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FOREWORD

CHURCH, STATE, AND SEX

JOHN H. ROBINSON*

I. INTRODUCTION

Why, a reader might ask, is a law review at a Catholic law school publishing a symposium on the topic of sexual orientation? Has not Rome already spoken on this matter? Is not the matter thereby concluded?¹ Rome has spoken,² to be sure, but for three reasons the matter is far from concluded. The first reason relates to the nature of the church and of debate within it. The second reason relates to the relationship that exists between churches of all sorts and modern, secular, pluralistic states. The third reason relates to a dilemma that the modern, secular state has generated for itself. In this Foreword, I will devote a few paragraphs to each of those considerations, then I will relate those considerations to the several articles that constitute this symposium. First, however, I need to say a few things about religious belief and about how it relates to rationality on the one hand and to the church on the other.

II. BELIEF AND RATIONALITY

So bleak is the intellectual landscape with which modernity confronts us that religious faith emerges as a uniquely desirable possession, but so strong is the challenge that modernity poses to religious faith that an authentic faith emerges as an immensely

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1. The allusion here is to a line from a sermon by St. Augustine. He said, "Roma locuta est; causa finita est." ("Rome has spoken. The case is closed.") It is a poor summary of a vastly more complicated thought articulated by St. Augustine in § 10 of Sermon 131. See 4 WORKS OF SAINT AUGUSTINE 322 (Edmund Hill, O.P., trans. and notes, John E. Rotelle, O.S.A., ed., 1992).

2. See *Congregation for the Doctrine of the Faith, The Pastoral Care of Homosexual Persons*, 16 ORIGINS 378 (Nov. 13, 1986), and *Vatican Congregation for the Doctrine of the Faith, Responding to Legislative Proposals on Discrimination Against Homosexuals*, 22 ORIGINS 174 (Aug. 6, 1992).

difficult achievement. What is more, the very success that modernity has enjoyed in its challenge to religious faith exacerbates the tension between the desirability of possessing it and the difficulty of sustaining an authentic form of it. As modernity makes it easy for us to believe that human life is meaningless, that the cosmos is indifferent to us, and that God and the afterlife are figments of our imaginations, the sense of meaning that religious faith conveys becomes all the more desirable—the best and perhaps the only protection against despair. But if we purchase that faith at the cost of our own intellectual integrity, we have paid too high a price.

Matters become exponentially more problematic as we move from the deistic repudiation of the bleakness just sketched to the densely packed message of the Christian Gospel. It is much easier, that is, to justify the belief that Someone in the Great Somewhere hears every prayer than it is to justify the belief that Jesus is the second person of the Trinity. Even if we succeed in the former justificatory enterprise, however, we have rescued only the most pallid, loveless god from modernity's juggernaut. It is for that reason that it is the latter, more challenging, justificatory project that interests me here.

For a belief to be rational, the believer ordinarily needs to have evidence of its truth; evidence, that is, that there exist states of affairs in the world that correspond appropriately with the contents of the belief. Belief, furthermore, *ought* to be rational; more correctly, we *ought* to be rational in our believing. Where, therefore, a belief of ours reveals itself, upon inspection, as lacking a proper evidentiary foundation, we ought ordinarily to shed it. To do otherwise is to be irrational, and insofar as we aspire to full humanity, we should not be irrational.

When we inspect the evidential foundation for Christian belief, some of us find it so weak as to render that belief irrational and therefore unworthy of our assent. Others of us find that evidential foundation to be so strong that they have a hard time understanding why others do not accept it. Still others come down somewhere between those two camps, finding some evidence for the relevant beliefs and some against it. For some, at least, in this middle camp, Christian belief involves a leap of sorts, a leap in which belief-supporting evidence is consciously weighted more heavily than is the belief-defeating evidence.

The conscious weighting of evidence of the sort just mentioned is certainly not unique to religious contexts, nor is its rational defensibility always problematic. We might want the brain surgeon, the rescue team, or the quarterback to focus on the smidgen of evidence that suggests the possibility of a positive

outcome for an operation, a search, or a game, when the vast preponderance of the evidence invites the conclusion that all is lost, and we might praise them for clinging to the belief that success is possible, especially when clinging to that belief makes their success possible. What distinguishes the religious believer's weighting of evidence from the three cases just noted is that in those cases the weighting was a response to one sort of crisis or another, while the religious believer whose faith is the product of a leap of some sort is asked to continue weighting belief-supporting evidence over belief-defeating evidence over a whole life.

III. BELIEF AND CHURCH

If at this point we shift our focus slightly to ask *how* the religious believer might succeed in this long-term weighting process, the church suddenly enters the epistemic picture. Whenever I stand to benefit enormously from maintaining a belief that it is entirely possible for me to lose, one obvious way for me to maintain it is by affiliating with others who accept that belief. Whether I am in the camp of those who find the belief to be self-evidently true or in the camp of those for whom maintaining the belief requires a leap of the sort described earlier, it may be easier for me to maintain the belief in question if I affiliate with those who are like-minded than it would be if I affiliated with those who find the belief to be false or absurd. Let us for the moment imagine the Christian church in its many confessions to be heavily populated by people from this middle camp. Of them we can say that because they believe, they belong to the church, and because they belong to the church, they believe.

But it is just here that the perilousness of religious belief reasserts itself. Just because religious belief is so precious, the believer is tempted to hang on to it *regardless of* its rational acceptability. But it is just this that the believer should not do. To believe not because one has good reason to think that there are states of affairs out there that correspond appropriately to the contents of the belief, but because the belief brings a sense of meaning to one's life, is to betray both one's humanity and belief itself. For this reason there is a tension at the core of any confession's life, however that confession might be structured. On the one hand, some people belong to it so as to be confirmed in their inclination to believe; on the other hand, those same people have an obligation to make sure that their belief has not become a counterfeit of itself—they have an obligation, that is, to make sure that they maintain their religious beliefs because

there is good reason to accept them as true and not because maintaining them gives those people a warm glow of some sort.

This would all be simple enough if it weren't for the fact that the church functions not only as a protector of belief in the way that I have just sketched, but also as evidence itself of the truth of those beliefs. By that I mean that one reason some people may have for believing Jesus to be divine is their experience of the church as a contemporary embodiment of the salvific work of Jesus. For these people, the church gives them a reason to believe that is additional to whatever other reasons that their experience and other sources have given them. The church, for them, is itself evidence for the truth of the beliefs that are partially constitutive of it. The church could never be *conclusive* evidence for the truth of the claim that Jesus is divine if only because the fact that a belief has a salutary affect on a person's life cannot give us conclusive reason to accept that belief as true; still, there is nothing irrational in attributing *some* evidential value to the way that people animated by a certain belief live their lives.

Someone regarding the church as evidence for the truth of the claims that it asserts would, I suspect, focus on at least two features of the church's life: first on how the people who make up the church live; and second, on what the church teaches about how it is that we should live. Where either of those features of the church's life fails to function as evidence of the truth of the church's central religious teaching, something has gone awry. Now it may be that what has gone awry is in the life or mind of the observer, but it is also possible that what has gone awry is in the life or mind of the church. The church needs to guard against this possibility more vigilantly than it guards against almost anything else.

IV. CHURCH AND SEX

With respect to human sexuality, the church is potentially vulnerable regarding both of the features just noted. It may be true, that is, that the people who make up the church lead stilted, joyless sexual lives, or that what the church teaches about sex is one source of this stilted, joyless sexual life. To the extent that either of these claims is true, the ability of the church to function as evidence for the truth of the claims that it asserts is compromised. It is, therefore necessary for the church to reflect both on how its adherents live their sexual lives and on how effectively it teaches the integration of sexuality into a flourishing human life.

If the church shrinks from such a reflective process, it risks failing in its mission as the manifestation of the truth of the Gospel message, but if it undertakes this reflective process, it finds at the outset just how formidable a process it has undertaken. Jesus had little to say about human sexuality,³ and the canonical letters add little to the little that he is reported to have said. It is not that their authors had nothing to say about human sexuality—Paul was particularly wont to write critically of the sexual libertinism of his pagan contemporaries.⁴ No, the point is that except for a luminous passage in Paul's letter to the Ephesians,⁵ the canonical letter writers make little effort to *integrate* their thoughts about human sexuality into their appropriation of the Gospel message, and even in that luminous passage, modern readers can find a profoundly troubling subtext. The problem for us today is that we do not find the canonical writers making a conscious effort to distinguish what their *culture* told them about sex from what the *Gospel* told them about it. The same is true of the patristic writers and of the work of the schoolmen, all of whose work was set in an intellectual and cultural context that they themselves did not adequately distinguish from the Gospel message that they handed on to us. The result is that as we moderns come to doubt the moral propriety of patriarchalism, for example, we find that we cannot resolve that doubt by reference to scripture and tradition. They are both influenced by the same patriarchalism that we are questioning, and yet the mode of that influence is such that we would be supremely unwise to regard either Scripture or tradition as validating it for us.

We find ourselves in a similar quandary as we reconsider the close nexus between morally permissible sexual activity and reproduction, a nexus that the tradition has handed down to us. Is that nexus an ineluctable implication of the Gospel message or is it an understandable but no longer relevant feature of the cultures in which that message was first articulated and later systematized? Neither scripture nor tradition answers that sort of question for us; so we must answer it for ourselves. This does not mean that we abandon scripture and tradition in our reassessment of the nexus between sex and reproduction, but it *does* mean that our resort to scripture and tradition has to be critical if it is to be useful. Failure to venture a critical appropriation of scripture and tradition risks impairing the ability of the church to function as evidence for the truth of the Christian faith, and it

3. See, e.g., MATTHEW 5:27-28; 19:3-12.

4. See, e.g., ROMANS 1:26-27.

5. EPHESIANS 5:21-33.

is the premise of this Foreword that, given the darkness of the times, that is one risk that the church should not run.

V. CHURCH AND STATE

Regardless of how the church in any of its sadly fissured confessions resolves any question pertaining to human sexuality, a further question remains for those confessions that function in modern western states. Those states, by and large, are secular in self-understanding, more or less heterogeneous in ethnic, ideological, and religious constitution, and more or less tolerant with respect to dissident thought and practice. So the confession that works out for itself a stable resolution of a disputed sexual question, must still ask itself whether and how that resolution should be expressed in terms of state policy.

It is always possible that the church will provide one answer for its adherents, while tolerating, or even advocating, a contrary resolution for the state in which its adherents live. A particular Christian confession might, for example, require its adherents to accept an understanding of marriage from which divorce is excluded, while tolerating or advocating no-fault divorce as a matter of state law. It is also possible, on the other hand, that the church will insist that the resolution of a disputed question that it requires its adherents to accept ought also to be adopted by the state. A particular Christian confession might, for example, require its adherents to accept an understanding of abortion that equates it with homicide, while simultaneously demanding that the state adopt just the same understanding of it.

Which of these approaches a confession should adopt in a particular case, or whether there is some third approach that it should adopt, is an inevitable further question for those confessions that function in modern states. Just how a confession should answer this further question is, I suspect, heavily a function of the sort of evidence that was crucial to its resolution of the underlying question itself. Where the resolution of the underlying question was driven primarily by its adherents' appropriation of the Gospel and by their application of the Gospel to that question, there the confession should ordinarily prescribe one rule for its adherents as adherents while tolerating or advocating another for the state in which it functions. Where, conversely, the resolution of the underlying question was driven primarily by its adherents' understanding of the current state of scientific evidence—whether the relevant science be biology, physics, or economics—there the confession is more likely to insist upon the same rule for the state as it does for its adherents.

Where, finally, Gospel considerations and scientific considerations are inextricably intertwined in a confession's efforts to resolve a particular disputed question, things become infinitely more complicated. Needless to say, questions related to sexual orientation belong overwhelmingly to this last category.

VI. STATE AND SEX

If a particular modern state were in possession of a constitutionally grounded, empirically warranted, internally coherent account of how it should regulate human sexual activity, it might perhaps not stand in need of advice from any religious confession on that score. Whatever may be true elsewhere, the American polity is surely not in that position. It is in fact deeply conflicted on just that question and its conflict is built into its constitutional history. To vindicate this claim, I will offer the briefest sketch of that history here.

For reasons that relate both to the time and to the occasion of its composition, the United States Constitution is silent on sex, marriage, divorce, homosexuality, and the like. This silence has not, however, barred the creation of constitutional law with respect to each of those matters. The trouble with that body of law for our purposes here is that it contains two dominant themes that are very difficult to reconcile with one another. The first theme is the sanctity of the family and its centrality in our culture. For well over a century the Supreme Court has celebrated the monogamous family as "the sure foundation of all that is stable and noble in our civilization,"⁶ and it has protected the family against all sorts of perceived threats to its vitality.⁷ The second theme is the autonomy of the individual with respect to his or her sex life. With one notable and hotly contested exception,⁸ the line of cases that extends from *Griswold v. Connecticut*⁹ through *Roe v. Wade*¹⁰ to *Planned Parenthood v. Casey*¹¹ has celebrated sexual choice as "central to the liberty protected by the Fourteenth Amendment,"¹² and it has protected those choices

6. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

7. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1879); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Smith v. O.F.F.E.R.*, 431 U.S. 816 (1977); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

8. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

9. 381 U.S. 479 (1965).

10. 410 U.S. 113 (1973).

11. 112 S.Ct. 2791 (1993).

12. *Id.* at 2807.

against all sorts of perceived threats to their integrity.¹³ It may be true that as a logical matter these two lines of decision are capable of reconciliation, but for both conceptual reasons and practical reasons, these two lines stand in stark contrast to each other.

Consider first the conceptual matter. The Justices who wrote *Reynolds*, *Meyer*, *Pierce*, *Barnette*, and *Yoder* all thought that they *knew* what the place of sexual activity in human life should be and what the role of sexually bonded couples in the intergenerational transmission of human life and culture ought to be. The Justices who wrote *Baird*, *Carey*, *Webster*, and *Casey*, on the other hand, all seem to think that we *cannot* know much about the place of sexual activity in human life except that the state should not meddle with each person's right to articulate his or her own best efforts in this general area.¹⁴ In the jargon of the day, we could say that the family line relies upon a thick theory of the human good, while the autonomy line relies upon a very thin theory of the good.¹⁵ The family line assumes epistemic access to the good, the autonomy line argues against just that kind of access. Public policy predicated upon a thick conception of the good is sure to vary significantly from public policy predicated upon a thin conception of it. The former is likely to be coercive just where the latter is likely to be permissive. In criticizing public policy for being too coercive or too permissive, therefore, the critics of that policy need to shore up their critique by reference to the appropriateness or not of the thickness or thinness of the account of the human good that underlies that policy. Where we really can know how people should act, we have at least *some* warrant for coerciveness, and where we really can't know how people should act, we have *significant* warrant for permissiveness. Needless to say, resolution of disputes over how thick a theory of the good is available to us as a polity will be somewhat difficult to achieve, as disputes over policies relating to sexual activity illustrate.

13. In addition to the cases cited in the text, see *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Carey v. Population Services International*, 431 U.S. 678 (1977), *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), *National Organization for Woman v. Scheidler*, 114 S.Ct. 798 (1994), and *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994).

14. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1993) ("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 the compulsion of the State.")

15. The thick/thin imagery can be traced to JOHN RAWLS, *A THEORY OF JUSTICE* 395-99 (1972).

In addition to the conceptual problems posed by the coexistence of the family line of cases and the autonomy line, there may well be practical problems inherent in their coexistence. The family line, after all, tends to privilege one form of sexual activity and more or less explicitly marginalizes all other forms of it. The autonomy line, by contrast, tends to reject all such privileging as epistemically illegitimate, for the reasons sketched in the preceding paragraph. In the face of these mutually contradictory tendencies, states can be forgiven for honoring one of them more fully than they honor the other. It may also be true, furthermore, that conscientious efforts to honor both of these tendencies equally—maximizing family well-being while interfering minimally with adult consensual sexual coupling—will, as a practical matter, be beset by problems of their own.¹⁶

We need not resolve these issues here. I mention them only to support my earlier claim that our secular liberal culture may have committed itself wholeheartedly to mutually inconsistent styles of thought about sex. It may well be true, in fact, that a good part of the culture wars in which we seem to be engaged these days is at base an expression of an awareness of the inconsistency between those two styles of thought.¹⁷ If that is the case, then it may also be true that our culture does in fact stand in need of, if not advice from, at least conversation with religious confessions on the conditions under which sexual activity contributes most fully to the achievement of the good.¹⁸ There will, of course, be several constraints on this conversation—secular states should not predicate their policies on sectarian premises, and authentic religions do not take their marching orders from the secular state—but even under those constraints, the conversation could benefit all of its participants.

VII. CONCLUSION

The several articles that make up this issue of our *Journal* are meant to contribute both to the conversation that I have just described and to other conversations within the church and within the secular culture. They will constitute such a contribution to the extent that they observe the basic rules of civil conversation everywhere. Those rules, as I understand them, require

16. See Barbara Dafoe Whitehead, *Dan Quayle was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47.

17. See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

18. See JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR* (1994), for a similar suggestion.

both that the participants in the conversation operate under no extraneous inhibitions with regard to what they are free to say and that they are genuinely open to the possibility of the other side's being right on a contested point. Where those conditions are not met, we talk past, or shout at, each other. The hope is that in this symposium our contributors meet those conditions and make genuine conversation possible among us.