

Editorial

THE REPRESSIVE LOGIC OF
LIBERAL RIGHTS: RELIGIOUS
FREEDOM, CONTRACEPTIVES,
AND THE “PHONY” ARGUMENT
OF THE *NEW YORK TIMES*

• David L. Schindler •

In its February 11 editorial,¹ the *New York Times* refers to “a phony crisis over ‘religious liberty’ engendered by the right,” expressing its disappointment that President Obama was willing to “lend any credence to the misbegotten notion that providing access to contraceptives violated the freedom of any religious institution.” Such a facile dismissal ought to be greeted with concern by reasonable citizens, whether religious believers or not. An adequate response to the views expressed by the *Times*, however, evokes a number of difficult issues regarding rights in a liberal society, as well as regarding the idea of human dignity that justifies and first defines rights. Indeed, once we understand the (mostly unconscious) premises with respect to these issues that inform the *Times*’s editorial, we will see that its claim of a “phony crisis over ‘religious liberty’” is consistent with its premises and thus bears an inner coherence.

¹“The Freedom to Choose Birth Control,” *New York Times*, 11 February 2012.

What I mean to suggest, then, is that Catholics make a grave mistake if they approach the current controversy on the assumption that all sides agree in principle about the nature and universality of rights, and if they thus think that what is at stake is simply a matter of a failure to apply this commonly held principle of universal rights with consistency. On the contrary, the liberal understanding of rights presupposed by the *Times* stands in deep tension with a Catholic understanding, on grounds of both reason and faith: the two notions of rights rest upon and are informed by significantly different ideas of human nature and dignity. Indeed, the rights assumed by the *Times* of their inner logic trump the rights claimed by Catholics, *whenever, and insofar as, these differently conceived rights come into conflict.*

The point, then, is that, if we fail to understand that the present crisis is at root one regarding the nature of the human being, our political strategies, however effective in the short term, will over the long term serve to strengthen the very assumptions that have generated the crisis in the first place. This does not mean that strategies that speak of rights in the liberal idiom cannot be justified for prudential reasons—even for a prudence that is Gospel-inspired. It means simply that even these strategies must be integrated as far as possible, from the beginning, into a more adequate sense of rights based on a fuller vision of the human person, if and insofar as such strategies are not themselves to reinforce the deeper terms of the crisis.

My purpose in what follows is to show the warrant for these judgments.

I begin by citing a striking claim by Pierre Manent, the contemporary French scholar and historian of liberalism, who, after clearly acknowledging the influence of Christianity on the liberal tradition, states the following:

The logic to which liberalism tends is to dismiss [the] moral content [of its Christian roots] and replace [the] “objective” morality, held as valid by the different Christian churches, by a formal morality of “reciprocity” or “respect” by all of the “individuality” of all. To choose a crucial illustration, it is impossible for a society claiming to be in the Christian tradition

to admit that the right to abortion be written into law, and it is impossible for a liberal society to refuse members this right.²

Manent does not explain fully why he makes this judgment, but it does not seem to me difficult to show that it is well-founded. My concern here is not directly with the claim to a right to abortion on its own terms, but with the claim to a right to abortifacients, contraceptives, sterilization, and the like, insofar as such claims conflict with the claims to rights, for example, of members of religious faiths involved in the administration of health institutions serving the general public. My question concerns the idea of rights that is affirmed by liberalism, and the anthropological-moral criterion yielded by this idea for adjudicating between exercises of rights (or would-be rights) that come into conflict in such situations. For my discussion, I will focus first on the work of John Locke, whose work provides a “classical” liberal view of rights.

(1) First of all, Locke defines the human person in terms of the property of rationality, ascribing rights in the full and proper sense to those who are capable of rational discourse, thus to adults. Locke includes children insofar as they possess this capacity in a rudimentary way, or are on their way to fully exercising such a capacity, while (apparently) excluding “changelings,” or those children who, due to some grave physical deformity, will never manifest reason.³ The original state of nature for Locke, then, is a state of perfect freedom wherein, by virtue of reason, all can “dispose of their possessions and persons as they think fit, within the bounds of the law of nature without asking leave or depending upon the will of any other man.”⁴ This state is exemplified above all in

²Pierre Manent, “Michael Novak on Liberalism,” chap. 14 in *Liberty/Liberté: The American and French Experiences*, ed. Joseph Klaitz and Michael H. Haltzel (Washington, D.C.: Woodrow Wilson Center Press, 1991), 209. Manent goes on: “Instead of hoping for a reconciliation between the two traditions, perhaps we could limit ourselves to asking those who are more Christian than liberal not to make themselves unbearable to liberal opinion, and those who are more liberal than Christian not to render liberal society unbearable for religious people” (210).

³Cf. Anthony Krupp, *Reason’s Children: Childhood in Early Modern Philosophy* (Lewisburg, Pa.: Bucknell University Press, 2009), 102–03; but see also Locke’s qualifiers, discussed by Krupp on p. 100.

⁴John Locke, *Second Treatise on Government*, ed. Thomas P. Peardon (New York:

Adam, who, on account of his not having a father, “was able, from the first instant of his coming into existence, to provide for his own support and preservation, and to govern his actions.”⁵ The origin of a man’s rights thus lies here, in the capacity to provide for his own support and preservation, and to govern his actions, within the bounds of nature.

But what is meant by “within the bounds of nature,” and how does this help clarify the criterion in terms of which we can adjudicate in a principled way conflicts that arise between different claims of rights? The heart of Locke’s answer to this question is expressed as follows: “Every one, as he is bound to preserve himself . . . , so by the like reason, when his own preservation comes not into competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.”⁶ Basic to human action is thus the unfettered capacity to choose and to exercise power. Human action in its original state, as witnessed to above all by Adam, is a matter of in-dependence. The individual properly conceived is entirely in control of his actions and able to dispose of his person and his possessions. Freedom is not originally-intrinsically conditioned by anything beyond the self; it consists in an act of choice that is, *a priori*, unbounded. It follows that all men are in principle equal in their claims of rights, *because and insofar as they are subjects of freedom in this (would-be) purely formal sense*,⁷ and hence in principle fully in control of their possessions and their persons. Locke does indeed imply a principled kind of order or limit when

The Bobbs-Merrill Company, 1952), ch. 2, n. 4, p. 4.

⁵Ibid., ch. 6, n. 56, p. 32.

⁶Ibid., ch. 2, n. 6, p. 6.

⁷What I mean by “formal” will be explained more fully in what follows. For now it is sufficient to say that formal freedom is a freedom conceived in abstraction from naturally-originally given relations to God and others, and taken so far to be logically empty of any metaphysical content that derives from such relations. The burden of my argument is that no such thing as a purely formal freedom in this sense actually exists. But to avoid repetition of the clumsy phrase “would-be purely formal freedom,” I will use the terms “formal freedom,” “formalistic freedom,” “putatively formal freedom,” and the like synonymously, unless the context clearly indicates otherwise.

he refers to “bounds of nature,” and again when he says that each man should seek to preserve all other human beings who, like him, also seek to preserve themselves. But Locke adds the crucial qualifier: *so long as one’s own preservation comes not into competition with others’ self-preservation*. The neuralgic question thus concerns what Locke means here by “competition” as a criterion for determining each one’s rights and duties with respect to others, and how he thus conceives the proper nature of those rights and duties.

The crucial elements of his position are four. First, my duty to preserve the rest of mankind springs first from and is defined in terms of my right to my own self-preservation. Second, my duty to preserve others is in the first instance “negative” in nature, a matter of toleration: I must not take away or impair either the life or that which tends to the self-preservation of others. Third, this duty of mine toward the other holds only insofar as the other, in the exercise of his right to self-preservation, does not enter into competition with my right to self-preservation. To summarize these three points in the contemporary parlance: my rightful claim on the other is first one of immunity from coercion by the other; my duty with respect to the other is to refrain from coercion in his regard; and, in the case of competition between my self and others, my right to immunity and the other’s duty to respect my immunity take priority over the other’s right to immunity and my duty to respect his immunity. Fourth, we must keep in mind that, in all of the above, the subject of rights for Locke, properly speaking, is the autonomous adult individual of whom we can say that he is fully able to dispose of his own possessions and person, and who is thus independent.

Given this law of nature—mutual self-preservation coincident with priority to one’s own self-preservation—and the idea of man as formal-independent agent that undergirds it, it follows that competition as a criterion for just and unjust actions between the self and others is inherently open-ended. My right to self-preservation, understood as preservation most basically of my autonomy, sets the primary context and terms for my duty to preserve others in their rights to self-preservation. The competition that would suffice as a moral warrant for not exercising my duty to observe the other’s right to self-preservation and immunity from coercion is thus present as a matter of principle *whenever, and insofar as, the other’s action limits my independence, or unfettered freedom of choice*. It seems to me not

difficult to see the pernicious ambiguity here, for example, with respect to cases like abortion. On what principled grounds, given Locke's conception of the human being as subject of rights only *qua* originally independent agent, can we claim unequivocally and as a matter of principle that an embryo has not in a given instance (say, when the embryo has a grave disease likely to demand intensive care after birth) entered into competition with its mother, who may thereby judge that she has the right to abort the embryo and no duty to avoid coercive activity in its regard? On what reasonable-objective grounds could we insist that a mother does not have such a right, that is, without appealing to some criterion *other* than a formalistically-conceived right to preserve herself *qua* independent, in the face of the competitive burden placed on that independence by the embryo? What is it in such a case that, given Locke's formalistic and logically self-centered assumptions, could possibly warrant my duty to recognize the embryo's right in principle, always and everywhere, to exist?

(2) But let us now situate these reflections within the context of the right to religious freedom that is our main concern. Consider what Locke says in his *A Letter Concerning Toleration* pertinent to the issue of potential conflict between different claims of rights in matters of religion. Inquiring with regard to the circumstances in which the rights of religious bodies need *not* be recognized in the commonwealth, Locke states first of all that "no moral rules" held by religious sects that are contrary "to those which are necessary to the preservation of civil society are to be tolerated by the magistrate."⁸ Now Locke clearly had in mind here "moral rules" that would undermine the foundations of society, and he thought there was little chance that churches would be inclined to enact moral rules that would deprive people of what was essential for self-preservation. However, the foregoing discussion enables us to see that the principle of self-preservation asserted by Locke, which is appealed to here in the context of judging when freedom of religion is *not* to be tolerated by the commonwealth, is highly ambiguous. This principle, now broadened to include civil society itself, remains open-ended in its formal, self-centered character.

⁸John Locke, *A Letter Concerning Toleration* (New York: Macmillan/Library of Liberal Arts, 1950), 50.

Thus, suppose we assume a civil society in which elements of “reproductive health” of whatever sort indicated by the medical profession and pharmaceutical companies—abortifacients, contraceptives, sterilization, and the like—are seen as important extensions of the capacities of freedom, that is, by virtue of the technological science that Francis Bacon and others said would enable men to dispose more adequately of themselves and their possessions, and thereby improve the human estate. Locke’s political liberalism fits hand in glove with the logic of modern science as conceived by Bacon. Science in Bacon’s technological sense (knowledge as power) precisely enables the expansion of human freedom in its formal sense as the ability to dispose over one’s person and possessions, and so far broadens the potential claim of rights based on freedom in this formal sense. The practices named above become but further expressions of this freedom that is now more amply empowered by technological science. On what principled grounds, then, given Locke’s notion of the individual as the subject of rights *qua* formal, independent agent, can it be said that such practices are not, *eo ipso*, extensions of what I am entitled to by virtue of my right to self-preservation? On what principled grounds therefore, can it be said, further, that the state has no right—indeed, on the contrary, that it has a duty—to overturn moral rules set by religious groups that would deny the right to these practices, which the state understands as necessary for the self-preservation of civil society, a society that is, again, conceived by Locke in terms of a contractual collection of formally-conceived, independent selves who alone are fully and properly subjects of rights?

The foregoing discussion thus, in sum, demonstrates that Locke’s conception of rights opens logically to a relativism permitting the right to abortion or any other procedure or chemical treatment that could be placed under the genus “reproductive rights.” A mother’s right according to Locke—whenever significant “competition” arises—trumps a mother’s duty to preserve the life of, or not to act coercively toward, her fetus. Further, this right of a mother to abort—or to have access to contraceptives—also trumps in principle the rights, for example, of Catholic hospitals and doctors, insofar as these latter would obstruct her exercise of this right.

(3) It is important for our purposes, however, to define more precisely the premises undergirding the relativism indicated here, so that we may understand properly the peculiarly repressive nature of that relativism. (i) First, there is Locke's idea of the human being as an independent, autonomous agent, which privileges a freedom understood essentially as the ability to choose and to exercise control over one's person and possessions. We have characterized such an act of freedom as purely formal. Why *formal*? Because this act is *first abstracted from*, and thus taken to be *originally uninformed by*, a *natural order of relations* to God and others, and to transcendent truth and goodness. To speak of a *formal agent*, then, as the possessor of this freedom, indicates *an understanding of human nature as first constituted in abstraction from such relations*.⁹

(ii) Second, there is the "negative" idea of rights as immunities that follows from Locke's conception of the human being as an independent agent. Why *negative*? Because, as one whose being is so conceived, my relation to the other is so far, logically, viewed first in terms of my right to be my (independent) self, *over against* the possible intrusiveness of the other. My right, most basically, is the right *not* to be coerced by the other, even as the other's duty is *not* to coerce me. My rights and duties with respect to the other, in a word, given my nature as a formally conceived independent agent, are not, and cannot be, properly *positive* in nature: my claim of rights *on my own behalf* makes no intrinsic demand on you *positively to assist me* in realizing my rights; nor does my duty to respect your rights

⁹The following articles provide further philosophical discussion of what is meant by the idea of the human being as a formal agent, pertinent to the problems regarding the person as a natural order of relations, and freedom and rights, that I am suggesting are attendant upon such an idea. Regarding the place of communion and relation in the constitution of personal singularity, see Adrian Walker, "Personal Singularity and the *Communio Personarum*: A Creative Development of Thomas Aquinas's Doctrine of *Esse Commune*," *Communio: International Catholic Review* 31 (Fall 2004), 457–479. Regarding the notion of freedom as a formally-conceived choice, and thus as originally empty of content, see David C. Schindler, "Freedom Beyond our Choosing: Augustine on the Will and Its Objects," *Communio: International Catholic Review* 29 (Winter 2002): 618–53. For the metaphysics of the human person and relationality entailed by creation, see Kenneth Schmitz, "Created Receptivity and the Philosophy of the Concrete," *The Texture of Being* (Washington, D.C.: The Catholic University of America Press, 2007), ch. 7, 106–31.

make any intrinsic demand on me *positively to assist you* in realizing your rights.

In short, neither my rights nor my duties, on Locke's understanding, are informed intrinsically, hence from within, by naturally-given positive relations to God or to others, or to the true and the good as implied by these relations.

(iii) Third, the person conceived principally in terms of a purely formal freedom-as-independence, and the negative rights tied to this conception of the person, together found and define what is termed in the contemporary political idiom the "*juridical*" view of rights. Juridical rights, in other words, rooted in a purely formal freedom, are understood to be empty of and so far logically silent or neutral with respect to God and others, or indeed to any particular order of transcendent truth or goodness: thus, in a word, to bear no "positive"—that is, definite—metaphysical claim regarding the nature of man in relation to, and as "bound" to,¹⁰ God and truth and goodness.

The simple but crucial point that I wish to introduce with respect to these judgments, then, and regarding what I take to be the peculiarly dogmatic nature of the relativism carried in such judgments, is that the purely formal freedom that establishes juridical rights in their merely negative sense is in fact not innocent of a "positive" metaphysical conception of the human person. A freedom viewed as first or constitutively empty of relation to God, and so far as silent or neutral with respect to God, does not thereby cease to express *a kind of relation* to God, one with definite implications (also) regarding a transcendent order of truth or goodness. On the contrary, such a freedom implies that relation to God—insofar as God is believed to exist—is and can only be *an extrinsic relation*, one logically-yet-to-be-enacted by a conscious act of choice; and such a freedom thereby implies also, *eo ipso*, a definite idea regarding man's nature as a creature and God's nature as Creator. The (would-be) purely formal freedom of liberalism, with its (would-be) purely juridical rights, thus has the same range of definite metaphysical implications as a freedom embedded in a natural order of relations to God and others, and to truth and goodness, only implications of

¹⁰The point here does not imply a naturalist approach to ethics; it is meant to imply only that duty, or moral obligation, is intrinsically tied to, but not in a way that makes it identical with, nature.

a different sort. To use the contemporary jargon, the juridical idea of rights, in its purported metaphysical “thinness,” is rather, of its inner logic, metaphysically “thick,” albeit in a peculiarly hidden and so far paradoxical sense.

(4) It is important for our argument, however, that we understand accurately the nature of this charge. To this end, let us place liberalism’s hidden-paradoxical metaphysics of freedom as formal, and thereby of rights as juridical, within the historical perspective provided by late Dominican scholar Father Servais Pinckaers in his important book, *The Sources of Christian Ethics*.¹¹ Pinckaers makes a central distinction between what he calls “freedom of indifference,” on the one hand, and “freedom for excellence,” on the other.¹² According to Fr. Pinckaers, “freedom of indifference,” which he says was originally bound up with nominalism but also expressed in the manual tradition of modern scholasticism, “fills the horizon of [contemporary] thought,” as indeed its “most widespread concept [of freedom]” (333). At the core of such a concept lies an understanding of freedom as “‘indifferent’ to nature” (333). Such a freedom consists essentially in “the power to choose between two contraries” (375), and involves an autonomy that entails “rejection of all dependence” (339). Finally, it always, as a matter of principle, forces a choice between “my freedom or the freedom of others. Freedom of others appears as limitation and as threat, since freedom is self-affirmation” (351). Such a freedom is thus “locked in self-assertion, causing . . . the individual to be separated from other freedoms” (332), and so far affirms the need to take what is first a negative stand toward others (339).

In all of these ways, then, freedom of indifference stands in contrast to what Pinckaers terms “freedom for excellence.” This latter freedom, which prevailed in the patristic and great scholastic periods and in the writings of St. Thomas rightly understood (330), is rooted precisely “in the natural inclinations to the good and true”

¹¹Servais Pinckaers, *The Sources of Christian Ethics* (Washington, D.C.: The Catholic University of America Press, 1995). See also the further development of freedom for excellence in David C. Schindler, “Freedom Beyond Our Choosing,” cited in footnote 9.

¹²Pinckaers, *Sources of Christian Ethics*, 327–78.

(375), and has its foundations in the longing for a happiness based in God (335).

In a word, what Pinckaers characterizes as freedom of indifference, a freedom that is “‘indifferent’ to nature,” corresponds exactly to what we have identified as the formal freedom of liberalism, in the latter’s abstraction from any natural-constituent order of relations to transcendent truth and to God. Such a freedom is an act without an anterior, immanent natural ordering by these relations, an act whose content thereby becomes simply an object of choice.

Freedom of indifference thus indicates a metaphysics of freedom that, *eo ipso*, displaces freedom for excellence, by reconfiguring the order of man’s relations to truth and to God. First, instead of being *natural* relations to truth and to God, and so far relations that always already order each individual’s freedom from within, these relations are conceived as mere “objects of circumstance,” which is to say, as options and thus as objects that the individual himself first, now arbitrarily, chooses. Second, human dignity takes its essential meaning from a formal agency abstracted from what are now extrinsically conceived relations; consequently, the individual who is the subject of rights becomes a logically self-centered agent defined primarily in terms of the independent power of self-determination. Third, the freedom of the self is understood in the first instance to be competitive with the freedom of others, such that the corresponding rights and duties between the self and others are conceived in the strictly negative terms of each one’s being protected from intrusive activity by the other.

In sum, then: liberalism’s intended strictly juridical order, in the name of avoiding a metaphysics, advances a definite metaphysics centered in freedom of indifference, whose central burden is to displace the person’s *natural community* with God and others, and with truth and goodness, by an *extrinsic and so far voluntaristic community*—what is commonly termed a contractual community—made up of formal-independent, logically self-centered individuals.

The hallmark claim of liberalism—that its juridical order remains *ex officio* empty of any one metaphysical truth, in order that individuals and groups in civil society may be left free to seek and defend the truth on its own terms—thus harbors within itself a subtle, but truly massive, deception. On the one hand, the intention

of such a formally-conceived juridical order remains just. On the other hand, this juridical order is already filled, *hiddenly*, with the metaphysical truth of a single group in society, that group which has been formed, largely unconsciously, by the tradition of liberalism. The problem is thus that the purely juridical state of liberalism, *eo ipso*, albeit in a way that is officially blind, conflates and so far eliminates the very distinction between state and civil society that it is the main intention of liberalism itself to defend, and that is indeed necessary for any civilization that would remain genuinely free.

(5) Thus I arrive at the principal conclusions of my argument, which can be framed in terms of suggestions made by Joseph Ratzinger/Benedict XVI and John Paul II. First, as demonstrated earlier, the liberal idea of freedom and rights entails relativism. But what we are now better able to see is that this liberal idea, and the juridical order of rights based thereon, are governed by a hidden metaphysics of formal-indifferent freedom, and that the *hidden nature of this metaphysics is just the point*. In other words, it is endemic to liberalism's formal freedom and juridical rights that *no definite metaphysics be announced* on their behalf regarding the nature of the human person vis-à-vis relations to God and others, and to the true and the good. My argument, in this light, is that the proposal of such freedom and rights thus involves *of its inner logic* a hidden "dictation" of just such a metaphysics. Precisely in the name of a formal nature that would be *absent of such relations*, the proposal *makes present a fragmented and so far reductive form of the relations*. The proposal of liberalism thus, in a word, involves what Ratzinger/Benedict XVI has termed a "dictatorship of relativism."¹³ In the name of the avoidance of any definite metaphysics of the person in relation to God and truth (hence relativism), liberalism *eo ipso* "imposes" a formalistic metaphysics of the person (hence dictatorship).

Second, when we recall that it is the independent, and so far logically self-centered, agent who alone is the subject of formal-indifferent freedom and juridical rights, we are able to see that this "dictatorship" takes concrete form by way of a paradoxical inversion

¹³Benedict XVI, "Homily at the Mass for the Election of the Roman Pontiff," ch. 3 in *The Essential Pope Benedict XVI: His Essential Writings and Speeches*, ed. John F. Thornton and Susan B. Varenne (San Francisco: HarperSanFrancisco, 2007), 22.

of liberal democracy into “a supremacy of the ‘strong’ over the ‘weak,’” as expressed by John Paul II in *Evangelium vitae*.¹⁴ The “supremacy” is *of the “strong”* because and insofar as it is executed by, and in the name of, agents for whom freedom and rights are “bounded by nature” only in the Lockean sense described earlier. That is, while the right of each individual to self-preservation implies a duty *not to obstruct* the rights of others to their own self-preservation, it does so *only insofar as these respective rights do not enter into competition*. The point, in other words, is that, on the liberal reading, rights are rooted precisely in a *formal-independent*, and so far adult-like, “strong” freedom that has been *originally abstracted from* any natural order of relations to, and so far from any natural order of dependence upon, God and others, and to transcendent truth and goodness. The claim to rights by the “strong” in this sense always, as a matter of principle, trumps in advance the claim by those—the “weak”—whose rights are tied to this natural order of relations, when and insofar as these respective claims enter into competition with each other. The claim to rights by the “strong” thereby also trumps the claim of those who would protect the rights of the “weak” in the event of such competition.

Indeed, the methods by which the criterion of competition is applied and defended in a liberal society will themselves be informed by formalistically conceived acts of freedom and intelligence: by (a) a *voluntaristic exercise of freedom*, rendered powerful by (b) a *technical-expert intelligence*, and supported—if indeed religious support is sought—by (c) a *positivistic appeal to God*.¹⁵ The methods whereby the criterion of competition is applied, in other words, will tend of their inner logic toward displacement of arguments based on an exercise of a freedom and intelligence intrinsically tied to a natural order of relations to God and truth, in favor of arguments by

¹⁴John Paul II, *Evangelium vitae*, 25 March 1995, n. 23.

¹⁵What a voluntaristic freedom, a technologistic intelligence, and a positivistic approach to God share is a common failure to grasp what is implied by the givenness of reality, and by the immanence of relation entailed in that givenness. What the three share in common, in other words, is the need for the individual first to construct a relation that is so far always, logically, yet-to-be-enacted. On this, see my “America’s Technological Ontology and the Gift of the Given: Benedict XVI on the Cultural Significance of the *Quaerere Deum*,” *Communio: International Catholic Review* 38 (Summer 2011): 237–78.

strategic manipulation, and thus by cosmetics and advertising—in a word, by the extroverted and so far “violent” methods of the “strong.”

Thus, in sum: the liberalism whose hallmark intention is to affirm *universal rights*, as a matter of its inner logic restricts rights in the proper sense, in their content as well as in the methods by which they are administered, to those who are “independent” of nature except as purely formally construed, and thus to the “strong.” This restriction entails the *exclusion* of those who are “dependent” on a nature ordered by intrinsic relations to God and others, and to what is true and good “transcendently,” in and for its own sake, and who are thus “weak.” That is, whenever a conflict arises between the independent and the dependent, rights are ascribed properly only to the former. Such an exclusion, again, is precisely “dictated,” enshrined without making explicit, and giving a reasonable account of, its own tacit, supposed purely formal metaphysics of the person, freedom, and rights. Which is to say, the exclusion proceeds in a manner that is thus “totalitarian,” though, it is crucial to see, the “totalitarianism” is one that of its nature requires enforcement first by lawyers, carried out precisely in the name of equal access to the exercise of rights on the part of all citizens, and by police only to the extent that the work of lawyers remains ineffective.

(6) Lest we think that this suggestion of a hidden logic of tyranny native to liberalism is merely a matter of abstract philosophical speculation, we need only return now to the writings of the *New York Times* on the right to religious freedom. Thus the recent editorial referring to the “phony crisis over ‘religious liberty’” states:

[I]t was dismaying to see [President Obama] lend any credence to the misbegotten notion that providing access to contraceptives violated the freedom of any religious institution. Churches are given complete freedom by the Constitution to preach that birth control is wrong, but they have not been given the right to laws that would deprive their followers or employees of the right to disagree with that teaching.

If a religious body does not like a public policy that affects its members, it is free to try to change it, but it cannot simply opt out of a society or claim a special exemption from the law

Mr. Obama had already gone too far out of his way to exempt churches and their religious employees from the preventative care mandate. It was not necessary to carve out a further exception for their nonreligious arms, like Catholic hospitals and universities, which employ thousands of people of other faiths.

...

The rule announced . . . would be objectionable[, however,] if it turns out that nonreligious employers are subsidizing the exemption of religious employers, in effect paying more for their insurance because they have to cover birth control. . . .

Little commentary seems to me necessary here, in addition to what has already been elaborated above. The argument of the editorial presupposes that whatever liberates a woman in her independence as disposer of her own person and possessions—here via the assistance of technological science—becomes, *ipso facto*, integral to her reality *qua* subject of rights. The rights in question concern what is termed “reproductive health” and the contraceptives that aid this “reproductive health.” The burden of the editorial, then, is that any claim of rights, such as that put forward in the name of a freedom situated within a natural order of relations to truth and to God, that would conflict with the right to free and equal access to contraceptives, is so far without reasonable warrant.

To be sure, the editorial insists that religious bodies have the right to preach against contraceptives, and to reject them, and these bodies are free to try to change public policies that acknowledge the right to contraceptives. Such bodies, that is, have the right to exercise their “freedom of indifference.” But religious bodies cannot act as though they are not members of society and thus claim exemption from legally approved public policies: such bodies, that is, can claim no right to exercise “freedom for excellence.” In other words, insofar as members of a church are members of civil society, and act publicly in a way that affects non-believing citizens, for example, by establishing institutions that serve not only church members but the broader citizenry, the civil magistrate—to recall Locke’s expression—becomes empowered to deny these churches’ claims to rights, exactly to the extent that such claims conflict with those affirmed by the broader citizenry. The right of these religious bodies not to provide contraceptives to those whom they serve and to their employees, which right is tied to these bodies’ moral duty, natural and supernatural, to truth and to God, must in principle give

way to the right of each citizen to exercise the freedom and independence to improve his or her estate and dispose over his or her health and comfort, in the ways made ever more effective by technological science.

In a word, in the case of a conflict between rights, rights in the liberal sense always prevail, *without reasonable-metaphysical argument*. According to the *Times*, protests to the contrary are indeed “phony”: they are, *eo ipso*, without credibility in a liberal society. In the view of the *Times*, a church that would conceive relations to truth and to God as natural, and thus as intrinsic to the human act, by definition misunderstands the nature of freedom in its secular integrity as an “indifferent” act of choice, and so far also misunderstands the nature of civil rights in their integrity as negative-juridical. Such a church thereby, according to the *Times*, also misunderstands the nature of the distinction between what is properly religious and what is nonreligious, which requires, given the prevalent liberal terms, the construal of religion as an essentially voluntary, hence arbitrary, addition to what is properly secular.¹⁶

¹⁶In the liberal understanding, there exists no such thing as the idea of the human person as *homo religiosus*, that is, as a naturally religious being in the sense affirmed by thinkers in the patristic and scholastic periods, and indeed in a significant sense by all great religious thinkers (see, for example, St. Augustine’s claim that God is more interior to me than I am to myself). To be sure, this idea of man as *homo religiosus* does not attenuate the need and intrinsic importance of free acts for religion rightly conceived! I merely wish to point out that the idea—fundamental for Locke, for example—that religion is an essentially voluntary society stands at the root of the tendency no longer to grant special status to the right to *religious* freedom, that is, as distinct from the right to freedom in other contexts and senses. Given liberalism’s formal freedom, in other words, relation to God becomes *eo ipso* a matter of choice: something that is so far first enacted by me, as distinct from being originally given to me as integral to my nature and reaching to the core of my being as a creature. But a God relation to whom is first elected by me, as distinct from being naturally-originally given to me, becomes by definition an arbitrary (because voluntaristic) addition to my natural secular reality. Even if I wish to make God the center of my life, doing so can now be properly only a fabrication (from *fabricor*, to make, forge); logically, God remains one among many of my equally-metaphysically arbitrary choices. In short, the special status accorded the right to religious freedom finds a reasonable basis finally only in a God who reaches to the inner meaning and depths of my secular nature as such, and thus makes a difference to everything I am and do; and this reasonable basis requires a relation to God that is first naturally-given as distinct from chosen. Given liberalism’s idea of religion as essentially a voluntary matter, therefore, the Obama

Our earlier discussion, then, showed the reasonable warrant for Professor Manent's claim of a principled opposition between a Christian-informed notion of freedom and rights and a liberal notion of these. Our discussion, furthermore, clarified the sense in which liberal rights bear a hidden, and hence paradoxical, logic of repression. We see now that the *New York Times* editorial provides a significant current example of this logic.¹⁷ My argument, then, in sum, is that, *insofar as the liberal idea of freedom and rights prevails in America*, such a logic of repression will continue apace, even if successfully resisted in this or that instance as a result of particular political strategies or policies.

(7) Now, an objection to this argument is ready to hand: that the ideas sketched in the name of liberalism as exemplified by Locke and indeed by the *New York Times* represent a doctrinaire and so far extreme version of the ideas of nature, freedom, and rights available to us in the liberal tradition. Such an objection is indeed not without merit, but its defense is a more subtle, and difficult, matter than it would first appear. I will respond in two parts.

administration is so far not inconsistent in denying the special status of the right to religious freedom. For discussion of various points connected with the problem of religion as an essentially voluntary society, see my *Ordering Love: Liberal Societies and the Memory of God* (Grand Rapids: Eerdmans Publishing Co., 2011), especially the chapter, "Civil Community Inside the Liberal State: Truth, Freedom, and Human Dignity," 65–132, at 111–24.

¹⁷See in this connection E. J. Dionne, Jr.'s column, "Tea Party Catholicism?" (*Washington Post*, 12 March 2012), which criticizes the rhetoric used by some bishops—Cardinals Francis George of Chicago and Timothy Dolan of New York, for example—in their response to the Obama administration's mandate, saying that their rhetoric is "extreme," and that "Catholicism's deep commitment to social justice is being shunted aside in this single-minded and exceptionally narrow focus on the health-care exemption." Regarding Cardinal George, he has in mind the latter's likening of the administration's understanding of rights in the present case to that of the former Soviet Union, which, the Cardinal says, permitted the right to worship, to the exclusion of the right to have "schools, religious publications, health care institutions, organized charity, ministry for justice and the works of mercy that flow naturally from a living faith." It suffices here simply to note that Dionne's criticism misses the fundamental point of Cardinal George's argument: that there is an understanding of the *principle and nature of rights* implied in the Obama administration's mandate that is no less peremptory and arbitrary in its own way than that affirmed in the Constitution of the former Soviet Union.

(i) On the one hand, the objection typically takes the form of arguing that the genius of the liberal tradition, in the face of the pluralism of modern societies, consists precisely in the fact that it officially, or constitutionally, enshrines no particular reading of such ideas, no doctrinaire vision of the person. The main burden of that tradition, on the contrary, is that each citizen or group is empowered to make the case for its own vision. The position of Locke, and especially of the *New York Times*, therefore, may be judged in this light to be an aberration with respect to the liberal tradition in its broader, more benign and indeed conservative, self-understanding. Thus a prominent Catholic interpreter of the present cultural situation argued some years ago that liberalism should be embraced because it is “a condition not a content,” and hence it allows the maximum amount of freedom necessary to make one’s case before the general culture. One might say that this argument is but a sophisticated version of the more pedestrian claim that each of us hears in countless forms everyday: namely, that the point is not that the truth does not matter, but that the freedom to argue must not be prematurely preempted by seeking to enshrine a particular version of truth in the juridical order, such that the rights of all members of society to the exercise of freedom would then be tethered to this particular version.

It should be evident that the objection I am rehearsing here is but a species of the very liberalism criticized earlier. The objection proposes that we should defer the truth for all juridical, or constitutional-public, purposes, for the sake of insuring a principled commitment to the freedom and rights of every citizen. But that indeed was just the burden of my earlier criticism: that the attempt to defer any definite claim of truth on the part of the juridical order itself thereby already embodies and thus privileges the definite truth of formal freedom, and of the definite view of rights as purely juridical that is tied to formal freedom. In other words, and once again: such a deferral of truth by way of abstraction from truth does not cease to be a claim about the nature of the person, and thus a metaphysical claim of truth, simply because the abstraction is made for expressly political reasons. On the contrary, such an abstraction remains what it is, namely, an implicit claim about the nature of the person and his act of freedom, now inserted into the heart of the

juridical-political order.¹⁸ Note: that this is so does not imply that citizens subject to a juridical order founded on formal freedom and rights do not remain free, and retain the right to propose different views of freedom and rights, including those rooted in nature and informed by religious faith. Indeed, the *Times's* editorial itself encourages such proposals. The pertinent point is simply that these proposals, given liberalism's formal-juridical order, will now be, and of their inner logic can only be, constitutionally and so far publicly impotent. Such proposals will be understood from the perspective of such a juridical order only as *options* exercised by citizens: options that, as such, have legal-political pertinence only *qua* a freedom of indifference exercised in the name of rights abstracted from any natural, hence intrinsic, order of relations to God and others, to transcendent truth and goodness.

My response to the objection is thus, first, to state again that there can be no juridical order that, in invoking freedom and rights, does not thereby, *eo ipso*, suppose and express some claim of truth about the nature of the human person and human dignity, about the person indeed as an order of relations to God and a transcendent good. The pertinent question is not whether the juridical order will embed such a claim of truth; the question, rather, concerns the relative adequacy or inadequacy of the claim that will of necessity be embedded in some form, and the relative degree to which this claim will be rendered explicit. The objection, in assuming that there is a juridical order that defends freedom and rights without relying intrinsically upon a claim of truth about the person, by that very fact

¹⁸It is often objected that such an abstraction of freedom from the natural order of relations to God and others, to truth and the good, is unproblematic as long as one is clear that this abstraction holds for prudential juridical-political purposes alone, and as long as one thus remains mindful of the fuller natural order of relations that is essential to the person as such, and hence in the range of his cultural-social life as a member of civil society with its communities of family and church. This objection, however, begs the crucial question regarding the sense in which a rightly understood natural-constituent order of relations to truth, God, and others affects the original and abiding meaning of the formal exigence to freedom. It begs the question, in other words, of the significance of *the difference* that these natural-constituent relations make in terms of freedom *already in its essential-actual character as such, qua formally exigent to exercise initiative and control and self-determination*—and if already in its essential-actual character, then also inside the juridical-political order. Regarding this difference, see “America’s Technological Ontology and the Gift of the Given,” cited in footnote 15.

tacitly privileges the truth of freedom of indifference and thus of a formally-conceived human nature. In so doing, the objection itself participates, however unwittingly, in the dictation of the peculiar tyrannical logic we have ascribed to liberalism, which as a matter of principle grants rights only to the “strong.”

Thus, in sum: those who would defend liberalism because it is “a condition not a content” themselves thereby implicitly invoke the very freedom of indifference lying at the root of the problem we have identified with respect to Locke and the *Times*. The difference is that the former, more conservative liberals wish, *qua members of civil society*, to *add* to this originally formally-conceived freedom an order of transcendent relations to the true and the good and God; while the *Times*’s more secular liberalism sees these relations for what they now, strictly-logically, are: optional, extrinsic additions to what is first a formally-conceived freedom. The *Times*’s editors, in other words, differ from conservative liberals, not because these editors do not share the premise that liberalism is “a condition not a content,” but because the editors want to maintain liberalism as the “condition” that it essentially is (with its hidden metaphysics of formal freedom), without burdening this (would-be empty) “condition” with the now arbitrary addition of (substantive, explicit religious and natural-moral) “content.”

(ii) My counter-argument, then, relative to the argument of liberalism in both its “conservative” and “liberal-progressive” stripes, is that any defense of rights that would be conceived with consistency as universal must indeed be—because it cannot not be—tethered to some definite claim of truth regarding the nature of the human being, of the relations between self and others, of the self in relation to a transcendent order of being and truth and goodness and hence to God. Liberalism does not avoid such a claim; on the contrary, it merely hides its claim to truth even as it implicitly frames this claim in reductive and deeply fragmented terms.

The burden of my positive proposal in this light, then, is that we can in the end secure the freedom and rights that are the hallmark intention of liberalism’s juridical order only by tying them to a *human nature understood to bear an intrinsic order of transcendent relations* (to the true and the good, to others, and finally to God). Liberalism’s *universalist intention* of securing equality of rights *for all*, in other words, can actually be realized *only via a metaphysics rooted in the natural truth regarding the person*. By this I do not mean to imply

that the state is, or can ever legitimately be, the source of the truth about the person. I mean only that the constitutional order and the exercise of political authority in any regime cannot but rest upon and express some vision of the human being, of his nature and destiny relative to questions of truth and the good and ultimately God.

Needless to say, the present forum does not allow us to deal adequately with the difficult questions that arise in the face of such a proposal. It will suffice merely to suggest in conclusion that, in Vatican II's Declaration on Religious Liberty (*Dignitatis humanae*), we find the ingredients necessary for an adequate statement regarding an idea of rights that integrates freedom and truth, in and through a natural order of relations of the human person to God and others and the good. Defense of such an idea was indeed the burden of the revisions made to *DH* in the later redactions of the document and included in its final text. The third schema had established what was understood to be a more "juridical-political" approach to the question of religious freedom. The debate that ensued following the third schema, and that included interventions by Karol Wojtyła among many others, pressed the question as to whether the foundations, and thus first and basic meaning of rights, did not need to be tied more clearly to relations and duties to the transcendent order of truth and to God, and whether the right to religious freedom, consequently, did not need to include more than the negative sense of immunity. To use the terms of our earlier discussion, the debate revolved around the distinction between a formal freedom and freedom for excellence: whether an adequate notion of freedom and rights did not need to integrate freedom of choice from the beginning into the natural order of relations to truth and to God.

In lieu of providing a complete account of the teaching of *DH*, which is not possible here, we will cite recent texts from Benedict XVI that nicely capture the burden of this teaching.

Openness to truth and perfect goodness, openness to God, is rooted in human nature; it confers full dignity on each individual and is the guarantee of full mutual respect between persons. Religious freedom should be understood, then, not merely as immunity from coercion, but even more fundamentally as an

ability (*capacité*) to order one's own choices in accordance with truth.¹⁹

The right to religious freedom is rooted in the very dignity of the human person (DH, 2), whose transcendent nature must not be ignored or overlooked. God created man and woman in his own image and likeness (cf. Gen 1:27). For this reason each person is endowed with the sacred right to a full life (n. 2)

Our nature appears as openness to the Mystery, a capacity to ask deep questions about ourselves and the origin of the universe, and a profound echo of the supreme Love of God, the beginning and end of all things, of every person and people. The transcendent dignity of the person is an essential value of Judeo-Christian wisdom, yet thanks to the use of reason, it can be recognized by all. This dignity, understood as a capacity to transcend one's own materiality and to seek truth, must be acknowledged as a universal *good*, indispensable for the building of a society directed to human fulfilment. (n. 2)

Earlier, on the occasion of the fortieth anniversary of *Dignitatis humanae*, shortly after his election in 2005, Benedict XVI stated that “the Second Vatican Council reaffirms the traditional Catholic doctrine which holds that men and women, as spiritual creatures, can know the truth and therefore have the duty and the right to seek it,”²⁰ making reference to *DH*, n. 3, which states: “everybody has the duty and consequently [*ideoque*] the right to seek the truth in religious matters”

It claims such as these, then, rooted in ideas of a nature and natural law innerly related to a transcendent order of truth and the good, and to God, that are presupposed by Benedict XVI in his statement at the United Nations that “removing human rights from [the context of the natural law inscribed on human hearts] would mean . . . yielding to a relativistic conception, according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of different cultural,

¹⁹Benedict XVI, “Religious Freedom, The Path to Peace,” Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace, 1 January 2011, n. 3.

²⁰Benedict XVI, “Relativism Puts Religious Liberty at Risk,” *L’Osservatore Romano*, 7 December 2005, weekly English edition, p. 1. Also available online at <http://www.ewtn.com/library/PAPALDOC/b16angrelat.HTM>

political, social, and even religious outlooks.”²¹ In other words, far from undermining the universality of rights, the anchoring of rights in a natural order of transcendent relations is precisely what protects rights from being restricted arbitrarily to one group as opposed to another—for example, to the “strong” over against the “weak.” Indeed, it is the anchoring of rights in such a natural order that secures a principled commitment to the right to freedom even when this right is abused. Thus, in the words of *DH*:

The right to religious freedom has its foundation not in the subjective attitude of the individual but in his very nature. For this reason the right to religious freedom continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it. The exercise of this right cannot be interfered with as long as the just requirements of public order (*iustus ordo publicus*) are observed. (n. 2)²²

In light of the foregoing, then, we can say, first, that *DH* anchors the right to religious freedom in the duty to seek the truth, especially religious truth. Affirming the right to religious freedom as an immunity from coercion, the Declaration understands this immunity as a necessary-logical consequence of our relation to God and duty to seek the truth about God. And the duty to seek the religious truth presupposes and demands the right to freedom in this search. Duty is prior to right even as each presupposes the other, and thus neither is simply a function of the other.

Second, the changes introduced into the Declaration in its later redactions, which emphasized the link between the right to religious liberty and the duty to seek the truth, did not attenuate the

²¹Benedict XVI, Address to the General Assembly of the United Nations, 18 April 2008: *AAS* 100 (2008), 334.

²²The vexed question of a putative “right to error” is implicitly answered by this text. Properly speaking, there is no such right. On the contrary, it is the truth regarding the nature and dignity of the human person that founds an unconditional right to freedom (whose exercise can be legitimately restricted in light only of the demands of a just public order). The right to freedom, in other words, remains tied to this natural truth and so is retained even when the person freely chooses what is false and evil. Again, there is a right to follow even an erroneous conscience, but this subjective right is informed from within by the demand to form my conscience in terms of truth. Which is to say, I have no objective right to error as such.

meaning of this right as an immunity, and thus did not make freedom into a simple instrument of truth, such that possession of the truth (apparent or real) would ever justify short-circuiting the right. On the contrary, these changes made the principle of immunity more secure, by rooting it in the natural freedom given its constituent form within a natural order of relations to truth and the good and God, and by placing the right to immunity thereby within the positive context of service to truth and God and others. The exercise of such a right can be limited only by the just demands of the public order (*iustus ordo publicus*).

Third, rights and duties as thus conceived are matters of nature and reason, and so far are appropriate for, and make a legitimate demand upon, all human societies, even if a full understanding of such rights and duties involves a dynamic, ever-more-complete opening—via free and intelligent personal acts—to the truth and goodness of God as revealed in Jesus Christ.

Fourth, the above indicates the warrant for the Declaration's statement that the state has a duty, not precisely defined, to recognize religion and to favor conditions that foster its growth, even as the state has a duty as well to see to it that religious truth is nonetheless never to be imposed. This means that the state's "negative" duty in matters of religious truth—that it is neither the source nor the first or final judge in such matters—is tied to its positive duty of fostering conditions favorable to the exercise of religion, as distinct from remaining simply agnostic or neutral with respect to religion. Although *DH* is clear about this (see art. 3), the document nevertheless expressly avoids entering formally into the question of the relation between Church and state.

In sum: the formal-juridical idea of freedom and rights by itself is logically vulnerable to the problem of relativism, and it is awareness of this that prompted the Council Fathers to make the changes they did following the third schema of the Declaration. The negative-juridical sense of freedom and rights, if not situated in an integrated fashion within the natural order of relations to truth and the good and God and others, remains open of its inner dynamic to relativism, indeed to what I have suggested is a relativism of a peculiarly tyrannical sort.

Here, then, is the burden of my argument: in responding to the crisis that has arisen regarding religious freedom and contraceptives, Catholics need to understand that the issue is not properly conceived as a matter of the consistent application of an idea of rights (as immunities) commonly embraced by the various parties. On the contrary, the dominant liberal culture, given exemplary expression in the *New York Times* editorial, is acting consistently with the formal-judicial view of rights that is framed by liberalism's hidden metaphysics of freedom of indifference. The issue that needs to be faced, then, is that of the proper nature of rights, which is to say, thus, of the proper nature of the person and his freedom in relation to truth, the good, God, and others. If this is not understood, efforts to resist policies such as that now imposed by the Obama administration in the matter of "reproductive rights" will, however successful in immediate strategic terms, continue otherwise to aid and abet the dominant liberalism's hidden logic of repression.

In sum, the task of Catholics, in the face of the current controversy, is not only that of effecting change in the culture's public policies, although of course it is also that. What is needed, at a more fundamental level, is a transforming conversion of our society's largely unwittingly assumed idea of the human being as an abstractly conceived in-dependent agent, and of the "culture of rights" and indeed entire way of life that have grown up around this idea and that now dominate America's political, economic, social, educational, and religious institutions. □

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