

Forum: Sexual Morality and the Possibility of "Same-Sex Marriage"

IS MARRIAGE INHERENTLY HETEROSEXUAL?

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The issue of same-sex marriage has exploded onto the American political landscape. Almost everyone knows that soon—perhaps even by the time this sentence is printed—the Hawaii Supreme Court will probably declare that the state constitution requires that same-sex couples be permitted to marry. Whatever happens there, public opinion concerning same-sex marriage is shifting so rapidly that it is very likely that sooner or later one of the states will adopt same-sex marriage.¹ That prospect has provoked a national reaction. As a general rule, states honor each other's marriage laws. That's why a heterosexual couple can get married during their vacation in Reno and have their marriage recognized back home in Atlanta. But there's an exception when the out-of-state marriage violates a "strong public policy" of the home state. More than half the states have responded to the Hawaii litigation by passing laws declaring a strong public policy against same-sex marriage, and these laws are likely to provoke further litigation.² Congress has also passed a law licensing states to entirely ignore Hawaii same-sex marriages, and denying all federal recognition to such marriages.³

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1. One poll, in July, 1995, found that a third of Americans think that two people of the same sex should be able to legally marry if they love each other, while two-thirds are opposed to same-sex marriage. The opposition is substantially weaker among younger people. Fifty-six percent of 18- to 24-year-olds are in favor. Jeff Holyfield, National Poll: A Third of Voters Say Same Sex Marriages Should Be OK, Associated Press, July 6, 1995, 1995 WL 4395753; see also Associated Press, One-Third of Voters Support Gay Unions, San Francisco Examiner, July 6, 1995, at A8 (briefly summarizing survey).

2. See Andrew Koppelman, "Same-Sex Marriage, Choice of Law, and Public Policy," 76 Texas L. Rev. 921, 924, 965-70 (1998).

3. See Defense of Marriage Act, Pub. L. 104-199; 110 Stat. 2419; Andrew Koppelman, "Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional," 83 Iowa L. Rev. 1 (1997).

One of the central issues in the same-sex marriage debate is whether, as many thoughtful people believe, marriage is *necessarily* a relation between persons of different sexes. These people think that, whatever goods a same-sex couple is capable of achieving together, marriage is simply impossible for them, because of the kind of thing that marriage is.⁴ When same-sex marriage appears on the national agenda, this is prominent among the claims against it. Some view of this sort is presupposed, not only by those who oppose all recognition of gay relationships, but also by those who support legislation establishing "domestic partnerships" with many of the legal benefits of marriage, but with the full status and honorific of marriage withheld. Since most Americans fall into one of those categories, it is plainly incumbent upon defenders of same-sex marriage to address this view.

This paper will examine the most sophisticated version of the claim that marriage is necessarily heterosexual, that developed by the "new natural law theorists," Germain Grisez, John Finnis, Gerard V. Bradley, and Robert P. George. As Stephen Macedo has observed, the argument developed by these writers "is by far the most elaborate intellectual case for distinguishing between homosexual and heterosexual activity."⁵ In Part I, I will explain why their claim is relevant to the legal question of whether the state is constitutionally obligated to recognize same-sex marriage. Part II states the argument of the new natural law theorists, that marriage is a communion of persons that can only be consummated and actualized by sexual acts of the reproductive type. Part III describes the principal objection to which this argument is subject: that because it focuses on the reproductive nature of heterosexual marriage, it cannot account for the recognition of marriages between heterosexual couples who are known to be infertile. It then discusses some recent responses to this objection, which clarify these writers' understanding of the good of marriage, but give rise to new puzzles. Part IV attempts to solve these puzzles by looking to one of the argument's most important antecedents, the sexual ethics of Thomas Aquinas, where certain implicit assumptions of the new natural lawyers are made explicit. Parts V and VI then turn to the related question whether homosexual sexual conduct is *per se* morally defective. Part V examines and criticizes the most common argument in favor of this conclusion, which focuses on the alleged bad consequences or concomitants of homosexual sex. Part VI then

4. I take no position here on how important this argument is in shaping popular attitudes. See Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination," 69 N.Y.U. L. Rev. 197, 280 n.314 (1994).

5. Stephen Macedo, "Homosexuality and the Conservative Mind," 84 Geo. L. J. 261, 276 (1995).

examines the new natural lawyers' response to this question, which turns on the dubious claim that pleasure is not a good reason to undertake any activity. Finally, Part VII argues that the new natural lawyers' argument, thus understood, rests on bad theology as well as bad philosophy.

I. THE LEGAL RELEVANCE OF THE CLAIM

The claim that marriage is inherently heterosexual is obviously relevant to legislative deliberation about same-sex marriage. Those who believe this claim will think that same-sex marriages ought not to be recognized because they cannot exist. The claim is also, however, relevant to the adjudication of the same-sex marriage issue, in Hawaii and elsewhere. I will begin, then, by explaining the claim's legal relevance to the litigation that is now taking place.

The present litigation is on remand from a May, 1993 decision, *Baehr v. Lewin*,⁶ in which the Hawaii Supreme Court held that denying marriage licenses to same-sex couples is unconstitutional unless the state can show a compelling reason to do so. The court's argument rested on the equal protection clause of the state constitution, which prohibits discrimination on the basis of sex. The court held that the marriage statute imposed a sex-based classification, because it "restricts the marital relation to a male and a female."⁷ The court therefore held that the statute would be unconstitutional unless the state could show that this classification was necessary to some compelling state interest, and remanded the case for a trial on that question. (Because the decision was based on the state constitution and raises no federal issues, it could not be appealed to the United States Supreme Court.)

In 1996, as expected, the state lost at trial.⁸ It is bringing the case back to its Supreme Court. "I will admit the likelihood of success is not particularly tremendous in this case," the state's lawyer told the judge while successfully petitioning the trial court for a stay of its injunction pending the appeal.⁹ Any victory for same-sex marriage in the courts may, however, be overturned at the ballot box. In April, 1997, the Hawaii legislature voted to place on the November, 1998 ballot a constitutional amendment that would give the legislature the power to reserve marriage to opposite-sex couples. If the amendment is adopted, the legislature will not be able to act until the 1999 session, and some marriage licenses are likely to be issued to same-sex couples in the meantime. The result, Hawaii Attorney General

6. 852 P.2d 44 (Haw. 1993).

7. *Ibid.* at 60.

8. *Baehr v. Miike*, 1996 Westlaw 694235, 1996 Haw. App. Lexis 138 (Haw. Cir. Ct., 1st Cir., Dec. 3, 1996).

9. Deputy Attorney General Rick Eichor, quoted in Ken Kobayashi, *State Appeal on Same-Sex a Long Shot*, Honolulu Advertiser, Dec. 5, 1996, at 1.

Margery Bronster has noted, is likely to be confusion. "If the Supreme Court ruled against the state and legalized same-sex marriages, and then the voters changed the Constitution [to ban them], we could end up having a window of time when same-sex marriage was legal, and what happens to those licenses?"¹⁰

The argument that persuaded the court is unfamiliar but clear. If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then Ricky is being discriminated against on the basis of his sex. This argument, however, had always lost in court before *Baehr*. (The Hawaii plaintiffs didn't even bother to make it, and the court had to come up with it by itself.)¹¹ The same counterargument had always been made by courts in other states: if lesbians and gay men are equally discriminated against, then there is no sex discrimination.¹² This counterargument continued to persuade the one dissenting judge in *Baehr*. The big legal innovation in *Baehr* was that the court noticed that this counterargument was the same one that the U.S. Supreme Court had rejected in *Loving v. Virginia*,¹³ the 1967 case in which it struck down laws against interracial marriage. Virginia had defended its miscegenation law with the argument that, while it was true that blacks were forbidden to marry whites, whites were equally forbidden to marry blacks. The U.S. Supreme Court could easily see the silliness of that argument. If prohibited conduct is defined by reference to a characteristic, then the prohibition is not neutral with respect to that characteristic. If the invocation of parallel discriminations was a bad argument then, the Hawaii court recognized, it's just as bad now.¹⁴

More relevant here is another argument against the result in *Baehr*, one that had also succeeded in some earlier cases: that same-sex couples may not marry because marriage by definition is between a man and a woman. This is the rationale that most courts have relied upon in rejecting the sex discrimination claim in the specific context of marriage.¹⁵ In *Jones v. Hallahan*,¹⁶ the Court of Appeals of Kentucky held that persons of the same sex could not marry, because "marriage has always been considered as the union of a man and a woman and we have been presented with no

10. Kim Murakawa, No Same-Sex Ruling in Sight, Honolulu Advertiser, July 31, 1997, at B4.

11. See "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination," p. 209 n. 40.

12. See *ibid.*, pp. 208-209.

13. 388 U.S. 1 (1967).

14. For further development of this argument, see generally "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination."

15. For a catalogue of the jurisdictions that have similarly denied the right of same-sex couples to marry, see William B. Rubenstein, *Cases and Materials on Sexual Orientation and the Law* (St. Paul: West Publishing Co., 2nd ed. 1997), pp. 748-49.

16. 501 S.W.2d 588 (Ky. 1973).

authority to the contrary.”¹⁷ The two women seeking to marry were prevented from doing so, not by any action of the state, “but rather by their own incapability of entering into a marriage as that term is defined.”¹⁸ “In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”¹⁹ Similarly in *Singer v. Hara*,²⁰ a Washington court held that, although the state constitution included a provision forbidding sex discrimination, the losing parties “were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself.”²¹ The Hawaii Supreme Court, however, dismissed this reasoning as an “exercise in tortured and conclusory sophistry,”²² and argued that the miscegenation cases had already disposed of such claims.

The facts in *Loving* and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both discredit the reasoning of *Jones* and unmask the tautological and circular nature of [the] argument that . . . same sex marriage is an innate impossibility. Analogously . . . the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the “custom” of the state to recognize mixed marriages, marriage “always” having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.²³

In an earlier article, I quoted this passage with approval, and commented on it as follows:

Civil marriage is wholly a creature of the state. Prohibition of sex discrimination is meant to change traditional practices which legally, and often socially and economically, disadvantage persons on the basis of gender. The state cannot, then, point to its own past discriminatory practices in order to evade the constitutional prohibition of sex discrimination. The strength of the sex discrimination argument is strikingly

17. *Ibid.* at 589.

18. *Ibid.*

19. *Ibid.* at 590.

20. 522 P.2d 1187 (Wash. Ct. App.), review denied, 84 Wash. 2d 1008 (1974).

21. *Ibid.* at 1196.

22. *Bachr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993).

23. *Ibid.* (Citation omitted.)

confirmed by the shabby definitional tricks to which courts have been forced to resort when they have been determined to reject it.²⁴

Since writing those words, I have become persuaded that there is more to the definitional claim than I had thought.

The argument presupposed, though inadequately articulated, by the *Jones* and *Singer* courts is that marriage is *not* wholly a creature of the state; that marriage is a human good achievable by heterosexual couples that simply cannot be achieved by homosexual couples, whatever the law may say.²⁵ If this is correct, it provides the basis for two answers to the *Baehr* court. First—and this seems to be the implicit argument of *Jones* and *Singer*—it may be argued that laws allowing only different-sex couples to marry classify on the basis of *marriage*, not on the basis of sex.²⁶ The most supportive precedent for this claim is *Geduldig v. Aiello*,²⁷ in which the Supreme Court held that discrimination against pregnant women is not sex-based. Pregnancy, the Court noted, is “an objectively identifiable physical condition with unique characteristics.”²⁸ A state disability insurance program that did not cover pregnancy, the Court reasoned, “divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.”²⁹ “There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”³⁰ Similarly, it might be argued, marriage is an objectively identifiable *moral* condition with unique characteristics; a law extending marriage to persons of both sexes divides citizens into two groups, married persons and unmarried persons, both of which include members of both sexes; there is no benefit that men receive and women do not, and vice versa.³¹

There are two difficulties with this legal argument. First, it comes too late to help the state in *Baehr*, where the highest tribunal with jurisdiction over the case has already held that denial of marriage to same-sex couples is sex discrimination. Second, and more relevant to the national debate over marriage, the persuasive authority of *Geduldig* is weak. The decision has not been overruled, but similar reasoning in the Title VII context has been

24. “Why Discrimination Against Lesbians and Gay Men is Sex Discrimination,” p. 214.

25. Thus stated, the argument cannot be refuted by evidence that same-sex marriages have been legally and culturally recognized in many times and places. See William N. Eskridge, Jr., “A History of Same-Sex Marriage,” 79 Va. L. Rev. 1419 (1993).

26. See David Orgon Coolidge, “Same-Sex Marriage? *Baehr v. Miike* and the Meaning of Marriage,” 38 S. Tex. L. Rev. 1 (1997).

27. 417 U.S. 484 (1974).

28. *Ibid.* at 496 n.20.

29. *Ibid.*

30. *Ibid.* at 496-97.

31. See Lynn D. Wardle, “A Critical Analysis of Constitutional Claims for Same-Sex Marriage,” 1996 Brigham Young U.L. Rev. 1.

rejected by Congress, and *Geduldig's* reasoning has been almost universally condemned by scholars.³²

For these reasons, a second legal strategy may be more attractive: even if it is conceded that the marriage laws classify on the basis of sex, it can be claimed that this discrimination is necessary to the compelling interest in promoting the realization of one of the highest goods that human beings can achieve, the good of marriage. A law that mapped this good in a misleading way (for example, by giving legal recognition to same-sex "marriages") would miseducate the public about the goods that are really worth pursuing.³³

II. THE ARGUMENT SUPPORTING THE CLAIM

These legal arguments depend on whether there is, in fact, a real good of marriage, independent of what any law says, that is necessarily heterosexual. As I noted earlier, the most sophisticated of these arguments is that developed by the new natural law theorists.³⁴ The most recent formulation

32. "The notion that distinctions based on pregnancy were not distinctions based on 'gender as such' obscured the most basic physical, cultural, and historical meanings of reproduction. To characterize pregnancy as 'unique' both assumed what should have been at issue and made that assumption from a male reference point. Men's physiology set the standard against which women's claims appeared only 'additional.' Nowhere in these cases did the Court give any coherent account of what makes female reproduction 'unique' for purposes of medical coverage." Deborah L. Rhode, *Justice and Gender* (Cambridge: Harvard University Press, 1989), p. 119. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which rejected claims that pregnancy discrimination violated Title VII of the Civil Rights Act of 1964, was overruled when Congress amended Title VII in 1978. See 92 Stat. 2076. For a lengthy list of law review articles condemning *Geduldig*, see Sylvia Law, "Rethinking Sex and the Constitution," 132 U. Pa. L. Rev. 955, 983 n.107 (1984).

One could still argue that, even if a pregnancy-based classification discriminates on the basis of sex, a marriage-based classification does not. This argument, however, sacrifices the doctrinal support of *Geduldig*. It is unclear whether the argument can be made to work without such doctrinal support.

33. "The practical insight that marriage . . . has its own intelligible point, and that marriage as a one-flesh communion of persons is consummated and actualized in the reproductive-type acts of spouses, cannot be attained by someone who has no idea of what these terms mean; nor can it be attained, except with strenuous efforts of imagination, by people who, due to personal or cultural circumstances, have little acquaintance with actual marriages thus understood. For this reason, we believe that whatever undermines the sound understanding and practice of marriage in a culture—including ideologies that are hostile to that understanding and practice—makes it difficult for people to grasp the intrinsic value of marriage and marital intercourse." Gerard V. Bradley and Robert P. George, "Marriage and the Liberal Imagination," 84 Geo. L. J. 301, 307 (1995).

34. Some other writers argue for the special status of heterosexual marriage on the basis of the good consequences of the most successful heterosexual marriages: enduring commitments between adults that constitute a stable, loving household in which children can thrive. See, e.g., "The Homosexual Movement: A Response by the Ramsey Colloquium," *First Things*, March, 1994, at 15, 17-18. There is, however, no reason to think that these good consequences can be realized only by heterosexual couples. Many same-sex couples

of the position is that of Bradley and George: "Marriage, considered not as a mere legal convention, but, rather, as a two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type, is an intrinsic (or, in our parlance, 'basic') human good; as such, marriage provides a noninstrumental reason for spouses, whether or not they are capable of conceiving children in their acts of genital union, to perform such acts."³⁵ The position they argue for is most fully set forth in the work of Grisez.³⁶

A foundational premise of Grisez's ethical theory is that certain goods are intrinsically and not just instrumentally worthy of being pursued. These "basic goods" are intelligible ends, capable of motivating us to act as a matter of free choice by appealing to our practical understanding. Such goods are worth pursuing at the price of discomfort or even pain. In the earlier work of Grisez and Finnis, the "rea[s]ons for acting which need no further reason"³⁷ include life and health; knowledge and aesthetic experience; excellence in work and play; friendship; inner peace; peace of conscience; and peace with God.³⁸ Each of these is an end in itself.

foster the same intimacy, caring, and enduring commitment that are valued in the most stable heterosexual marriages. See Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991); Letitia Anne Peplau, "Lesbian and Gay Relationships," in John C. Gonsiorek and James D. Weinrich, eds., *Homosexuality: Research Implications for Public Policy* (Newbury Park: Sage Publications, 1991). Studies using a broad range of indexes of well-being have found that children raised by same-sex couples develop just as well as (and, if it matters, are no more likely to be gay than) children of opposite-sex couples. See Charlotte J. Patterson, "Children of Lesbian and Gay Parents," 63 *Child Development* 1025 (1992). It is also sometimes argued that the recognition of homosexual marriages will damage social mores, by undermining the moral basis of these familial goods. This claim is parasitic on the kind of claim that the new natural lawyers make, that there is a defensible, nonconsequentialist way of understanding these goods according to which the good of marriage is inherently unrealizable by same-sex couples. Otherwise, any damage done to social mores could and should be remedied by correcting popular misconceptions about the nature of marriage. See Macedo, "Homosexuality and the Conservative Mind," pp. 293-300.

35. *Ibid.*, pp. 301-302, footnote omitted.

36. Grisez, whose work is the fountainhead of the new natural law theory, is a theologian as well as a philosopher; his most important work, *The Way of the Lord Jesus*, "is constructed primarily as a textbook in fundamental moral theology for students in Catholic seminaries." Germain Grisez, *The Way of the Lord Jesus*, vol. 1: *Christian Moral Principles* (Chicago: Franciscan Herald Press, 1983), p. xxix. However, he also thinks that the principles of natural law are accessible to reason without recourse to revelation. *Ibid.*, p. 175. His argument about homosexuality appears to be capable of being detached from its theological context and sources, and offered as having independent philosophical value. It is so offered by Finnis, George, and Bradley. It is not clear to what extent Grisez himself approves of the detaching of these reflections, nor is it certain that, were he to present the argument in its detached form, he would do so in the way that these other writers have.

37. Germain Grisez, Joseph Boyle, and John Finnis, "Practical Principles, Moral Truth, and Ultimate Ends," 32 *Am. J. Jurisprudence* 99, 103 (1987).

38. *Ibid.*, pp. 107-108.

None of them is reducible to any of the others, or to some common factor which they essentially share. Each, as an end, provides a complete explanation for a human action; if we are told that a given action is done for the sake of one of these goods, we need no further explanation.³⁹

The law, according to this theory, exists in order "to secure the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate, and foster the realization by each individual of his or her personal development."⁴⁰ This conception implies that the state "should deliberately and publicly identify, encourage, facilitate, and support the truly worthwhile (including moral virtue)"⁴¹ The law governing sexuality, then, ought to facilitate the realization, by each member of the community who pursues it, of the good achievable by the sexual faculty.⁴² What is this good?

Sexuality, Grisez claims, makes possible a genuine bodily union between two persons. That is the good that spouses can bring about by engaging in marital sexual acts. Such acts achieve this good because, and only because, of that union's aptness for procreation. Reproduction differs from other biological functions in that with respect to it,

each animal is incomplete, for a male or a female individual is only a potential part of the mated pair, which is the complete organism that is capable of reproducing sexually. This is true also of men and women: as mates who engage in sexual intercourse suited to initiate new life, they complete each other and become an organic unit. In doing so, it is literally true that "they become one flesh" (Gn 2.24).⁴³

It may be helpful to emphasize the distinctiveness of what Grisez is claiming here. Part of the claim is that a man and a woman can together realize a good that neither of them, alone, is capable of realizing. This quality of being a complementary collaboration is not a unique attribute of sexual intercourse, however; the same is true of two pianists playing a four hands piece, or two people playing chess together. In neither of these cases,

39. Robert P. George, "Recent Criticism of Natural Law Theory," 55 U. Chi. L. Rev. 1371, 1390-94 (1988).

40. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 147.

41. John Finnis, "Liberalism and Natural Law Theory," 45 Mercer L. Rev. 687, 697 (1994).

42. All of these premises about value and the purposes of law are controversial, but I will not challenge them here. It is noteworthy that, although the "new natural lawyers" are all conservative with respect to the issues considered in this paper, normative theory of this kind has attractions for the left as well as the right. See, e.g., Martha C. Nussbaum, "Valuing Values: A Case for Reasoned Commitment," 6 Yale J. L. & Hum. 197 (1994); Martha C. Nussbaum, "Aristotelian Social Democracy," in R. Bruce Douglass, et al., eds., *Liberalism and the Good* (New York: Routledge, 1990), pp. 203-252.

43. Germain Grisez, *The Way of Lord Jesus*, vol. 2: *Living a Christian Life* (Quincy, Ill.: Franciscan Press, 1993), p. 570.

however, are the two persons's bodies coming together to create an *organic, bodily* union. Whatever unity is achieved is not an organic, bodily unity.⁴⁴ It is thus part of the natural character of sexuality that it draws us toward a good that can only be fully realized in intercourse that is apt for and open to the possibility of procreation.

Sexual intercourse has the potential to bodily unify two persons, but it can only do this if engaged in for certain practical reasons, under certain descriptions. To be engaged in uprightly, it must be in the context of a relationship of lifelong commitment to a single partner.⁴⁵ In such a relationship, a marriage, the one-flesh unity of a couple reflects a real and enduring union of their persons. "Sexual mating contributes to an intelligible good, which fulfills persons, only insofar as it is one element of the complete communion by which a man and a woman become, as it were, one person. Another element is necessary to bring about that communion: marital consent which conjugal intercourse fulfills."⁴⁶

Grisez and Finnis's understanding of the value of marriage has developed over time. In his most recent work, Grisez has added an item to the list of "basic goods" enumerated above, and now claims that "marriage itself is a basic human good."⁴⁷ The reduction of marriage to other basic goods, such as friendship and the transmission of life, is unsatisfactory, for three reasons:

First, in marrying, people seem to intend only one many-faceted good rather than several distinct goods. Second, since the good of anything is the fullness of its being, and since basic goods of diverse sorts are irreducible to one another, either there is one basic human good proper to marriage or marriage is not one reality; but recent Church teaching, which resolves the tensions in the tradition, presents an integrated view of marriage; therefore, marriage is one reality having a basic good proper to it. Third, while marital friendship and fidelity might be reducible to the reflexive good of friendship, the core of the good of marital

44. This claim is open to the objection that the man and woman are not "an organic unit" at all, and that Grisez has mistaken a metaphor for an argument (as George Kateb has said in conversation). For the moment, however, I lay this objection aside. A deeper objection is that, even if they become such a unit, there is nothing uniquely good about such unity. I postpone this objection as well.

45. The new natural lawyers' argument condemning as immoral all sexual acts that are not "marital," in the sense in which they use that word (which excludes, for example, contracepted intercourse by married couples), is taken up in Part VI. That argument is distinct from the one addressed here. Many people think that nonmarital sex is not per se immoral, but that the distinctive good of marriage is only achievable by heterosexual couples. Such people may accept the argument set forth in this section, but reject the argument considered in Part VI.

46. Grisez, *The Way*, v. 2, p. 651.

47. *Ibid.*, p. 556. Finnis now takes a similar view; see John Finnis, "Law, Morality, and 'Sexual Orientation,'" 69 *Notre Dame L. Rev.* 1049, 1064-65 (1994).

communion is the good which Augustine calls the "sacramentum." . . . Now, this good, the couple's one-flesh unity itself, is not reducible to the existential good of friendship, for, while the couple's consent gives rise to the marital bond, it transcends the moral order: unlike a friendship, a marriage is indissoluble.⁴⁸

While all of these arguments indicate that marriage is a good distinct from and irreducible to friendship, none of them indicate that marriage is necessarily heterosexual. Couples of the same sex can and do form enduring and monogamous ties that are not readily distinguishable from those of heterosexual couples. Grisez, however, proposes a distinction: marital communion is a sexual communion, and the one-flesh unity that sexuality has the potential to achieve can only be achieved by the coming together of a male and a female body in a way that is suitable for reproduction. Only then do they genuinely become a single organism.

Homosexuals obviously cannot become one flesh in this sense, because "the coupling of two bodies of the same sex cannot form one complete organism and so cannot contribute to a bodily communion of persons."⁴⁹ Two persons of the same sex therefore cannot achieve the good that is marriage. The intimacy they achieve in sexual activity is a mere appearance; "each one's experience of intimacy is private and incommunicable, and is no more a common good than is the mere experience of sexual arousal and orgasm."⁵⁰

Grisez's argument provokes an obvious objection. Even if one agrees that there is a self-evident good, over and above mere pleasure, that is achievable by sex, why should one think that that good has precisely the dimensions that Grisez offers for it? Why is communion of the reproductive type the only bodily communion between persons that is possible?

George observes that "intrinsic values, as *ultimate* reasons for action, cannot be deduced or inferred. We do not, for example, infer the intrinsic goodness of health from the fact, if it is a fact, that people everywhere seem to desire it. . . . We see the point of acting for the sake of health, in ourselves or in others, just for its own sake, without the benefit of any such inference."⁵¹ The intrinsic nature of these goods can only be defended dialectically:

While they may be defended by dialectical arguments designed either to rebut arguments against them, or to show up the defects or inadequacies of ethical theories that attempt to do without them, they cannot them-

48. Grisez, *The Way*, v. 2, p. 568 n.43. The arguments here rely heavily on religious authority, raising some doubt whether the same conclusion can be reached by reason alone.

49. *Ibid.*, p. 653.

50. *Ibid.*

51. Robert P. George, "Recent Criticism of Natural Law Theory," 55 U. Chi. L. Rev. 1371, 1392 (1988).

selves be deduced or inferred or derived from more fundamental premises. One cannot argue one's way to them (the way one can, on the basis of more fundamental premises, argue one's way to a conclusion). The claim that they are self-evident does not imply that they are undeniable or, still less, that no one denies them. What it does imply is that the practical intellect may grasp them, and practical judgment can affirm them without the need for a derivation. (Which is not to say that they can be grasped without an understanding of the realities to which they refer.)⁵²

In order to show that the basic good of marriage has the dimensions they claim, then, the new natural law theorists would have to offer a dialectical defense of their view.

Any such defense must address a widely held contrary view. For at least some same-sex couples, sexual intercourse is valued, not merely as a pleasurable experience unintegrated with the rest of one's life, but as an activity that is an important constituent of one of the primary relationships in one's life, exactly as is the case with many heterosexual couples. In a sexual relationship, homosexual or heterosexual, the activity of pleasuring one another sexually may have the real and intended effect of constituting a relationship that is different and better—more intense, more committed, closer, and more enduring—than it would be if the partners substituted, say, conversation. "For most persons, gay or straight," Sidney Callahan observes, "chaste friendships and general charity cannot produce the same intense intimacy, bodily confirmation, mutual sanctification, and fulfilling happiness that come from making love with a faithful partner."⁵³ One may reasonably wonder whether Grisez and his followers simply do not understand the good that is being pursued by these couples.⁵⁴

III. THE RESPONSE TO THE STERILITY OBJECTION

Grisez's argument appears, on first blush, to confer an uncertain status on infertile heterosexual couples. Several recent writings by the new natural lawyers attempt to account for the disparity between their treatment of the homosexual couple and the sterile heterosexual couple. These clarify their understanding of the good of marriage. Indeed, to the extent that the promised dialectical defense of their understanding has occurred, it has occurred in the course of their responses to the sterility objection.⁵⁵

52. *Ibid.*, pp. 1388-89.

53. Sidney Callahan, "Why I Changed My Mind: Thinking About Gay Marriage," *Commonweal*, Apr. 22, 1994, p. 7.

54. Directly relevant here is George's suggestion, quoted above, that intrinsic values cannot be grasped without an understanding of the realities to which they refer.

55. Bradley and George offer one other piece of evidence that shows that their view is not nonsensical or idiosyncratic: Anglo-American law traditionally required consummation

Sterile heterosexual couples too, one might argue, are incapable of becoming one procreative organism, because it is impossible that in them sperm and egg could be united. If "the organic complementarity of man and woman in respect to reproduction is the necessary condition for the very possibility of marriage,"⁵⁶ then the infertile heterosexual couple would seem to lack that complementarity in the same way as the homosexual couple. They may differ from the homosexual couple in that they *seem* to the untrained observer to be capable of becoming a "complete organism that is capable of reproducing sexually,"⁵⁷ but medical science can show that this is an illusion and that they are *in fact* like the homosexual couple in lacking that capacity. If "two persons can become one flesh in marriage only because they are a male and a female *who can join together as a single principle of reproduction*,"⁵⁸ then one might infer that persons who cannot so join together cannot marry. What Finnis says of the homosexual couple might equally be said of the sterile heterosexual couple: "[I]n reality, whatever the generous hopes and dreams and thoughts of *giving* with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client

as an essential element of marriage, and held that only an act of genital union can effect consummation. "This requirement for the validity of a marriage, where in force, has never been treated as satisfied by an act of sodomy, no matter how pleasurable." "Marriage and the Liberal Imagination," p. 308. The support of this tradition for their position is uncertain, however. I have found scant American legal support for their view that "contraception vitiates the marital quality of spousal genital acts." *Ibid.*, p. 310 n.30. See *Kreyling v. Kreyling*, 20 N.J. Misc. 52, 23 A.2d 800 (1942) (refusal to have intercourse without contraception constitutes constructive desertion); *Ehrlich v. Ehrlich*, 112 N.Y.S.2d 244 (Sup.Ct. 1952) (annulment granted on basis that plaintiff was below age of consent at time of marriage and plaintiff did not "freely cohabit" with other party as husband and wife after reaching age of consent, where parties continued to have sexual intercourse after plaintiff reached age of consent but did so only with use of contraceptives); T.C. Williams, Annotation, Avoidance of Procreation of Children as Ground for Divorce or Annulment of Marriage, 4 A.L.R.2d 227 (1949 & Supp. 1997) (citing cases). (I am grateful to Prof. Sally F. Goldfarb for sharing her research on this topic. See "Family Law, Marriage, and Heterosexuality: Questioning the Assumptions," 7 Temple Pol. & Civ. Rts. L. Rev. 285 (1998).) If they were correct, the law would hold that *any* marriage in which the spouses had always used contraceptives is unconsummated. (Some British authority did once so hold, but the House of Lords ruled to the contrary in 1948. See Tony Honore, *Sex Law* (London: Duckworth, 1978), p. 18. I am grateful to Alan Ryan for directing me to this study.) Still, it is true that same-sex marriage would be inconsistent with this legal doctrine, since such a marriage could not be consummated by penile-vaginal intercourse. Support for same-sex marriage thus does entail, as they note, that consummation "ought not to be a requirement for the validity of marriage, or, if it is to be a requirement, it should be considered to have been satisfied by a wider range of possible sexual behaviors." "Marriage and the Liberal Imagination," p. 309.

56. Grisez, *The Way*, v. 2, p. 634.

57. *Ibid.*, p. 570.

58. *Ibid.*, p. 618; emphasis added.

to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a gruelling day on the assembly line."⁵⁹ Moreover, this argument would imply, a fertile person ought not to choose a sterile spouse, particularly when a fertile partner is also available. The illusion of marital communion would have been chosen instead of the reality. Finnis does not draw these conclusions, of course, but other natural law theorists have been less diffident. Philo, a Judaeo-Platonist philosopher of the early Christian period, condemned as "unnatural" not only homosexuality and masturbation, but also celibacy and failure to divorce a barren wife.⁶⁰ "Those who woo women who have been shown to be barren with other husbands are simply mounting them in the manner of pigs or goats and should be listed among the impious as enemies of God."⁶¹

The new natural lawyers, of course, take an altogether different line. "If a couple know or come to learn that they will never be able to have children, their marital communion is no less real and no less fulfilling as a communion of complementary persons, even though it always will lack the fulfillment of parenthood."⁶² But this line is equally applicable to the homosexual couple. Although the good of procreation is unavailable to them, they may find marriage "fulfilling for them in itself, apart from the fruitfulness of their cooperation."⁶³ Their sexual acts would not be merely instrumental, or the choice of appearance over reality; rather, they would be integrated with their commitments. "The willing of a good leads to the integration of acts with it, and the full integration of sexual acts in marriage with the good of marriage makes those acts reasonable and worthy."⁶⁴ But then, it appears that the unitary good of marriage is realizable even when the one-flesh communion of a single reproductive organism cannot be achieved. Moreover, the possibility of adoption or artificial insemination means that they, like sterile heterosexual couples, can become parents. "For parenthood is far more a moral than a biological relationship: its essence is not so much in begetting and giving birth as in readiness to accept the gift of life, commitment to nurture it, and faithful fulfillment of that commitment through many years."⁶⁵ All the evidence we now have indicates that children raised by gay couples turn out as well as those raised by heterosex-

59. John Finnis, "Law, Morality, and 'Sexual Orientation,'" 69 Notre Dame L. Rev. 1049, 1067 (1994), emphases in original.

60. See John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (Chicago: University of Chicago Press, 1980), p. 148.

61. Philo, *De specialibus legibus* 3.36, translated and quoted in Boswell, p. 155.

62. *The Way*, v. 2, p. 572.

63. *Ibid.*, pp. 572-73.

64. *Ibid.*, p. 637.

65. *Ibid.*, p. 689.

ual couples.⁶⁶ In short, if the basic good of marriage is available to, and thereby can make intelligible and appropriate the sexual activity of, the sterile heterosexual couple, the same seems true of the gay couple. No distinction between the two kinds of couple seems capable of bearing the weight that Grisez wants to place upon it.

Sexuality makes possible the good of transmitting human life, but that is hardly the only source of the goodness of sex. It also can draw us toward friendship of a kind and degree that is unmatched by any other relationship to which one can aspire. Grisez is right to claim that the character of marital communion calls for a more mutual and dependable commitment than any other kind of friendship,⁶⁷ and "that marrying, having children, and raising them are among the best things in human life, those prized for their own sakes, and that it is important to integrate one's sexuality with other elements of one's personality."⁶⁸ These things are good for gay people as well as heterosexuals, and gays can integrate their sexuality into a marital project in much the same way that heterosexuals can. Grisez never explains the purported disanalogy between the gay couple and the sterile heterosexual couple, even though all the condemnations he heaps on the former are equally applicable to the latter, and all the encomia he offers to the latter are equally applicable to the former.

Finnis has attempted to fill this gap in the argument. Even when a heterosexual couple cannot reproduce, Finnis writes, "[t]he union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality)"⁶⁹ The homosexual couple differs from the heterosexual couple, Finnis explains, precisely in that "their reproductive organs cannot make them a biological (and therefore personal) unit."⁷⁰ Thus, Finnis rejects Stephen Macedo's critique of his position. Macedo observes that "[a]ll we can say is that conditions would have to be more radically different in the case of gay and lesbian couples than sterile married couples for new life to result from sex . . . but what is the moral force of that? The new natural law theory does not make moral judgments based on natural facts."⁷¹ Finnis replies that, although values cannot be directly derived from facts, the moral character of acts may depend on natural facts—most prominently here, "that the human mouth is not a reproductive organ."⁷²

66. See Charlotte J. Patterson, "Children of Lesbian and Gay Parents," 63 *Child Development* 1025 (1992).

67. Grisez, *The Way*, v. 2, p. 575.

68. *Ibid.*, p. 661.

69. "Law, Morality, and 'Sexual Orientation,'" 69 *Notre Dame L. Rev.* 1049, 1066 (1994).

70. *Ibid.*

71. Stephen Macedo, "The New Natural Lawyers," *The Harv. Crimson*, Oct. 28, 1993; quoted in *ibid.*, p. 1068 n.51.

72. "Law, Morality, and 'Sexual Orientation,'" p. 1068 n.51.

The relevance of that fact is, however, disputable. One might reply that the vagina of a woman whose diseased uterus was removed when she was twelve years old similarly "is not a reproductive organ." It lacks reproductive powers. She and her husband are not capable of becoming "a complete organism that is capable of reproducing sexually."⁷³ Thus Macedo argues that the homosexual couple is, in fact, the moral equivalent of the infertile heterosexual couple: "In effect, gays can have sex in a way that is open to procreation, and to new life. They can be, and many are, prepared to engage in the kind of loving relations that would result in procreation—were conditions different. Like sterile married couples, many would like nothing better."⁷⁴ Finnis has nothing but scorn for this argument:

Here, fantasy has taken leave of reality. Anal or oral intercourse, whether between spouses or between males, is no more a biological union "open to procreation" than is intercourse with a goat by a shepherd who fantasizes about breeding a faun; each "would" yield the desired mutant "were conditions different." Biological union between humans is the inseminatory union of male genital organ with female genital organ; in most circumstances it does not result in generation, but it is the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation.⁷⁵

Whether such behavior "is suitable for generation" would seem to depend, once again, on whether the organs that are used are suitable for generation. A sterile person's genitals are no more suitable for generation than an unloaded gun is suitable for shooting. Once again, why isn't the sterile heterosexual couple equally condemned for allowing fantasy to take leave of reality?⁷⁶

Finnis is certainly correct that the moral character of acts may crucially depend on natural facts. If someone points a gun at me and pulls the trigger, he exhibits the behavior which, as behavior, is suitable for shooting, but it still matters a lot whether the gun is loaded and whether he knows it. Intent matters: the act is a homicidal kind of act even if the actor mistakenly thinks the gun is loaded, when in fact it is not. Material reality matters, too: if, knowing the gun is unloaded, he points it and pulls the trigger, intending homicide, then indeed fantasy has taken leave of reality. But the only aspect of material reality that matters is whether the gun, as it now is, is in fact

73. Grisez, *The Way*, v. 2, p. 570.

74. Macedo, "The New Natural Lawyers," quoted in Finnis, "Law, Morality," p. 1066 n.46.

75. Finnis, "Law, Morality," p. 1066 n.46.

76. Thus Macedo's reply to Finnis: "But the sterile heterosexual couple's 'openness to procreation' is as much a fantasy as that of Finnis's kinky shepherd. Sterile heterosexuals have as great a chance of breeding a child as the shepherd and his goat do a faun." Macedo, "Homosexuality and the Conservative Mind," p. 280.

capable of killing. Contingencies of deception and fright aside, all objects that are *not* loaded guns are morally equivalent in this context: it is not more wrong, and certainly not closer to homicide, to point a gun known to be unloaded at someone and pull the trigger than it is to point one's finger and say, "bang!" And if the two acts have the same moral character in this context, why is the same not equally true of, on the one hand, vaginal intercourse between a heterosexual couple who know they cannot reproduce, and on the other, anal or oral sex between any couple? Just as, in the case of the gun, neither act is more homicidal than the other, so in the sexual cases, neither act is more reproductive than the other. As Macedo has observed, "penises and vaginas do not unite biologically, sperm and eggs do."⁷⁷

Nonetheless, Grisez insists that an act can be of a reproductive kind even when reproduction is neither intended nor possible. "[P]rovided the husband and wife do what is of itself suited to procreating, their will to engage in true marital intercourse is the only intention they must have to make what they do a marital act. They may also intend to procreate, but, even if conception is possible, they need not; it is sufficient if they simply intend to actualize their one-flesh unity so that they can experience and enjoy it."⁷⁸ How can he think it makes sense to say that an act in which reproduction is known to be impossible is an act of the reproductive kind? Grisez appears to place considerable weight on the fact that no sex act is ever certain to achieve

77. Ibid, p. 280. Bradley and George respond to this sentence as follows:

Sperm and eggs, however, are parts of the biological reality of persons, just as penises and vaginas are. Neither sperm nor eggs, nor penises and vaginas, are properly conceived as nonpersonal "equipment" that is "used" by persons, considered as standing over and apart from these and other aspects of their biological (i.e., bodily) reality. . . . In denying that human males and females really unite biologically when they mate—whether or not their mating is, or is even intended to be, procreative—Macedo slips into person-body dualism

"Marriage and the Liberal Imagination," p. 311 n.32. It is most obscure, however, how they think Macedo's claim presupposes or entails any position on the question of the relation between the self and the body. (Macedo can't figure this one out, either. See Stephen Macedo, "Reply to Critics," 84 Geo. L. J. 329, 334-35 (1995).) George has lately continued the debate:

Were Macedo to acknowledge what we believe to be the case, namely, "that the biological reality of human beings is 'part of, not merely an instrument of, their *personal* reality,'" then it is difficult to see how he could resist our claim that "the biological union of spouses in marital acts constitutes a truly *interpersonal* communion," whose value is intrinsic, and not merely instrumental to pleasure or the sharing of pleasure, the expression of tender and affectionate feelings, or any other extrinsic goal.

Robert P. George, "Public Reason and Political Conflict: Abortion and Homosexuality," 106 Yale L.J. 2475, 2499 (1997), footnotes omitted. Macedo, however, could concede the antecedent claim in the first quoted passage, and still dispute that the spouses unite biologically (rather than simply collaborate with their bodies to produce a result that neither could produce alone, as in a piano four hands piece). He could also concede that the biological union takes place, but deny that this union has intrinsic value.

78. Grisez, *The Way*, v. 2, p. 636.

conception. "In most instances, of course, physiological conditions preclude conception. However, those conditions are not part of the human act of intercourse, for they are neither included in the couple's behavior nor subject to their choice."⁷⁹ But this equivocates on what it means to intend something. I can intend to produce an outcome, even if I know it is unlikely. If I fire a gun at someone, hoping to hit him, I have attempted homicide even if I know that I'm a lousy shot and that I'm very likely to miss. The matter is altogether different if the outcome is not merely unlikely, but actually impossible. "One cannot choose unless one thinks of something, sees it as interesting, *and considers it possible*."⁸⁰ If I know the gun is unloaded, then, it simply is not possible for me to pull its trigger while intending homicide.

Bradley and George respond to this argument as follows:⁸¹

This analogy would hold if, and only if, it were true that human (and other animal) acts of inseminatory union are in general behavior suitable for reproduction, but not when the nonbehavioral conditions of reproduction do not obtain. But this proposition is not true. Animal (including human) intercourse, unlike pulling the trigger of an unloaded gun, is part of a complex biological function, namely, reproduction. Such intercourse constitutes reproductive functioning, even if the process of which it is a part is, due to nonbehavioral factors, incomplete. This is why we easily recognize the mating of animals we know to be sterile as mating, and not as failed attempts to mate.⁸²

Now, there is one perspective from which it makes sense to say that the infertile genital organ is still a reproductive organ, and that the intercourse of a sterile heterosexual couple can be a reproductive kind of act. From the scientific point of view, the essences of things are "properties which are relevant to the framing of a maximum number of causal laws and the formulation of explanatory theories."⁸³ This is the perspective Bradley and George appear to be invoking here. Because Darwinian pseudoteleology is a useful explanatory tool, it makes sense to classify behavior according to its tendency to maximize a typical organism's likelihood of reproducing its genes. In terms of this kind of classification, mating behavior is mating behavior whether or not the organism engaging

79. *Ibid.*, p. 634.

80. Grisez, *The Way*, v. 1, p. 68; emphasis added, citation omitted.

81. They are responding to a presentation of it in an essay by Stephen Macedo, who borrowed it from an earlier draft of this paper. See Macedo, "Homosexuality and the Conservative Mind," p. 280 n.80.

82. Bradley and George, "Marriage and the Liberal Imagination," pp. 312-13. At the end of the quoted passage, a footnote adds: "By contrast, where a male mounts a female but, for whatever reason, does not manage to achieve vaginal penetration what we have is precisely a failed attempt to mate." *Ibid.*, p. 313 n.38.

83. Irving M. Copi, "Essence and Accident," in Stephen P. Schwartz, ed., *Naming, Necessity, and Natural Kinds* (Ithaca and London: Cornell University Press, 1977), p. 188.

in it (or the other organism that is the object of its attentions) happens to be fertile. In Finnis's words, "it is the behavior which, as behavior, is suitable for generation."⁸⁴ This, however, leaves unexplained the assignment of moral significance to these classifications, so that the moral valence of behavior is held to depend on whether it falls within one of them.

This assignment of moral significance is crucial to the next part of Bradley and George's response to the unloaded gun analogy:

The unloaded gun analogy breaks down further when we consider the specifically human acts we refer to as marital acts. The sexual organs of human beings are not instruments, or "equipment," which have their value and intelligibility as means of accomplishing ends extrinsic to them. Rather, sex organs are parts of the personal reality of the human being. Thus, when spouses unite genitally—when they mate—their biological unity is truly (inter)personal. . . [I]f, as we believe, the genital union of spouses makes them truly one-flesh, then the marital acts of spouses, fertile or not, are perfectly intelligible. They are not pointless. On the contrary, *qua* unitive, they are intrinsically good.⁸⁵

Some unarticulated assumption appears to be at work that makes an activity that is typically reproductive, though not reproductive in fact, have the unitive significance, and therefore the moral value, of an activity that is in fact reproductive. The puzzle presented by this argument is made more poignant by the following example that Bradley and George provide:

[Consider] the case of an elderly married couple who simply no longer experience pleasure in their acts of genital intercourse. They are, however, still physiologically capable of performing such acts and can do so without emotional repugnance. Is there any point to their continuing to perform them? Can it be reasonable for them to do so, at least occasionally, as a way of actualizing and experiencing their marriage as a one-flesh union? We say yes. We suspect that [most liberals] would say no. Our answer is valid if marriage, and the genital acts that actualize it, are intrinsically good and, thus, have an intelligible point even apart from their capacity to produce pleasure.⁸⁶

The only coherent alternative to their view, they think, is "that the sexual relationship of partners in marriage, if it has any point and value at all, *must be instrumental* either to pleasure, the expression of feelings, and the like on the one hand, or to procreation on the other."⁸⁷ This excludes many possibilities from consideration. As Ronald Garet has argued in his critique of Finnis, "[i]t is difficult to prove a negative, and indeed Finnis does not in

84. Finnis, "Law, Morality," p. 1066 n.46.

85. Bradley and George, "Marriage and the Liberal Imagination," p. 313.

86. "Marriage and the Liberal Imagination," p. 310.

87. *Ibid.*, p. 8.

fact consider every candidate for such a common good to see if it is actualized by homosexual conduct."⁸⁸ Consider the possibility that there is an intrinsic good pursued, distinct in kind from ordinary friendship or ordinary pleasure, but of which pleasure is a necessary component, in the same way that the presence of air molecules between speaker and listener is a necessary component of the good of spoken conversation. As Paul Weithman has observed, sexual activity, whether heterosexual or homosexual, could "constitute two people as a *social* unit, the function or characteristic activity of which is to promote their friendship and love through special acts of physical intimacy and tenderness."⁸⁹ On this account of the good of marriage, a married couple has a reason to give one another pleasure, by whatever means are conveniently available. They do not have a reason to engage in any activity that does not give either of them pleasure, for the same reason that one does not have a reason to speak (instead of communicating in some other way) to a person who is deaf. What, then, about the elderly couple in the hypothetical? It hasn't yet been established that they have a reason, connected with the distinctive good achievable by the sexual faculty, to engage in intercourse, rather than other, more pleasurable activities.

That is not to say, however, that the elderly couple can have *no* reason to engage in intercourse. They may have such a reason. Before this reason can be described, however, it is necessary to dig out the unarticulated assumption that underlies the new natural lawyers' view of the moral significance of behavior which, as behavior, is suitable for generation. To trace the roots of this assumption, it is necessary to turn to the work of Thomas Aquinas, to whom all subsequent natural law theorists are, of course, heavily indebted. Aquinas had his own argument why marriage was necessarily heterosexual, and why homosexual conduct was necessarily inferior to it. In that argument, we will discover the premises that underlie the puzzling claims of the new natural law theorists.

IV. THE ARGUMENT'S THOMISTIC ROOTS

Aquinas is, of course, first and foremost a theologian, but he carefully distinguished the knowledge that we acquire through reason from the

88. Ronald R. Garet, "Deposing Finnis," 4 S. Cal. Interdisciplinary L. J. 605, 628 (1995). Others have made the same point. See Paul Weithman, "Natural Law, Morality, and Sexual Complementarity," in David M. Estlund and Martha C. Nussbaum, eds., *Sex, Preference, and Family: Essays on Law and Nature* (New York: Oxford University Press, 1997), pp. 228-29 ("Finnis moves from the claim that homosexual unions cannot realize 'the marital good' to the claim that they cannot realize *any* common good without intervening argument."); Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (New York: Oxford University Press, 1997), p. 86.

89. Paul J. Weithman, "A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics," 9 Notre Dame J. L. Ethics & Pub. Pol'y 75, 87 (1995). See also Weithman, "Natural Law, Morality, and Sexual Complementarity," pp. 239-41.

knowledge that we acquire through revelation.⁹⁰ His argument against homosexuality is presented as an argument of the former sort. He thinks that homosexual conduct can be shown to be contrary to natural law, which is accessible to everyone regardless of religious faith. There is a theistic component to his condemnation of homosexuality, but this is consistent with the condemnation being a philosophical condemnation, since he thought that some facts about God were knowable without the aid of revelation.

Homosexual intercourse is wrong, he argues in the *Summa Theologiae*, because "in the case of unnatural vice man violates what has been determined by nature concerning sexuality."⁹¹ The place of the sexual faculties in the natural order was clear to Aquinas: "[I]t is natural for [man] to reproduce through sexual intercourse, as it is in the case of other perfect animals. This is proved by the natural members that are assigned by nature to this purpose."⁹² That the natural order is ordained by God appears to Aquinas to be apparent from the study of nature itself.

We see that things that lack consciousness such as bodies in nature function purposively. This is evident from the fact that they always, or nearly always, function in the same way so as to achieve what is best. Therefore it is evident that they achieve their end, not by chance but by design. But things that do not possess consciousness tend towards an end only because they are directed by a being that possesses consciousness and intelligence, in the same way that an arrow must be aimed by an archer. Therefore there is an intelligent being who directs all things to their goal, and we say that this is God.⁹³

The most pertinent way of reading this passage is as a claim that the purposiveness of organs in nature indicates an artificer who created them.⁹⁴

90. See F. C. Copleston, *Aquinas* (Harmondsworth: Penguin, 1955), pp. 54-63.

91. *Summa Theologiae*, II-II Q. 154, in Paul E. Sigmund, ed. and trans., *St. Thomas Aquinas on Ethics and Politics* (New York: Norton, 1988), p. 80.

92. *Summa Theologiae*, I Q. 98, in *ibid.*, p. 40.

93. *Summa Theologiae*, I Q. 2, in *ibid.*, p. 32.

94. Apart from the difficulties with this view that are noted in the text, it was given a death blow by Darwin, whose theory of evolution shows that exceedingly elaborate structures which *seem* to be purposive can in fact be the product of entirely fortuitous chains of events. The Darwinian hypothesis shows that Aquinas was mistaken when he claimed that "things that do not possess consciousness tend towards an end only because they are directed by a being that possesses consciousness and intelligence."

There is another way of reading this passage, and that is to say that cosmic design is inherent in "the unconscious cooperation of different kinds of material things in the production and maintenance of a relatively stable cosmic system." Copleston, *Aquinas*, p. 126. Thus understood, Copleston argues, the argument is supported rather than invalidated by Darwin. But Aquinas's argument thus understood, even if it is accepted, reveals divine intentions at so abstract a level that its ethical implications are minimal and cannot yield any determinate sexual ethics. At best, it might show that it would be immoral to annihilate the universe, assuming one had the technical means to do so.

From the existence of God, thus demonstrated, Aquinas infers new conclusions about the natural phenomena that were his starting point: specifically, that the natural order of things reflects the will of God. It is God's will that human beings ought to act in accordance with the patterns laid down in nature. From this it follows that any departure from the natural order of things is a defiance of the will of God, and is therefore evil. A teleological account of this kind appears to be the only way to account for Aquinas's conclusion elsewhere that homosexual intercourse is one of the worst of the vices of lust, worse even than rape: "God himself arranged the natural orders. And so a sin against nature in which the natural order itself is violated is a sin against God who is the creator of that order. . . . [T]he individual is more bound to the nature of species than he is to other individual members of that species and therefore the sin which attacks nature itself is more grievous."⁹⁵

The fundamental difficulty with this way of reasoning is that urged by Hume, who argued that any attempt to infer the existence of God from natural phenomena "is useless; because our knowledge of this cause being derived entirely from the course of nature, we can never, according to the rules of just reasoning, return back from the cause with any new inference, or making additions to the common and experienced course of nature, establish any new principles of conduct and behaviour."⁹⁶ One can attribute no intention to the artificer of nature (if there was or is one) that is not apparent from the observation of nature itself. This destroys the teleological objection to homosexuality. Observation of nature alone does not reveal that there is anything wrong with deviating from what ordinarily and typically happens in nature. Anything that is physically possible may well have been intended by the designer of the universe, who made it possible. Nature makes possible both procreation and other uses of the sexual faculties, and even if nature was created for a purpose, there is no way to infer from nature itself which of these was intended or whether that intent ought to be binding on us. As Grisez acknowledges, any moral argument that relies entirely on natural patterns without more is untenable, because it "moves by a logically illicit step—from human nature as a given reality, to what ought and ought not to be chosen."⁹⁷

95. *Summa Theologiae*, II-II Q. 154, 12, tr. Mortimer Downing, in Edward Batchelor, Jr., ed., *Homosexuality and Ethics* (New York: Pilgrim Press, 1980), pp. 46-47.

96. David Hume, "An Enquiry Concerning Human Understanding," in L.A. Selby-Bigge, ed., *Enquiries Concerning Human Understanding and the Principles of Morals* (Oxford: Oxford University Press, 3d ed. 1975), p. 142. See generally David Hume, *Dialogues Concerning Natural Religion*, Norman Kemp Smith, ed. (Indianapolis: Bobbs-Merrill, 1947).

97. Germain Grisez, *The Way of the Lord Jesus*, vol. 1: *Christian Moral Principles* (Chicago: Franciscan Herald Press, 1983), p. 105. In fairness, it must be acknowledged that the defenders of homosexual conduct also sometimes fall prey to the naturalistic fallacy, arguing that, because homosexual sexual appetite is usually innate, it cannot be pathological. By this logic, Tay-Sachs disease and cystic fibrosis cannot be pathological, either. For a

There is another way of reading Aquinas, one which avoids the logical fallacy of reasoning from natural facts to judgments of value. This is the kind of argument developed by Grisez and his followers. It begins, not with any unprovable supposition about divine intentions, but with knowable goods. Copleston explains the procedure well: "Every man possesses the natural inclinations to the development of his potentialities and the attainment of the good for man. Every man possesses also the light of reason whereby he can reflect on these fundamental inclinations of his nature and promulgate to himself the natural moral law, which is the totality of the universal precepts or dictates of right reason concerning the good which is to be pursued and the evil which is to be shunned."⁹⁸ Aquinas's argument against homosexual conduct in the *Summa Contra Gentiles* appears to follow these lines:

Now, it is good for each person to attain his end, whereas it is bad for him to swerve away from his proper end. Now, this should be considered applicable to the parts, just as it is to the whole being; for instance, each and every part of man, and every one of his acts, should attain the proper end. Now, though the male semen is superfluous in regard to the preservation of the individual, it is nevertheless necessary in regard to the propagation of the species. Other superfluous things, such as excrement, urine, sweat, and such things, are not at all necessary; hence, their emission contributes to man's good. Now, this is not what is sought in the case of semen, but, rather, to emit it for the purpose of generation, to which purpose the sexual act is directed. . . . Therefore, the emission of semen ought to be so ordered that it will result in both the production of the proper offspring and in the upbringing of this offspring. It is evident from this that every emission of semen, in such a way that generation cannot follow, is contrary to the good for man.⁹⁹

This is open to the same objection that the first argument was subject to, that reproduction is not the only good that humans can pursue by the use of their sexual faculties, and that one cannot without circularity call desires for other goods unnatural. Moreover, Aquinas acknowledges the objection "that it is either a slight sin, or none at all, for a person to use a part of the body for a different use than that to which it is directed by nature (say, for instance, one chose to walk on his hands, or to use his feet for something usually done with his hands) because man's good is not much opposed by

thoughtful assessment of the relevance of scientific information to the moral assessment of homosexual conduct, see Stephen J. Pope, "Scientific and Natural Law Analyses of Homosexuality: A Methodological Study," 25 J. Religious Ethics 89 (1997).

98. Copleston, *Aquinas*, p. 221.

99. "Summa Contra Gentiles" 3.122, trans. as *On the Truth of the Catholic Faith* by Vernon J. Bourke, Book 3, Part 2 (New York: Image, 1956), pp. 143-44.

such inordinate use."¹⁰⁰ (This objection, if sound, has startling implications for the argument made in the *Summa Theologiae*: is it worse to walk on one's hands than to commit rape?) Aquinas responds that "the inordinate emission of semen is incompatible with the natural good; namely, the preservation of the species. Hence, after the sin of homicide whereby a human nature already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is precluded."¹⁰¹ This passage simply makes no sense at all. Aquinas clearly does not mean that every member of the human race has an obligation to reproduce; otherwise virginity would be unlawful.¹⁰² If human semen is somehow understood to be a scarce commodity that must not be squandered in nonreproductive uses, then all sexual acts in which procreation is impossible, such as intercourse by the sterile, the pregnant, or the elderly, would similarly be condemned as unnatural. Noonan observes that Aquinas was able to avoid this conclusion, which would have placed him considerably outside of mainstream views, only by invoking Aristotelian metaphysical categories:

If coitus was to be regarded as an unalterable process because of its generative consequences, but not every act of coitus was generative, then a discrimination had to be made between the normal or per se and the accidental. This discrimination was made by Thomas. He postulated as normal an act of coitus which led to generation. This norm was not derived from any statistical compilation. It was the product of intuition. . . . Because the sexual act might be generative, and because generation was an important function, the theologian intuited that generation was the normal function. A typical or essential act of coitus, which was generative, was therefore supposed. Other acts of coitus which did not achieve this purpose were regarded as generically generative but accidentally frustrated. There were thus three types of seminal ejaculation: (1) acts in which insemination was impossible; these were unnatural; (2) acts in which insemination was possible and conception resulted; these were natural and normal; (3) acts in which

100. Ibid., p. 146.

101. Ibid.

102. See Boswell, *Christianity, Social Tolerance, and Homosexuality*, pp. 322, 325-26, to which my discussion is heavily indebted. Boswell's book has been criticized from many quarters, but to my knowledge, no one has adequately responded to his devastating critique of Aquinas. Those who have addressed it at all have done so only briefly, and have focused on minor interpretive errors without explaining how Aquinas could answer Boswell's criticisms. See, e.g., Bruce A. Williams, "Homosexuality and Christianity: A Review Discussion," 46 *Thomist* 609, 619-22 (1982); J. Robert Wright, "Boswell on Homosexuality: A Case Undemonstrated," 66 *Anglican Theol. Rev.* 79, 92 (Jan. 1984); Anthony C. Daly, "Aquinas on Disordered Pleasures and Conditions," 56 *Thomist* 583, 601-02 (1992).

insemination was possible, but conception did not occur; these were normal, but accidentally different from the norm.¹⁰³

It is not clear that it even makes sense to postulate one type of coitus as normal in this way, so that heterosexual intercourse is held to be an act of a reproductive kind even if reproduction is not intended and is known to be impossible. The problem of intelligible essences arises here in the same way as it did in Grisez. Why is it not equally plausible to say that all acts of seminal ejaculation are essentially reproductive, though they may be accidentally frustrated, or to say that no acts of seminal ejaculation are essentially reproductive, and that reproduction is only an accidental consequence that may ensue under certain conditions? There is nothing in nature that dictates that the lines have to be drawn in any of these ways. Moreover, even if heterosexual sex is normal, it does not follow that it is normative. Why does Aquinas think that these Aristotelian categories carry any moral weight? It appears that this gap in the argument is being filled sub silentio by the premise that one kind of act is in accordance with the Creator's intentions and other kinds are not. In heterosexual coitus, the couple is using its organs in accordance with God's design, while the homosexual couple is ignoring or violating that design. Aquinas's second argument thus collapses into the first, and reproduces all the difficulties of the first.

Now let us return to the new natural lawyers. The reason they ascribe unitive significance to the infertile heterosexual couple should now be clear. As in Aquinas, their argument can be salvaged, if at all, only by silently presupposing a kind of Aristotelian hylomorphism, in which the infertile heterosexual couple participates imperfectly in the idea of one-flesh unity, but the homosexual couple does not participate at all. The infertile heterosexual couple does become one organism, albeit an organism of a handicapped sort, that cannot do what a perfectly functioning organism of that kind can do. The heterosexual couple is only accidentally infertile, while the homosexual couple is essentially so. But as in Aquinas, unless one posits a divine artificer whose intentions are knowable, it is not clear how the essence/accident distinction can do any moral work.¹⁰⁴ In what

103. John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Cambridge: Harvard University Press, 1966), p. 243.

104. Jeffrey Stout has made a similar point: "A correct moral language, by Thomistic lights, would be one in which the basic ethical expressions correspond to the *real* moral species. . . . It is clear how to expand on such talk theologically: the real moral species will be the ones given unique metaphysical status by the Creator; all others will be the result of arbitrary human classifications. If, however, you delete the reference to the Creator, it becomes unclear how the line between real and arbitrary is to be drawn. It is still less clear why a secular philosopher would want to make ethics depend on the resolution of such a murky question." "Truth, Natural Law, and Ethical Theory," in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992), p. 79.

sense *are* they one flesh? Procreative unity isn't realized *in them*. Their unity, if it exists outside of the ideational community in which they participate (and in which the homosexual couple obviously can also participate), consists in their membership in a class, a natural kind that ideally *can* procreate.¹⁰⁵

Why should we think that such a natural kind is a real thing, rather than an *ex post* mental construct? We could do it with the unloaded gun, because the gun was constructed by an intelligent designer for a purpose. An unloaded gun remains a *gun*, a device designed for shooting. In contrast, it's far from clear in what sense, that has any moral weight, the genital organ of a sterile man can properly and precisely be called a *reproductive* organ. It is not fit for reproduction. Moreover, if the Darwinian model is correct, it cannot be said to be *designed* for reproduction, except in a metaphorical sense that can only mislead in this context. The structure is what it is because it just happened, in the past, to increase the gene's likelihood of reproducing itself. The gene wasn't *trying* to reproduce itself. A gene has neither mind nor intention. Grisez and Finnis have not fully come to grips with what Leo Strauss argued is the central dilemma for moderns, including modern followers of Aquinas: "a fundamental, typically modern, dualism of a nonteleological natural science and a teleological science of man."¹⁰⁶

One may, finally, insist on the essentialism implied by the ordinary meaning of words. The heart of a dead man, which will never beat again, is still a heart. His stomach is still a digestive organ. Similarly, the penis of a man who is sterile is still a reproductive organ. But the only aspect of reproductiveness that is relevant to the natural lawyers' argument, namely the reproductive *power* of the organ, does not inhere in *this* organ. It is not a reproductive organ in the sense of power or potential, even if it is a

105. One strategy for salvaging this argument might be by analogy with the case of a defective infant, whose brain has been damaged and who will never develop a cognitive capacity exceeding that of, say, a dog. Such an infant would still be entitled to the concern and respect we give to any other baby, because it is a creature of the human *kind*, even if it itself can never develop the capacities of a well-functioning human being. Similarly, it might be argued; the infertile couple's act of intercourse deserves to be honored as an act of the reproductive kind, even if it itself deviates from the norm by being incapable of achieving the good possible in such an act. This strategy, however, implies that there is something defective and deviant in the organs of such a couple. This argument can work only if one of them suffers from some abnormality. Normal women, however, are only capable of reproducing during a small part of their lives; there is nothing abnormal about menstruation and menopause. The argument in this footnote was suggested by Christine Korsgaard.

106. Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), p. 8. Finnis has argued that Strauss is mistaken in thinking that natural law theory necessarily depends on a teleological conception of nature, but, I have argued here, neither Aquinas's nor Finnis's condemnation of homosexual conduct makes sense without relying on such a conception. See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 52.

reproductive organ in the taxonomic sense. And, once more, it remains mysterious why its being a reproductive organ, in either sense, should have the moral significance that the new natural lawyers want to assign to it.¹⁰⁷

V. WHAT IS BAD ABOUT BAD SEXUAL ACTS?

A question answered in Aquinas, but which I have thus far not explored in the works of his modern followers, is why acts that are not marital in the sense meant by these writers are thought to be positively wrong. Even if the new natural lawyers' argument as set forth thus far can answer the objections I have raised, without more it implies nothing about the status of homosexual unions, which might be good in their own way even if they do not realize the distinctive marital good. Perhaps we can say that homosexual couples cannot achieve "marriage," but only some deviant variation, which we might call "schmarriage."¹⁰⁸ Why should we think that schmarriages are sufficiently different from marriages that the law ought to distinguish between them in allocating rights?¹⁰⁹

The new natural lawyers have an answer to this question, but it is one that many readers will find surprising and unfamiliar. It may therefore be helpful to review some of the more conventional responses to this question. Once again, I hope to show that the failure of these more familiar responses teaches us that if the traditional view about same-sex marriage cannot be supported by the arguments of the Grisez school, that view is unlikely to find support elsewhere. In this section, I will explore the most sophisticated efforts to defend it, and show how they depend on the kind of argument from natural teleology whose defects we have just explored. In the next section, I will show the distinctive nature of the new natural lawyers' claim, which avoids the pitfalls of their predecessors only to fall into new difficulties.

I have said that the new natural lawyers' argument about the nature of marriage needs to be supplemented if it is to support the legal conclusions for which it is invoked. One way of doing this is suggested by Aquinas. The fatal gap in his argument, we have noted, is his failure to show what human good will be frustrated by homosexual conduct. He never fills this gap persuasively, but another of his discussions of homosexuality suggests a strategy which many of his successors have followed. Certain desires, he observes, although they may arise from natural causes, are manifestations of conditions that are undoubtedly defects, because these conditions are invariably accompanied by indisputable evils. Thus, for example, a person

107. Thanks to Joseph Sartorelli for helping to clarify these distinctions.

108. With apologies to Robert Nozick, whose famous comparison of doctoring, the essential goal of which is healing the sick, and "schmoctoring," the essential goal of which is earning money for the practitioner, I have borrowed from here. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 235.

109. The question thus phrased, with its implicit allusion to Nozick, was put to me by Michael Bratman.

may, under circumstances of disease, find sweet things bitter, or vice versa, or may find pleasure in eating earth or coals, or as a consequence of habituation may find pleasure in cannibalism or copulation with beasts or with members of his own sex.¹¹⁰ With the exception of the sexual cases, all of the cases Aquinas cites can be shown to be bad dispositions, distortions of ideal human nature, by the bad things that accompany them. If such a showing could be made in the case of homosexuality, then homosexuality could be shown to be contrary to human nature and therefore bad. The argument would rely on a natural teleology, but the telos would be a human telos, a telos of human purpose and the fulfillment of human wants.

The most influential version of this argument is that made by certain psychiatrists (now a distinct minority in their profession) who argue that sexual attraction to members of one's own sex is a kind of mental disease.¹¹¹ This position only solidified after some early equivocation about what is to count as a disease. The earliest proponents of the disease view in the late nineteenth and early twentieth centuries defined disease in terms of deviation from customary standards of acceptable behavior. They "un-self-consciously invoked morality—God, country, family—in describing their treatment of homosexuals."¹¹² Similarly, the American Psychiatric Association's first listing of mental disorders stated that homosexuals were "ill primarily in terms of society and of conformity with the prevailing cultural milieu."¹¹³ This naive valorization of social custom is hopelessly question-begging. Why should the individual have to conform to the custom, rather than the custom be relaxed to suit the individual?¹¹⁴

The modern psychiatric proponents of the disease view have therefore relied on the claim (disagreeing with Freud) that all human beings were

110. *Summa Theologiae*, II-II Q. 31, art. 7.

111. I will assume in this discussion that the only reason that we are interested in knowing whether homosexuality is a disease is because diseases are bad things that society has an interest in preventing. The question whether homosexuality fits definitions of disease which bear no necessary relationship to human interests and concerns, such as "disease is any condition that prevents the organism from surviving and reproducing in a statistically typical way," seems beside the point. Interested readers should consult Michael Ruse, *Homosexuality: A Philosophical Inquiry* (Oxford: Basil Blackwell, 1988), pp. 203-35.

112. Jonathan Katz, *Gay American History* (New York: Harper Colophon, 1976), p. 132.

113. American Psychiatric Association, *Diagnostic and Statistical Manual, Mental Disorders* (DSM-I) (Washington, D.C., 1952), p. 38; quoted in Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (Princeton: Princeton University Press, 1987), p. 40.

114. I shall argue below that the psychiatric conception of homosexuality as a disease has never escaped this question-begging character. Normative arguments against homosexuality that are parasitic on the disease view are therefore circular, since the disease view is itself parasitic on unstated normative premises. See, e.g., John Giles Milhaven, "Homosexuality and Love," in Edward Batchelor, Jr., ed., *Homosexuality and Ethics* (New York: Pilgrim Press, 1980), pp. 63-70; William Muehl, "Some Words of Caution," in *ibid.*, pp. 71-78; Steven Goldberg, "What is 'Normal?' Logical Aspects of the Question of Homosexual Behavior," 38 *Psychiatry* 227 (1975).

constitutionally predisposed to heterosexuality and that only overwhelming environmental forces, specifically massive fears induced during childhood, could divert sexual object choice toward a same-sex object. These writers, principally Sandor Rado, Irving Bieber, and Charles Socarides, all thought that this diversion is caused by severe early developmental disturbances. All therefore concluded that homosexuality must invariably be associated with severe personality disorders. (There were differences of opinion as to how early the trauma occurred, and therefore how profound the consequent disturbance was.)¹¹⁵ The only homosexuals any of these doctors knew, of course, were their patients, who had come to them precisely because they were leading troubled lives. "Since it was assumed that all homosexuals suffered from a pathological condition there was no question about the methodological soundness of relying upon patients for a more general understanding of the disorder."¹¹⁶

The reason why the disease theory has now been abandoned by most psychiatrists and psychologists is that this prediction has been demonstrated to be false, most importantly by Evelyn Hooker's studies, which found that psychologists judging projective test results of matched pairs of male homosexuals and heterosexuals could not distinguish the homosexuals from the heterosexuals, and categorized two-thirds of the members of both categories as of average adjustment or better.¹¹⁷ The disease theory also misconstrued the nature of homosexual desire, which it held could not be the basis of enduring, loving relationships. Thus Socarides wrote that mutual love "cannot be achieved in any homosexual relationship on an enduring basis," because "there are multiple underlying factors which constantly threaten any ongoing homosexual relationship: destruction, mutual defeat, exploitation of the partner and the self, oral-sadistic incorporation, aggressive onslaughts, and attempts to alleviate anxiety—all comprising a pseudo-solution to the aggressive and libidinal conflicts that dominate and torment the individuals involved."¹¹⁸ It has since been documented that many homosexual relationships are, except for the sex of the participants and the legal status of the union, indistinguishable from heterosexual marriages.¹¹⁹

115. These views are described in Bayer, *Homosexuality and American Psychiatry*, pp. 28-38.

116. *Ibid.*, p. 41.

117. Evelyn Hooker, "The Adjustment of the Male Overt Homosexual," 21 *J. Projective Techniques* 18 (1957). Hooker's work is discussed in Bayer, *Homosexuality and American Psychiatry*, pp. 49-53. See also Sylvia A. Law, "Homosexuality and the Social Meaning of Gender," 1988 *Wisc. L. Rev.* 187, 212-14, and citations therein.

118. Charles W. Socarides, "Homosexuality—Basic Concepts and Psychodynamics," 10 *Int'l J. Psychiatry* 118, 119, 122 (1972).

119. See Peplau, "Lesbian and Gay Relationships;" Andrew Koppelman, "Three Arguments for Gay Rights," 95 *Mich. L. Rev.* 1636, 1664-66 (1997). For a fuller intellectual history and critique of the disease view, see Kenneth Lewes, *The Psychoanalytic Theory of*

Notwithstanding this evidence, some psychiatrists continue to insist that homosexuality is a disease. Their reasons for thinking so, however, have become increasingly obscure. Consider the murky formulations of Socarides, the most prominent member of the faction of the psychiatric community that still holds the disease view.

Heterosexual object choice is outlined from birth by anatomy and then reinforced by cultural and environmental indoctrination. It is supported by universal human concepts of mating and the traditions of the family unit, together with the complementariness and contrast between the two sexes. Everything from birth to death is designed to perpetuate the male-female combination. This pattern is not only culturally ingrained, but anatomically outlined. The term "anatomically outlined" does not mean that it is instinctual to choose a person of the opposite sex. The human being is a biologically emergent entity derived from evolution, favoring survival.¹²⁰

Socarides appears to want to substitute evolutionary imperatives for Aquinas's cosmic design, but it's hard to tell how he thinks that this can be done. There has, however, been one careful attempt to formulate the kind of neo-Darwinian argument that Socarides is groping for. Michael Levin's argument is of interest here because it is the most sophisticated attempt to reconcile natural teleology with the data on the one hand and Darwin on the other. It is the last redoubt of the disease conception.

Levin argues that heterosexuals, in the aggregate, are more likely to be happy than homosexuals. This is because the organisms that are produced by the evolutionary process will find it reinforcing to engage in behaviors that made more likely the survival of their ancestors' genes into the next generation. In this framework, it makes sense to say that physiological structures have quasi-purposive functions. The argument, unlike that of Aquinas, does not depend on postulating a divine artificer. If while organism O was evolving, its survival was enhanced by the use of physiological structure S for function F, then O will be made happy by using S for F, and will be made less happy by using S for something incompatible with F. Thus, for example, it would be inadvisable for Mr. Jones to pull out all his teeth and string them around his neck because he thinks they would look nice as a necklace, thereafter feeding himself intravenously. Not only will his jaw muscles and digestive tract deteriorate from lack of use, damaging his health and perhaps shortening his life, but

Male Homosexuality (New York: Simon and Schuster, 1988). The title is revealing: psychoanalysis never paid much attention to lesbians and the disease conception was never nearly so well elaborated with respect to them.

120. Charles Socarides, "Homosexuality," in Silvano Arieti, ed., *American Handbook of Psychiatry*, 2nd. ed. (New York: Basic Books, 1974), v. 3, p. 291; quoted in Bayer, *Homosexuality and American Psychiatry*, pp. 34-35.

he is also likely sooner or later to experience vague yearnings to chew something. Such yearnings are a predictable outcome of the evolutionary process that produced him.

Nature is interested in making its creatures like what is (inclusively) good for them. A creature that does not enjoy using its teeth for chewing uses them less than a toothed competitor who enjoys chewing. Since the use of teeth for chewing favors the survival of an individual with teeth, and, other things being equal, traits favorable to the survival of individuals favor the survival of the relevant cohort, toothed creatures who do not enjoy chewing tend to get selected out. We today are the filtrate of this process, descendants of creatures who liked to chew.¹²¹

The same logic, Levin argues, applies to the sexual function. "Homosexuality is likely to cause unhappiness because it leaves unfulfilled an innate and innately rewarding desire."¹²² Therefore, he concludes, "legislation which raises the odds that a given child will become homosexual raises the odds that he will be unhappy."¹²³ Society is thus justified on utilitarian grounds in doing what it can to signal its disapproval of homosexuality and thereby encourage heterosexuality. Civil rights legislation for homosexuals, or even the repeal of laws against sodomy, will send the wrong message to society's young people, increase the number of them who choose to become gay (whether sexual orientation is in fact chosen is not addressed in Levin's argument), and therefore increase the amount of unhappiness in society.¹²⁴

Before we consider the merits of Levin's argument, it is worth noting how much of Aquinas's argument has disappeared from this formulation. Unless one endorses the radically utilitarian moral theory that holds that there is a moral obligation to maximize pleasure (including one's own), Levin's argument is strategic rather than moral. There is no reason other than a prudential one why any individual should refrain from homosexual conduct, and it is not clear that Levin's argument has prudential implications for any individual (as opposed to society in the aggregate). It is much harder to falsify than that of the psychiatrists, whose model suffered serious damage as soon as it was shown that there were *any* well-adjusted homosexuals. Levin does not show that homosexuality is wrong, but only that it is "abnormal," and at least some of the weight of his argument seems

121. Michael Levin, "Why Homosexuality is Abnormal," 67 *The Monist* 251, 259 (1984).

122. *Ibid.*, p. 261.

123. *Ibid.*, p. 274.

124. In his more recent work, Levin writes that his earlier assumption that legislation could encourage heterosexuality "was empirically faulty." Michael Levin, "Homosexuality, Abnormality, and Civil Rights," 10 *Pub. Aff. Q.* 31, 35 (1996). He now abandons his crude utilitarianism, unfortunately in favor of a crude libertarianism, in which freedom of contract condemns all antidiscrimination laws, even if the result is a permanent class of social outcasts who have done nothing to deserve their fate. See *ibid.*, p. 46.

to rest on the ambiguous meaning of that word, which connotes inferiority as well as statistical atypicality. To this extent, it makes the same illegitimate inference from facts to values that we found in Aquinas.

Levin's analogy with chewing depends heavily upon speculation as to the degree of precision that the F of the sexual S calls for. Males, he argues, are probably instructed by their genetic programming (lesbians are outside the scope of Levin's discussion, but one can easily imagine an analogous argument with respect to them) not merely to put their penises into small, moist openings, but specifically to put their penises into moist openings which are accompanied by such visual clues as breasts and wide hips, because males who are programmed at that level of specificity have a greater likelihood of reproducing themselves than those who are not. If the breasts and wide hips are not present, Levin suggests, a male will feel something missing from his life and will be unhappy.

But even if S originally evolved in order to perform survival-enhancing F, it does not follow that an O cannot find it reinforcing to use S in F-like ways that nonetheless do not achieve F. That is what happens when birth control devices are used, or when infertile persons copulate. It does not follow, because it would be a bad idea for Jones to yank out all his teeth, that Jones will be made unhappy by eating a candy bar, even though it will not nourish him. Running may be reinforcing because it was once necessary for catching food, but Jones may find it equally reinforcing to bicycle—an activity that did not improve the survival capacities of his primate ancestors, who didn't have bicycles. Does Levin's argument commit him to the conclusion that runners are happier than cyclists?

Levin recognizes that there will be counterexamples. His argument is a probabilistic one, so that "saying that homosexuals are bound to be less happy than heterosexuals must be understood as short for 'Not coincidentally, a larger proportion of homosexuals will be unhappy than a corresponding selection of the heterosexual population.'"¹²⁵ But the argument better supports the prediction that in a society in which persons are free to pursue whatever gendered sexual object they like, a larger proportion of the population will be heterosexual than homosexual. Even if certain tastes are unusual and even contrary to the tastes of most people, this does not imply that those who have those tastes are not pleased when they gratify them. If more people like Mozart's music than Schoenberg's, does this prove that the large crowd at Mostly Mozart is having a better time than the much smaller group listening to the Schoenberg concert? The hypothesis that the Mozart audience is happier would be difficult to test under any circumstances. The

125. Ibid., p. 262. A similar argument about homosexual unhappiness is made more casually by Richard Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992), pp. 303-07. For a critique, see William N. Eskridge, Jr., "A Social Constructionist Critique of Posner's *Sex and Reason*: Steps Toward a Gaylegal Agenda," 102 Yale L. J. 333, 362-65 (1992).

hypothesis that Schoenberg-lovers are *inherently* and *necessarily* unhappier people than Mozart-lovers would be impossible to test in a society in which Schoenberg-lovers are stigmatized and pressured to keep their preference secret and to listen to Mozart instead.¹²⁶

Levin's model is way out of synch with actual human behavior. It cannot explain why anyone ever chooses to engage in homosexual sex when opposite-sex partners are available. People tend to want to do what will make them happy, and they don't need Levin to tell them not to pull out their teeth and wear them as necklaces.¹²⁷ Because human needs evidently have more variegated and complex sources than Levin's simple evolutionary model allows,¹²⁸ any conclusion that model produces about what people need in order to be happy is unreliable.¹²⁹

126. Levin does not offer much evidence to show that gays are in fact unhappier than heterosexuals, and the evidence he does cite is misleadingly selective. Compare his use of data about San Francisco gays in "Why Homosexuality is Abnormal," pp. 276-79, with the more sober assessment of that and other data in Ruse, *Homosexuality*, pp. 216-21. Ruse concludes that the evidence does not indicate any significant difference between the well-being of homosexuals and heterosexuals.

Even if homosexuality were stipulated to be a less desirable orientation than heterosexuality, this is inadequate to support Levin's argument for its social stigmatization, because he offers no evidence that such stigmatization will actually reduce the incidence of homosexuality. It is revealing that the disease conception's proponents considerably exaggerated their ability to help their patients achieve heterosexuality. See Bayer, *Homosexuality and American Psychiatry*, p. 33. Most authorities now agree that at least many people's sexual orientation is generally established in very early childhood at the latest and is thereafter exceedingly difficult to change. Moreover, efforts to bring about such change may themselves "may cause a variety of severe symptoms, particularly depression and anxiety, as a result of the undermining of self-esteem." Richard A. Isay, *Being Homosexual: Gay Men and Their Development* (New York: Farrar Straus Giroux, 1989), p. 7.

127. Levin is similarly perplexed by the desires of women. See his strange remarks about female orgasm in Michael Levin, *Feminism and Freedom* (New Brunswick: Transaction, 1987), pp. 271, 277.

128. This is not to say that no sociobiological hypothesis can account for the revealed preference of some persons for homosexual behavior. Such hypotheses have been devised: for example, Edward O. Wilson suggests that homosexuality's reproductive costs may be outweighed by the adaptive advantage of a nonprocreating relative for members of his or her genetic cohort. See *On Human Nature* (New York: Bantam, 1979), pp. 147-153. Levin correctly notes that this argument begins by already assuming that homosexuality has some function and seeks to find that function. "Why Homosexuality is Abnormal," p. 273. Wilson's hypothesis is, however, at least as plausible as Levin's, which is no less speculative and (unlike Wilson's) cannot explain why homosexual sex ever occurs. Ruse reviews the sociobiological hypotheses in some detail, see Ruse, *Homosexuality*, pp. 130-149, but acknowledges that sociobiology offers only "some interesting ideas and some suggestive facts. There is nothing which compels conviction." *Ibid.*, p. 149.

129. Another argument from natural teleology that is sometimes made, although not by Levin, is that homosexuality should be regarded as a disability because homosexuals cannot procreate, or at least cannot do so as easily as heterosexuals. See, e.g., Posner, *Sex and Reason*, pp. 305-06. This is not an especially powerful argument. Gay men must adopt or find women willing to bear their children. Lesbians must look outside their sexual

In sum, the disease conception reproduces the central flaws of Aquinas's argument: it neither explains why the goods achievable through sexuality can be achieved only through heterosexual sex, nor shows that other forms of sexual expression are positively bad. The claim that homosexuality is wrong because it is unnatural cannot be salvaged by pointing to homosexuals' painful and solitary lives, because many homosexuals do not lead such lives, and there is little reason to think that homosexuality per se, rather than societal intolerance, brings about such lives. Now that the closet door is opening, and openly gay people have become commonplace, it has become increasingly clear that many of them are well-adjusted and have formed enduring, loving relationships.

VI. THE DISINTEGRITY ARGUMENT

That fact might be taken to end the discussion, but it does not. Grisez and Finnis, whose claims I shall now take up once more, emphasize, and I think correctly, that human well-being cannot adequately be assessed solely on the basis of utilitarian considerations of pleasure, pain, and social adjustment. Such utilitarian considerations dominated the psychiatric debate over homosexuality. One psychiatrist who played a key role in deleting homosexuality from the list of mental disorders argued that for a behavior to be appropriately termed a psychiatric disorder, it had to be regularly accompanied by either subjective distress or some generalized impairment in social functioning.¹³⁰ While this standard may make sense from the institutional perspective of psychiatry, it is hardly a complete account of the ways in which one's psychic state may damage one's well-being. The same objection may be made against Levin, for whom considerations of pain and pleasure are even more clearly the sole standard on the basis of which lives are judged. To that extent, these modernizers of Aquinas have departed from one of his central teachings, and the departure has not been an improvement.

The new natural law theory has as one of its central tenets the rejection of the view that human well-being consists in subjective satisfaction. Finnis writes that "for anyone who has accurately understood the relations between desire and understanding, the correlate and object of desire is *perfection*, i.e., what makes the one who desires *better off*, what is for him a *good thing*. Satisfaction is a good aspect of the attainment of that good, but it is not that good, and 'satisfying for me' is in very many cases not part of the

relationships for sperm. The disability in question is hardly crippling. Moreover, since contraception is common among heterosexuals, it is far from clear that gays must spend an unusual amount of their time fooling around with equipment in order to regulate their ability to reproduce.

130. Bayer, *Homosexuality and American Psychiatry*, p. 127, quoting Robert Spitzer, member of American Psychiatric Association Committee on Nomenclature.

description under which he pursues that object of desire."¹³¹ Thus, unlike either the psychiatrists or Levin, the new natural lawyers can coherently claim that homosexuality is wrong and harmful even if homosexuals themselves are satisfied and feel contented with their lives.

Finnis offers a powerful argument for his claim that the good is not simply identical with pleasure or pleasant experiences. Borrowing from Robert Nozick, he offers the thought experiment of the "experience machine": suppose that you could spend your life plugged into a machine which, by stimulating your brain while you lay floating in a tank, would afford you a lifetime of nothing but pleasurable experiences, which would include the illusion of activities, achievements, and fulfillments?¹³² If pleasure or good experiences were what was really good, one would not hesitate to plug into the machine, which would almost certainly provide one with more such experiences than one could otherwise have. But, of course, the reverse is true. Such a lifetime is obviously not to be chosen. This, Finnis thinks, teaches three important lessons. First, human flourishing consists in action, not experience; the point of human activity is the activity itself. Second, one's character and identity are good things; it is unreasonable to plug into the machine because it dissolves these things, so plugging in is, as Nozick says, "a kind of suicide."¹³³ Third, appearances are not a good substitute for reality. One wants a real life that consists of real activities.¹³⁴

The new natural lawyers hold with Aquinas that ethics are grounded in nature, but they emphasize more clearly than Aquinas did that our knowledge of how to live cannot be deduced from facts about nature. Indeed, they proceed in the opposite direction, methodologically. Our knowledge of human nature, of the kind of beings we are, depends upon data provided by practical reflection and judgment.¹³⁵ Such reflection—the thought experiment of the experience machine is an example—reveals the goods that perfect beings with our nature, human beings.

It is on the basis of such reflection that the new natural lawyers claim that homosexual conduct is wrong because it is contrary to nature, that is, harmful to beings who have the nature that we have. Our review of the earlier, failed attempts to establish this claim should make clear the challenge that they face. They cannot deploy the Thomistic argument that it is wrong to divert human faculties from their natural ends, for they are

131. John Finnis, *Fundamentals of Ethics* (Oxford: Clarendon Press, 1983), p. 44, *emphases in original*.

132. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 42-45.

133. *Ibid.*, p. 43.

134. *Fundamentals of Ethics*, pp. 37-42.

135. See Robert P. George, "Natural Law and Human Nature," in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992), pp. 31-41.

well aware that "as a general premiss, in any form strong enough to yield the moral conclusions it has been used to defend, this argument is ridiculous."¹³⁶ They must show that homosexual conduct is bad, even though such conduct does not produce subjective unhappiness, is often part of enduring relationships, and, for people whose orientation is exclusively homosexual, is the only way to achieve an enduring sexual relationship. What we have said so far shows that it is not in principle impossible to do this. People may be mistaken about their best interests. Nonetheless, it is a formidable task.

Grisez and Finnis both think that the lessons of the experience machine have implications for sexual ethics that are relevant to the moral assessment of homosexual conduct. First, because appearances are not a good substitute for reality, if a genuine good is achievable through sexuality, one ought to pursue that good itself rather than its mere appearance. Second, because the good is not reducible to good experiences, pleasure alone is not a good reason to pursue anything. As Grisez puts it, "[o]ne should not choose to satisfy an emotional desire except as part of one's pursuit and/or attainment of an intelligible good other than the satisfaction of the desire itself."¹³⁷ Third, and most important, because one's character and identity are good things, the use of one's sexual faculties solely for the pursuit of pleasure is wrong. Such use tends to destroy one's character and identity: empty pleasures have an addictive quality that are likely to overwhelm one's ability to discern and to pursue what is truly good. The pursuit of pleasure for its own sake is tantamount to plugging oneself into the machine.¹³⁸

The new natural lawyers' basis for condemning sexual activities that aim solely at pleasure is set out most clearly in their argument against masturbation. "[I]n choosing to masturbate, one does not choose to act for a goal which fulfills oneself as a unified, bodily person. The only immediate goal is satisfaction for the conscious self; and so the body, not being part of the whole for whose sake the act is done, serves only as an extrinsic instrument."¹³⁹ Finnis argues that masturbation involves "a threefold lack of personal integrity": it is not part of any chosen project; the stimulation and fantasizing activity is unintegrated with real goods; it is unintegrated with any other real person.¹⁴⁰ The self-alienation that occurs when one uses one's body as an instrument for the gratification of one's consciousness, Grisez writes, "is an existential dualism between the body and the conscious self, that is, a division between the two insofar as they are copinciples of oneself considered as an integrated, acting, sexual person. Therefore, to

136. Finnis, *Natural Law and Natural Rights*, p. 48.

137. Grisez, *The Way*, v. 1, p. 208.

138. See Finnis, *Fundamentals of Ethics*, p. 48.

139. Grisez, *The Way*, v. 2, p. 650.

140. John M. Finnis, "Personal Integrity, Sexual Morality and Responsible Parenthood," 1 *Anthropos: Rivista di Studi sulla Persona e La Famiglia* 43, 47 (1985).

choose to masturbate is to choose a specific kind of self-disintegrity . . .¹⁴¹

Disintegrity is bad because self-integration, "harmony among all the parts of a person which can be engaged in freely chosen action,"¹⁴² is a basic good—a good that is intrinsically worthy of pursuit. It is self-evidently good to be a single, coherent self rather than a mess of conflicting desires and impulses. To the extent that one makes one's reason the slave of one's passions, one sacrifices this good.¹⁴³ As a consequence, one loses sight of all of the real goods that are not available on the experience machine; "one tends to regard only two realities as important: the conscious experience in which that satisfaction is obtained and the instruments—the alienated body and desacralized world—used to bring about the satisfaction."¹⁴⁴ The argument obviously can be extended beyond masturbation to other sexual activities, such as many acts of casual fornication of either the homosexual or heterosexual variety, the sole end of which is pleasure.

Unlike Aquinas, Grisez does not think that there is anything uniquely monstrous about homosexual acts. These same considerations equally condemn other nonmarital sexual acts. Fornicators achieve only the experience, not the reality, of marital communion, which requires marital commitment. Married couples who contracept, or who engage in oral or anal sex, cannot achieve the reality of one-flesh communion. In both of these heterosexual cases, what the couples are doing, Grisez thinks, is essentially mutual masturbation rather than marital intercourse. Sodomites differ from these in that, if their orientation is exclusively homosexual, they are not choosing an illusory good *instead* of a real one, but "they do choose to use their own and each other's bodies to provide subjective satisfactions, and thus they choose self-disintegrity as masturbators do."¹⁴⁵

This argument depends crucially on the premise that the procreative, marital communion of a man and a woman not only are good, but are the only good thing that is achievable through sex. Is this credible? Are the only gratifications achieved by the homosexual couple the same kind of gratifications that are provided by the experience machine?

First of all, it should be noted that the argument against actions taken solely for the sake of pleasure is a non sequitur. It depends on an illegitimate inference from the case of the experience machine. The experience machine argument, it will be recalled, demonstrated that pleasurable experience was not the *only* criterion of well-being. Here it is argued that pleasure alone is *never* a good reason to do anything. The lessons of the experience machine, however, are equally consistent with the

141. Grisez, *The Way*, v. 2, p. 650.

142. Grisez, *The Way*, v. 1, p. 124.

143. See *ibid.*, pp. 208-10.

144. Grisez, *The Way*, v. 2, p. 664.

145. *Ibid.*, p. 654.

view that pleasure is a good of an inferior kind, which is worthy of pursuit in itself, but the value of which can easily be trumped by other and higher goods. On this view, pleasure is not a sufficient reason to forego or damage a higher good, such as friendship or knowledge, but its pursuit is at worst morally neutral unless there is some good reason *not* to pursue it.¹⁴⁶ The rejection of this position would have odd consequences: would not Grisez also have to say that pain is not a bad thing in itself, and that the avoidance of pain is never a good reason for action?¹⁴⁷

There is reason to suspect that Grisez does not believe all the implications of what he is saying. He observes that the old scholastic natural law theory, which holds that faculties should only be used in ways that realize their natural powers, produces the absurd result that it is immoral to chew sugarless gum just for the pleasure of chewing, apart from nutrition.¹⁴⁸ (Aquinas's example of walking on one's hands made the same point.) This example, however, creates a similar problem for his own theory. When one chews gum, is not one choosing to have a sentient experience, merely for its own sake? Grisez's suspicion of bodily pleasures is curiously selective, holding sexual pleasure to a burden of justification that he does not place upon other kinds of pleasure.¹⁴⁹

146. Thus Macedo observes that, while it would plainly be bad to plug into the experience machine for life, it is unclear why it would be bad to plug into it for short periods occasionally. "Homosexuality and the Conservative Mind," p. 273 n.53. Finnis has shown that doing this would be dangerous:

[W]e should warn anyone contemplating a limited period on the machine that he had better arrange *in advance* for someone else to unplug him. For anyone plugged into the machine is unlikely to be capable, *de facto*, of understanding the desirability of those goods of activity, authenticity and reality which give reason for unplugging; or, if he can in some sense understand those goods while submerged in his world of mere experience, he is unlikely to be motivated by them. Both our powers of intelligent discernment and our intelligent desire to act intelligently (i.e. for the sake of understood goods) are likely to be overwhelmed by the massively possessive experience of feelings, satisfactions, etc. Some such submerging of reason by passions is well-known to us in our own daily life, is it not?

Fundamentals of Ethics, p. 48. But this does not show (and doubtless was not intended to show) that plugging in temporarily is bad in itself or wrong. While pleasure has an addictive quality that a prudent person will recognize, it does not follow that one should never act for the sake of pleasure alone.

147. Of course, he could say that pain is bad if it prevents the pursuit of genuine goods, making it impossible to work, to converse, and so on, but this is not true of all pain.

148. *The Way*, v. 1, p. 105.

149. Martha Nussbaum and Kenneth Dover have offered a similar objection to Finnis: Going for a swim, hiking, and masturbating are all different ways of using the human body for pleasure, and we see nothing intrinsically objectionable about any of them. . . . The assertion that [sexual] activity *must* be different from other activities in which the body is used for pleasure merely because it involves sexual organs and sexual pleasure appears to be deduced from a religious or metaphysical axiom with which we are unfamiliar.

"Appendix 4: Dover and Nussbaum Respond to Finnis," in Martha C. Nussbaum, "Platonic

Grisez recognizes that one uses one's body as an instrument all the time, and that ordinarily this is not morally problematic. "This is done when one works and plays, and also when one communicates, using the tongue to speak, the finger to point, the genitals to engage in marital intercourse."¹⁵⁰ In such cases, however, "the body functions as part of oneself, serving the whole and sharing in the resulting benefits."¹⁵¹ It is hardly clear, however, that this is never the case with masturbation or casual fornication. Often the pursuit of sexual gratification is thought of as responding to a bodily need, rather than inducing one: the arousal typically precedes the act. I feel an itch before I scratch it. In scratching an itch, I am not abusing my body or regarding it as "a lower form of life with its own dynamism,"¹⁵² but tending respectfully to its needs, which are my needs. The pleasure that is involved may indeed be unintegrated with one's other projects, but this is true of pleasures that Grisez and Finnis find unproblematic. "The mother who writes poetry in her free moments, the pope who occasionally skis, are engaging in humanly fulfilling activities which they need not direct to any of the purposes set by their commitments and which they can undertake without making any additional commitment"¹⁵³ Why cannot sex at least sometimes be one more kind of harmless play?¹⁵⁴

Moreover, the pursuit of sexual gratification may serve some end beyond itself. Grisez acknowledges the example of one who masturbates in order to relieve sexual tension in order to get to sleep. Even if masturbation is undertaken for the sake of an ulterior end, however, Grisez concludes that the choice to masturbate "remains the adoption of a proposal to have the sentient and emotional experience of masturbating," and thus "is to choose

Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies," 80 Va. L. Rev. 1515, 1649-50 (1994).

150. *The Way*, v. 2, p. 650.

151. *Ibid.*

152. *The Way*, v. 1, p. 139.

153. Germain Grisez, Joseph Boyle, and John Finnis, "Practical Principles, Moral Truth, and Ultimate Ends," 32 Am. J. Jurisprudence 99, 141 (1987).

154. Grisez appears to limit the scope of the prohibition of pursuing "mere emotional satisfaction" by holding that it applies only to "possible choices whose moral quality is in question." Grisez, *The Way*, v. 1, p. 209. "One has no choice to make unless one hesitates and deliberates, and so one never has occasion to act for the mere satisfaction of an emotional desire unless there is some reason for restraint." *Ibid.* This claim is repeated in the discussion of psychoactive drugs in v. 2, p. 536: "But someone who chooses to satisfy an urge also must be aware of some reason not to satisfy it, for there would be no need to choose unless one were aware of an eligible alternative." This claim seems overstated, since one sometimes hesitates even when the alternatives being deliberated about are both trivial. If I buy that pack of gum, I'll have to break a dollar bill, and then I'll have a bunch of change jingling around in my pocket all afternoon, which I sometimes find mildly irritating: What should I do? Is it immoral to buy the gum? Similarly, it is unclear why there is any reason for restraint in the case of masturbation. One's hesitation and deliberation are pointless if there is in fact no reason to hesitate.

a bad means to a good end.”¹⁵⁵ The pursuit of sexual pleasure is no longer bad because, like the experience machine, it is unintegrated with and diverts one from the achievement of real ends. Rather, it is bad even if it facilitates the achievement of those ends.¹⁵⁶

Grisez’s argument does point to an important truth. Sex does have the potential to be exploitative or instrumental or both. That potential is far more likely to be realized when persons regard their sexual faculties primarily as means for producing good experiences. Since many of us are at least sometimes tempted to engage in sex on those terms, and since such sex is an inferior kind that has the potential to distract from or disrupt more valuable and enduring relationships, it makes moral and prudential sense to distinguish more valuable from less valuable expressions of sexuality, and to discourage the latter. The question is whether Grisez and Finnis have drawn this line in a sensible way.

Grisez acknowledges that the deliberate inducement of pleasurable states of consciousness can sometimes facilitate the achievement of goods beyond pleasure. Consider his discussion of psychoactive drugs. In some places, he takes a very hard line against them. Thus he writes that when one uses such substances solely for the experience they provide (as opposed to, for example, relief of disabling pain, promotion of alertness in one’s work, or some other intelligible good), one alienates one’s consciousness from one’s own body, making the latter a tool of the former. The pattern of reasoning is quite similar to that he applies to the case of masturbation.

But a person’s capacity to embody himself or herself completely in his or her acts is necessary for the self-giving involved in the communication which establishes and nurtures interpersonal communion. Hence, to choose to use a psychoactive substance precisely for the experience is to accept damage to the capacity of one’s bodily self for interpersonal communion. But to damage an intrinsic and necessary condition for attaining a good is to damage the good itself. Thus, in choosing to use a psychoactive substance, not for the sake of some intelligible good, but precisely for the experience, a person accepts damage to the basic human good of friendship or association.¹⁵⁷

155. Grisez, *The Way*, v. 2, pp. 650-51.

156. Nor, again, does Grisez place so heavy a burden of proof on nonsexual bodily pleasures. Although one must not masturbate, even to get a night’s sleep, “one might rightly choose to drink oneself into a stupor—if, for example, one’s leg had to be amputated and no other anesthetic were available.” Grisez, *The Way*, v. 1, p. 258. Although one’s motives are correct, does not the choice to drink remain the adoption of a proposal to have the sentient and emotional experience of drinking? The drinker can invoke the principle of double effect, perhaps, but so can the masturbator. All the drinker intends is to avoid pain, but all the masturbator intends in the example is to get a night’s sleep. In what sense is he instrumentalizing his body more than the person who takes a sleeping pill?

157. *Ibid.*, p. 537.

It's obviously true that a person in a drugged stupor is incapable of friendship or association. But in this passage Grisez seems to want to go beyond this extreme case and condemn *any* use of psychoactive substances not absolutely necessary to the attainment of some good beyond good experience. In the same discussion, however, Grisez concedes the possibility of "drinking that serves sociability": "[I]f several people, having set out to celebrate an occasion or engage in conversation, drink only to facilitate their common activity, their incommunicable states of consciousness must remain subordinate to their interpersonal communion; and, if one party's drinking begins to interfere with communication, the others will consider that an unfortunate excess."¹⁵⁸ In this passage, it appears that the good of friendship or association may be promoted by the inducement of altered states of consciousness among the participants, so long as this alteration is not carried to excess.

Evidently, Grisez understands that the activity of inducing pleasure can be a fundamentally different *kind* of activity when a group undertakes it together than when someone undertakes it alone. If this is true, then the same may be true of sexual acts that are not "marital" in his sense of the word: it is true that each of the participants is trying to induce, in herself and in the other, an experience of pleasure which is (like all experiences) essentially solitary and incommunicable, but the activity of bringing about this experience is a collective one. Why is it not the case that here, too, "their incommunicable states of consciousness must remain subordinate to their interpersonal communion"?

We have returned to the question whether the new natural lawyers have understood the good of marriage. Bradley and George say that pleasure is innocent when it is the by-product of a certain kind of activity, one in which "the body is not typically commandeered into the service of a project that is fully and accurately described (and, thus, morally specified) as producing pleasure, whether as an end in itself or as means to other ends."¹⁵⁹ Macedo responds that this mischaracterizes the experience of many lesbian and gay partners.¹⁶⁰ Bradley and George would doubtless reply that, in "nonmarital" sex acts, even if the overall goal is to realize intimacy and love, the specific aim of the sex acts *as such*—the reason the partners induce orgasm in one another, rather than engaging in other activities—is to produce pleasure. This would seem to prove too much, however. Even married heterosexuals engaging in uncontracepted sex typically do some things solely for the purpose of producing or increasing physical pleasure. Must the new natural lawyers condemn these acts as well? How detailed a sex manual, with how many subtle distinctions between permitted and

158. *Ibid.*, pp. 536-37.

159. "Marriage and the Liberal Imagination," p. 317.

160. "Reply to Critics," pp. 330, 332.

forbidden acts, sequences of acts, and positions, does the new natural law theory imply?¹⁶¹

VII. READING THE MIND OF GOD

A more coherent approach is to return to Aquinas's insistence on natural teleology. This is the move made by other Christian writers who defend the traditional position on homosexuality. From this perspective, heterosexual complementarity is taken to be a sign of God's creative design. "If we affirm a faith in a personal God who intends a purpose for us and whose creation evinces a design intelligible to reason as well as disclosed by revelation, it is only logical that we see that design manifest in the act that makes us."¹⁶² Even a childless heterosexual marriage reflects this design, as it "remains a sign and symbol of humanity's foundational acts."¹⁶³

161. The answer, evidently, is "pretty detailed." See Germain Grisez, *The Way of the Lord Jesus, Vol. 3: Difficult Moral Questions* (Quincy, Ill.: Franciscan Press, 1997), pp. 132-38.

162. Paul Baumann, "An Incarnational Ethic: Listening to One Another," *Commonweal*, Jan. 28, 1994, p. 19. I am grateful to Paul Sigmund for calling my attention to this article.

163. *Ibid.* Grisez's text offers some oblique evidence that this is his real concern as well. All he says, in response to the argument that sodomitic sex may be a way of manifesting friendship and affection, is that "sexual intercourse is not chosen by sodomites in preference to conversation and mutually beneficial acts because it is the more expressive means of communicating good will and affection. Rather, it is chosen because it provides subjective satisfactions otherwise unavailable." *The Way*, v. 2, p. 654 (footnote omitted). This claim, which Grisez's followers have repeated, has struck many readers as a gross libel on many committed same-sex relationships. See, e.g., Carlos A. Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism," 85 *Geo. L. J.* 1871, 1912-18 (1997); Perry, *Religion in Politics*, pp. 88-89; Macedo, "Homosexuality and the Conservative Mind," p. 282; Martha C. Nussbaum, "Integrity," in John M. Finnis and Martha C. Nussbaum, "Is Homosexual Conduct Wrong? A Philosophical Exchange," *New Republic*, Nov. 15, 1993, p. 13. It invites the objection that Garet raises against Finnis, that outward behaviors are too crude a basis for the moral differentiation of acts. Garet, "Deposing Finnis," pp. 636-44, 650; see also Perry, pp. 91-93.

The reasons for Grisez's refusal to assimilate homosexual friendship to marital friendship are made clearer in James Hanigan's exposition of the point, which Grisez cites with approval. ("James P. Hanigan, *Homosexuality: The Test Case for Christian Sexual Ethics* (New York: Paulist Press, 1988), 97-104, explains this point well, though not all the parts of this book can be recommended." Grisez, *The Way*, v. 2, p. 654 n.193. This footnote is appended to the first of the two sentences in the passage just quoted. I shall confine my discussion to the cited pages from Hanigan.) Hanigan acknowledges that homosexual partners can become intimate friends. "But their oneness is and remains the oneness of friends to which unity sexual activity is not essential and is often a distraction. If sex is, in fact, essential to their friendship, the moral value of the friendship is called into question, for it brings into doubt the unconditional nature of their being for one another as friends." Hanigan, p. 100. Here we find the same diremption that we found in Grisez, but the next sentence explains why it does not apply to heterosexual marriage: "The unity of friends has features of unity and difference, but that difference is not sexual and so it is not in their sexual relationship that they manifest this unity and difference." *Ibid.* The specifically sexual difference of even the infertile married couple, it appears, gives their sexual union a

The impulse reflected by this reasoning is understandable, but it ultimately rests on bad theology as well as bad philosophy. The desire to see God's design in the world produces a characteristic vice, the temptation to suppress evidence that spoils the pattern we thought we saw (such as the testimony of others who do not see it, or who see a different pattern). This is reflected most strikingly in the trial of Galileo: his opponents insisted that, since their understanding of the divine plan was incompatible with Copernican astronomy, the old Ptolemaic system must be the correct one. Galileo's findings have now been assimilated by the religious, but even at this late date Darwin is still giving indigestion to some. The denial that homosexual conduct produces any good beyond the gratification of sexual appetite appears at least in part to have the same source: homosexuality seems to signify a disenchanted universe, in which, for all we can tell, there is no plan or purpose at all. This disenchantment is particularly troubling in matters sexual, which many people feel a special need to integrate into a religious narrative.

I promised earlier that I would explain why the elderly married couple in Bradley and George's hypothetical, who no longer experience pleasure in their acts of genital intercourse but remain physiologically capable of performing such acts, might have a reason occasionally to do so. If the good they achieve is not the same good that is achieved by the homosexual couple—for it seems clear that the homosexual couple has no reason to engage in any particular form of sexual intercourse (rather than pleasuring one another in other ways) when *they* are too old to enjoy doing so—then

value that the homosexual couple cannot attain. What is this value? "The unity ritualized and enacted in sexual behavior is a two-in-one flesh unity, a unity that has its created basis in the physical and biological complementarity of male and female. There are various ways human beings can imitate, or play at imaging this unity, but apart from the actual basis in reality of male and female sexual union, these ways are only pretense or imaginative simulations of the real thing." *Ibid.*, p. 102. Marital intercourse even between infertile heterosexual couples differs crucially from homosexual intercourse, it appears, in that the former is "a communion of complementary persons." Grisez, *The Way*, v. 2, p. 572.

The trouble with this move is that it slides right back into the scholastic natural law theory, repudiated by Grisez, which "moves by a logically illicit step—from human nature as a given reality, to what ought and ought not to be chosen." Grisez, *The Way*, v. 1, p. 105. Unless Aquinas's weakest arguments, those inferring divine command from natural teleology, are accepted, the biological complementarity of the sexes contains, in itself, no moral implications whatsoever. It is true that that complementarity means that heterosexual intercourse *typically* can realize a project, procreation, which homosexual intercourse cannot realize. But as soon as one extends one's approval to heterosexual intercourse that cannot be procreative, such as that of an infertile heterosexual couple, this distinction loses its salience. One can still insist, as Hanigan does, that only heterosexual marriage can serve as "a symbolic sign of Christ's unity with his Church," Hanigan, p. 96, but here one has left philosophy behind and is entirely in the realm of dogmatic theology. There is, of course, no way to disprove the claim that sexuality is a sacrament that symbolizes the wholeness of the created order, but there is no way to demonstrate this claim, either.

what intelligible good do they achieve?¹⁶⁴ The good they achieve is a religious one. Finnis explains the intrinsic good of religion thus: "[I]f there is a transcendent origin of the universal order-of-things and of human freedom and reason, then one's life and actions are in fundamental disorder if they are not brought, as best one can, into some sort of harmony with whatever can be known or surmised about that transcendent other and its lasting order."¹⁶⁵ The couple in the hypothetical might well surmise—many people *do* surmise—that the use of the genitals in heterosexual, marital intercourse is precisely the use that is intended by the good and loving Creator, and that action in accordance with the Creator's intentions has special value. When they engage in genital intercourse, they are instantiating, so far as it is in their power, the interpersonal organic unity that, even if it is not fully realized in *them*, is the object of God's creative design and is real and complete in the mind of God.¹⁶⁶ And if they believe this, then they have a reason to engage in intercourse, whether or not they experience physical pleasure in so doing. They, like any other religious community, are "cooperating in the devotion and service called for by what they believe to be the accessible truths about the ultimate source of meaning, value and other realities, and about the ways in which human beings can be in harmony with that ultimate source."¹⁶⁷ What neither

164. Both I and the new natural lawyers would set aside considerations that are parasitic on goods not actually realized in the sex acts. Such considerations would include, for example, the fact that a sex act may be reminiscent of past pleasures and thus evoke the accompanying emotions, or the fact that it is a point of pride for some people to achieve erection, penetration, and ejaculation.

165. *Natural Law and Natural Rights*, pp. 89-90.

166. Though Finnis is a theist, he would certainly deny that his theory is derived from any postulate about the will of God. Indeed, he has dismissed the grounding of ethical obligation in God's will as "a prize specimen among conceptual fallacies collected for exhibition in elementary philosophy books." *Ibid.*, p. 343. He would argue that claims about God's will are properly conclusions rather than premises of practical reasoning:

[T]hose who claim to know what God wills in some human context, and that that will should be obeyed, are . . . claiming . . . that God positively favours both the basic goods and human adherence to the principles and requirements of practical reasonableness in the pursuit of those goods; that the evils and disorders of this world are not favoured so, but are merely tolerated by God for the sake of some positive good (what, and how attained, we do not know); and that friendship with God, some sharing in God's life and knowledge and love-of-goods, is available to those who positively favour what God positively favours. In the context of such beliefs—and it is only in such a context that claims about the authoritativeness of God's will for man are plausibly made—the question 'Why should God's will be obeyed?' has no bite.

Ibid., pp. 404-405. If, however, a proposed line of practical reasoning turns out to be a failure, but the practical conclusion continues to be held by large numbers of people, then we are drawn to the hypothesis that reasoning is really proceeding *sub silentio* in the opposite direction, from premises about God's will to conclusions about the human good. This type of reasoning is common, and the fallacy Finnis dismisses is in fact widely held; that is why it is so often "collected for exhibition in elementary philosophy books."

167. Finnis, "Liberalism and Natural Law Theory," p. 693.

they nor anyone else has a good reason to do is to get laws enacted on the basis of such exceedingly contestible religious surmises.

It is, of course, a fallacy to think that a disenchanted view of nature is irreconcilable with belief in God. It is at least equally consistent with the Judeo-Christian tradition to consider it impious for one to presume knowledge of God's intentions in creating the universe: "Where wast thou when I laid the foundations of the earth? declare, if thou hast understanding."¹⁶⁸ The theories of Galileo and Darwin and the rejection of natural teleology are all compatible with religion. There is no reason in principle why one cannot believe in God without also believing that He is a kind of cosmic Kilroy, Who feels impelled to leave His initials carved on every tree.¹⁶⁹ On the other hand, these theories do place greater demands on religious faith than their predecessors. They demand that faith stand on its own bottom, rather than leaning on comforting hints drawn from observed phenomena. And this is, perhaps, why they are resisted so fiercely. Faith is hard.

The new natural lawyers are more sophisticated than their predecessors, but they, too, appear to fall into the trap of imputing divine intentions to natural phenomena. Moreover, judged by the standards implicit in their own work, their arguments about homosexuality are not only mistaken, but positively destructive. If they are in error, then the prevalence of this kind of error is itself an obstacle to the realization of self-evident goods, and harms innocent people. They may well be right that marriage is a noninstrumental good. They have not, however, shown that the good they are describing is necessarily heterosexual, or that it has any intrinsic relation to sexual acts of the procreative kind. And if they haven't been able to show this, it seems most unlikely that other, less philosophically sophisticated efforts can succeed. The argument that marriage is inherently heterosexual therefore offers no good reason for denying same-sex couples the right to marry.

168. Job 38:4, King James version.

169. Ronald Garett has accused Finnis of conflating religious and biological categories: The concept of "two in one flesh" differs, I think, from that of the functioning biological unit. Nature allows us so to function, or in its indifference prevents us. But grace enables us to be "two in one flesh," despite nature's cruelty or caprice. And grace enables us to be "husband and wife," in sacramental memory of God's redemptive action in history. The power of grace to join us in one flesh is not restricted by our chromosomes.

Garett, "Deposing Finnis," p. 647. The distinction insisted on by Garett opens up the possibility that the gay couple, as much as the sterile or elderly couple, reflect and participate in God's design. See David McCarthy Matzko, "Homosexuality and the Practices of Marriage," 13 *Modern Theology* 371 (1997). To say it once more, natural kinds don't always have the natural powers associated with their kinds, and the worth of things is distinct from both.

