are different in some unspecified way (to specify opens one to the charge of “ste-

8. *Perry*, 981.

9. See *ibid.*, 992–93.

reotyping”) implies a return to institutionalized sexism. These arguments are similarly taken up again in *Obergefell*.¹⁰

Once these arguments have been eliminated, the opposition to civil recognition of “same-sex marriage” can only be based on moral disapproval of homosexuality. But the courts have rejected the idea that the majority’s moral disapproval can suffice as a legitimate basis for state laws limiting fundamental rights. Rather, state laws must be rationally related to a legitimate state purpose, and mere moral disapproval cannot serve as such a purpose.

An Illusion

This last point concerning the legal value of the moral disapproval of a majority suggests another theme in the courts’ reasoning—the sharp distinction between public reason and private morality. The claim of the traditional arguments’ irrationality is of course made in a civil and legal context. The courts emphasize repeatedly that they are only addressing “civil marriage,” that is to say, marriage insofar as it is a juridical creature of state legislation. This limitation allows them to say that they are not mandating a moral position, but only making a judgment about what the law requires. “Our obligation is to define the liberty of all, not to mandate our own moral code”¹¹ is a claim piously repeated by the courts. *Obergefell*, for example, tells us that

[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.¹²

10. See, for example, *Obergefell*, 15.

11. *Goodridge* at 312 and the concurring opinion of Justice Greaney at 349 (both citing *Lawrence v. Texas*, 539 U.S. 558 [2003]).

12. *Obergefell*, 19.

So the courts appear at least to acknowledge the legitimacy of citizens' deeply held convictions on both sides of the "gay marriage" issue. The implication would seem to be, then, that the issue of "gay marriage" transects two distinct domains—the public and the private—and that, if the traditional arguments are not civilly or legally rational, they may be rational—and therefore morally sustainable—in contexts other than the civil or legal one, where broader religious and moral starting points are relevant and may be decisive.

The courts seem, therefore, to offer a kind of settlement of the issue, by means of the distinction between the public and the private. But this "settlement" trades on an ambiguity in the idea of "tolerance." The ostensibly non-moral notion of tolerance proffered by the courts would treat the concept as a merely legal one. It would have us suppose that tolerance means governmental neutrality to two positions, a neutrality that would leave in place a kind of *modus vivendi* between irreconcilable worldviews. The question then is whether tolerance really can be thought of in this way, or whether it does not slide into another sense of tolerance, one which is thoroughly moral. The latter would see tolerance not as an agreement to disagree for practical and political reasons, but as signifying an imperative for the acceptance of diverse views and ways as equally valid.

This second version of tolerance, then, offers a standard for judgment concerning the proper disposition one has toward all others within society. Anyone who does not accept this moral standard sets himself beyond the pale of legitimate public discourse. Where this happens, a given private position might be politically and legally "tolerated" on a conditional basis due to prudential considerations, such as preserving countervailing principles of autonomy (e.g., "religious freedom") or the undesirability of intruding too overtly in domestic or ecclesial matters. This second version would nevertheless seek gradually to instill tolerance as a personal and public virtue, one that would dictate a moral and finally anthropological position regarding questions such as that of "gay marriage." It would seek to inculcate not only a begrudging acceptance of the *de facto* presence of an opposing worldview, but the actual embrace of the new idea of marriage—that "same-sex" and "opposite-sex" marriage are essentially and morally equivalent and should be accepted as such.

If the courts at times speak as though they have the “merely” legal notion of tolerance in mind, in reality of course they have the second, and necessarily so. This is because tolerance in the first sense can only be an illusion in issues that involve beliefs about vital human matters. These are matters that necessarily involve our deepest convictions about what humanity is. Disagreement on such points cannot help but touch on the foundations of culture and society. In a moment we will see that an anthropological shift is underway. But, for now, if the arguments against “gay marriage” are publicly irrational, that must necessarily mean that they are also publicly bigoted. But bigoted public arguments are in fact immoral public arguments, and this means that the private position will always be at least publicly immoral. But can there be a position that is publicly immoral and yet privately moral? If issues such as “gay marriage” necessarily imply a certain conception of society, then rejection of the conception will appear to be antisocial, uncivil. And so it turns out that the concept of “tolerance” is in fact a demand of conformity in moral and anthropological belief.¹³

In short, the tolerance that *really* is proffered is provisional and contingent, tailored to accommodate what is conceived as a significant but shrinking segment of society that holds a publicly unacceptable private bigotry. Where over time it emerges that this bigotry has not in fact disappeared, more aggressive measures will be needed, which will include more explicit legal and educational components, as well as simple ostracism.

2. REASON AND NATURE

In the minor Platonic dialogue *Minos*, Socrates characterizes law as “wishing” to be “the discovery of what is.” The sense of the statement is not simply that law *should*—if it is to live up to its calling, if it is to be good law or laws—embody the true or the just. That would be only a positivistic and finally moralistic in-

13. Even as the court insists on its reverence for “sincere, personal” beliefs concerning traditional views of marriage, it refuses to grant that these can have any merit for public life, indicating that a policy based on such beliefs would be tantamount to a violence against the dignity of same-sex couples (see *Obergefell*, 27).

terpretation. Rather, Socrates suggests a deeper point, viz. that even contradictory notions of the just express something of the truth. All laws tacitly wish therefore to be the discovery of what is, even if all fall short by varying degrees in this discovery. There is another side of Socrates's formulation, however. Theories of law, legal systems, and particular laws, precisely in falling short of the fullness of the true or the just, nevertheless always express or mediate what a given culture or society *thinks* is true, even when the legal order outwardly rejects any such pretensions. In other words, law always implies (indeed, cannot avoid implying) a truth claim about the human person.

Classical notions of law tend to be clear about law's relationship to them. They begin with the basic human elements of inclination or desire and a primitive knowledge of the good. In part, this desire and primitive knowledge of the good are rooted in our embodiedness. Our desire for fully human life and love can only be for life and love as expressed and experienced by living, embodied beings. As such, this beginning point for law presupposes a robust anthropology. Not only is the body in part the source of desires that make reason practical, and on that basis a source of law, it also serves in its very visibility as a sign of human origins and destiny. It therefore serves as support and guidance to help us to be human in the fullest sense, however infinitely varied the instantiation of our lives might be. According to this classical approach, then, the truth claims about ultimates—such as the natures of the person, the body and physicality generally, freedom, and society—are fairly manifest. Law so conceived clearly and explicitly mediates an idea about “what is.”

The legal developments from our own day we have been discussing also mediate a claim about what is, although the courts would seem to believe they are doing no such thing. These tacit truth claims about the human person nevertheless dictate the sort of rationality thought to be coherent for legal authority. Of course, these implicit truth claims do not come out of a void. Rather, they represent the general outlook of deep currents in modern thought and therefore tendencies whose roots are centuries old. Consider the following passage describing this outlook, as it is represented in Hobbes, from Leo Strauss's *Natural Right and History*:

We understand only what we make. Since we do not make the natural beings, they are, strictly speaking, unintelligible. According to Hobbes, this fact is perfectly compatible with the possibility of natural science. But it leads to the consequence that natural science is and will always remain fundamentally hypothetical. Yet this is all we need in order to make ourselves masters and owners of nature. Still, however much man may succeed in his conquest of nature, he will never be able to understand nature. . . . There is no natural harmony between the human mind and the universe.

Man can guarantee the actualization of wisdom, since wisdom is identical with free construction. But wisdom cannot be free construction if the universe is intelligible. Man can guarantee the actualization of wisdom, not in spite of, but because of, the fact that the universe is unintelligible. Man can be sovereign only because there is no cosmic support for his humanity. He can be sovereign only because he is absolutely a stranger in the universe. He can be sovereign only because he is forced to be sovereign. Since the universe is unintelligible and since control of nature does not require understanding of nature, there are no knowable limits to his conquest of nature.¹⁴

This striking passage captures an important ambiguity at the heart of the modern project. The new form of knowing and reasoning Strauss describes tends by its very logic toward a constructive and technical approach to the world. The knowable is the makeable, according to the formula *verum quia faciendum*.¹⁵ To know the world, in other words, is freely to construct it. But to be entirely free in this regard, the world must be drained of its inherent meaningfulness. Hence the “unintelligibility” of things in themselves. Here we find the fundamental nihilating character of modernity’s main currents of thought at their sources. Knowledge and reason concern not things in themselves but their mechanical properties, their external relations, extension, mass, force, etc. At the same time, this concept of knowing and reasoning gives birth to the modern narrative of inevitable and

14. Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1950), 174–75.

15. See Joseph Ratzinger, *Introduction to Christianity*, trans. J. R. Foster (San Francisco: Ignatius Press, 1990), 31–35.

perpetual technical progress and development, the ever-greater conquest of nature (“no knowable limits”).

The implication for freedom and intellect, then, is that they are something set apart from the physicality even of the body. But where freedom is set aside from reality as given, it becomes *indifferent* freedom, freedom without interior ordination, freedom without a given end; where intellect is set aside from material reality, it views the world as only an object with its mechanical functionality and exterior and purely efficient causality. The more exhaustively meaningful and value-laden the world, the less room there is for absolutely “free construction” not only of our world but of ourselves. This exaltation of freedom is matched, however, by an angst concerning its possibility in a world thought of in mechanistic terms. Hence, we find an oscillation between absolute freedom as the radical source of human dignity and a despairing doubtfulness of the concrete possibility of that freedom in the real world. This oscillation is well represented in a passage from Canadian philosopher George Grant:

[W]here the political liturgy is full of appeals to the individual in his freedom to make society, the scientific analysis of society and individuals is centered around the principle of a complete determinism. . . . We assert “scientifically” that human conduct can be absolutely predicted and therefore controlled; as individuals we believe ourselves to be free in the most absolute sense, as the makers of our own selves and our own values.¹⁶

Now, of course, the question of “gay marriage” especially raises the question of the body in relation not only to the person, intellect, and freedom but in relation to society and law. The body is unavoidably part of the cosmos and participates in its mechanical properties. Insofar as physicality is seen as a threat to freedom, no part of it could threaten more than the body itself, which not only operates beyond and outside indifferent freedom but also—in its very visibility and personal recognizability—situates and determines personal identity. The body is

16. George Grant, “Value and Technology,” in *Collected Works of George Grant*, vol. 3, 1960–1969, ed. Arthur Davis and Henry Roper (University of Toronto Press, 2005), 227–44, at 234.

both part of the heteronomous world of mechanism, and is also the expression of personal identity to the human community as a whole. Progress would ultimately need both to liberate the body by technical means from its limitations and defects (i.e., to make the body a better mechanism and a product of human freedom) and also to liberate the “self” from the body insofar as it represents the mechanical properties of physicality so conceived.

Legal Reasoning

These developments of course have had profound implications for the deep structure of public and legal reason. Statements of Benedict XVI in an address to the German Bundestag are helpful in pinpointing some of these implications. He begins by noting that unlike most great religions, Christianity has never claimed that revelation is or should be a direct source of civil law. Rather, Christianity has always “pointed to nature and reason as the true sources of law—and to the harmony between objective and subjective reason, which naturally presupposes that both spheres are rooted in the creative reason of God.” He goes on to speak of “the two fundamental concepts of nature and conscience, where . . . reason is open to the language of being.” Modernity’s tendency toward legal positivism, on the other hand, demands “an unbridgeable gulf” between “‘is’ and ‘ought.’” If nature

is viewed as “an aggregate of objective data linked together in terms of cause and effect,” then indeed no ethical indication of any kind can be derived from it. A positivist conception of nature as purely functional, as the natural sciences consider it to be, is incapable of producing any bridge to ethics and law, but once again yields only functional answers.¹⁷

The basic assumptions about nature (creation) and its reducibility to “an aggregate of objective data linked together by cause and effect” and to its purely functional aspect are not only

17. Benedict XVI, “The Listening Heart: Reflections on the Foundations of Law” (address to the Bundestag, Berlin, September 22, 2011), https://w2.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html.

characteristic of the jurisprudential thought form known as legal positivism, but are the pervasive presuppositions of modern legal theory *tout court*. In assuming the “functionalistic,” mechanistic meaning of nature, law must also, if it is to be human, be a pure construction of freedom. Where it looks to what is, it will only be able to consider the human person in terms of the logic of functionality and mechanism.

It is significant that the only evidence and arguments deemed legally valid, as shown by the *Perry* court’s reliance on expert testimony by academics in the human sciences of sociology, psychology, economics, history, and so forth, each modeled on the natural sciences, are those that view “what is” according to the model of functionality and mechanism. Arguments of a more explicitly philosophical-anthropological nature are not legitimate forms of legal argument. We see in the sameness argument precisely this presupposition about functionality or mechanism as the source of knowledge about what is. At the same time, as we have seen, this functionalistic-mechanistic view of nature and being has implications for what we think freedom is. If human dignity lies chiefly in the fact of personal freedom, then the primary goal of law will be to liberate the subject as far as possible for self-invention.

Everything that has been said thus far leads to the peculiarly modern difficulty in integrating human freedom and material reality. We see this tendency nowhere more powerfully than in modernity’s liberation of human ends and freedom from the natural, particularly as these might be expressed by the body. Consider H. L. A. Hart’s famous rejection of natural law, in which he nevertheless grants a “minimum content” of law, viz. security against violent death at the hands of others and at least some minimal property rights. Even this minimum content, however,

depends on the fact that in asking what content a legal system must have we take this question to be worth asking only if we who consider it cherish the humble aim of survival in close proximity to our fellows. Natural-law theory, however, in all its protean guises, attempts to push the argument much further and to assert that human beings are equally devoted to and united in their conception of aims . . . other than that of survival, and

these dictate a further content to a legal system (over and above my humble minimum) without which it would be pointless. Of course we must be careful not to exaggerate the differences among human beings, but it seems to me that above this minimum the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is “necessary” in this sense.¹⁸

For Hart, law is a human construction in view of vulnerability in the contingently factual world, from which natural teleological and formal causality have been subtracted. This fact is born out by Hart’s discussion of the aims of man in society. Beyond the fear of death, the most basic passion and the one to which both Hobbes and Locke had referred, Hart maintains that our purposes for living in society are too diverse to be a necessary basis for law. Similarly, John Rawls tells us that “[h]uman good is heterogeneous because the aims of the self are heterogeneous. Although to subordinate all our aims to one end does not strictly speaking violate the principles of rational choice . . . it still strikes us as irrational or more likely as mad. The self is disfigured.”¹⁹ If the contractual foundation of society is founded on the fear of death, it makes sense that in order to maximize self-realization we must minimize natural order. Indeed, “ends” are reduced to personal goals or aims. The law’s primary purpose then, above and beyond securing person and property, is to maximize the freedom for self-expression and determination. What is most important remains unstated but nevertheless obvious: to root law in nature would be to submit human freedom to what has now been reduced to the purely functional and mechanical. In such a world, law must be pure construction if it is to be rational and human.

On the other hand, Hart’s most important detractor, Ronald Dworkin, introduces legal principles of justice, which he argues underlie law in its very meaning. But Dworkin’s response to legal positivism introduces only a liberal notion of “natural

18. H. L. A. Hart, “Positivism and the Separation of Law and Morals,” in *The Philosophy of Law*, ed. R. M. Dworkin (Oxford: Oxford University Press, 1977), 17–37, at 36.

19. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 554; cited in Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988), 337.

law,” one that is rooted in rights and indifferent self-determination. Here again we find the tacit presupposition that to envision a connection between law and nature would be to submit the legal subject either to the mechanical properties of reality or to the arbitrary acts of the will of another (such as a legislative majority). The underlying principle is that of “equality,” or more specifically, the right to “equal concern and respect.”²⁰ But equality here is conceived only in terms of the range of individuals’ free self-determination. It can have no root in the common dignity we possess in the very structures of our being.

Characteristically, “equal concern and respect” correlates with a fairly standard notion of the meaning of the liberal political and juridical order: politics, laws, institutions, and actions in the public order must be “independent of any particular conception of the good.”²¹ In a political and juridical world so defined, an underlying emphasis on the self-creation of the moral subject controls. And so, Dworkin is only what we might call the flip side of Hart. If Hart can only envision law as a human construction abstracted from natural principles, Dworkin seeks to found law on preexisting principles of justice, but principles that are rooted only in individual self-interest and indifferent freedom. As with Hart, Dworkin’s principles presuppose the dichotomy between freedom and nature on which the liberal order is founded.

These basic jurisprudential assumptions can be seen in the way decisions are made in courts such as those we have been discussing. Consider on the one hand, the famous and influential passage from the Supreme Court’s *Casey* decision, a passage that has been both celebrated and reviled. There, the Court famously declared:

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²²

20. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 272–73.

21. Ronald Dworkin, “Liberalism,” in *Public and Private Morality*, ed. S. Hampshire (Cambridge: Cambridge University Press, 1978), 127.

22. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Implied is a particular role and limitation of government and law. It is to generate a political and legal order without pre-determining the pattern of individual self-definition in relation to the basic meaning of reality as a whole. Just below the surface of the Court's argument is the fear of determination, of the loss of freedom, here expressed in terms of the state or of a legislative majority. For the Court, the meaning of things cannot be known or presupposed in a juridical context, but can only be a matter of individual belief, given to the self by the self. Were the state to impose meaning, it could only be the imposition of the legislative majority's arbitrary view of things. The majority's "moral disapproval" could have no basis in rationality, because the connection of that rationality to "what is" can only be understood in mechanistic-functionalistic terms, rather than in natural terms.

Of course, conservative jurists, who have heaped scorn on the passage, differ only by the fact that they do, in effect, seek to place the arbitrary imposition of meaning in the democratic majority, rather than in the individual. In other words, the conservative position is grounded in essentially the same jurisprudential positivism, but it is more willing to give weight to a majority's "moral disapproval," based only on democratic principles.

3. THE ANTHROPOLOGY OF ORIENTATION

My point then is this: the entire modern conception of law and its meaning favors the mechanistic view of physicality and the separate, bodiless conception of the fully human. Indeed, this view generates the standards of rationality and argumentation employed on all sides in the debate over "gay marriage." Consider the claim that there is no legally cognizable difference between "same-sex couples" and infertile "opposite-sex couples" or fertile "opposite-sex couples" and "same-sex couples" employing reproductive technologies. To borrow Benedict's language, this is an entirely "functionalistic" view of the body's sexual and procreative meaning. It would appear that the body's procreativity can be entirely replaced by the technical processes of the lab without any real loss of its essential humanity. Rather, its replacement would be an enhancement of the humanity of conception and birth. We also see these assumptions at work in the argu-

ment that man and woman are essentially interchangeable for all legally cognizable purposes.

That civil marriage would be by definition the union of a man and a woman, a union which normally and naturally results in children, means that a (perhaps, *the*) primary polarity underlying and shaping social and personal identity—and giving cultural form to social life—is that between man and woman. This is a question not just of “function” but of personal and social identity; it is a question of what we think the human being and society most fundamentally are and what we think the place of the child in that society is. More fundamentally, the social significance of this polarity allows for the integration of sexuality and love, the integration of the body’s inherent order and its implications for bodily acts as fully personal.

The sameness argument signals the rapidly approaching extinction of this polarity as personally and socially decisive. Indeed, it implies its replacement by another anthropology, that expressed by the concept of “orientation.” If this concept means nothing else, it means that the identity of the person is no longer grounded in either masculinity or femininity as naturally and personally ordained to each other and as expressed by the body. The shift therefore effectively demotes the meaning of sexual difference—the correspondence of the male and female bodies as such—to a sub-personal and purely material (“biological”) significance. The body in its sexual ordination—and the implications extend beyond sexuality—is therefore no longer decisive for the person. Rather, a person’s sexual desire and freedom possess a fundamentally arbitrary and indifferent relationship to his or her body’s natural correlation to the opposite sex. The relationship between man and woman therefore becomes merely a variant, a particular “orientation,” grafted onto what is in fact an underlying androgynous anthropology. This anthropology has emerged even more clearly in the recent debate over “transgender” rights, where its proponents increasingly describe gender as a spectrum or continuum that is not governed by the body’s given order, but rather by an interior act of self-identification in accordance with which the body may be reconfigured. The arbitrary relationship between the sexual complementarity of man and woman and the personal subject implied by the concept of “orientation” easily glides into further cultural and social implications, as the rapid ad-

dition of further elements of the new sexuality, represented for example in the multiplication of letters in the so-called “LGBTQ+” movement, shows.

That this new paradigm is actually displacing the former—so that the former is increasingly unavailable as a form of social and personal identity—is evident when we consider the fuller implications of the sameness argument. Of course, it is the very purpose of the concept to redefine the meaning of sexuality altogether. Were this not the case, the concept would fail to treat “gay” relationships as equivalent to traditional man-woman relations. Hence, it is part of the very logic of the concept that it characterizes both same-sex relationships and the man-woman relationship as merely alternative “orientations.” But in doing so, the new category abstracts the essence of sexuality from the natural correspondence of man and woman. Thus, sexual attraction, according to the conceptual world of orientations, displaces this natural correspondence as the explanation for a given person’s sexuality. Hence, if a man and woman are attracted to each other, it is not because of the natural correspondence of the sexes; it is because they happen to have or identify as having a particular “orientation,” that of “heterosexuality,”²³ rather than another, that of “homosexuality.” But this in turn suggests that whatever correspondence there may be between the male and female bodies is only an accident of the sub-personal mechanisms of physicality. *Personal* correspondence, on the other hand, is due to an individual’s “orientation,” which is conceived as fundamentally indifferent to the underlying natural correspondence of the bodies, since it can just as legitimately be directed toward the opposite (“biological”) sex or toward the same (“biological”) sex (or to both).

The problem with this developing anthropology, and its codification in law, is that it is impoverished as a human form. The identity of the person is no longer grounded in his masculinity or her femininity understood as a personal-somatic ordination of love; it is, rather, grounded in his or her “orientation”

23. I use “scare quotes” to signify my rejection of the pair heterosexual-homosexual, as explained in my “Liberal Androgyny: ‘Gay Marriage’ and the Meaning of Sexuality for Our Time,” *Communio: International Catholic Review* 33, no. 2 (Summer 2006), 239–65.

and thereby removed from the body as an expression of the person. Hence, the extinction of the sexual difference is also an extinction of the personal-somatic ordination of man and woman. Rather, if “orientations” really are conceived as equivalent and parallel, if the difference of the sexes has been lost to an underlying androgynous sameness, then the unavoidable fact of the sexually differentiated body has been reduced in its significance to being merely the biological and material conditions and circumstances of sexual acts of whatever kind. The “opposite-sex” arrangement of marriage and family, while not rejected as a possibility of desire and choice, is nevertheless reduced to constituting the manifestation of simply one of the possible “orientations.” It is, again, simply grafted onto an underlying androgynous anthropology as one of its variants.²⁴

This suggests a basic paradox. The personal meaningfulness of the body’s specification as male or female is in fact *inescapable*—that is to say, it is affirmed even in its outward denial or rejection. We can see this truth when we consider that sexual acts must rely on the sexualized body, but that the body is only sexual insofar as it is male or female. Furthermore, the fact that a body is either male or female depends on the correlation of male and female to each other. After all, the structures of the male body would make little sense were it not for the concrete reality of the female body, and vice versa. The odd result is that, under the shift to orientations, sexual acts rely for their very being on that from which fully human and personal meaning has been drained. This paradox is particularly clear with regard to homosexual acts,

24. Note that the mechanistic assumptions about the human person are entirely consonant with the experience of same-sex attraction as “innate” or “natural.” Efforts to find the “gay gene” or other physiological causes of homosexuality express the desire to substantiate the source of this self-experience in precisely the world as so conceived. The “natural,” here, clearly means something like the non-free; it stands for the idea of this self-experience as rooted in empirical and therefore deterministic circumstances, to be discovered at either a physiological or psychological level. Of course, it is universally recognized that human desire can be directed in ways that ultimately invert the true meaning of desire. Lost, then, is the deeper reality of the body’s expression of form and finality, which offer a firmer basis for understanding the authentically human. Indeed, the treatment of sexuality on the basis of “orientation” expresses the arbitrariness of the body’s natural ordination. What is not taken into account, then, is the personal order of love expressed by the body in its very visible form as male or female.

which both depend on the fact of the body's sexual polarity for their very possibility and also tacitly deny any deep anthropological significance of that polarity. In effect, homosexual acts and desire are only parasitic on the bodily correspondence of the masculine and the feminine.

But this paradox also characterizes the concept of "heterosexuality." As we have seen, the anthropology of orientation conceives of the man-woman couple not according to their natural correspondence but according to their orientation, which is labeled "heterosexual." The idea of "heterosexuality" as a category alongside "homosexuality" therefore fully incorporates the logic of "orientation," viz. the indifference of the self and desire to the natural ordination of the body. Because it also rests on the abstraction of the person from this natural ordination, it also views the ordination of the male and female bodies to each other as only the external or material conditions necessary for sexual acts. This leads us to an odd result: even sexual acts between a man and a woman are conceived in a way that makes them also to be parasitic on the natural correspondence of the male and female bodies.

Once we see this point, we can also see why the "gay marriage" movement has so quickly become passé, giving way to the "trans" movement, with its complete detachment of the person from the givenness of the body. Only with this detachment is it possible to speak for example of "gender reassignment," as though the "cultural markers" on which the original "assignment" was based are utterly arbitrary in relation to the self or to one's self-experience. Likewise, only such a detachment could provide the logic behind medical intervention to delay puberty in order to let children decide their gender. Here too, the movement itself can only be parasitic on what is naturally given, even as it either implicitly or explicitly attempts to radically materialize and functionalize nature and thereby evacuate the human meaning of that on which it is parasitic. This parasitism is manifest even in the more radical elements of the "LGBTQ+" movement, which speak of the attempt to escape the "binary" structure of sexuality. In fact, far from actually escaping the binary givens, they simply "blend" them.

These developments suggest a deeper point. The person as conceived by this anthropology lives an unnatural relation to

his or her body. Sexuality clearly is an unavoidably natural attribute of the body. As we have seen, the anthropology of orientation pertains especially to personal and social identity. But the body presents a real problem for this identity. It is a problem precisely because, no matter how far we remove it to a subordinate realm of function and mechanism, it threatens to name us, to tell us who and what we are precisely on the basis of its visibility and the fact that—however much we may put it at a distance—it is undeniably and in a substantial way part of us. This is particularly true in the realm of sexuality. The anthropology of orientations is, therefore, in the awkward position of trying both to affirm and deny the meaningfulness of the body's sexuality.

The result is a fragmentation in both personal identity and sexual love. The simultaneous dependency on the sexualized body and loss of that body's deep meaning leave no place for the development of sexual love as an expression of the deepest reaches of the I. The implicit androgyny leaves us no way to integrate the body, desire, love, or personal acts. To the extent that these are rooted in the sexualized body, they are reduced to a material impulse of the organism. On the other hand, since according to the ideology of orientations sexual desire and love can run contrary to the sexual ordination of the body just as reasonably as they can run in accordance with it, we might believe that they are separate from the body, that they are purely spiritual realities that merely *use* the body. But then it is difficult to see how sexual acts, which after all are bodily acts, can really be fully personal acts. Does the specifically sexual—as love and desire—arise from the body or from the disembodied self? If from the former, then it is hard to understand how to characterize them as properly human and personal; if from the latter, then it is difficult to understand how they can be expressed as specifically sexual.

Here then is the dilemma and the source of human impoverishment. The primacy of the category of "sexual orientation" implies a fundamentally extrinsic relationship between a functionally-mechanistically conceived body and a correspondingly spiritualized freedom. Ironically, once this starting point has been accepted, sexual desire and love are left without a real home. They must oscillate between the functionally sexual—an order that has been treated as one of mechanistic determinism—

and the spiritually androgynous—an order of bodiless freedom and love. But they cannot fit comfortably in either.

Public Reason and the Child

This disintegration of bodily acts as personal enactments of love is carried over into the implications for love's fruitfulness. To reduce the difference of the sexes to biological function, which in the end can be replaced and improved upon by the technical processes of the lab, is assumed to humanize physicality by making it an expression of human freedom. The increasingly clear connection between "gay marriage" and developing reproductive technologies is telling evidence of this. The logic of the anthropology of orientation and the logic of the technologization of human conception (which is, of course, a much broader practice than "gay marriage") are in fact the same.

Indeed, the use of technology to enable gay partners to conceive has at times been viewed as *superior* because it is rooted in what is thought to be a mature choice rather than sub-personal natural processes.²⁵ Again, to conceive the question this way is to have reduced those "natural processes" to the merely functional-mechanical. There have been predictions that in the near future the majority of children in medically developed societies will be produced by means of the lab, both to prevent the sorts of problems that occur in the "less perfect" mechanisms of nature and to allow for certain enhancements thought to be on the horizon. Where natural conception and reproductive technologies are equated, as the courts have done, the child (even in the case of natural conception) is treated as a product of mechanical function.

At a deep level, however, the inescapability of the experience of the body in its maleness and femaleness reminds us that we are not self-originating. To already be something before an act of freedom suggests to the modern mind a loss of freedom rather than its ordination. But the importance of what we do not simply choose, but only choose as an expression of a more deeply possessed gift, is especially evident in the difference and correspondence of the male and female bodies. This becomes all

25. See Adoption of Tammy, 416 Mass. 205 (1993).

the more obvious with respect to the procreative implications of sexuality and, by extension, the natural relations of the family, despite their suppression by the anthropology of orientation. The sexually “other” represented in the masculinity or femininity of the body serves as an invitation to love, precisely in its difference. It is an invitation that is by its very nature “open ended,” both in its origins and in its destiny.

This open endedness already implicit in the vocation inscribed in sexual difference finds its complete expression in the *fruitfulness* proper to the love of man and woman precisely as such—viz. the child. Clearly the fact of birth—both being born and giving birth—does not fit comfortably with the notion of personal identity as rooted most primitively in the individual’s act of choice. The visible expression of the parents in their bodies—their knowledge of each other and their self-knowledge in relation to each other—already bespeaks the fruitfulness proper to their love. It bespeaks the fact that this fruitfulness both requires and precedes their freedom. The body in its sexual ordination indicates our being something before any possible act of our freedom. It indicates being part of a lineage, of being a child of *this* mother and *this* father.

Similarly, the child’s knowledge of himself or herself—his or her personal and social “identity”—is simultaneously a knowledge that his or her origin is embedded more deeply in reality than any act of his or her parents’ wills. The parents did not give themselves their own bodies. Their bodies represent what stands behind them and shapes their freedom. The parents’ act of freedom is in fact an act of consent to this deeper origin in a fabric of relations that precedes them, gives meaning to their love, and stretches out from the past into the future.

According to the logic of “reproductive technologies,” the ideas of conception and birth are viewed in terms of choice and instrumentalism, technique presiding over a set of biological processes. The implication is that “natural relations” are only part of the functionality of the material universe, except of course to the extent that they too are viewed entirely in terms of choice—that is to say, a choice to utilize these processes for a human good. But such a line of reasoning misconceives both the meanings of birth and of love. In principle, the act that causes conception by technical means could occur without there ever having been

any sort of bodily communion of the spouses or even without the spouses' gametic contribution. Hence, the relation between love and the act of choice to have a child is motivational and moral, rather than ontological. But the child needs more than to know that the intentions of his parents were good. He needs to know that his *ontological origin* is good, and this means that he needs to know that he is more than the functionalistic product of others' freedom.

Where reproductive techniques are used, the bodily relations of the parents are abstracted from—are merely accidental to—the conception of the child. This last point is crucial. The child born in this fashion cannot understand himself or herself as having been already implicit in the parents' bodily composition and the love proper to it prior to any particular choice or act of the parents. In this way, the child's coming to be is abstracted from the "open endedness" of the love proper to the "sexual difference" of the parents. Rather, the parents and the child must see the child's origin as the act of choice initiating technical means, rather than in the consent to the fruitfulness already implicit in their bodily acts of love. The conception of the child, then, is radically the result of an act of choice rather than the always-already implicit fruit of love. Hence, the act is restructured on the model of "making" (*poiesis*) as opposed to the "acting" (*praxis*) of fruitful love.²⁶ The very logic expressed by the courts is that of Baconian and Hobbsian knowledge as production rather than knowledge as reception or discovery of what is.

To put it another way, the nominalist tendencies endemic to modern thought are impressed into the flesh of familial relations. The actual, natural familial relations are treated as only material ("biological") sources, in themselves of little consequence or meaning (as the growing trends of surrogacy and artificial insemination make clear), while relations treated as pure acts of production or construction are seen as humanly decisive. For the latter to be decisive, the former must first (as Hobbes recognized) be drained of its inherent meaning.

26. See Robert Spaemann, "Genetic Manipulation of Human Nature in the Context of Human Personality," in *Human Genome, Human Person, and the Society of the Future, Proceedings of the Fourth Assembly of the Pontifical Academy for Life*, ed. Juan de Dios Vial Correa and Elio Sgreccia (Vatican City: Libreria Editrice Vaticana, 1999), 340–50, esp. 342.

The symbolic meaning of such a “making” then is that the child does not have a deeper origin than the parents’ freedom, or that, to the extent it is acknowledged that there is such a deeper origin, it amounts to a denial that that deeper origin stands in relation to the child in any way differently from any other sort of production that begins with materials given in the physical order. That procreative fruitfulness is at a radical level something the parents give themselves in an act of choice insinuates that the child is subordinated to that choice. This is why *Donum vitae*²⁷ tells us that artificial means of reproduction treat the child as property. Such means are a violence to the child’s dignity and self-knowledge as both “earlier” and “greater” than the parents’ freedom.

CONCLUSION

The foregoing suggests ways in which political and legal liberalism, while seeming to protect and produce pluralism, in fact at the deepest level produces and enforces an absolute monism of beliefs about such absolutes as the meaning of the person, freedom, and the world. Radical differences in various beliefs all drift toward mere stylistic expressions of an underlying liberal conception of what is. This is why political liberalism tends to remake pre-political and inherently non-liberal relations (e.g., marriage and family) and institutions (e.g., churches) in its own image and likeness. It tends to view these only as various types of voluntary association. There is little doubt that the question of “gay marriage” has been caught up in this process. This is why the underlying anthropology and the type of rationality in which it flourishes offer little basis for cognizable objections to the inevitable if gradual assimilation of the anthropology of orientation into educational systems, professional organizations, public ethical standards, tax policies, anti-discrimination laws, and so forth, enforced by the technocratic-bureaucratic leviathan (which is composed not only of governmental but also business, media, and technological organs) that constitutes the environment in which the modern individual moves and breathes. It is this un-

27. Congregation for the Doctrine of the Faith, *Donum vitae*.

derlying anthropology and its implications for the person that must be challenged if the natural relations of man, woman, and child are to be sustained. □

DAVID S. CRAWFORD is associate professor of moral theology and family law at the Pontifical John Paul II Institute for Studies on Marriage and Family at The Catholic University of America.