

Quarterly Review of the John Paul II Institute
U.S. V. SKRMETTI SPECIAL ISSUE



Humanum

Issues in Family, Culture & Science



U.S. V. SKRMETTI:
DEBATING REALITY

U.S. v. Skrmetti:

Debating Reality



Humanum

Issues in Family, Culture & Science

U.S. V. SKRMETTI: DEBATING REALITY

U.S. v. Skrmetti: Debating Reality

Clifford Geertz once observed that law is a way of “imagining the real,” that it offers “visions of community” rather than “echoes of it.” If so, then the gender debates represent more than clashes between interest groups. At stake: what do we think is real?

This special edition presents some of the papers given at a recent colloquium on *U.S. v. Skrmetti*, to be decided by the Supreme Court, probably in June. The case concerns a Tennessee law prohibiting the use of puberty blockers or cross-sex hormones on children. However the decision turns out, it will have profound implications.

PAGE

FEATURE ARTICLES

DAVID S. CRAWFORD: <i>Skrmetti</i> and the Pathologization of Sex	4
MARGARET HARPER MCCARTHY: The Feminist Roots of Transgenderism	12
MICHAEL HANBY: Transgender Theory and Post-Political Order	23
D. C. SCHINDLER: Can Transitioning Be Healthcare? A Reflection on Sex as Symbol	35
JOHN BURSCH: The Legal and Cultural Context of <i>Skrmetti</i>	41



Humanum

Issues in Family, Culture & Science

FEATURE ARTICLE

Skrmetti and the Pathologization of Sex

DAVID S. CRAWFORD

1. The Obscurity of "Transgender"

A remarkable feature of the transgender movement is its conceptual obscurity. Take the term “transgender” itself. What does it mean? No one really knows. Yet, opposition to the new sexual regime based on it is met with aghast charges of bigotry.

This obscurity is evident in the Biden administration’s arguments in *U.S. v. Skrmetti*, currently pending before the Supreme Court. The case, challenging a Tennessee law prohibiting medical transitions for children, began as a suit filed in federal court by the ACLU on behalf of a small group of children and their parents, but was taken up and argued in the Sixth Circuit and then the U.S. Supreme Court last December by the Biden Justice Department. The Trump administration has been content to let the case be decided by the Court (presumably, this month) without further intervention.

At points in its arguments, the Biden administration seems to presuppose what we might call the “classic model” for “transgender,” the idea of being “trapped in the wrong body,” as one of the anonymous young plaintiffs—16-year-old “L.W.”—put it. Similarly, 13-year-old “John Doe” expressed anxiety about “under[going] the wrong puberty.”^[1] This testimony evokes the implausible idea that these children’s “identity” is a kind of personal essence at odds with their bodies. They are treated as *really* being one sex, even if their bodies *really* are the opposite sex. The point of the implicit argument is to emphasize the importance and urgency of the courts’ decision for these children. If they do not receive the desired procedures as children, then bodily conformity with their true selves will be permanently impeded. One problem with this classical model however is that, while it may serve well in the context of litigation and political activism, few in the gender movement talk about or even believe in it, steeped as they are in theories of social construction and anti-essentialism.

On the other hand, the brief also seems to take the opposite view. We see this in its assertion that under Tennessee’s law “a teenager whose sex assigned at birth [was] male can be prescribed testosterone to conform to the male identity, but a teenager assigned female at

birth cannot.” Setting aside for a moment (see below) the incongruity of this comparison—the treatment for the boy in this example would be to *remedy* some organic problem in the natural developmental arc of puberty (rather than to “affirm his identity”), while for the girl the very purpose of hormone treatment would be to *subvert* her natural development—the basis for the charge of discrimination seems to be that, even though the two are “similarly situated” insofar as each seeks to “affirm” a male “identity,” they are treated differently on the basis of their differing sexes as “assigned at birth.” The argument is presumably designed to shoehorn the case into the Supreme Court’s 2020 decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020).

Yet, *Bostock*, in its interpretation of “sex” for purposes of Title VII’s discrimination prohibitions, did not commit itself to the idea that transgender individuals really are the sex of their “identities.” Rather, *Bostock* suggests the opposite insofar as its holding turns on the idea that a *man* and *woman* who each “identify” as a woman have that fact as a shared characteristic (again, setting aside the dubious assumption that a man’s “identity” as a woman and a woman’s “identity” as a woman have anything to do with each other), yet are treated differently, based on their different sexes, specifically *as a man and a woman*. In fact, the Court leaves the category “identity” completely blank. Is the shared characteristic a mere verbalism? Or is it a common choice or feeling? Or does their shared identity have some sort of ontological status? While these questions are left unaddressed, *Bostock*’s argument only works if the man is a man and the woman is a woman, despite their shared “identities.”

Without reference to what is real and external to the experience itself, it is impossible for a “transwoman,” for example, to be certain of having the experience of being a woman rather than the experience of being a man who thinks he is having the experience of being a woman.

At the same time, the solicitor general’s arguments in *Skrmetti* claim that Tennessee’s law represents a form of “stereotyping,” arguing that the primary purpose of Tennessee’s legislation is “to force boys and girls to *look and live* like boys and girls,” or “to enforce conformity with characteristics that are ‘typically male or typically female.’” In other words, the Biden administration seeks to portray Tennessee’s law as a transparent effort to impose the legislature’s or voters’ prejudices and stereotypes concerning sex or gender on the state’s children. Here too we run into obscurity since it is not clear what sort of “stereotypes” we are dealing with. Is the stereotype that, for example, boys should not *look* feminine (due to hormonally enlarged breasts or smaller jaw size)? If this is the stereotype, then isn’t the Biden administration treating obstruction of children’s natural maturation process and the permanent changes to children’s bodies rather glibly, as though they were similar in kind, if not gravity, to choices in dress or hairstyle? Or rather is the stereotype the assumption that, for example, a child born with a girl’s body cannot in fact be a boy? This second alternative was the position suggested by the Sixth Circuit’s 2018 *Harris Funeral Holmes*, which colorfully spoke of “stereotypical notions of how sexual organs and gender identity ought to align.”[2] In this latter case, if the problem really is only a matter of stereotypes, why is medical intervention necessary at all? Wouldn’t the less invasive response be to change the stereotypes?

In the context of litigation, these ambiguities may seem problematic for the Biden administration's legal argument. But, in the larger movement, obscurity is not a bug but a feature. In surveying current terminology, self-proclaimed "trans-feminist" Susan Stryker warns that transgender's "meaning is still under construction." Stryker nevertheless ventures to say that the term refers broadly to those

who move away from the gender they were assigned at birth, people who cross over (*trans-*) the boundaries constructed by their culture to define and contain that gender. Some people move away from their birth-assigned gender because they feel strongly that they properly belong to another gender through which it would be better for them to live; others want to strike out toward some new location, some space not yet clearly described or concretely occupied; still others simply feel the need to challenge the conventional expectations bound up with the gender that was initially put upon them. In any case, it is the movement across a socially imposed boundary away from an unchosen starting place, rather than any particular destination or mode of transition, that best characterizes the concept of transgender [3]

In Stryker, "transgender" takes on a libertarian cast, emphasizing transgression and a general rejection of the "unchosen." In that sense it seems distant from the "classical" situation I described above. This abstract and ambiguous character of the movement is captured perfectly by *Harris Funeral Homes*, which described the concept of "gender identity" as similar to "religious identity" insofar as the latter may be "*just as fluid, variable, and difficult to define as 'gender identity'*"; after all both have a 'deeply personal, internal genesis *that lacks a fixed external referent.*'"[4] Yet, it was this concept, in all its ambiguity and abstraction, that controlled the court's judgment in the case.

2. Sex and Fragmentation

Conceptual ambiguity was built into the movement from the beginning. We see this already in its earliest theorizing. For example, early sexologist Karl Heinrich Ulrichs (1825–1895) posited a biological basis for what he called "Urnings," which he described as "*anima muliebris virili corpore inclusa*" ("a feminine soul contained in a man's body"), a phrase he used to describe homosexuals (like himself), but which could alternately mean "transsexual" or "transgender." [5] Here we see the beginnings of the idea that a sexualized soul or self could be at odds with the normal expectations for a sexually differentiated or dimorphic body. Because Ulrichs thought that this division and conflict is biologically based, he also thought it is "natural," like a third sex, and therefore also that it should be socially, politically, and legally accepted. Setting aside the ambiguity of Ulrichs's use of the word "natural," his "third sex" rendered the relationship between the "soul" and the sexually dimorphic body arbitrary. One could be male, female, or "Urning" by "nature." But what can it possibly mean to have a body that is "by nature" inherently sexed but a soul that stands "by nature" in opposition to that sex?

By the time of sexologist and early transgender rights advocate Magnus Hirschfeld in the early twentieth century, these alternatives, based on a simple dichotomy between body and soul, were multiplied considerably. His theory of "sexual intermediaries"—that everyone possesses some combination of male and female characteristics—meant that the various combinations of sexual characteristics, including both primary and secondary sex characteristics and traits,

“erotic preferences, psychological inclinations, and culturally acquired habits and practices,” could amount to more than 43 million unique variants.[6]

Ulrichs and Hirschfeld demonstrate sexology’s growing claim to “scientific” objectivity concerning sex, as opposed to religious and cultural traditions. In this, they offer an early background for the efforts of John Money in the 1950s. Money’s famous division between sex and “gender,” intended to aid his study and clinical work on the rare set of conditions then grouped under the term “hermaphroditism”(but now known as “intersex”),[7] was coupled with a further fragmentation of the body itself, which was divided sex into about seven parts or aspects—morphological sex, gonadal sex, chromosomal sex, and so forth.[8]

This division and then subdivision spawned an influential but ultimately problematic way of seeing sexuality: a sexed body, which was separated into parts and reduced to physiological functionality, set alongside the psychosocial element of “gender.” Money’s coinage of “gender” in its contemporary sense was followed by the famed psychoanalyst Robert Stoller’s use in the 1960s of the term “gender identity,” which he defined as “the awareness ‘I am a male’ or ‘I am a female,’” an assessment conceived as distinct from the indications of the body.[9]

Paradoxically, the effect of these dualisms, with its implicit devaluation of the body, has been to maximize the importance of “gender identity” for personal self-understanding and to vest it with a seemingly inviolable spiritual quality, an unchangeable center surrounded by a set of essentially plastic or alterable body parts. As an expert witness from the World Professional Association of Transgender Health (WPATH) put it in 2005 testimony, “attempts to change one’s gender identity have been unsuccessful and in many cases were very harmful to the individual involved.” Therefore, “whenever there is a lack of congruence among the various elements of sex, the goal of gender specialists is to bring the other elements of sex into conformity with one’s gender identity, thus confirming the primacy of gender identity relative to the other aspects of sex.”[10]

According to this view, subjectivity itself appears to be integrated by “identity,” while the sexually dimorphic body is implicitly placed outside of identity and reduced to the functional relations of its parts and aspects. Indeed, if “identity” refers to self-sameness and unity, then the human subject appears to be unitary only by virtue of *not* being organically related to this fragmented and materialistic body.

3. The Pathological Inversion

More momentous than a mere attempt to understand a relatively unusual set of anomalous conditions, the effect of the fragmentary view of the person has been to redefine human sexuality universally.

Both Money and Stoller were concerned with what they considered disorders. Yet, their reconceptualization of sexuality presents us with a certain paradox. Already in their own work, this fragmented way of seeing persons, such that the whole is in effect reduced to parts that exist and function in parallel ways, rapidly expanded to become a lens for understanding human sexuality as such, even for those who do not experience non-alignment. In other words, a category originally intended to aid in understanding and remediating disorders or anomalous conditions became an indispensable conceptual tool for understanding the nature of sexuality universally. Both Money and Stoller acknowledged this seeming paradox. Indeed, Stoller characterized his patients as “natural experiments,” by which we can gain a more exact understanding of the nature of human sexuality.[11] So, the ideas of “gender” and “gender identity” effectively viewed human sexuality in its very nature through a lens designed to

understand aberration.

If activists claim that centralizing the “binary” falsely pathologizes sexual variance, Money and Stoller in fact inaugurate a pathological understanding of sex in its very nature. In their hands, the conditions explaining transgender or hermaphroditism—i.e., the fact of non-alignment of parts and aspects—have become the optic for saying what sex *is*. This is because the optic assumes a principled *lack* of organic unicity or order between the sexually dimorphic body and the internal subjective state, as well as among the various bodily aspects of sex, and this lack of order is taken as the universal character or truth of sex. According to this view, in other words, we can understand “sex” by knowing that “identity” and the sexually dimorphic body are in principle independent aspects, that a woman, for example, who “identifies” as a woman does so because these aspects “align,” rather than because she is an organically constituted whole.

The relationship (and therefore what we mean by “sex”) in that sense is essentially “fragmented” and “arbitrary,” i.e., “without order” (=dis-ordered, *pathological*), *even where there is “alignment.”*[12] If “pathology” indicates disorder, then Money’s and Stoller’s understanding of human sexuality is pathological.

For second-wave feminists who followed in the 1970s, the medical context was removed entirely, while the dis-order and arbitrary fragmentation of the human subject into sexed “biology” plus a gendered “identity” was further universalized, popularized, and politicized.[13] Hence, Gayle Rubin dreamt of “an androgynous and genderless (though not sexless) society, in which one’s sexual anatomy is irrelevant to who one is, what one does, and with whom one makes love.”[14] Since then, “gender” and “gender identity” have come to dominate discourse about human sexuality.

4. "Cis" Is "Trans"

Here we can begin to see the background for the current debate’s abstract and even unreal character. The fragmentation of sexuality into parts that may or may not align loses sight of the nature of sexuality, and in doing so it places that nature and anomalous occurrences on the same footing. According to this view, the variations in sexuality are mere equivalent instantiations. In this way, *anomalous* variants are given the same logical and ontological status or weight as the central case of human sexuality. To make sense of the whole set of variants, which have now all been leveled, means to move to a higher level of *abstraction*. In the case of “transgender,” this higher level of *abstraction* is the concept “gender identity,” which serves as a genus for its species: “trans,” “cis,” “nonbinary,” or even Hirschfeld’s 43 million.

Under this logic, we begin to speak of fathers giving birth or mothers with penises. Or, for example, we begin to theorize that, when “trans women claim to be biologically female, their claims are intelligible within trans-inclusive communities because those communities deploy more sophisticated concepts of sex that do a better job of tracking the different combinations of sex characteristics and the way those characteristics can be changed.”[15]

We can perhaps present this fragmented anthropology schematically. Let’s say “A” is the intelligibly natural occurrence of something, but that there are also anomalous instances: A1, A2, A3, A4, etc. If we lose track of A as possessing the intelligible nature of the thing (because we have reconceived it as a fragmented collection of parts rather than as a natural, organic whole), then when we try to understand the entire set instantiations, we will need to move to a higher level of abstraction—a genus—to include all the instances A, A1, A2, A3, A4, etc. Hence,

the higher level of abstraction will necessarily be intelligible in terms of the possibility of all the members of the set. Yet, what makes A1, A2, A3, A4, etc., different from A is that they lack A's intelligible internal order. In other words, what makes them distinct from A is precisely their *dis-order*. So, the genus, giving coequal status to each of its species, will be defined in terms of this lack of order and therefore in terms of dis-order. A's order will then appear to be merely an arbitrary variant within the set. Since it will seem only to be an arbitrary variant, A's characteristic internal order will appear as only another version of the dis-order characterizing instantiations constituting the rest of the set. In other words, the whole set, including A, will be defined in terms of dis-order. Thus, A will be understood as a variant of the dis-order of A1, A2, A3, A4, etc.

From this we can see that "cis" is in fact only a position on a spectrum defined by the possibility of "trans" in all its ambiguities and variations. The spectrum itself, of course, is predicated on the arbitrary relationship between identity and the body. In this sense, "cis" is only a variant of "trans."

This pathological inversion has haunted the legal understanding of sex right up to our own day and helps to explain the Biden administration's confounding medical aid to the natural arc of puberty with intervention to subvert that arc.

5. "Identity's" Quandary

If this logic seems especially to imperil a fully human or personal understanding of the body, the pathological deracination of sex from nature also indicates a loss of a genuinely human or personal sense of "identity."

As mentioned, while the effect of transgender theory, from its inception in the nineteenth century, has been fragmentation and disorder, the inherent meaning of "identity" points to *self-sameness* (*identitas*= "sameness") or wholeness. Suggested then is that the subjective element "identity" is the constituting whole, the unifying and essential element of personality, as explained above. Yet this experience of oneself as identical with oneself is presumably athematic. I cannot, in other words, fully objectivize myself or stand outside myself. On the other hand, the claimed "identity" in the case, for example, of *Bostock's* man who experiences himself as a woman, does precisely that. Here, self-sameness has been absorbed into an immaterial subjectivity or consciousness or mind abstracted from and treated as arbitrarily related to bodily existence.

But without reference to what is real and external to the experience itself, it is impossible for a "transwoman," for example, to be certain of having the experience of being a woman rather than the experience of being a man who thinks he is having the experience of being a woman. This point can be extended to even more obscure examples from the twilight land of gender theory, such as "non-binary identities." Am I really "non-binary," or am I simply *feeling* non-binary, or am I merely choosing non-binary (but if this latter, what could it possibly mean—would it not be akin to choosing not to be human or not to be a mammal)? This question is part of a more universal one: how well can any of us possess the sort of thematic or categorical knowledge of ourselves—our "identities"—implied by the trans movement?

More concretely, authentic identity is a sense of oneself that arises within the larger tissue of organic ties of natural human communities. The male and female bodies point to each other and can only have their meaning—precisely as male and female—in relation to each other. They also point to the child, and the child likewise points back to the parents. When we gaze in the mirror as we age, our parents peer back at us. When we look into our children's eyes we

see our spouses, brothers and sisters, parents, or in-laws. “Identity” is born from this tissue of relations, which are themselves concrete, embodied, and situated within culture, time, and place. I am who I am because I am born of my mother and father, with a name, a family background, a cultural background, a language. “Identity” in this sense can only be received; it is fundamentally “unchosen.”

But these are precisely the ties that the transgender movement obscures. If the relationship I have with my body is arbitrary and finally dis-ordered, then so are these relationships. Receiving life from a mother and father means that we always bear within ourselves a visible and foundational likeness to others. It means that we bear society within ourselves. In this way, “identity” points both to the past and the future as it reflects the connectedness of men, women, and children in the endless river of generations. The implicit denial of these organic relationships is a dangerous denial of that identity, and our shared humanity.

Elements of the present essay are adapted from David S. Crawford, “Against Trans Rights” and “Response to Jasper Heaton,” in Problems in Applied Ethics: An Introduction to Contemporary Western Debates, ed. Steven B. Cowan (London: Bloomsbury Academic Press, expected in 2025).

[1] It is hard not to sympathize with the suffering of these children, who have become confused and alienated from themselves and their bodies. Recent studies suggest that the vast majority of children will outgrow feelings of dysphoria (e.g. Wylie C. Hembree et al., “Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline,” *The Journal of Clinical Endocrinology and Metabolism* 102:11 [2017], 3869, 3879, App.726; James M. Cantor, “American Academy of Pediatrics Policy and Trans-kids: Fact-checking 1,” *Sexology Today!* [2018], App.464). Yet, an ideology has developed in which adults, however well meaning, have effectively exploited their condition to advance a larger agenda through litigation or political action.

[2] *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576-77 (6th Cir. 2018), at 576-77.

[3] Susan Stryker, *Transgender History: The Roots of Today’s Revolution* (New York: Sean Press, 2008, revised 2017), 1.

[4] *Harris Funeral Homes*, at 576 n. 4, citing and quoting Sue Landsittel, “Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII,” *Northwestern University Law Review* 104 (2010), 1147, 1172 (emphasis added).

[5] See Stryker, *Transgender History*, 52-53.

[6] Hirschfeld also helped arrange for “the first documented male-to-female genital transformation in 1931” (*Transgender History*, 54-55); Elizabeth Heineman, “The Early 20th Century Trans-Rights Activist Who Transformed the World’s View of Sexuality and Gender,” in *The Conversation* (Nov. 9, 2018).

[7] Money is now condemned by all sides for his research and clinical practices. See, for example, John Colapinto, *As Nature Made Him: The Boy Who Was Raised as a Girl* (Harper Perennial, 2006); Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 194-95.

[8] John Money, Joan Hampson, John Hampson, “Examination of Some Basic Sexual Concepts:

The Evidence of Human Hermaphroditism,” *Bulletin of the John Hopkins Hospital*, vol. 97 (1955): 301–19; Money, Hampson, Hampson, “Imprinting and the Establishment of Gender Role,” *A.M.A. Archives of Neurology and Psychiatry*, vol. 77 (1956): 333–36. See also, M. Dru Levasseur, “Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights,” *Vermont Law Review*, vol. 39 (2015): 943–1004, at 980–81, n. 214 (noting that the number and character of the elements has varied over time).

[9] Robert Stoller, “A Contribution to the Study of Gender Identity,” *International Journal of Psychoanalysis* 45 (1964), 220, quoted in Jennifer Germon, *Gender: A Genealogy of an Idea* (Palgrave MacMillan, 2009), 65. See also, Stoller, *Sex and Gender: The Development of Masculinity and Femininity* (Karnac Books, 1968), at 40. See also, Germon, *Gender*, 63ff.

[10] Sharon M. McGowan, “Working with Clients to Develop Compatible Visions of What It Means to ‘Win’ a Case: Reflections on *Schroer v. Billington*,” *Harvard Civil Rights-Civil Liberties Law Review*, vol. 45 (2010): 205–45, at 234–35, citing transcript of Bench Trial at 402-03, *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2005) (No. 05- 1090). The “various elements” here echo Money’s division of identity and the sexed body into parts, increasing the number from seven to nine.

[11] Stoller, *Sex and Gender*, at vii, 5, 14.

[12] The work of scientists such as Money and Stoller should serve as a cautionary example for conservative attempts to use the category “biology” to defend the integrity of sexual dimorphism, since modern biology stands partly behind the fragmenting and pathologizing tendencies we see in their work. Rather, we need a new “biology,” understood in terms of *human nature* (e.g. Hans Jonas, *The Phenomenon of Life: Toward a Philosophical Biology* [Evanston IL: Northwestern University Press, 1966, 2001]; Leon R. Kass, *Toward a More Natural Science: Biology and Human Affairs* [New York: The Free Press, 2008]).

[13] E.g., Ann Oakley, *Sex, Gender, and Society (Toward a New Society)* (London: Temple Smith, 1972), ch. 6.

[14] Gayle Rubin, “The Traffic in Women: Notes on the ‘Political Economy’ of Sex,” in *Toward an Anthropology of Women*, ed. Rayna R. Reiter (Monthly Review Press, 1975): 157–210, 204.

[15] Jasper Heaton, “The Case for Trans Rights,” in *Problems in Applied Ethics*, op. cit.

David S. Crawford is the Dean for Academic Affairs and Associate Professor of Moral Theology and Family Law at the Pontifical John Paul II Institute for Studies on Marriage and Family, and the author of Marriage and the Sequela Christi (Lateran University Press).

June 9, 2025



Humanum

Issues in Family, Culture & Science

FEATURE ARTICLE

The Feminist Roots of Transgenderism

MARGARET HARPER MCCARTHY

What Gender “Is”

To know what to do with something one has to first know what it is. This is also true, therefore, of “Gender.” But, ironically, “Gender” isn’t anything. But it’s more than that (if nothing can be increased). It’s the *nothing* against the *something*. “Gender” is nihilism’s atomic bomb against the prevenient natural order.

The prevenient natural order is our *nature*. To have a nature is to be a kind of thing, and, therefore, to have a determinate (objective) end known as “flourishing” or, subjectively, as “happiness.” Moreover, it is to be that nature by virtue of being born, as the word itself indicates (*natus* being the past participle of *nasci*, “to be born”). To have a nature is to have been *given* it, and to be poised to do so in turn.

“Gender” would destroy nature, then, in its strongest and most pregnant sense, by negating or neutralizing the evidence of our birth, namely, our sexuate condition, and thereby sterilizing the possibility of giving birth in turn. Gender is against *generation*, the meaning hiding in the very term it takes illicitly for itself.

Why does “Gender” want to do this? Because to be sexuate is to be caught up and enmeshed in a three-directional set of relations: those with our forebears, the opposite sex, and our future progeny. The fact that we are so enmeshed, and, especially, all prior to our choice, runs up against the idea of freedom that shapes the public mentality, the one which, as Ratzinger put it, “prefers to have neither a whence nor a whither, to be neither from nor for, but wholly at liberty.”[1] Contrary to what these relations once were—sources of life—they are now an “attack on our freedom.” We must, therefore, get out from under our nature; it must be our “Ground Zero.”

This is what we are doing now (excluding, for the moment, federal agencies). Moving forward, we have moved backwards, or downwards, towards the most basic thing. We are no longer asking what we can *do* with our bodies (sex without marriage, sex without children, sex

without the opposite sex); we are asking *what* we are, if anything at all. The man who calls himself “Susan Stryker,” a professor at the University of Arizona, wrote in what is now a transgender classic, “Performing Transgender Rage”:

The transsexual body is an unnatural body. It is the product of medical science. It is a technological construction. It is flesh torn apart and sewn together again in a shape other than that in which it was born.

It is, he continues, a technological construction—channeling “rage and revenge” against the “hegemonic oppression” of nature itself.[2]

How did we get here? There are remote causes and recent ones.

Original Sin

The remote cause, of course, is that aboriginal catastrophe that disturbed the primordial state. In that state, the man and the woman found themselves to be *creatures*. That is, they were *not* the Creator. Yet, according to Genesis 1, unlike in all other accounts of the beginning, this creaturely lot was “very good.”

Not God, but *like* God, they stood on their own. They had their own existence and were responsible for it. They were rational and free, capable of forming and generating society, and through that society, of having dominion over the world. They were immortal. Moreover, they were surrounded by resources for their sustenance, apparently in abundance, which, for the most part, they could take for themselves: plants and trees which were “pleasant to the sight and good for food,” “Eden” being a place of delight and luxury, as the word signifies. Adam was, moreover, capable of cultivating these plants through his own work and intelligence. All of this had been handed over *to them*. They were not just passively waiting for their next order or to see when they might get their next meal.

If the being of the woman has been eviscerated of everything that “woman” means and entails, what is so sacrosanct about the title “woman”?

At the same time, all of this had been *handed* over to them as a *bestowal*. The tree “at the center of the Garden,” according to Tradition, was meant to show them that everything they already were and had was saturated with a link back to the *Giver of all good gifts*. This meant that everything they had been given had its own inner *givenness* with definite terms for its flourishing or happiness. The plants and trees had their own character, their own “treeness” and “plantness.” They “yielded seed;” they had “lives of their own,” so to speak. So too, with man. Receiving his being, he received a *given* kind of being: in the image of God he was created, male and female.

In short, “it was *good*” to be a creature. One was *not* God so that one could be *with* God. This was reflected on the horizontal plane as well. The male was not the female, and the female not

the male so that they could be *with* each other.

Original Sin disturbed this situation. This began with the demonic temptation. The “Father of Lies” suggests that the lot of the creature was *not good*, that it was a precarious lot set up by a “Master-Tyrant” who jealously held his goods, only to dole them out parsimoniously and arbitrarily. The image of starvation is suggested when the Tempter distorts the command: “Did God say: ‘You shall not eat of *any* tree of the garden?’” (Gen 3:2). Scripture tells us that what the Tempter instills into their hearts is envy. “Envy,” Augustine contends, “is *the* diabolical sin,”[3] since “through the devil’s envy sin entered the world” (Wis 2:24). Acting on envy then, the first couple *commits* the original sin. They take the “apple” from the *one* tree off limits, the one at the center of the garden, representing their link to the *Giver of all good gifts*.”

The original envy was no garden variety envy; for it was not a matter of envying God for what he had for fear that his having it would harm the creature or lessen what the creature had (as Aquinas defines envy).[4] For the creature came to *exist* by virtue of what God had (or, rather, is). And it had it *in abundance*, notwithstanding that God had it infinitely more. It was a matter of not having what they had in the *mode* in which God had what He had, namely, *as God*, as *being* Being (Subsisting Being), then as Creator of what they had (and were). The Tree at the center represented that. When they grasped at it, they were acting out of envy of God’s “lot” as Creator and Giver of all good gifts, on the other side of and “in the middle” of their abundance. They were “grasping at equality with God.” Maximus the Confessor summed up what they did in its essence: they wanted to “be like God” “without God,”[5] instead of “like God *with* God, *from* God, *in accordance* with God.”

It is worth noting that it is *Eve*—not “the first couple”—who takes the fruit of the Tree in the middle of the garden. There are patronizing accounts of this, where Eve is a mere child who didn’t know any better. There are gentlemanly (chivalrous) ones where Adam is at fault (on account of his absence). In either case the blame is shifted. It is not Eve’s fault. She’s a victim. But Eve was no un-schooled child. In fact, she is depicted as having *full knowledge* of the commandment when she *corrects* the Tempter after he misrepresents it. (Adam had told her about it, and well, apparently.) “No, we *may* eat of the fruit of the trees of the garden, only not the one in the middle.” That the Biblical account gives “equal opportunity” to women (in intelligence *and sin*) is something that Gertrud von Le Fort fully appreciated in her masterpiece, *The Eternal Woman*. [6]

In *The Eternal Woman*, Le Fort writes that the Fall, as initiated by the *woman*, is a fall of the creature in the most complete and radical sense, because the woman bears, as symbol, the metaphysical significance of creatureliness, understood in its religious sense, as surrender to God “awaiting in humble readiness.” In *taking* the fruit from the tree in the center of the garden, Eve is unfaithful to that significance. Moreover, because “she is not only destined to surrender but constitutes the very power of surrender that is in the cosmos [according to her very being, and her innermost meaning] ... woman’s refusal denotes something demoniacal and is felt as such.” “The woman who falls is more terrible than the man in his fall.”[7]

This is to say that the “Devil’s envy” enacted by Eve is the refusal of the creaturely “lot,” that is, of having everything God has “*from* God and *with* God,” not *as* God. As St. Paul says, “The world that has Satan for its God” (2 Cor 4:4) is not simply a world that denies God—for even the demons believe [in him] (Jas 2:19) . It is rather a world that denies God’s communion with us as creatures, as *flesh*, as St. Paul says.[8] The problem is not the lack of abundance. Eve *knows* about the abundance (“No, we can eat *from every tree but one*.”). It is the “lot” of having that abundance as a creature that chafes.

What this means, Le Fort explains, is that the Fall is not really the creature *falling earthward*. It is rather a descent *away from the earth*, from creatureliness in its religious sense, that is, as the not-God from and with God. It is a move towards self-divinization and idolatry as a result of the Tempter's promise: "You shall be like unto God." [9] According to Hesiod's account of the history of the gods, the "Great Mother" is the first form of this. The Great Mother is a projection of the refusal to acknowledge a transcendent source of the world's generative power. She is the mother of the living without "the help of the Lord." In that sense it is a stepping out from a communion with the *Giver of all good things*. Here is where Le Fort addresses the "chivalrous account" which depends on the woman being the "weaker sex."

It is entirely false to say that Eve fell because she was the weaker. Whenever woman has been suppressed, it was never because she was weak, but because she was recognized and feared as having power, and with reason; for at the moment when [the woman] no longer desires surrender but seeks self-glorification, a catastrophe is bound to ensue. The dark narrative of the struggle over the tumbling matriarchate still quivers with the fear of woman's power. The most profound surrender has as its opposite the possibility of utter refusal, and this is the negative side of the metaphysical mystery of woman. . . . In the picture of Medusa and that of the Furies the ancient saga also reflects the horror inspired by the woman who has fallen. [10]

Susan Stryker's "transgender rage" is exactly this, avowedly.

[W]e have done the hard work of constituting ourselves on our own terms, against the natural order. Though we forego the privilege of naturalness, we are not deterred, for we ally ourselves instead with the chaos and blackness from which Nature itself spills forth. [11]

When woman is untethered from the "help of the Lord," she is also untethered from the given terms of things. She no longer "lets be" the life that is given her, allowing it to follow its "own mysterious [given] law of becoming." [12] She is, as Christopher Dawson wrote, a "barbaric and formidable deity who embodies the ruthless fecundity of nature, and [whose] rites are usually marked by licentiousness and cruelty." [13] She is characteristically possessive. As Walter Ong wrote:

Possessiveness can be selfish and kill, and possessiveness relates particularly to woman, as in the widespread mythological symbol of the impersonal, possessive, unwittingly selfish Great Mother, whose children are for her not persons but possessions that she consumes or smothers (envelopes to the point of death). [14]

Worse, we need only think of the almost universal right given to mothers to decide whether to allow an unborn child to live or to have it killed. "More total power over another is unthinkable." [15]

Here Le Fort refers us to the "latter days" apocalyptic figure of the "great whore." Unfaithful to the meaning of the symbol she bears—refusing her surrender to God—this diabolical figure dominates the man through seduction and stops up the sources of life.

She serves but as a thing, and the thing avenges itself through domination. Over the man who has fallen under the domination of dark forces she rises triumphantly, the enslaver of his passions. The whore as utter unfruitfulness denotes the image of death. As mistress she is the rule of utter destruction.[16]

Man, too, dominates in his way—"knowledge through power" and all that. We have heard about it relentlessly. But the reduction of all creaturely things to "raw matter" can only happen if the link with the Creator has been severed. This seems to be "on the woman" who refused to be, for both of them, the "handmaid of the Lord."

Proximate Causes: Post-Christian Nihilism

(Original) Sin becomes clearer and more radical with the advent of Christianity, for now that the Creator is known to be the creator of *everything*—there being nothing presupposed—opposition to Him must be opposition to the prevenient natural order *as such* (not only to *what one should do with it*). As David Bentley Hart has said, eloquently, once everything is Christ's there is *no place* to go to oppose him.[17] There is *nowhere* else, no *something* else, no *other god*, in some other civilization to go to. We must *get behind everything*, to "the *nothing*," to start over. This genuinely post-Christian "original sin" is what we are living with now. We are trying to get behind *the way we were born*, and the various "lots" this imposes on us.

Radical Feminism: Simone de Beauvoir

For centuries, since the Early Modern Period, society has been fleeing nature, in the strongest and most pregnant sense, through its re-conception of the natural order and the political nature of man.[18] But the application of post-Christian nihilism began to be applied in earnest to the sexuate condition with feminism, especially that of Simone de Beauvoir (antecedents in earlier feminism not to be excluded). Being an existentialist, Beauvoir thought that to really *exist* as man, one had to *found oneself*. [19] "The definition of man," Beauvoir declared, "is that he is a being who is not given, who makes himself what he is . . . man is not a natural species: he is an historical idea." [20] This meant that man had to stand against the given and "make [himself] a lack of being" through a "perpetual surpassing of what is given" in the direction of an "indefinitely open future." [21] What follows is that "ethics" is definitely *not* the pursuit of happiness, since happiness subjects freedom to an objective "end," giving it a course of action and measure of its success or lack thereof. On the contrary, freedom aims only at itself. [22]

What, though, about the body? There is no place where our given nature (essence) makes itself as palpably felt as with the body, particularly for the woman. Beauvoir had to deal with this and deal with it she did at the beginning of her book, in a long chapter on reproductive biology. Her account is a nervous one, because while the facts she lays out suggest clear meanings about what a male or female *is*, she must deprive those meanings of any authority concerning a specific course of action. Notwithstanding, then, a fascinating account of the latest discoveries in the field of biology—the discovery of the egg, its positive and active contribution, and so on—everything is downgraded to the merely "factic," since there is a clear link between greater intelligence and individuality (something she likes) and greater involvement between the sexes and between them and their young (something she doesn't like), and because of what this all means for the human female. Thus, she will "conclude" at the end of the chapter—against the overwhelming evidence she has just laid out—that biology,

especially female biology, is just “data” on which, over time, society has overlaid its cultural values. (The very title of the chapter, “Biological Data,” of course, would have already prepared the reader.) If society values the child, then the woman will be valued as a mother; and the “data” will be used to confirm it. Absent such a societal value, the “data” will not.[23] In the end, female biology is little more than what “humanity has made of the human female.”[24] This downgrading of biology will serve the thesis of the book, which is to show that the “one born” has “become a woman” only because her body has been *subjected*, forced, that is, into a culturally constructed corset, setting her up for marriage and motherhood.[25]

Here is the beginning of what would eventually be called the “sex-gender” distinction, where “sex” is “mere biology” (or “biological sex”) and “gender” is an “identity” (or “spiritual sex”), one imposed on us by society, with no necessary link to “sex.” “Gender” is something *else*. [26] Naturally, since the human being is a rational and political animal, there are distinctions to be made: between being born a girl and becoming a woman, and being born a boy and becoming a man through personal (free) appropriation—self-possession and self-communication—and formation within the tradition and customs of one’s culture. (We can even say that culture “turns us into” human beings and into men and women, and that our own biology demands this by the fact that we are born the most vulnerable among all our animal peers.) But the new “sex and gender” binary, initiated by Beauvoir, does not represent these distinctions. It undermines them. For the distinctions between nature and person, and nature and culture (or nurture) are no longer distinctions within a unity—each one implicating the other—but two self-enclosed spheres attached arbitrarily and artificially. (This will be true when, eventually, “gender” is something “deeply felt” or chosen.)

With Beauvoir, the *negation* of the prevenient order is not as radical as it will become later. It has not yet become *nothing*. Beauvoir never doubts that the “*one* who becomes a woman” is a *girl*. At the same time, she has eviscerated all the meaning hitherto associated with what a “girl” is, such that there is no reason on the side of the “biological data” that suggests the “stereotype” that a girl should marry a man and become a mother. It has become *almost nothing*.

And yet, because Beauvoir *knows* there are good reasons on the side of the “biological data” that a girl is ordered to marriage and motherhood, one can see in her elements of the more “Hobbesian” feminists like the infamous Shulamith Firestone, or today’s Camille Paglia, who save time and go right to the source of the (alleged) problem (between the sexes)—nature itself—by calling for the “elimination of the sex distinction itself” and replacing natural reproduction “by one sex for the benefit of both” with artificial reproduction, “where children can be born to both sexes equally, or, independently of either.”[27] Beauvoir is manifestly interested in these possibilities with her clear preference for the reproduction at the lowest rung of animal life (e.g., in bacteria, protozoa, annelid worms, mollusks, fish, toads, and frogs) for the obvious reason that there, there is the *least amount of relation between the sexes—even none at all* (i.e., asexual, hermaphroditic fertilization outside the female body).[28] Her existentialist ethics are already set up for these possibilities. If woman, like man, is “not a fixed reality but a becoming her *possibilities* have [yet] to be defined.”[29]

Post-Feminism: Judith Butler

Judith Butler calls herself a “post-feminist.” The first reason is that she owes her thinking to the feminist decoupling of “sex” from “gender.” The second reason is that she takes it further, by removing any remaining vestige of authority “sex” might have. What Beauvoir didn’t see, according to Butler, is that the one who becomes a woman, is *already* a cultural artifact. Beauvoir accepted the naïve modern view that gender *followed* from sex as culture *followed*

from nature, gender and culture adding its meanings to nature and sex. This is what Butler calls the “causal” view, where being precedes becoming, or where a sex—a girl or a boy—precedes what that sex has been made to become, a woman or a man, respectively. On the contrary, says Butler, the so-called “causes” like “nature,” “sex,” “girl,” or “boy,” are really all effects. (The theory needs a lot of scare quotes.) The very idea that they are given is the (deceptive) product of culture. In one of her first articles, she turns to theatrical theory, where it is understood that an actor doesn’t just “act,” or “express” himself. Rather he *enacts* himself, bringing his *persona* into being, by *performing* a “script.”[30] So it is also in real life, off the stage, argues Butler. “Gender” is a repeated performance of a “script” which brings the “sexed” *persona* into being, making it look as though “he” or “she” (again, scare quotes) were always there. It’s a theatrical trick, or a scam when we’re outside the theatre.

One might notice a certain return to the idea of the political animal according to which there is a mutual relation between nature and culture (the city). Or, better, the doctrine of creation according to which God *brings us into being* by speaking. But in Butler’s mind the whole “play” is a malicious “deployment of power” in which we are given “socially compelled” scripts which place us in a “matrix of intelligibility” with the “appearance of substance,” so that we can be *put in our place*, “immobilized,” and therefore “excluded” from other possibilities. Just as *being* a girl excludes her from becoming an “independent woman,” and *being* a man excludes him from turning sexually to another man, so, too, *being* a sex excludes the girl from being a boy, and the boy from being a girl. The sinister “play” is just “gender border control” which keeps each in its own place with its own “lot,” which is *not* good.

Now “sex” has become nothing, without any residual (female) “data.” It has been entirely explained away. There is now nothing to which a certain course of action or “identity” must conform. Now we can perform *ourselves* into being, with our own (actor-written) scripts, out from under our prescribed “lots.”[31] Butler is conscious of translating, at the level of sexual difference, Friedrich Nietzsche’s claim that “there is no ‘being’ behind doing, effecting, becoming . . . the deed is everything.”[32]

Many radical feminists rail against this recent development. “What on earth has just happened?” they ask. All their hard-won victories have just disappeared. They had fought not for people who call themselves “women,” but for *women*, with their distinct claims, grievances, and (victim) status. Moreover, they have fought for the *being* of those same women, cleansed from any particular course of action (or “becoming”). One of these (pejoratively named) “Trans Exclusionary Radical Feminists” (TERFS) writes that women could finally “do whatever the hell they wanted.”[33] But now “sexism” and “homophobia” have returned, with women “being” men just because they like camo, or are attracted to other women.

But how is this not just the ultimate point of the trajectory radical feminists themselves set up? If the *being* of the woman has been eviscerated of everything that “woman” means and entails, what is so sacrosanct about the title “woman”?

The Man Who Calls Himself Andrea Lu Chu

It seems right, then, that the last feminist in this account is a man who calls himself “Andrea” Lu Chu (book critic at *New York Magazine*). In his review of Judith Butler’s new book *Who’s Afraid of Gender?*, Chu makes a “moral case for letting trans kids change their bodies” under the title of “Freedom of Sex” (March 11, 2024).[34] In it he takes on the recent, and quite successful, opposition to the medical “transitioning” of *children* by journalists on the Left who were concerned chiefly about informed consent to what are life-changing treatments, like Jesse Singal, Matthew Yglesias, Matt Taibbi, Andrew Sullivan, Helen Lewis, Bari Weiss, all of

whom are exiled on Substack. These he calls, pejoratively, the “Trans Agnostic Reactionary Liberals” (TARLS).

Parting from Butler, who wished away the “biological data” as the *effect* of “deployments of power,” Chu thinks that there might be something to the older view, that sex *is real*, after all, and that “gender norms” might in fact *follow* from it.

It is difficult to explain why the [above] gender norm would exist in the first place if it were not for the actual fact of reproduction, which at this point in the descent of man still requires very specific biological conditions in order to occur, including the presence of at least one of each gamete type (sperm and ova), a well-functioning uterus, and a reasonably sound endocrine system. This is sex as *biological capacity*; in this sense, it is no less of a material resource than water or wheat. Every human society invested in perpetuating itself—which is to say, every society—has regulated the production, distribution, and use of biological sex. This is more than the sex-based division of labor (hunter-gatherers and all that). It is the actual division of sex.[35]

“Sex is real,” says Chu. But “so is global warming!” “Don’t accept it.” Like Firestone and Paglia, Chu doesn’t need a “bad guy” pulling the wool over our eyes with *falsehoods* about the real (sex) to justify our non-acceptance of it. It’s the *truth* about the real that we shouldn’t accept. Chu is a “bio-libertarian,” in the sense that we are only free when we are *from the truth*, or, free to *change* it. Why? Because: “Possibility is not a luxury; it is as crucial as bread.” There is something ancient about Chu’s view. Eve, again, rejects reality *as she knows it, truly* (“We may eat of *all but one* of trees”), not falsely. Why? because “in the middle” of that reality is its *givenness*, which constrains the possibilities.

All of this means that for Chu, unlike Butler who has little interest in “sex changes” (there being nothing to change from and into), sex changes must be on the table. And *for children* especially! These are not a “hard case” for him. To the objection of the “Trans Agnostic Reactionary Left,” who are worried about the *freedom of consent* for children incapable of understanding what they are doing, the “moral case” is breathtaking: “If children are too young to consent to puberty blockers, then they are *definitely* too young to consent to puberty, which is a drastic biological upheaval in its own right.” For Chu, the possibility of sex changes is the weapon against everything we have not consented to, beginning with our birth, and the “lot” it assigns us. With sex changes on the table, we can now “ask” to be born, at least “in a certain way.”[36]

What, then, about regret? Responding to all the “compassion mongering” by people “peddling bigotry in the guise of sympathetic concern” about “bad outcomes,” he answers: “Where there is freedom there will always be regret...and like us, children also have the right to the hazards of their own free will. ... They may regret the outcome of a decision, but it is a very different thing to regret the freedom to decide.” It is enough that the sex change is *wanted*. The medical maxim “First, do no harm” is off the table for Chu. “No one has the authority to know what counts as harm.”

Like the others, Beauvoir and Butler[37] (and Mill before them), there can be no question of *happiness* as a measure of success, since freedom has been wholly untethered from, and sovereign over, nature.[38] His article “My New Vagina Won’t Make Me Happy and It Shouldn’t Have To”[39] makes that clear. But however bad it feels, it is good, because one is resisting the prevenient natural order. It’s a kind of nihilistic asceticism, a perpetual Lent. Sex now is *something*, but as Ground Zero.

Conclusion

The idea of “Gender” is marked by envy from beginning to end, in the primordial sense, not for want of *something* that one doesn’t have—for each of the sexes has the full complement of human nature—but for want of *his distinct way* of having it. It is to want to cancel the difference: *to be like the other, without the other*.

In *The Silence of the Lambs*, a certain Hanibal Lector is in a maximum-security prison for cannibalism. A young, smart Ivy League detective played by Jodie Foster visits him so that he might help her understand the serial killer she’s pursuing. He’s killing women so that he can get a hold of female parts to sew together into a “suit” he can wear. The young, enlightened detective suggests: “He’s got a psychological problem.” Hannibal, who knows what it means to cancel the difference, counters: “No. It’s covetousness.”

[1] Cardinal Joseph Ratzinger, “Truth and Freedom,” *Communio: International Catholic Review* 23, no. 1 (Spring 1996): 27.

[2] Susan Stryker, “Performing Transgender Rage,” in *The Transgender Studies Reader* (New York: Routledge, 2006), 245, 251.

[3] St. Augustine, *De catechizandis rudibus* 4. 8: PL40, 315–16.

[4] *ST*, II-II, 36.1.

[5] St. Maximus the Confessor, *Ambigua*: PG 91, 1156C.

[6] Gertrud von Le Fort, *The Eternal Woman*, trans. M. C. Buehrle (San Francisco: Ignatius Press, 2010). After reading Le Fort’s book, Edith Stein said of it: “I find that, actually, everything else that has been written about woman in the past decades is now superfluous” (*Self-Portrait in Letters, 1916–1942*, trans. Josephine Koeppel, OCD (Washington DC: ICS Publications, 1993), 196–97.

[7] *The Eternal Woman*, 13–14.

[8] “[M]any deceivers have gone out into the world, men who will not acknowledge the coming of Jesus Christ in the flesh; such a one is the deceiver and the antichrist” (2 John 7). See also 1 John 2:18–22 where the antichrist is associated with leaving behind the “flesh” of the apostolic Church.

[9] *The Eternal Woman*, 12–13.

[10] Le Fort continues: “Even the belief in witches during Christian centuries, however tragically it may have erred in individual cases, signifies in its deeper implications the utter rightness of the aversion against the woman who has become unfaithful to her metaphysical destiny” (*The Eternal Woman*, 13).

[11] “Performing Transgender Rage,” 254.

[12] Karl Stern, *The Flight from Woman* (New York: Farrar, Straus and Giroux, 1965), 285.

[13] Christopher Dawson, *Enquiries into Religion and Culture* (Washington, DC: The Catholic

University of America Press, 2009), 226.

[14] Walter Ong, *Fighting for Life: Contest, Sexuality, and Consciousness* (Ithaca, NY: Cornell University Press, 1981), 100.

[15] *Fighting for Life*, 70.

[16] *The Eternal Woman*, 15.

[17] David Bentley Hart, “Christ and Nothing,” *First Things* (October 1, 2003): “But what is the consequence, then, when Christianity, as a living historical force, recedes? We have no need to speculate, as it happens; modernity speaks for itself: with the withdrawal of Christian culture, all the glories of the ancient world that it baptized and redeemed have perished with it in the general cataclysm. Christianity is the midwife of nihilism, not because it is itself nihilistic, but because it is too powerful in its embrace of the world and all of the world’s mystery and beauty; and so to reject Christianity now is, of necessity, to reject everything except the barren anonymity of spontaneous subjectivity. . . . Our sin makes us feeble and craven, and we long to flee from the liberty of the sons of God; but where now can we go? Everything is Christ’s.”

[18] On the relation between the early-modern departure from natural law and the current thinking about sex, see Pierre Manant, *Natural Law and Human Rights: Towards a Recovery of Practical Reason*, trans. R. C. Hancock, (Notre Dame, IN: University of Notre Dame Press, 2020). See especially Chapter 1, “Why Natural Law Matters,” 1–18, and the Appendix, “Recovering Law’s Intelligence,” 119–30).

[19] *Ethics of Ambiguity*, 25.

[20] *The Second Sex*, 45.

[21] *Ethics of Ambiguity*, 45; *Second Sex*, 16.

[22] *Second Sex*, 17; *The Ethics of Ambiguity*, 141.

[23] *The Second Sex*, 46–48.

[24] *The Second Sex*, 48.

[25] *The Second Sex*, 47.

[26] On the recent use of the two terms and their eventual bifurcation, see David Haig, “The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001,” *Archives of Sexual Behavior* 22, no. 2 (April 2004): 87–96.

[27] Shulamith Firestone, *The Dialectic of Sex* (New York City: Farrar, Straus, and Giroux, 2003), 11. See also Paglia, *Sexual Personae* (London: Yale University Press, 1990), 139.

[28] Beauvoir notes: “The phenomena of asexual multiplication and parthenogenesis are neither more nor less fundamental than those of sexual reproduction” (*The Second Sex*, 26). One is reminded of the process of “bokanovskification” in the “Fertilizing Rooms” of *Brave New World* where scores of identical individuals are produced through the budding of one fertilized ovum (5th ed., 1932 [New York: Harper and Row Publishers, 1965], 103).

[29] *The Second Sex*, 45.

[30] Judith Butler, “Performative Acts and Gender Constitution: An Essay in Phenomenology

and Feminist Theory,” *Theatre Journal* 40, no. 4 (December 1988): 519–31.

[31] For Butler, the question is more complicated than this, since for her there can be no “pre-discursive” substance or subject that (who) stands neutrally outside relations of power. Thus the “subject” (her scare quotes) is always constituted in the interplay of both *having been constituted*, and the rejection of that constitution. It is constituted in a *negative* relation. See Judith Butler, “Contingent Foundations: Feminism and the Question of ‘Postmodernism,’” in *Feminists Theorize the Political*, eds. Judith Butler and Joan W. Scott (New York City: Routledge, 1992), 9. See also Butler, *Gender Trouble* (New York City: Routledge, 1990), 148–49.

[32] Butler, *Gender Trouble*, 34 (see also 195).

[33] See my review of *Trans: When Ideology Meets Reality* by Helen Joyce: “A Friendly Critique of Helen Joyce’s *Trans: Why Radical Feminists Have to Go Further*,” *Public Discourse* (September 8, 2022).

[34] “Freedom of Sex,” *New York Magazine* (March 11, 2024).

[35] “Freedom of Sex.”

[36] We can curse ourselves as Job did—“Perish the day on which I was born, the night when they said, ‘This child is a boy!’”—while *staying alive* (Job 3:3–1).

[37] For Butler, this means that one must never land in a “gender” lest one become “fixed and immobile.” One must remain fluid, in a state of amorphous nonidentity. See *Gender Trouble*, 16–25 and *Bodies that Matter*, 78–79. Commenting on the relation between Butler’s negative conception of agency and the fluidity of the subject (agent), Louis McNay notes that the “model of agency as displacement tends to fetishize the marginal and celebrates, in an unqualified fashion, the notion of nonidentity. The spontaneous and fluid politics of the performative is implicitly aligned with the amorphous. ... Nonidentity is the condition of possibility of all identity” (“Subject, Psyche, and Agency: The Work of Judith Butler,” in *Theory, Culture, and Society* 16, no. 2 [April 1999], 189).

[38] F. Slade, “John Stuart Mill’s Deontological Hedonism,” in *Maritain and America*, eds. C. Cullen and J. A. Clair (American Maritain Association, 2009), 86.

[39] *New York Times* (November 24, 2018).

Margaret Harper McCarthy is an Assistant Professor of Theology at the John Paul II Institute and the editor of Humanum. She is married and a mother of three.

June 6, 2025



Humanum

Issues in Family, Culture & Science

FEATURE ARTICLE

Transgender Theory and Post-Political Order

MICHAEL HANBY

The purpose of this essay is to propose an alternative to what I call the standard framework for thinking and speaking about transgender issues and for waging our political and legal battles with the Sexual Orientation Gender Identity movement (SOGI) more generally. In the standard framework, SOGI issues appear in two main guises. On the one hand, they present themselves as a contest of freedom and rights, whether a negative freedom for self-definition or a positive entitlement to recognition and social benefits, in tension with the rights claims of parents, religious groups, employers, and other societal interests. On the other hand, they appear in a clinical, therapeutic, or pastoral guise, that is, under the rubric of personal and public health.[1] Superficially, the civil rights and public health faces of SOGI may appear as a pair of Janus faces juxtaposed to one another, but they are in fact mutually reinforcing in ways that should become clearer as we proceed.

I should acknowledge at the outset that acceptance of this standard framework is often the price of admission to what's left of the public square and that the necessity of winning particular legal and political battles often compels defenders of the reality of nature to argue within its parameters. Nevertheless, I do not think that accepting its terms will enable us to win the War for Reality or to see the full extent of what it would mean if we were to lose it; nor do I think necessity should prevent us from understanding what we're up against or calling things by their proper names whenever we can. I should also say that I don't think that I am breaking any new ground here. I see myself as doing little more than drawing out the implications of what many others have said. But since it is the most obvious things that are often hardest to see, I think they are worth saying anyway.

"Sex" and "gender" are not facts of nature just lying there waiting to be discovered by the neutral rationality of science. And the distinction between a merely biological "sex" and a social or psychological "gender" is not a scientific distinction. It is not the discovery of detached empirical observation or the result of experimental testing but is an *a priori* interpretive lens for processing empirical and experimental data whose conceptual origins lie elsewhere.[2] It is not science, therefore, when a physician from the Mayo Clinic's Transgender and Intersex Specialty Care Clinic says on the clinic's website: "Some people erroneously think transgender patients make a choice to change their gender. Rather, it's about confirming their

identity and wanting to live authentically. Being transgender indicates diversity, not pathology.” Identity, authenticity, and diversity, suffice to say, are not empirical data or the findings of a double-blind experiment. When a professional scientific organization such as the Endocrine Society asserts in its 2021 report that “sex is a biological concept” while “gender includes the perception of the individual as male, female, or other, both by the individual and by society,” when it defines “gender *identity*” as “a psychological concept that refers to an individual’s self-perception,” and when it adopts the “gender assignment” or “cisgender” nomenclature as if these were self-evident facts of nature, it abuses the immense authority that our society confers upon science and conceals what it is in fact doing when it makes such statements, which is articulating a philosophy with a dubious historical and intellectual patrimony.[3]

In other words, the distinction between sex and gender, both in its historical origins and in its essence, is an irreducibly *philosophical* distinction. While it is crucial that we recognize this, it is not enough. Rather, if we want to see what this distinction really means and how it functions, we must ask *what kind* of philosophy it is. My colleagues and I at the John Paul II Institute have spent years arguing that SOGI presupposes, advances, and enforces a reductive, bi-furcated, and ultimately posthuman theory of human nature and that controversies over restrooms, women’s sports, so-called “gender affirming care,” and parental rights are really proxy arguments about whether men and women are real and whether this post- and ultimately sub-human vision of human nature is going to be imposed as the official philosophy of the United States by force of law, now reduced to a blunt ideological instrument in a low grade civil war and by forces deeper, more extensive, and more powerful than law even in this degraded sense. This diagnosis remains inevitably and unavoidably true, because in the order of reality, which is an order of ontological and logical necessity, metaphysics and natural philosophy are first philosophy. It is not possible to expunge philosophical assumptions and judgments from science or even to bracket them out so that they cease to be operational because such judgments are simply not optional, though it is not only *possible* but indeed quite *common* to be deceived about that and naively imagine that “science” and the objective pursuit of scientific “truth” free us from this necessity.[4] Turns out it is also politically quite useful.

However this may be in the order of reality, in the order of *intention*, things are different. As others have shown, the sex-gender distinction is the bastard offspring of feminist theory and the mid-twentieth-century biomedical atrocities of John Money, who himself belonged to a strain in the history of experimental medicine that can be traced back to Weimar Germany.[5] This is not an unnatural liaison. Both are *essentially* revolutionary forms of thought which perpetually seek to overcome the constraints of givenness, which is why “scientific revolution” is not a one-time historical event in the seventeenth century but our permanent *modus vivendi*. Feminism undertakes this revolution in the name of liberation, science in the name of “truth,” by which it *really* means what is “possible” or “successful.”

This is why naïve appeals to the authority of “science,” while perhaps tactically useful, are ultimately self-defeating despite the welcome evidence that this vast, unaccountable science experiment performed on the world’s children is a failure measured by the sociological and psychological outcomes originally used to justify it. “Science” is not a brake upon our descent into unreality, but its engine. From the scientific and biotechnical point of view, “nature” is simply whatever happens or can be made to happen. It measures truth, what things *are*, by our power, what we can *do*. “Nature” viewed scientifically provides no inherent limit to biotechnical power except the limit of possibility, which can only be discovered in the process of attempting to violate it. (Creating transgender mice, e.g.) There is no way from within this form of reason and its corresponding vision of nature even to pose the unavoidable question of what things are or what they might mean; nor does it offer any reason to think that they

might be or mean much of anything. This is also why feminist thought from Margaret Sanger to Shulamith Firestone and from Donna Haraway to Judith Butler has depended on the “utopian” possibilities of biotechnology for its project of freeing women from the “oppressive” constraints imposed on them by society and their own bodies. The revolutionary possibilities of gender theory and the revolutionary possibilities of biotechnology are made for each other; indeed, they are made *by* each other, a fact to which I’ll return.

The point at present is simply that while the sex-gender distinction harbors a world of ontological assumptions and implications that it perpetuates and enforces, it is not the product of a *speculative* philosophy intent on *understanding* “*the truth of human nature*,” categories which are in fact abjured by advanced gender theory. Rather, it is the product of a political philosophy and a technical form of thinking for which “understanding” is unnecessary and even discredited. For those of an Aristotelian or scholastic bent, you might say that while a genuinely speculative anthropology that sought to understand the truth of the human being would be *per se* ontological and political *per accidens*, gender theory is *per se* political and ontological *per accidens*. The distinction between biological sex as a meaningless mechanical substrate and gender identity as something *other than* and thus already *opposed to* sex (which are both abstractions from the living whole whose actual, undivided existence is at once natural, historical, cultural, and free) was in its very conception *a political instrument*, or to be still more precise, an *anti-political* instrument in the revolutionary project of liberation from social, political, and biological constraint. Of course I am speaking objectively, at the level of origin and essence, not imputing insincerity or ulterior motives to all those who identify as *trans*. No doubt there are many people who are both sincere and confused. But in the real (as opposed to the *imagined* order), the transgender rights movement is not a politics undertaken on behalf of a new kind of human being, real or fictitious. Transgender identity is the invention of a new kind of human being on behalf of a revolutionary politics. Gender theory, it turns out, is not theory—*theoria*—at all. If I may borrow from Karl Marx, the point of gender theory, its very essence and *raison d’être*, is not to comprehend human nature but to change it, and thereby to change our social and political reality. But if the point is only to change human nature and not comprehend it, then gender theory and its stock concepts need only be *functional*, effective at producing the desired result. They need not, indeed *better* not, be *true*.

Gender ideology... is antithetical to the idea of reason itself and to the common experience of a common world lying behind it. What is left is a world where “everything is possible and nothing is true,” which profoundly perverts the very nature of language and ideas. ... Change the language, you change the reality. Gain control of the language, and you control reality.

The distinction between sex and gender, then, is not only irreducibly philosophical, but irreducibly *political* and—not to put too fine a point on it—*ideological*. By ideology I mean something fairly precise and technical, not the colloquial meaning that identifies ideology with any philosophy whatsoever, or with a theory lacking the imprimatur of scientific authority, or as a synonym for “ideas I don’t like.” This first sense denies the very possibility of

philosophical truth (by which I simply mean *truth* as something other than logical coherence, the sum of historical and social conditions, or mathematical and experimental function). The second rests on the naïve understanding of science just criticized, which is essential to the establishment of gender ideology as a ruling regime. And the third is stupid. Rather, in speaking of gender ideology I mean something akin to what Marx meant in describing it as a cognitive superstructure generated by underlying material conditions. An ideology is an essentially instrumental form of thought whose true nature and function are other than what they appear and profess themselves to be. Ideology in this sense is *inherently* deceptive and often *most deceptive* to its sincerest adherents. In this case, what presents itself as a “fact of nature” and thus, by turns, as a matter of civil rights and public health—and at a deeper level, a discourse of truth, of *what is*—is really the instrumental concept of a scientific and political revolution fundamentally at odds with the democratic republic we imagine ourselves to be. Whether this outcome is *in fact* at odds with the ideals of liberal democracy or the logical outworking of its deepest presuppositions—or somehow both at once—is a question for another day. (Though the answer is “yes.”)

However, if this is true, then the true meaning of the “transgender moment” which may or may not be passing cannot be apprehended within the framework of civil rights thinking. Neither can it be apprehended by *medicine*, and it should not be entrusted to the authority of endocrinologists and clinical psychologists, much less their professional associations who are late comers to this game. A historical survey of the DSM confirms this. Mayo’s Transgender and Intersex Specialty Care Clinic, which pronounces with such authority on the science of identity, authenticity, and diversity, did not even exist until 2015, until *after*—a cynic might think—*Obergefell* had established a stable market for it.[6] The ever-growing medicalization of all human phenomena legitimates the subsumption of every facet of life under the rubric of public health and insinuates the state and its proxies into the heart of all human relationships. It invokes the authority of science to enforce a false empathy devoid of understanding to forestall any serious questioning and to justify anonymous and unaccountable exercises of political power. We should be deeply wary of this. It’s not as if we don’t have ample historical precedent for what happens when state power is fused with ideologized science and medicine. I continue to be amazed at how little the atrocities of the last century, when the international eugenics movement represented scientific consensus, factor into our present reflections. We can be grateful to Covid for bringing the contemporary form of this machinery more clearly into the light.

Rather, the meaning of the “transgender moment” is principally a question of political and social philosophy. Specifically, confrontation with a mass psychosis as sudden and swift as we’ve experienced over the past decade presents the sort of question taken up by Hannah Arendt and theorists of the 1950s when confronted with the fact that the totalitarian regimes of the 1930s and 40s had depended upon mass support. Incidentally, this ought to be a caution against thinking that democracy and totalitarianism are opposites. What were the social and political conditions, to say nothing of the metaphysical and spiritual conditions, that could induce large masses of people to embrace the psychotic unreality of National Socialism? How could something so fantastic have ever happened? And on such a scale? One need not indulge in a mindless *reductio ad hitlerum* conflating SOGI and Nazism to see that the question—and at a formal level, the *comparison*—is apt.

Totalitarianism, according to Arendt, is a thoroughly *modern* phenomenon, dependent upon the modern *machinery*, the industrial, medical, and communication technology necessary to subordinate the totality of meaning to political control. There has been tyranny from time immemorial, but there simply could be no such thing as totalitarianism prior to the 20th century because its scientific, technological, and economic preconditions were not yet present.

Totalitarianism is discontinuous with and unanticipated by classical political theory, because totalitarianism itself is not a proper *political* form but something else, consequent upon the *destruction* of political community and the sorts of human experiences that are its prerequisite. And its novelty cannot be comprehended within normal categories of political thought, ancient or modern. Totalitarianism is not oligarchy, democracy, or tyranny. It is not nationalism. It is not authoritarianism. It is not even fascism. It is not the absolute rule of party or state.

Totalitarianism rests upon what Arendt calls a “contempt for reality.” (Augusto Del Noce calls it “a rebellion against being.”[7]) Masses who embrace totalitarianism, she says, “do not believe in anything visible, in the reality of their own experience. They do not trust their eyes and ears but only their imaginations...What convinces masses are not facts,” Arendt writes, “and not even invented facts, but only the consistency of the system of which they are presumably part.”[8]

Totalitarianism is thus “an escape from reality into fiction,” or more precisely, a fictional *system* whose full arrival is perpetually postponed to some indefinite distant future, a *possible* world rather than the actual one.[9] Totalitarianism is not identical to party or state but is, above all, a *movement* that identifies itself with the movement and meaning of history itself, a closed system of thought from which it deduces the meaning of everything, in the service of which party, nation, law, state, even oneself and the movement’s own ideological contents are mere instruments, and for the sake of which all of these can be willingly negated, sacrificed, and destroyed.[10] “Perhaps the most disturbing factor in the success of totalitarianism,” says Arendt, “is the true selflessness of its adherent...” that he is unlikely “to waver when the monster begins to devour its own children and not even if he becomes a victim of persecution himself...To the wonder of the whole world, he may even be willing to help in his own prosecution and death sentence if only his status as a member of the movement is untouched.”[11] If we remember that gender theory is a revolutionary *political* philosophy before it is anything else, and that the prevailing concept of gender is an essentially *functional* or *instrumental* concept in service of the revolution that gives history its meaning, then the astonishing indifference of WPATH, transgender activists, and transgender medicine itself to the actual health of the people who identify as transgender, its willing negation of even its own ideological content, begins to make sense. If transgender health must be sacrificed on the altar of the revolution, if transgenderism must commit matricide against the feminism that gave it birth, if the T in the LGBTQ+ movement must logically annihilate the L and the G, then so be it. The crucial thing is that the given constraints of the present—natural, social, moral, and political—are perpetually surpassed and the revolution continues on.

Totalitarianism lays claim to the totality of meaning, the meaning of nature and the meaning of history. Or rather, it identifies the meaning of nature with the progressive movement of history. This is one reason why totalitarian regimes are so deeply and sometimes quite brutally and bizarrely invested in experimental science. For its rule to be *total*, it must govern us internally as well as externally, our thoughts and speech as well as our action. For the former, it is necessary to seize control of education and even the language as components of an endless feedback loop of propaganda. For the latter, it must terrorize the population into conformity with the possibility that its omnipresent power might descend upon anyone at any time. But in neither event is totalitarianism compatible with the shared reality disclosed through our common, pre-ideological language, or the common world and common non-political bonds that are the presupposition of properly political community. And since totalitarianism depends on mass support, it can only take root where the grip on these common things has been lost and where a profoundly isolated and alienated people, having lost faith in the underlying *mythos* and principles of their civilization, sense that “everything is

possible and that nothing is true.”[12] In other words, among what theorists of the late nineteenth and early twentieth century called mass humanity. “Mass propaganda,” Arendt explains, “discovered that its audience was ready at all times to believe the worst, no matter how absurd, and did not particularly object to being deceived because it held every statement to be a lie anyhow. The totalitarian mass leaders based their propaganda on the correct psychological assumption that, under such conditions, one could make people believe the most fantastic statements one day, and trust that if the next day they were given irrefutable proof of their falsehood, they would take refuge in cynicism; instead of deserting the leaders who had lied to them, they would protest that they had known all along that the statement was a lie and would admire the leaders for their superior tactical cleverness.”[13] She goes on to describe how, under conditions of such social disintegration, people will embrace a lie not in spite but *because* of its untruth, because all the old pieties have shown themselves to be false, and the idea of truth itself has been discredited.

The challenge for those who still believe in truth and philosophy is enormous. It is of course impossible to argue with opponents whose argumentative first principles are incommensurable, but the difference, in this case, runs even deeper than that. The disagreement is not just about argumentative first principles, but about the very nature of reason and truth—where these really exist—and thus about what it means to argue. It is difficult to defeat an opponent on grounds that his theory is false when its very untruth—or its position outside the binary of true and false—is the very ground of its appeal.

The non-identity of the totalitarian movement with the nation and the state becomes visible when the symbols of the *movement*—the swastika, the hammer and sickle, (the rainbow flag?)—begin to appear alongside or even to supplant traditional national insignia and when what you might call the civic liturgy of the nation, which was traditionally tied to the liturgical calendar of the Church, is replaced by the sacral festivals of the movement: the Nuremberg Rallies and Heroes’ Memorial Day in Germany, October Revolution and International Workers Days in the Soviet Union, and, perhaps, Pride Month and Transgender Visibility Day, formerly known as Easter Sunday. And this non-identity of movement and nation becomes operational through the inevitable distinction between real and ostensible or invisible and visible government, which Arendt describes as a kind of “planned shapelessness.”[14] She notes that Hitler never bothered revoking the Weimar Constitution or abolishing its nominally democratic institutions. He simply disregarded them, ruling with “the force produced through organization” outside these structures.[15] The subsequent multiplication of offices functioned, on the one hand, to make the actual seat of power something of a mystery—one was never quite sure whom to obey—and at the same time to make its felt presence immediate, conveying the sense “that the will of the Fuehrer can be embodied everywhere and at all times.”[16]

Writing in 1950 in the immediate aftermath of the war and naturally focusing on Hitler’s Germany and Stalin’s Russia as the only two fully realized instances of totalitarianism yet to have appeared on the earth, Arendt in *The Origins of Totalitarianism* seems to think that death camps and *Das Führerprinzip* were essential features of totalitarianism. By the time *The Human Condition* was published in 1957, she seems willing to consider an evolution of sorts in which the last stage of government in the nation state would conclude not in the rule of one, but in the rule of nobody, that “what we traditionally call state and government” would give way to “pure administration.”[17] Such an evolution of “organization,” may or may not require the death machinery of earlier stages of development. However, while perhaps less reliant on brutality and terror for its efficacy, it would be no less absolutist and might well be total, more adept at ruling us from within as well as without, for being impersonal.

My thesis, if it is not already clear, is that totalitarianism is not an accidental by-product of SOGI ideology. If it were, then the enforcement mechanisms of our cultural revolution would not be systematic, but merely an ad hoc collection of isolated excesses that might yet be tamed with a good dose of liberal tolerance and a redoubled emphasis on free speech. In other words, we might view SOGI ideology through the lens of classical liberalism as one of the many opinions that can be accommodated within a pluralist society, which is of course how it is tacitly framed in its “civil rights” guise. But this is an illusion. The problem with our recent censorship regime is not that it abolished free speech—it has always been possible to say all manner of outlandish things—but that it abolished the truth. It abolished the truth because the truth cannot coexist alongside SOGI ideology. And the truth cannot exist alongside SOGI ideology because this ideology is inherently and essentially totalitarian, asserting political control over the meaning of nature and history (as a history of perpetual revolution or progressive liberation). The adoption and enforcement of this ideology as America’s official theory of human nature thus marks a pivotal moment in a long process of America’s transformation from a liberal democracy into an absolutist but post-political form of rule, the rule of nobody that I call “biotechnocracy.” Let me try to sketch out this argument in a few points. I trust the affinities with Arendt’s analysis, beyond those I’ve already sketched, will be obvious.

Gender ideology, as we have seen, is essentially an anti-political *political* phenomenon. Revolutionary, in other words. But it is also a *biopolitical* phenomenon to borrow Michel Foucault’s phrase, determining through the fusion of political and scientific power the meaning of nature, life, and history in at least three inter-related senses.[18] It is biopolitical in *origin*, both in the sense that its paternity lies in the history of experimental medicine, but more fundamentally, because biotechnology supplies its condition of theoretical and practical possibility. We could never imagine that a man might really be a woman if we did not also imagine we could transform him into one through gender reassignment surgery and hormone therapy. It is biotechnical *in essence* because it presupposes the bifurcated conception of the person and the reductive and mechanistic conception of the body that I alluded to earlier. And, most importantly for my present purposes, it is biopolitical in its *practical and political implication* in the two-fold sense that realization of this brave new world as a human norm *requires*, as a matter of personal and public health, the fusion of state power and what Rachel Levine called “the complex and nuanced field of transgender medicine,” and, conversely, because organized medicine, professional associations, and public health bureaucracies become the organs of the invisible government through which the rule of nobody diffuses its sovereignty.

The public health regime is only one aspect of this invisible government, however. As we have suggested, gender theory as a totalitarian ideology imposes on the totality of meaning not only a fictitious reality, but a closed system of thought. Ask Justice Ketanji Brown Jackson or Secretary Levine what a woman is and you will find that you have pushed the play button on an endless loop of ideological Muzak impervious to criticism or questioning, whose first principles are never allowed to emerge into the light of day. What matters is the inner consistency of the system, even or perhaps *especially* if it is absurd. Incidentally, if there is a legitimate role for some branch of psychology, it would seem to be here, at the nodal points of politics and psychosis, where people find themselves trapped inside the closed loop of this fictional world. Again, there is ample evidence in modern history and on TikTok to suggest that politics and psychosis are not strangers to one another.

The concept of gender identity performs this same function. The only criterion for the “truth” of gender identity is authenticity—that is *why* it is identity—fidelity to one’s own inner feeling which is entirely self-referential. It can thus be neither true nor false or something one could

ever be “wrong” about, which is also why it is incoherent. “I was assigned a male gender at birth because of my anatomy, but I identify as a woman because I feel like a woman.” All this can really mean is “I feel like I feel what a woman must feel like.” It’s turtles all the way down. Because “authenticity” has no criterion of verification outside itself and cannot be rationally adjudicated, assertions of identity act as “conversation stoppers.” They mark the point beyond which it is impossible to reason or speak, beyond which questioning itself becomes an act of violence. One is sometimes tempted to think, amidst the revolution’s interminable assault on the moving target of language, that the trans movement will not be satisfied until we are all reduced to an inarticulate grunting. But it turns out that even silence is violence. Only *recognition* suffices, and only then, in the precise terms that are permitted in the moment. Arendt observes that in Stalin’s Russia, “the most perfect education in Marxism and Leninism was no guide whatsoever for political behavior. One could follow the party line only if one repeated each morning what Stalin had announced the night before.”[19] We will have to read the paper to see what forms of recognition are permitted tomorrow.

Gender ideology thus amounts to a renunciation of our common reason; indeed, it is antithetical to the idea of reason itself and to the common experience of a common world lying behind it. What is left is a world where “everything is possible and nothing is true,” which profoundly perverts the very nature of language and ideas. Ideas are no longer ordered to understanding, but to their political function. The language which is our common possession no longer seems to *disclose* this common reality, for there is no longer a common reality to disclose. Language is instead treated as an instrument for *creating* reality and, thus, an instrument of the will to power, though the true nature of language as the medium of truth is inadvertently affirmed even in the attempt to deny it.[20] Change the language, you change the reality. Gain *control* of the language, and you control reality.

This is what the pronoun war is really all about. The contested pronouns are not the reflexive first-person pronoun (I), which is used for self-reference, nor the second-person pronoun (you), which is a form of address. The battle is over third-person pronouns (he, she, it), which denote the place of human beings within the shared world of *things*. The attempt to control third person pronouns is not an attempt to control how people are spoken *to*, but how they are spoken and thought *about* in and amongst this world of things. This once-common world is destroyed in speech and recreated as a private possession. But because we are not really identitarian atoms, and because language is itself public by nature, it is impossible to redefine human nature for just one person. If *any* of us is merely the combination of a meaningless material substrate and a psychological and social gender identity, then all of us are. This is why I often say that we are all transgender now, even if our sex and gender happen to align. And we have discovered in real time that this transgender conception of human nature, and the redefinition of something as fundamental as man and woman, mother and father, means the destruction and re-creation of everything else that is premised upon this primordial reality: not just language, but familial relations, education, morality, history, law, and medicine.

Fulfilling this extraordinary demand requires extraordinary power, not only the power of biotechnology to re-engineer our physical nature, but a veritable *reality machine* with the power both to create this brave new world in speech and to impose and enforce it in the external world of bodies and things. We cannot answer the question previously posed, how an ideology so revolutionary and so fantastic could have triumphed so suddenly—at digital rather than analog speed, one is inclined to say—without comprehending the nature of this machine and the new forms of power it represents which operate both internally and externally in ways that we have not yet fully comprehended. I am speaking at least in part about the digital revolution, without which the lightspeed victory of the transgender revolution would have

been unthinkable. Tendentious objections to the characterization of so-called rapid-onset gender dysphoria (ROGD), on grounds that there do not exist sufficient studies to consider ROGD a clinical diagnosis, miss altogether the level at which this new form of power is operative in reshaping our subjectivity, a phenomenon analyzed in its proper philosophical (rather than superficial and clinical) depth by Antón Barba-Kay.[21] It is not just that the virtual world social media creates is a space in which alienated adolescents can be embraced by virtual communities affirming them in their non-conforming identities, though this may well be an empirical factor in the explosion of transgender identities among young people. It is rather that our new virtual reality is an un-carnate, dematerialized reality, indifferent to the friction of time, space, and the body, which reforms all of our “identities” in immaterial terms.[22] The connections between the un-carnate reality of this new “digital gnosticism” and the widespread adoption of a dematerialized conception of identity have yet to be explored in the necessary depth, but their coincidence and the astonishing speed of their mutual triumph cannot be fortuitous.

This new immaterial reality is not without material effect. These new forms of power have engendered capacities for surveillance and mass manipulation that would have been the envy of twentieth-century totalitarians. You don’t need a Stasi when you have smartphones and the mutual surveillance of all against all. “Rule by internet” may be the most perfect realization to date of the ambitions of Hobbes’ *Leviathan* to erect a common *power* which, in the absence of a common *good* and a common *world*, rules by keeping us in awe. The digital Leviathan rules, or rather, compels us to rule ourselves by inducing what Shoshana Zuboff calls “anticipatory conformity” over the mere *possibility* that the furies might descend to destroy, deplatform, and de-person anyone, anywhere, anytime, for any act of wrongthink.[23] “Rule by internet”—the rule of everybody and nobody at once—is certainly shapeless, and therefore capable of exerting great political power without identifiable political agency or responsibility. But it is not exactly unplanned.

Amused by the dustup over Trump’s renaming of the Gulf of Mexico, I recently became acquainted with the Associated Press Stylebook which, if I even knew it existed, I had never paid any mind to. I have since become enthralled with it—or at least as enthralled as one can be without paying \$34.95 for a subscription. It reads (and operates) like an owner’s manual or a user’s guide for the reality machine. It instructs the reporters of its 235 news bureaus, whose stories are published by over 1,300 newspapers and broadcasters in 94 countries and are immediately available to the world, as well as the many other publications that look to the Stylebook as the journalistic gold standard “not to use the term “transgenderism,” which “frames transgender as an ideology.” The Stylebook matter-of-factly states that “gender refers to internal or social identity and often corresponds but is not synonymous with sex,” which “refers to biological characteristics such as chromosomes, hormones, and reproductive anatomy, which can also vary or change in understanding over time or be medically and legally altered.” It therefore concludes that a child is not “born a boy or a girl” but that sex “is usually assigned at birth by parents or attendants and can turn out to be inaccurate.” It declares that “a person who is assigned female at birth and transitions to align with their identity as a boy or man is a transgender boy or transgender man, and a person who is assigned male at birth and transitions to align with their identity as a girl or a woman is a transgender girl or woman.” It establishes predictable standards for the use of gender-specific pronouns and lists examples of gender identities including “nonbinary; bigender; agender; gender-fluid; genderqueer,” and so on, and instructs its reporters against “deadnaming,” even if you’re dead. All of this it does on the authority of organized “science.” “Experts from organizations including the American Medical Association, the American Psychiatric Association, and American Psychological Association say “gender is a spectrum, not a binary structure consisting of only males and females.” And it directs its reporters not to “quote

people speaking about biology or athletic regulations unless they have the proper background.” And here I’ve been wondering why the AP hasn’t called.

The power to determine what people think about and the language through which they think it is extraordinary, far more potent, and much deeper and more extensive in its governance, than even the power of law. The power to determine what people do *not* think about, what is never permitted to enter their mind, what they never even miss, is more extraordinary still. Earlier I characterized totalitarianism as the subordination of the totality of meaning—the meaning of nature and the meaning of history—to political control, and for this reason I said that it must govern us internally as well as externally. There is no totalitarianism so total as the power to make thoughtlessness compulsory. At the surface level, I have proposed as an alternative to the standard framework of civil rights and public health that we think of transgenderism as a totalitarian political ideology, but the deeper proposal is that we cease to think of transgender theory *as theory* at all. It is only a discourse of truth *per accidens*, that is, insofar as truth claims are ontologically impossible to avoid. *Per se*, it is an instrument of power, a weapon, in an unending War on Reality. We cannot hope to survive this war, much less to win it, unless we see it for what it is. This calls for thinking and understanding. For it is only by thinking and understanding that the reality machine can be broken.

[1] This is ironic, needless to say, considering that “gender affirming care” proceeds by harmfully inflicting systemic change on otherwise healthy bodies.

[2] On the philosophical origins of the sex-gender distinction, see Abigail Favale, *The Genesis of Gender: A Christian Theory* (San Francisco: Ignatius Press, 2022).

[3] Aditi Bhargava, Arthur P. Arnold, *et al*, “Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement,” *Endocrine Reviews*, vol. 42, no. 3 (2021), 221–26.

[4] See Michael Hanby, *No God, No Science? Theology, Cosmology, Biology* (Chichester: Wiley-Blackwell, 2013).

[5] See Favale, *The Genesis of Gender*, 85–105, 145–50; Margaret H. McCarthy, “The Emperor’s (New) New Clothes: The Logic of the New Gender Ideology,” *Communio: International Catholic Review* 46 (Fall 2019), 620–59.

[6] The sudden appearance, seemingly out of nowhere, of so-called “gender affirming medicine” fulfills a prophetic observation frequently made by Leon Kass long before this branch of medicine was imaginable, namely, that without a *philosophically* adequate conception of *wholeness*, which is the unspoken basis of our medical and biological standards of *health*, the awesome technical powers of medicine can (and will?) be harnessed to any end whatsoever. See Kass, *Toward a More Natural Science* (New York: Free Press, 2008), 157–248.

[7] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1968), xxxii. Augusto Del Noce, *The Crisis of Modernity* (Montreal: McGill-Queens University Press, 2014), 34.

[8] *Ibid.*, 351.

[9] *Ibid.*, 352.

[10] “The difference between the elite and the mob notwithstanding, there is no doubt that the

elite was pleased whenever the underworld frightened respectable society into accepting it on an equal footing. The members of the elite did not object at all to paying a price, the destruction of civilization, for the fun of seeing how those who had been excluded unjustly in the past forced their way into it" (ibid., 332).

[11] Ibid., 307. Such spectacles of self-accusation have become common in our own time, as people routinely broadcast to the world groveling confessions of their various forms of "privilege" in a futile attempt to atone for the sin of being and having been and in the hope of placing themselves on the right side of history.

[12] Ibid., 382.

[13] Ibid.

[14] Ibid., 402. On the important distinction between ostensible and real government, see 397–98.

[15] Ibid., 418.

[16] Ibid., 405.

[17] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 45.

[18] See Foucault, *The History of Sexuality Volume 1: An Introduction* (New York: Pantheon Books, 1978), 135–59. Giorgio Agamben defines Foucault's biopolitics as "the growing inclusion of man's natural life in the calculations of modern power." Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Redwood City: Stanford University Press, 1998), 119.

[19] Arendt, *The Origins of Totalitarianism*, 324.

[20] In other words, the attempt to escape reality is destined to fail. Truth and goodness are affirmed as a matter of ontological necessity in the very act of speaking despite the attempt to deny their reality; "If only our opponent will only say something," said Aristotle, he will inadvertently demonstrate the impossibility of really disbelieving in truth and goodness. For if there were no truth, or, what amounts to the same thing, if "all are alike both wrong and right, one who is in this condition will not be able either to speak or to say anything intelligible; for he says at the same time both 'yes' and 'no.' And if he makes no judgment but 'thinks' and 'does not think, indifferently,' what difference will there be between him and a vegetable? For why does a man walk to Megara and not stay at home, when he thinks he ought to be walking there? Why does he not walk early some morning into a well or over a precipice, if one happens to be in his way? Why do we observe him guarding against this, evidently because he does not think that falling in is alike good and not good? Evidently, then, he judges one thing to be better and another worse. And if this is so, he must also judge one thing to be a man and another to be not-a-man, one thing to be sweet and another to be not-sweet. For he does not aim at and judge all things alike, when, thinking it desirable to drink water or to see a man, he proceeds to aim at these things; yet he *ought*, if the same thing were alike a man and not-a-man...Therefore, as it seems, all men make unqualified judgements, if not about all things, still about what is better and worse"(Aristotle, *Metaphysics* IV.4, 1006a13, 1008b5-27).

[21] A 2023 article in *The Scientific American* is a perfect object lesson in how the reality machine comprised of digital media and public health experts create and enforce this alternate, biotechnocratic reality. Calling on the authority of the now-discredited World Professional Association for Transgender Health (WPATH) to dismiss the phenomenon of

ROGD on grounds that it lacks the support of clinical studies, the article asserts without thought or argument that “[m]any transgender people experience gender dysphoria, meaning that the gender that was assigned to them at birth and their gender identity don’t align, causing distress” (O. Rose Broderick, “Evidence Undermines ‘Rapid Onset Gender Dysphoria’ Claims,” *Scientific American* [August 24, 2023]),

[22] See Antón Barba-Kay, *A Web of Our Own Making: The Nature of Digital Formation* (Cambridge: Cambridge University Press, 2023), 49–56. Incidentally, for reasons not unlike those I’ve offered here and elsewhere, Barba-Kay concurs that this new “virtual” social reality is “at an unprecedented odds with the conditions of political life as such” (131). Barba-Kay considers this emerging “post-political” reality from the perspective of digital formation and does not consider the fusion of the digital and the biotechnical. For more on the latter see Michael Hanby, “Homo Biotechnicus,” *The Lamp Magazine* (August 2, 2024); and “Resist the Conception Machine,” *First Things* (December 1, 2024).

[23] Shoshana Zuboff, “Big Other: Surveillance Capitalism and the Prospects of an Information Civilization,” *Journal of Information Technology* 30 (2015), 82.

Michael Hanby is the Associate Professor of Religion and Philosophy of Science at the John Paul II Institute at the Catholic University of America. He is the author of Augustine and Modernity and No God, No Science? Theology, Cosmology, Biology, as well as numerous articles.

May 25, 2025



Humanum

Issues in Family, Culture & Science

FEATURE ARTICLE

Can Transitioning Be Healthcare? A Reflection on Sex as Symbol

D. C. SCHINDLER

Initially, it may seem that the answer to the question that forms the title of this brief reflection would depend on the way one chose to define the first term. Thus, if we accept the definition offered by the Trump administration's executive order, namely, that transitioning is the "chemical or surgical mutilation of the body," the answer would be fairly clearly "no." But if one defined the term as "bringing one's biology into alignment with one's gender," or perhaps apparently more neutrally as "changing one's bodily expression of sex with the means provided by medicine," the answer may seem more ambiguous. In this respect, one might believe that the matter is essentially decided by who gets to define terms, which is to say that it is defined by power.

But I would like to propose that the key term is not the first, but the second, "healthcare," and that reflecting on the proper meaning of this term brings us beyond the realm of power and into the more fundamental realm of ontology. From this realm, I suggest, a response to the question becomes much more straightforwardly evident.

What is healthcare? It is the care—which is to say the activities, treatments, procedures, and so forth, ordered to the cultivation or restoration—of health. But how do we know whether the care we take in one instance or another actually promotes health? In his engagement with the novel science of "economics" in the late 19th century, the English writer John Ruskin insisted that we needed a word to contrast with the word "wealth" which would indicate an accumulation of possessions that did not conduce to well-being but instead to corruption. He proposed the word "illth." We might say that the word suits even better the cultivation, through artificial means, of a physical condition that does not promote, but rather thwarts, human flourishing. So the basic question we need to ask is, how do we distinguish "healthcare" from "illthcare"?

We can receive some light from etymology. The word "health" comes from the Old English *haelp*, the root of *hale*, related most directly to "whole" (in the sense of "sound," "intact," or "well"), but also to the words "holy" and "hallowed." To be healthy is to be "whole," integral,

not just to *feel* good about oneself in spite of whatever state one actually happened to find oneself, but to *be* in a good condition. We all recognize, for example, that the use of drugs to produce a feeling of well-being can often be especially destructive of one's health.

If we consider the question in the title from the perspective of health understood according to its roots, the answer is clear: insofar as "transitioning" means changing a body's "phenotype" to express the contrary of its "genotype," then, however much it may bring a body at least on the surface closer to alignment with one's feelings or desires, it quite obviously undermines the integrity of the body, and so the person. Quite objectively, it cannot be said to bring about "wholeness," which is to say, "health." The issue in pharmaceutical or surgical "transitioning" is not the apparently violent medical intervention itself, because, as we know from the need to amputate under certain circumstances, a compromise of bodily integrity in a certain respect may be required to sustain integrity in a more basic sense. Amputation allows the body to survive, which is to say to maintain a kind of wholeness even if it is a compromised or wounded sort of integrity; transitioning, by reversing one feature or another, or more specifically the outward expression of sexuality in indifference to its actual reality, straightforwardly contradicts wholeness.

In addition to (and indeed by virtue of) its enabling the continuance of the human race, sexual difference is even more basically a symbol of our relation to reality.

Let us explore this last point in more depth. Although sexual difference comes to its most direct expression in the genital organs (which is why these are the principal "target" of surgical intervention in transitioning), that difference pervades the entire body. We all know that the difference is inscribed in every cell of the body insofar as it lies in the chromosomes that are present in each cell. But we are learning, increasingly, that this presence does more than simply signal the construction of those discrete organs in the embryo's development. Instead, they bear on every part of the body and the body as a whole. There are the evident differences in typical body structures, bone shape, weight distribution, and so forth, that are formed in a basic way by one's sex. A knowledgeable person can determine the sex of an ancient murder victim by looking at the skeleton. But there are also more subtle differences in the way all of the body's systems operate, in the size, structure, and placement of the organs, the "wiring" of the brain, and so forth, to such an extent that doctors are now coming to realize that the medical standards and practices assumed for centuries have been "sexist," mostly unconsciously, to be sure, extrapolating from male models diagnoses and treatments ill-suited to women. (For my part, I would venture to guess that, if we had precise enough equipment and properly designed experiments, we would discover that the very cells communicate differently with each other in men and women.) Any procedure that changed only discrete organs or systems would in this respect set the body in opposition to itself, and of course it is impossible for a procedure to do anything *but* treat discrete systems. Transitioning is therefore not an instance of healthcare, but of "illthcare."

But we can go still deeper. In the field of philosophical anthropology, the question of where the determinative "locus" of sexual differentiation most fundamentally lies remains a matter of dispute: is it a matter of the body or is it a matter of the soul? While arguments continue to be

made on both sides,[1] there is a growing consensus that the best way to characterize sex or gender is as a modality *of the person*. [2] Even if there is a material cause of the differentiation, sex never remains merely a matter of matter, so to speak, but is formative of the whole person, body and soul. Aristotle notoriously proposed that sexual difference arises where body and soul meet: in males, the body is adequate to the soul, while in females the body obstructs the soul's full expression. [3] Disregarding this particular judgment, we can nevertheless retain the essential insight that the differentiation occurs at the very point of union of body and soul in the constitution of the human being. This would account for the formative presence of gender in every part of the body, and indeed, of the psyche more generally. We now know that different patterns of behavior are manifest from the very first hours of a child's existence—that is, long before any “training” can intervene. As study after study has demonstrated, what it means to be male or female thus comes to expression not only physically, but emotionally, intellectually, and culturally as well, which is to say, at every level of human being. Understanding the matter in this way reveals that “gender” is not a social construct but arises right at the very core of our being. The distinctive implications and tasks that follow upon being a man or a woman inevitably impress themselves on us in natural and spontaneous ways: I cannot think about what it would mean to live a complete, a meaningful and fulfilling life without implicitly or explicitly conceiving that in a “gendered” mode: I think about being a good man, a good father, a faithful friend specifically to the men and women with whom I am close, in a way appropriate to each.

In this respect, to “change” the surface appearance of sexuality through artificial means is to contradict not only the health of the body but the health of the *person*. This is a more radical dis-integration.

But there is even a further step to take. It is interesting to note that the rise of the “transgender” phenomenon has been so commonly experienced as a “crisis of meaning.” There are many moral questions of extraordinary gravity in the public sphere—abortion, for example, or the sexual abuse of children—but none that so immediately raise doubts on what we might call our “grip on reality”: we have begun to despair about whether we are losing our capacity to see things for what they are and to say them as we see them. However disturbing it may be, we are no longer shocked when public figures deny the evidence “right in front of their very eyes” when it comes to matters of sex and gender.

It is not at all an accident that the word “gender” is so frequently paired with the word “ideology”: ideology is a system of thinking that not only fails to subordinate itself to reality according to what the scholastics called the “*adaequatio intellectus et rei*” (the “joining together” of the mind and the thing); even more radically, it does not even take such an “*adaequatio*” to be the aim of thought, but instead reconceives thinking in purely pragmatic terms as the promotion of a particular political program. Ideology *imposes* ideas instead of *conceiving* them. The affirmation of “gender identity” as something created *ad libitum* goes hand-in-hand with the promotion of an ideology, insofar as both take for granted an essential detachment of the human spirit from the real. There are many reasons one might offer to explain the connection between the transgender phenomenon and despair regarding our capacity to know, to achieve communion with what is real; I propose that one of the basic reasons is that, in addition to (and indeed by virtue of) its enabling the continuance of the human race, sexual difference is even more basically a *symbol of our relation to reality*.

In the Wednesday Catecheses that he delivered in the first couple decades of his pontificate,[4] St. John Paul II famously described the body as the symbol of the person, meaning that the sexual organs bore witness to our being ordered to each other in love, an ordering inscribed in our flesh. The word “symbol” is more fitting than one might initially realize in this context:

etymologically speaking, the word “symbol” literally (!) means a “joining together” (*sym-ballein*). From this perspective, there is a certain irony in connecting the words sex and symbol, since the word “sex” appears to come originally from the verb “secare,” to cut, divide, or bifurcate. The word “sex” came into use to describe the division of a species into male and female. But this is a division that is precisely ordered to unity: the difference is what makes possible a proper joining together of two into one, in contrast to a mere juxtaposition of beings that are alike or a repetition of the same (Greek: *homos*). (Incidentally, “homosexuality” is a monstrosity of a word, invented in the 19th century, not only because it is a cobbling together of Greek and Latin roots, but more profoundly because it represents a self-frustrating contradiction: etymologically, it means a division that is not actually a division.)

In a sense, sexuality is the very paradigm of the symbol, the “joining together.” As far as I know, the word “symbol” appears only once in Plato’s dialogues: namely, in the well-known story recounted by Aristophanes in the *Symposium*. According to the myth Aristophanes (or perhaps Plato) invented to explain the phenomenon of eros, human beings were originally spherical, with two heads, four arms and four legs. But because of their completeness in themselves, their inner perfection, they became self-satisfied and haughty. Zeus therefore contrived to humble them by cutting them in two (*secare*!). This is the origin of love: a desire of each to find its “other half,” and thus to be restored to unity. In this account, Plato states that every person is a “symbol of man” (*anthropou symbolon*, *Symposium*, 191d), alluding to the “*tesserae hospitalis*” in the ancient ritual of friendship wherein a bone or potsherd was broken in two in order to commemorate the founding event, and the two parties took a piece with them. These “symbols” represented the capacity to renew the friendship at any moment in the future through the reunification (*sym-ballein*) of the pieces. The friendship thus remained implicitly present in the symbol.

By calling the person a “symbol of man” specifically in reference to the sexual organs, Plato was implying that the sexually-differentiated body was a reality that made the unity of man present, so to speak, in the flesh.[5] The Neoplatonic tradition that followed Plato opened up a more cosmological dimension in this symbolic representation. According to Plotinus, the desire for sexual union is the manifestation in the body of a desire for the transcendent unity from which all things come and to which they are destined to return. In other words, it is a specifically bodily expression, a physical image, of the desire for God. Sexual difference in this respect is a symbol of the cosmic friendship that Plato says is the most fundamental reality of the cosmos.

The Swiss philosopher Jean-Jacques Rousseau evoked something of this vision in a more modern context in his *Emile*, which is a fictionalized treatise on education.[6] However we might go on to judge Rousseau’s particular notion of education, it is incontrovertible to say that this was a ground-breaking book in the sense that it explored the psychological dimensions of education more carefully than anything written before. In his account, Rousseau identified the moment of puberty as the most dramatic and decisive moment—the “moment of crisis”—in a child’s education, and he did so for a very interesting reason.[7] For Rousseau, the fundamental aim of education is, in a nutshell, to reconcile the self and the other, which is to say to bring the child into a harmonious relation to the world, to teach him to connect with the other, so to speak, without losing his own self. Puberty is the essential moment, to his mind, because it represents what he calls the “second birth”: if our first birth is our entry into the world, in puberty we are awakened to the other precisely *as other*. [8] We can think here of the essentially dichotomous nature of sexual difference. Rousseau believes that this dawning of awareness of the “other sex” is an effective paradigm of our awareness of otherness *tout court*. It represents a key moment in education because in the original experience of the other in puberty the child establishes a pattern that will accompany him for the rest of his life.

It has to be acknowledged that Rousseau's recommendation for how best to navigate this original encounter with the other is rather perverse: he suggests that a child entering puberty should be taken repeatedly on tours of a hospital to witness suffering, so that his first and formative experience of otherness would reinforce his superiority and thus never allow otherness to threaten him with a sense of alienation.[9] In other words, it was crucial for Rousseau that a child's primal experience of otherness should occur in the mood of pity rather than that of envy. It does not seem to occur to Rousseau that one might experience otherness in the mode of love and gratitude: "The Father is greater than I." But in any event, setting aside his specific proposal, there is a remarkable insight here: namely, that the relation to the "other sex" is not just one relation among many but is a paradigmatic expression of relation to otherness as such. Sexual difference is, in other words, a symbol of one's relation to the world, the whole of reality, to all others (and even to oneself), and ultimately to God. It is for just this reason that matters concerning the meaning of sex and gender provoke such strong reactions one way or the other: we all sense, rightly, that there is quite a bit at stake in what some try to trivialize as just what takes place in the privacy of the bedroom.

More than a century later, Sigmund Freud elaborated an insight similar to Rousseau's but worked out at a more fundamental and comprehensive level, though again within the limits of a profoundly impoverished anthropology.[10] For him, the reckoning of self and other begins, not in adolescence with the onset of puberty, but from the very first moments of existence, specifically in relation to the mother and the father. Arguably, Freud was operating with a univocal sense of sexuality, and so did not sufficiently recognize the (properly analogical) difference between post-pubescent sexuality, which is ordered to bodily union and procreation, and sexual difference *simpliciter*, which is the manifestation of the twofold unity of human existence. But he was nevertheless able to recognize the comprehensive significance of this differentiation, and attain insights that can continue to illuminate and inform our sense of child development. To say it again, Freud, too, reveals that sex and gender are the *real symbol* of man's relation to the world; our relation to the "other" sex is a paradigm of our relation to the whole of reality.

If we return to our opening question in the light of the foregoing reflections, we begin to see how deeply it reaches. If transitioning is the medical reversal, through artifice, of some of the bodily aspects of sexual difference, it is not only contrary to healthcare in the proper sense of the term (i.e., the restoration and preservation of the wholeness of the human being), it is the very paradigm of "illthcare"; it is arguably the most radical opposition to healthcare conceivable. One might object that euthanasia is the most extreme contradiction, since it is the deliberate medical destruction of health, but the argument here is whether it is more radical to eliminate a thing altogether or to reverse it as fundamentally as one can while keeping it in existence. In any event, however well intentioned, however much it is proposed as a way to relieve what is clearly excruciating suffering, transitioning cannot but set a person in opposition to himself in a radical way insofar as it does violence to what lies at the core of his being, of his very personhood. Indeed, we have come to see that this intervention not only sets one in opposition to oneself, but symbolically in opposition to the world more broadly; it severs communion with the real. The etymological opposite of the word "symbol" is "diabolical," from *dia* (across or against) and *ballein* (to throw or cast). This novel approach to the profound challenge, the tragedy, of "gender confusion" can be said to be diabolical in many senses of the word: it not only sets a person at odds with reality, it does so with the deceptive promise of regaining unity, and it propagates rifts and confusion beyond the individual and into the community more broadly. It undermines the reliability of words, the very thing in which individuals join together as rational animals. In this respect, the transgender phenomenon affects everyone and calls us to recover a genuine understanding of the meaning of health, and of sexuality.

^[1] See, for example, John Finley, “The Metaphysics of Gender: A Thomistic Approach,” *The Thomist* (October 2015): 585–614, and William Newton, “Why Aquinas’s Metaphysics of Gender is Fundamentally Correct: A Response to John Finley,” *The Linacre Quarterly* 87 (2) (2020): 198–205.

^[2] See, for example, Antonio Malo, *Transcending Gender Ideology: A Philosophy of Sexual Difference* (Washington, DC: CUA Press, 2020), and Mark Spencer, “A Trinitarian Metaphysics of Man, Woman, and Priesthood,” *Proceedings of the American Catholic Philosophical Association*, forthcoming. This is also the language Finley proposes in the article cited above, and for which I give a sustained argument in “Perfect Difference: Gender and the Analogy of Being,” *Communio* (Summer 2016): 194–31.

^[3] Aristotle, *On the Generation of Animals*, book IV, chapters 1–2.

^[4] John Paul II, *Man and Woman He Created Them: A Theology of the Body* (Boston: Pauline Books and Media, 2006).

^[5] To be sure, Aristophanes’ story seeks to account not only for the natural pairing of man and woman but equally for the male-male and female-female pairings common in Greek culture. There is no room here to make the case that, Plato, for his part, seeks precisely to critique this Greek practice in his *Symposium*, but such a case can be found in my essay, “Plato and the Problem of Love: On the Nature of Eros in the *Symposium*,” *Apeiron* 40:3 (2007): 199–220. In any event, that critique is already implicit in Aristophanes’ own story: neither do male bodies “fit together” (*sym-ballein*) with other male bodies, nor do female bodies with other female bodies. Only man and woman properly fit together; only they are actual *symbols* in the original sense of the term Plato’s Aristophanes himself employs.

^[6] Jean-Jacques Rousseau, *Emile, or On Education* (New York: Basic Books, 1979).

^[7] *Emile*, book IV.

^[8] “We are, so to speak, born twice: once to exist and once to live; once for our species and once for our sex” (*Emile*, 211).

^[9] “If the first sight that strikes him is an object of sadness, the first return to himself is a sentiment of pleasure” (*Emile*, 229). On this, see 223ff.

^[10] Sigmund Freud, *Three Essays on the Theory of Sexuality* (New York: Basic Books, 2000).

D.C. Schindler is a professor of metaphysics and anthropology at the John Paul II Institute in Washington, D.C. He lives in Maryland with his wife, Jeanne, and their three children.

May 20, 2025



Humanum

Issues in Family, Culture & Science

FEATURE ARTICLE

The Legal and Cultural Context of *Skrmetti*

JOHN BURSCH

Last December, the Supreme Court heard oral arguments in *United States v. Skrmetti*. The case involves the constitutionality of a Tennessee law, SB1, that prohibits any medical procedure for the purpose of “Enabling a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex,” and “Treating purported discomfort or distress from a discordance between the minor’s sex and asserted identity.” Including Tennessee, 27 states have enacted such protections for children.

Skrmetti was a political milestone. Ten years ago, the Supreme Court had not yet constitutionalized a right to same-sex marriage. *Obergefell v. Hodges* was not decided until June 2015. Few had even heard of a transgender political movement. And Ryan Anderson’s groundbreaking book about gender ideology, *When Harry Became Sally*, would not be published for another three years, in 2018. Yet in *Skrmetti*, the United States sided with the ACLU and gender activists, asking the Court to hear the case after the Sixth Circuit upheld SB1.

Skrmetti was also a legal milestone. Until deciding *Bostock v. Clayton County* in 2020, the Supreme Court had never issued an opinion that directly addressed the rights of those who identify as transgender. *Skrmetti* will be only the second such case. And the United States and the ACLU were now asking the Supreme Court to reach the remarkable conclusion that the Equal Protection Clause of the Fourteenth Amendment—enacted in 1868—had from its inception applied heightened scrutiny to laws that classify based on transgender status because such classifications amount to sex discrimination. The argument would have likely been laughed out of court ten years ago, but the United States and the ACLU argued that their position was a natural extension of *Bostock*, a position that the Biden administration had pushed into every nook and cranny of federal law and regulations over the previous four years.

This backdrop leaves many questions. How did we get here in such a short time? What might the Supreme Court do in *Skrmetti*? And how will the decision impact the future cultural discussion about gender ideology? I hope to answer those broad questions and build a foundation on which to have a fruitful discussion.

Cultural backdrop

In 2015, five of nine Supreme Court Justices decided *Obergefell* and “found” a right to same-sex marriage in the Due Process Clause of the Fourteenth Amendment. That Amendment says nothing about the definition of marriage. It says only that the government must give Americans “due process,” which typically means the right to a hearing, the right to an impartial judge, and similar procedural rights.

The decision was a remarkable reversal. Only four decades earlier, in 1972, the Court rejected a request to hear an identical case from Minnesota. There, too, the plaintiffs claimed a federal constitutional right to same-sex marriage and invoked the Due Process Clause. They lost in the Minnesota Supreme Court. The U.S. Supreme Court then unanimously denied their petition for certiorari. That’s not uncommon. What was unusual is that the Court gave a reason: “for want of a substantial federal question.” The Court doesn’t usually do that. But it did here because the Justices unanimously agreed that the U.S. Constitution had nothing to say about how to define marriage; in 2015, the Court discovered that right in the same constitutional silence.

What does this have to do with gender ideology? Everything. It was the incredible transformation in public opinion about same-sex relationships and conduct that made *Obergefell* possible. And that transformation was led by the media and entertainment industries, everything from Tom Hanks playing a gay lawyer dying of AIDS in the movie *Philadelphia* to popular television shows spotlighting gay characters, such as *Queer Eye for the Straight Guy*, *Ellen*, *Will & Grace*, and *Modern Family*. Hollywood had normalized same-sex conduct that the Church, from its inception, considered contrary to God’s laws regarding human sexuality. Given the publicity push, NBC Entertainment’s chairman, who identified as gay, expressed his “surprise” that the Supreme Court’s “decision wasn’t *more* one-sided because public opinion already seemed to be overwhelmingly there.”

It took the publicity machine just over 40 years to make the case for gay, lesbian, and bisexual conduct and relationships. With the benefit of the internet and social media, it took much less time to make the case for gender ideology. Indeed, activists had been preparing the launch.

The Supreme Court issued its long-expected same-sex marriage decision in June 2015. For those who were reading the tea leaves, the outcome was not a surprise. Justice Kennedy had been slowly building the case for such a right over a series of decisions, and in the Court’s 2014 Term, he had hired a law clerk who, while a student at Harvard, had co-authored a chapter with a famous Harvard Law professor about why *now* was the time to constitutionalize same-sex marriage. Those who desired to add the “T” in LGBT knew all that and had already mapped out a ground strategy.

Two months before *Obergefell* was announced, Olympic gold medalist Bruce Jenner announced he was a “trans woman” in a *20/20* interview with Diane Sawyer. Less than *two weeks* before the Court’s decision, Jenner debuted a new name and image—using the name Caitlyn Jenner—and began using feminine pronouns publicly as self-descriptors.

The following month, in July 2015, the TLC network debuted *I Am Jazz*, a reality television show about Jazz Jennings. Jennings was born male but purportedly began identifying as a girl *at age two*. The series highlighted Jennings and his family “dealing with typical teen drama through the lens of a transgender youth” and continued over numerous seasons. Jennings also published a children’s book, *I Am Jazz*, designed for teachers and parents to read to young children (ages four through eight, according to Amazon.com). The American Library Association gave the book its Rainbow Project Book List Award in 2015.

Television shows quickly started adding trans or “nonbinary” characters to their lineups. These included popular shows such as *Glee*, *The Bold and the Beautiful*, *Law & Order: Special Victims Unit*, *Two and a Half Men*, *Twin Peaks*, *CSI: Crime Scene Investigation*, *Chicago Med*, *Ugly Betty*, *Grey’s Anatomy*, and even *Star Trek*.

Producers determined that *no* age limit was too young for this kind of re-education. In 2021, an episode of *Muppet Babies*—a television cartoon show for children ages four through seven—featured male character Gonzo’s decision to become a “princess” and wear a dress, though only after keeping his decision a secret. When Miss Piggy asks Gonzo why he didn’t tell his friends, he says, “Because you all expected me to look a certain way,” and “I don’t want you to be upset with me.” Recognizing her “prejudice,” Miss Piggy apologizes and says it “Wasn’t very nice” of Gonzo’s friends “to tell you what to wear.”

The same year, *Blue’s Clues*—a popular television show for children as young as three years old, released an episode to celebrate “Pride Month.” The show featured a cartoon Pride Parade with a drag queen voiced by Nina West, a contestant from *RuPaul’s Drag Race*. As each float passed by to the tune of “The Ants Go Marching One by One,” West sang words encouraging viewers “to celebrate gay, lesbian, pansexual, transgender, non-binary, and bisexual parents.” One float “Featured a trans-identified beaver family” that included a child beaver with “scars on its chest, apparently resulting from a double mastectomy surgery.” In case there was any mistake about this, a Nickelodeon spokesperson confirmed that the cartoon markings were, in fact, scars from “top surgery.”

Meanwhile, as smart phones and social media exploded, Facebook, Snapchat, TikTok, and other social media platforms fed children millions of hours of content promoting gender ideology. According to one study, TikTok videos featuring the hashtag #Trans have been watched more than twenty-six *billion* times. And that was several years ago. LGB Alliance’s Kate Harris opines that it is “no coincidence that the growth of TikTok coincides exactly with the exponential growth of children presenting with gender dysphoria,” noting that TikTok’s transgender messaging frequently tells children “Don’t involve your parents.”

Legal backdrop

The legal revolution was just as swift and well-funded. In 2016, less than a year after the *Obergefell* decision, the Obama administration’s Departments of Justice and Education sent their now-infamous “Dear Colleague” letter to the nation’s schools. The letter told schools that Title IX—which has always been understood to require schools to maintain separate showers, restrooms, locker rooms, and sports teams for men and women—now required schools to allow access to facilities and teams based on “an individual’s internal sense of gender.” If a school refused to capitulate, the administration threatened to withdraw the school’s federal funding. Although the following presidential administration rescinded the letter, innumerable school districts across the country used the letter to justify changing their policies. In those districts, gender identity—not sex—is the determining factor for who has access to male and female showers. These policies immediately triggered lawsuits from parents and students who demanded that privacy facilities in schools be assigned based on sex only, not gender identity.

In response to those lawsuits, gender activists quickly developed a novel legal theory: it is unlawful discrimination to exclude a boy from the women’s showers and locker room if he identifies as a woman. How can that be? Because, the activists said, it is impossible to discriminate against a person for being same-sex attracted or transgender without discriminating against that individual based on sex. And federal courts routinely ruled in favor of school districts that adopted gender-identity-based privacy policies. Many accepted

the activists' theory and said that schools *had* to assign privacy spaces based on gender identity or they could be liable under Title IX for sex discrimination. Some went further and accepted the underlying ideology, declaring that a male identifying as a woman is a woman, and females who are upset that a man is in their shower need to get over it.

The legal theory made it to the Supreme Court in the context of Title VII, the federal law that prohibits discrimination in employment based on numerous protected classifications, including sex. In *Bostock*, the Court considered three consolidated cases, two involving plaintiffs who claimed discrimination because of their status as same-sex attracted, and one who claimed discrimination by a funeral home based on transgender status. In the transgender case, *Harris Funeral Homes*, the funeral home required its employees to follow a professional, sex-specific dress code, consistent with industry standards and as federal law allows. In 2007, Harris hired funeral director Anthony Stephens, a male. About seven years later, Stephens handed the funeral home's owner a letter explaining that Stephens had gender dysphoria and decided to start presenting and dressing as a woman at work. The owner took two weeks to carefully consider this. He weighed the impact of his decision on Stephens and Stephens' wife. He also thought about his female employees and clients who would be sharing a single-sex restroom with Stephens. Finally, he considered the impact on his clients' grieving process. In the end, the owner could not agree to Stephens's plan to violate the dress code, so he offered Stephens a severance. The Equal Employment Opportunity Commission sued.

A large majority of adolescent children experiencing gender dysphoria, if left alone, will naturally desist and realign their mind with their body. In contrast, nearly 100% of such children who are affirmed in their gender identity will continue down a road of lifetime medical treatment and misery.

The Supreme Court ruled for Stephens. Adopting the gender activists' core legal theory *and* gender ideology's proposed anthropology, the Court majority wrote, "take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. . . . [T]he individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

"[H]omosexuality and transgender status are inextricably bound with sex," the majority continued. Why? "[B]ecause to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."

There were numerous problems with that analysis. For starters, the majority opinion assumes that the defendant employers did "not dispute that they fired the plaintiffs for being homosexual or transgender." But Harris Funeral Home's owner *did* dispute that. He said he offered Stephens a severance because Stephens wanted to dress like a woman when meeting with grieving families, and because the owner was concerned about Stephens using the single-sex restroom with female employees. Later in the opinion, the majority *disclaimed* that the

Court was deciding anything having to do with “sex-segregated bathrooms, locker rooms, and dress codes.” But that was precisely what was at issue in Harris Funeral Home’s case.

In addition, the majority opinion bought into gender ideology’s anthropology, referring to individuals having a sex that was “identified . . . at birth.” Sex is determined at birth based on male or female sex organs. It’s not possible for an individual’s sex to change when they grow older. Sex is fixed and objectively determined, not malleable and subjectively professed.

Moreover, a judge who (correctly) seeks to interpret a statute in accord with its original meaning is supposed to ask what an average American with a reasonable command of the English language would have thought a law’s plain text meant at the time of enactment. Congress enacted Title VII in 1964. There was not a single American in 1964 who thought that the law applied to employment decisions based on homosexual or transgender status. The vast majority of Americans in 1964 would not have even recognized the term “transgender,” much less believed that sex discrimination encompassed a situation like the funeral home’s. That’s why the dissent accused the majority opinion of “sail[ing] under the textualist flag” when “what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.”

Finally, the majority opinion derided the employers’ concern that a decision for the plaintiffs would “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination.” It said that the decision applied only to Title VII. But gender activists and the Biden administration quickly took the opinion’s “transgender discrimination equals sex discrimination” reasoning and applied it to many non-Title VII contexts.

On the activist front, lawsuits quickly challenged laws that assigned sports teams based on sex instead of gender identity. Lawsuits fought over whether men who identify as women can be assigned to women’s prisons. The same battle ensued over men who identified as women for the purpose of sleeping in overnight shelters in the same room as women who had been trafficked and abused. Employees were punished by public and private employers alike if they declined to use someone’s preferred pronouns because they believed those pronouns to tell a lie.

As for the administration, it promulgated new Title IX regulations that *required* boys who identify as girls to be given access to women’s showers, bathrooms, and locker rooms, as well as women’s overnight accommodations for school trips. The administration told colleges and universities—even those that accepted no federal funding—that they needed to treat men who identified as women as female for purposes of dormitory assignments. Reversing an Obama administration policy that federal funds could *not* be used to pay for surgeries to “change someone’s sex” because those surgeries were experimental and dangerous, the Biden administration demanded such coverage, and for private employer health-coverage, too. The list goes on.

States were quick to follow suit. For example, in Michigan, the Michigan Supreme Court followed *Bostock*’s reasoning to rewrite Michigan’s public-accommodations laws to cover differential treatment based on sexual orientation and gender identity. And if that wasn’t enough, Michigan’s Legislature and Governor enacted a bill to ensconce those changes in the law permanently.

Courts, legislatures, cities and towns, and school boards enacted similar policies. But in the midst of this tidal wave, the first seeds of reason and common sense were starting to sprout.

The lead-up to *Skrmetti*

As courts continued to rule against students and families who merely sought to maintain sex-based school privacy spaces, it was becoming clear that the average citizen was not losing any sleep over the issue. But when it came to sports, things were dramatically different. The same person who didn't care about a female-identifying male in the restroom cared a great deal when that male finished half a lap around the track or the pool in front of a female competitor.

The first lawsuit was brought on behalf of several young women in Connecticut, where two males identifying as females had “won” 13 women's state championship track-and-field titles. Although the case was not immediately successful—after dismissal and reinstatement, it is still pending in a federal district court—it raised public awareness. The next step was the development of a model women's sports act that assigned sports teams based only on sex, not gender identity. It was adopted promptly in half the states.

Soon, stories about California female prisoners being sexually assaulted and impregnated by female-identifying male inmates started to reach the public consciousness. So did stories about detransitioners and children in schools who were socially transitioned by teachers and counselors while keeping that fact hidden from their parents. The gender fever had not yet broken, but the temperature was going down.

The most significant development is that science started to catch up with common sense. Countries that had been at the forefront of developing gender-identity theory, such as Sweden, Norway, Finland, and the United Kingdom, started abandoning the gender affirmation model in favor of conventional psychological approaches, like counseling. Systematic reviews concluded that medical gender transitions were not helpful at best and harmful at worst. From the United Kingdom's National Health Service's Cass Report to the recent Canadian summary report, doctors were sounding the alarm. Puberty blockers can cause mental health problems and permanent damage to physical and emotional development. Cross-sex hormones in females atrophy and chemically degrade the female sex organs, leading to sexual dysfunction and eventual sterility. They triple the risk of heart attack, double the risk of stroke, and lower the age of breast cancer, just to name a few.

Surgeries cause permanent disfigurement of the body; they can be both sterilizing and irreversible. A 16-year-old girl who undergoes a mastectomy so that she can look more like a boy will never be able to nurse her baby, even if she pursues reconstructive surgery for her chest. And a Finnish study concluded that there was no difference in suicide rates for those experiencing gender dysphoria who pursued a surgical remedy.

Moreover, a large majority of adolescent children experiencing gender dysphoria, if left alone, will naturally desist and realign their mind with their body. In contrast, nearly 100% of such children who are affirmed in their gender identity will continue down a road of lifetime medical treatment and misery. And doctors have no way to know ahead of time which children will desist and which will persist with their dysphoria.

Recognizing that every child deserves to be kept safe from harmful drugs and surgeries, Alliance Defending Freedom worked with legislators across the country to craft bills that prohibited healthcare providers from administering puberty blockers or cross-sex hormones or from performing surgeries on children who experience discomfort with their sex. Twenty-seven states have adopted such protections into law. These bills recognize that the medical profession has a duty to promote health and human flourishing. Puberty-blocking drugs, cross-sex hormones, and surgeries inflict irreversible damage on children. Rather than provide long-

term benefits, they turn children into life-long patients. And in many cases, they deprive children of the ability to become parents later in their lives.

In 2023, with bipartisan support, Tennessee passed its SB1. In response, the ACLU sued Tennessee, and the Biden administration intervened. The administration claimed that Tennessee's law protecting children violated the Equal Protection Clause of the U.S. Constitution. The ACLU made the same claim and also added a claim that parents had the right to demand experimental and dangerous medical interventions for their children that they did not even have the right to demand for themselves. A federal district court issued an injunction to stop the law from going into effect. But the U.S. Court of Appeals for the Sixth Circuit reversed, concluding that SB1 did not violate anyone's rights.

As an aside, note that Tennessee's was just one of many such lawsuits filed against these laws around the country. One of those lawsuits, in Alabama federal court, resulted in the discovery of the infamous internal documents at WPATH, the World Professional Association for Transgender Health, a recognized expert on so-called "gender medicine." American doctors frequently defer to WPATH's standards of care when searching for guidance about how to help their young patients who may be suffering from gender dysphoria.

Some internal WPATH documents had previously been leaked to the public, with troubling information. Doctors, nurses, and other WPATH members had frank discussions about whether children could give informed consent to undergoing life-altering procedures when they—and often their parents—don't understand the full consequences. The obvious answer is no.

WPATH members also discussed that many children and adolescents who visit gender clinics have high rates of other psychological conditions, including depression, anxiety, post-traumatic stress disorder, borderline personality disorder, autism, dissociative identity disorder, and more. Yet the lead author of WPATH's chapter on mental health thought this made no difference. He said: "The mere presence of psychiatric illness should not block a person's ability to start hormones."

Another internal WPATH topic was detransitioners. But rather than showing compassion for those individuals and questioning the premise of medical intervention, WPATH chatroom entries discussed how to "reframe" detransitioners' serious regret as merely "normal" exploration of gender over time.

But none of these revelations compared to what appeared in the WPATH documents discovered in the Alabama litigation. As described more fully in a *Skrmetti* friend-of-the-court brief that Alabama filed in support of Tennessee at the Supreme Court, WPATH—joined by the United States and "social justice lawyers"—crafted WPATH's latest standards as a political and legal document. Indeed,

some WPATH authors, acting on advice of "social justice lawyers [they] spoke with," intentionally chose *not* to seek a systematic review of the evidence before making treatment recommendations. The reason? Because "evidence-based review reveals little or no evidence and puts us in an untenable position in terms of affecting policy or winning lawsuits."

At the time, the Assistant Secretary for Health in the Biden administration's Department of Health and Human Services was Rachel Levine, a male who identifies as a female. Secretary Levine met frequently with WPATH. A few months before WPATH was to release its latest

guidelines in September 2022, WPATH sent Secretary Levine an embargoed copy of the draft guidance, which specified age minimums for various transitioning surgeries, such as “chest masculinization,” “breast augmentation,” “vaginoplasty,” “phalloplasty,” and so on. Secretary Levine’s office contacted WPATH with a political concern: “that the listing of ‘specific minimum ages for treatment,’ ‘under 18, will result in devastating legislation for trans care.’” “Secretary Levine’s chief of staff suggested that WPATH hide the recommendations by removing the age limits from [the recommendations] and creating an ‘adjunct document’ that could be ‘published or distributed in a way that is less visible.’”

“The authors of the adolescent chapter wrestled with how to respond to the request” but ultimately agreed to change the ages from recommendations to mere suggestions. Secretary Levine demanded more meetings. Then, days before WPATH was to release its guidance, the American Academy of Pediatrics threatened to oppose the guidance “if WPATH did not remove the age minimums.” WPATH doctors “struggle[d] to find any sound evidence-based argument(s)” in the opposition, but recognized it would be a major political challenge for WPATH if the Academy did not support the guidance. So WPATH “caved” and removed the age limits. Other documents revealed that WPATH hindered the publication of evidence reviews, undertaken by Johns Hopkins, that show little to no evidence that children and adolescents benefited from WPATH’s recommended interventions.

Skrmetti

Turning to the *Skrmetti* case itself, there was a curious lack of alignment between the ACLU and the United States. For starters, the ACLU had challenged the entirety of SB1, including the law’s prohibition on surgeries for the purpose of a gender transition. The United States initially supported that position. But when Secretary Levine’s intervention in WPATH’s recommendations became public, the Biden administration changed course and opposed such surgeries for minors. The administration never explained why it supported these surgeries in the past, why it changed position, or why it was now disagreeing with WPATH recommendations that the administration was claiming in court filings were evidence-based and reflected the accepted standard of care.

In addition, as noted, the ACLU pushed *two* legal theories in its cert. petition, one based on the Equal Protection Clause, the other based on parental rights. The United States invoked only the Equal Protection Clause. The Supreme Court granted *only* the United States’ cert. petition. This had two practical effects. First, it effectively eliminated parental rights from the Court’s decision. That was curious, because in theory, if the Court upheld SB1 under the Equal Protection Clause, it might have to confront the validity of these model medical-protection laws again in the future under the parental rights theory. The Court does not usually proceed that way. At the same time, however, by denying the ACLU’s petition, the Court did not have to deal with the somewhat tricky issue of how to recognize a broad parental right to direct a child’s healthcare while carving out an exception for dangerous and experimental procedures like those defined in SB1.

Second, by granting only the United States’ cert. petition, the Court left open the possibility that, after the November elections, a new administration could withdraw the United States’ petition and the Court could then either grant the ACLU petition and decide the case anyway, or decline to grant the ACLU petition and duck a merits decision. On February 7, 2025, the United States filed a letter with the Court announcing that “the government’s previously stated views no longer represent the United States’ position.” “The Department has now determined that SB1 does not deny equal protection on account of sex or any other characteristic. Accordingly, the new Administration would not have intervened to challenge SB1—let alone

sought th[e] Court's review of the court of appeals' decision reversing the preliminary injunction against SB1."

Despite all that, the United States "believe[d] that the confluence of several factors counsels against seeking to dismiss its case" at the Supreme Court. Chief among these factors was that there were many cases in lower federal courts where the same constitutional question is being litigated. The new administration urged the Court to "Resolve the question presented without either granting the private plaintiffs' pending petition for a writ of certiorari, or requesting further, likely duplicative briefing from the same parties about the same court of appeals judgment."

Why would the new administration do that? The best guess is that the new administration read the tea leaves from oral argument and concluded that the Justices were going to uphold SB1. And that seems to be the consensus from most of the legal commentators who reported on the case.

At the two-and-a-half hour oral argument, several of the Justices echoed a concern that the Sixth Circuit articulated in its opinion reversing the preliminary injunction: that lawmakers are better suited than judges to make determinations about complicated medical questions. This was a victory for all those who have been focusing public attention on the medical reviews from the UK, Finland, Denmark, and Sweden.

The Biden administration's Solicitor General, Elizabeth Prelogar, pressed that SB1 uses gender dysphoria as the sole reason to prohibit giving minors puberty blockers and cross-sex hormones. If a child is undergoing precocious puberty, for example, puberty blockers are allowed. Since SB1's effect turns on whether the interventions are used in a manner that is inconsistent with the sex that an individual was assigned at birth, she argued, it was a sex-based line that required heightened scrutiny under the Equal Protection Clause. If this sounds remarkably like the theory in *Bostock*, that's because it is. Three Justices seemed to accept this argument and pressed Tennessee's Solicitor General, Matt Rice, on this point.

What General Prelogar and these Justices missed was that SB1 does not regulate based on *who* seeks treatment but based on the benefits and risks *of the treatment requested*. Using the surgical context, when a doctor removes a young woman's breasts, it matters a great deal whether the reason is because she has breast cancer or the reason is because she wants to look more like a boy. The benefits and risks of the two treatments are radically different. Likewise, the risks and benefits of a vaginoplasty are very different when done to help a female who has suffered harm to her genitals versus a boy who wants to look more like a girl.

This difference in risks and benefits is immediately apparent when considering puberty blockers. When a child is experiencing precocious puberty, the FDA has approved the administration of puberty blockers until she is older. The purpose is to promote the natural and healthy development of her body. But when a child is experiencing gender dysphoria, the FDA has *not* approved the administration of puberty blockers at any age. The use of puberty blockers to treat gender dysphoria is poorly studied and very risky. The British National Health Service recently stopped such treatments for lack of evidence. Using puberty blockers for gender dysphoria can result in infertility, depression, anxiety, and suicidal ideation. The UK's Cass Review determined that when it comes to puberty blockers and gender dysphoria, both WPATH standards and Endocrine Society guidelines were "unreliable and methodologically un-rigorous."

It was also suggested that SB1 has a disparate impact based on sex: only males are denied estrogen treatment, for example, and only females are denied testosterone treatment. But

that's a misunderstanding of the Supreme Court's disparate-treatment doctrine. As numerous cases confirm, sex discrimination only occurs when a law imposes a burden on a person she would not bear if she was a member of the opposite sex. When it comes to medical treatments, biological differences between the sexes matter. For example, in *Dobbs*, the decision that overruled *Roe v. Wade*, Mississippi's 15-weeks law applied only to women because men can't become pregnant. Even though the law had a 100% disparate impact, the Supreme Court did *not* apply heightened scrutiny under the Equal Protection Clause. The Court said it would do that only if the law were a mere pretext for sex discrimination, for example, a law that prohibits a driver's license for anyone who has the capacity to bear a child. Mississippi's law was nothing like that, so only rational-basis review applied. That result makes sense. Otherwise, laws regulating insurance coverage for prostate cancer and cervical cancer would be subjected to heightened scrutiny because they disparately impact only one sex.

General Prelogar and the ACLU's attorney, Chase Strangio, a female who identifies as male, argued alternatively that SB1 had to be subjected to heightened constitutional scrutiny because the law discriminates based on transgender status, and that the class of people who identify as transgender are entitled to extra constitutional protection because of the history of discrimination against them. In other words, someone's status as transgender is more like race or sex than it is like age or height. But again, SB1 regulates based on the risks and benefits of procedures, not based on someone's status as transgender. Tennessee's law would prohibit the use of cross-sex hormones to make a girl look more like a boy even if the girl identified as female. A doctor does not need to know *how* a child identifies to know whether SB1 regulates a procedure.

The only other path to heightened review based on a transgender classification is to argue proxy discrimination. This requires two elements, first, that the regulated activity is "an irrational object of disfavor," and second, that the law uses seemingly neutral criteria closely associated with a disfavored group. The paradigm example of proxy discrimination is a tax on yarmulkes. It's irrational to tax yarmulkes but not other types of head coverings or clothing. And there is nearly a 100% overlap between Jews and those who wear yarmulkes.

Here, however, there is nothing irrational about regulating medical procedures with serious risks and uncertain benefits for children. Given all the evidence from Sweden, Finland, Denmark, the UK, and Canada, it would be irrational for a state legislature *not* to have some interest in regulating these experimental and dangerous interventions. And if the Tennessee Legislature had been acting with animus or hostility generally towards those who identify as transgender, then the legislators would have prohibited these interventions for *all* those who identify as transgender, including adults. The fact that the Legislature limited SB1 to protecting children disproves any claim of proxy intervention.

Because the parental-rights issue was taken off the table as a result of the Court granting only the United States's cert. petition, not the ACLU's, there was not much discussion about it. But Justice Barrett did highlight that the issue would *not* be resolved, clarifying in a colloquy with General Prelogar that "even if we decided that this wasn't a sex-based classification that triggered intermediate scrutiny, that would not prevent parents from still asserting the substantive due process right," i.e., parental rights. General Prelogar confirmed that was correct. But the outcome should be no different because there is no parental right to experimental and dangerous medical interventions for children.

Notwithstanding *Obergefell*, the Court's governing precedents in *Glucksberg* and *Dobbs* hold that a fundamental right must be "deeply rooted" in our nation's history and tradition. And while the Court has recognized that parental rights generally are deeply rooted and can be

enforced either through the Due Process Clause or the Privileges and Immunities Clause, there is no fundamental right for *anyone* to obtain a specific medical treatment. It follows, then, that there is no fundamental right for a parent to demand experimental and dangerous medical interventions for their children. To put it another way, the Constitution does not require states to defer to a parent's risky demand for WPATH's suspect protocols when a state determines that those protocols are too dangerous for children.

Takeaways

So where does *Skrmetti* leave us legally and culturally? Legally, the Court could take one of several paths. First, it could hold that SB1 is subjected to heightened constitutional scrutiny, that the Tennessee Legislature has not proffered sufficient scientific evidence to pass that scrutiny, and SB1 and laws like it violate the Equal Protection Clause. That is a very unlikely outcome.

Alternatively, the Court could hold that SB1 triggers heightened scrutiny and the case should be remanded to the lower courts to take additional evidence and decide in the first instance if the law survives that scrutiny. That is certainly a possible outcome.

Based on the oral argument, the most likely outcome appears to be that the Court will hold that SB1 triggers only rational-basis review, and the law easily satisfies that standard. But note that Justice Gorsuch—who authored *Bostock* and articulated the legal theories that undergird many of the *Skrmetti* arguments—did not ask a question or make a single comment during the oral argument.

A rational-basis holding could have immediate implications in other contexts. For example, the Ninth Circuit struck down an Idaho women's sports bill in a case called *Hecox v. Little*. Hecox is a male who identifies as a woman who sued to participate on the women's track team. After a district court enjoined the sports law, Hecox failed to make the team, and Hecox dropped out of school for a time, yet the district court and a Ninth Circuit panel allowed the case to proceed and kept the injunction in place because Hecox could also be denied participation on a university women's club soccer team—even though that was relief Hecox never requested in the complaint. The Ninth Circuit's holding was that the Idaho law violated the Equal Protection Clause. It suggested that states in the Ninth Circuit should be assigning sports teams based on circulating testosterone, not sex. *Skrmetti* could change that. Depending on what the majority opinion says, there may also be implications for Title IX and other contexts. At a minimum, it would stop the further expansion of *Bostock*'s logic outside the Title VII context. That would be tremendously helpful to curb future harm from gender ideology.

Culturally, as Abigail Shrier celebrated at the end of January, there are signs that the “gender fever” has finally “broken.” A Supreme Court ruling that upholds SB1 would certainly put more wind in the sails of those who oppose gender ideology as a false and dangerous philosophy and anthropology. But it would not be the end of the gender ideology movement. A mere 3 million votes separated the winner and loser in the last presidential election, and the loser would have continued and expanded her predecessor's aggressive policies promoting gender ideology. We do not and cannot put our faith in presidents, political parties, or Justices.

So rather than viewing this cultural moment as the breaking of gender fever, I would instead recommend that we view it as a pause in the hysteria, a pause that gives us an opportunity to speak to the culture about the gender ideology movement. We must identify and rebut the false arguments and assumptions of the transgender movement. We must confront the language of gender ideology and how it influences our court system. We must better

understand the feminist roots of transgenderism and embrace the roots that reflect our true human anthropology and reject those that do not. We must persuade the country that there is nothing abnormal about the male and female bodies, and that it is wrong to treat gender dysphoria as a disease of the body rather than the mind. After all, gender dysphoria is the *only* dysphoria where some healthcare practitioners recommend that an individual align her body with her mind rather than her mind with her body.

We must seek to eliminate gender ideology from our constitutional and political order by amending statutes like Title VII and Title IX to make clear that they are laws that regulate based only on sex, not gender identity. We must work to reinforce the rights of parents to reject gender transitions for their children without being accused of abuse and neglect, to reject secret social transitions at schools, and to reject modern efforts to destabilize and disintegrate the nuclear family. Finally, we must put the science back in medicine, eliminate the politicization of so-called gender-affirming care, and re-establish the common-sense notion that it is harmful to permanently disfigure the body to address a mental-health issue. And we must do all these things with compassion and accompaniment.

We cannot be satisfied with the publishing of papers and the promise of additional dialogue. We need to use this national pause in the gender ideology hysteria to act, promoting good laws, persuading judges, and educating the public. It is entirely possible that in four years, we may find that gender fever has returned with more funding, better messaging, and even greater political and legal intensity.

Of course, gender ideology is only one way our culture rejects the Church's teachings. We hear from our culture that there is no such thing as objective truth; that we should act on our feelings, not out of reason and discipline; that we should pursue personal gratification at any cost, and that we cannot trust there is an eternal God who loves us and always wants what is best for us. These are the very same lies the serpent told Adam and Eve in the Garden of Eden. This is no coincidence.

We do not need to solve all these problems. We are not responsible for changing someone's mind about the subject. But God calls us to spread the Good News to all those we encounter, and to let Him use those labors to advance His Kingdom here on earth. My hope is that as we discuss these important issues, we pray for God's guidance about how best to inculcate our culture with the truth of marriage, family, and human sexuality. Because nothing less than human flourishing is at stake.

John Bursch is senior counsel and vice president of appellate advocacy with Alliance Defending Freedom. He has argued 13 cases before the U.S. Supreme Court. In Obergefell v. Hodges, he represented the state of Michigan and in Bostock v. Clayton County, he represented Harris Funeral Homes. He has published a book with Sophia Institute Press, Loving God's Children: The Church and Gender Ideology.

May 16, 2025
