Against the Old Sexual Morality of the New Natural Law

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I. INTRODUCTION

It is said that when he was on his death-bed, W. C. Fields was seen by his daughter reading the Bible. Dumbfounded, she asked whether he had experienced a last minute conversion. ‘No,’ he replied, ‘I’m just looking for loopholes.’

I hope that what follows is not the philosophical equivalent of looking for loopholes. I mean to take seriously the possibility that the new natural law’s radical critique of contemporary sexual attitudes and conduct might be true. Consider Germain Grisez’s challenge to the libertarianism which certainly characterizes an extreme form of liberalism that came to the fore in the 1960s:

The promoters of sexual liberation thought it would eliminate the pain of sexual frustration and make society as a whole more joyful. What has happened instead shows how wrong they were. The pain of sexual frustration is slight in comparison with the misery of abandoned women and unwanted children, of people lonely for lack of true marital intimacy, of those dying wretchedly from sexually transmitted disease. Moreover, unchastity’s destructive effects on so many families impact on the wider society, whose stability depends on families... Boys and girls coming to maturity without a solid foundation in a stable family are ill-prepared to assume adult social responsibilities.

I do not believe that this is true—I feel sure that it is not the whole truth—but it may well represent an important and neglected part of the truth. Such charges need to be taken seriously, both on their own terms and as part of the broader conservative critique of the cultural changes accelerated by the sexual revolution of the 1960s.

The argument of this chapter is that while we should reject the sexual teachings of the new natural law—ably represented by John Finnis’s important contribution to this volume—we also have something to learn from it. The natural lawyers are fundamentally right in their insistence that we must make value judgements in the realm of sexual morality.
They are also right, I believe, to insist on the continuing validity of important aspects of traditional morality, especially the value of married life. The new natural law goes badly wrong, however, in its very narrow view of the legitimate forms of sexual expression. In particular, I will argue, the new natural law's own moral stance, properly understood, provides grounds for affirming the good of sexual relationships between committed, loving homosexual partners, and for extending the institution of marriage to homosexuals.

I also mean this chapter to make a larger point about liberalism. Contrary to the suggestions of Michael Sandel and others, liberalism properly understood is not committed to a stance of neutrality on questions of the good life. There is no inconsistency between a robust commitment to liberalism (or perhaps I should say a commitment to a robust liberalism) and support for an institution such as marriage, which certainly expresses a judgement about better and worse lives. While liberal principles support a wide range of individual freedoms, they also allow space for political judgements to be made about better and worse ways of using our freedom. Public policies may encourage the better ways without coercing people or infringing on their basic rights.

The new natural lawyers correctly perceive that liberalism has less to do with neutrality than its critics allege. The natural lawyers are prepared to be judgemental, and liberal public policy can and should incorporate some of their judgements. Unfortunately, as we shall see in Parts III–V below, the natural law strictures about sexual morality are unreasonably narrow and arbitrary.

II. NATURAL LAW AND LIMITED GOVERNMENT

We can begin, however, by conceding that there are many ways in which natural law and limited government are compatible. Finnis points out in his contribution to this volume that natural lawyers have long affirmed the importance of such standard features of legally limited constitutional government as the rule of law and orderly rotation in office. Finnis also mentions the Second Vatican Council's momentous if somewhat belated embrace, in 1965, of a principled case for religious liberty, even for those with false beliefs. The Council allowed that the pursuit of religious truth is so 'inherently and inimitably a matter of personal assent and conscientious decision,' as Finnis puts it, that government intervention here both harms individuals and violates their dignity. In these ways, and no doubt in many others, natural law theory endorses certain garden variety limits on government power.

There are also resources for limiting government power more specific to
the natural law tradition: useful antidotes, for example, to civic republicanism and other doctrines that inflate the importance of political life. Natural lawyers emphasize the principle of subsidiarity, with its insistence that the state's function is instrumental with respect to those associations which directly promote basic human goods, such as the family, friendship, and religious communities. The state regulates and facilitates these associations but should not supplant them. For the new natural lawyers, the goods of politics are instrumental rather than basic.

Finnis also describes the ideal community, 'the good will's most fundamental orienting ideal,' as one that transcends politics: it is 'nothing less than . . . the fulfilment of all persons in all the basic human goods'. The ideal community is not the political community, as Aristotle supposed, but rather the 'heavenly kingdom . . . attainable only by virtue of divine revelation'. This too has the effect of putting politics in its place: as an affair about very important goods (peace, prosperity, freedom, order) but not about the whole good nor directly about the highest goods.

By emphasizing that politics is of essentially instrumental importance, and that the ideal community transcends what can be achieved in politics, natural law provides for a political moderation that may be lacking in theories sometimes more closely associated with liberal democracy. Totalistic democratic theories, such as that of John Dewey for example, posit political ends that embrace man's highest and most complete ideals, and encourage people to transfer all moral and religious aspirations onto the shared political project. Concentrating moral energies in this way seems to me not only politically dangerous but a disservice to the complexity of the moral life. Finnis, in contrast, limits political aspirations, and insists that room be left for extra-political associations in which to pursue important parts of the good life, for Finnis the most important parts.

The new natural law certainly has resources for limiting political power. Indeed, in some respects its limitations are excessively strict. Finnis levels harsh criticisms at Leo Strauss for allowing that governments may sometimes do intrinsically nasty things when the safety of the whole people is at stake. Strauss's sin is to have justified NATO's threat to use nuclear weapons against innocent civilians in order to deter aggression by Stalin's Soviet Union. Finnis argues, to the contrary, that the strategic deterrent (established around the time Strauss was writing *Natural Right and History*) was immoral.

Strauss was hardly eccentric in arguing that the normal rules of good conduct might justifiably be relaxed in extreme circumstances. Locke made similar allowances in his discussion of executive prerogative, and so have many other friends of limited government. That a reasonably just nation like the United States might feel compelled to threaten innocent civilians to ward off an unjust and potentially devastating attack is deeply
unfortunate. It is also, it seems to me, clearly justifiable in some circum-
stances. What is unclear is how to justify the absolute prohibition on
threats against the innocent that Finnis espouses.

The new natural law's absolutism depends on the 'incommensurability
thesis', which holds that basic goods are plural, and that it is always wrong
to choose against basic goods. That values are plural is common ground
among many contemporary moral philosophers, including Isaiah Berlin,
Thomas Nagel, and Bernard Williams. On this ground, one can agree
with the natural lawyers that utilitarians are wrong to posit a simple scale
according to which moral trade-offs can be made in hard cases. Value plu-
ralism does not, however, yield the new natural law's absolute prohibi-
tions on choosing against basic goods—such as innocent life—no matter
what other values hang in the balance. It is a terrible thing to be forced to
threaten innocent lives in order to preserve ourselves from unjust aggres-
sion, as Strauss conceded. Catastrophic consequences do matter, however,
and they can matter enough to justify the sort of threat involved in the
nuclear deterrent posed by the United States.10

It is hard to see how one vindicates absolute prohibitions against the
kinds of threats involved in the strategic deterrent, unless one believes in
a providential deity who is prepared to sort out the consequences for us in
the end.11 Absent such a faith, we should ourselves take the responsibility
for making hard trade-offs, even though we cannot fully specify, aside
from particular decisions and circumstances, exactly how we do so, even
though we cannot define precisely in advance when it is justifiable to
break the normal moral rules and limits. If rule-like procedures were
available to us in hard cases the moral world would be simpler than it is.
As things stand (and as Strauss suggested, following Aristotle) the ult-
mate contours of moral rightness 'reside in concrete decisions rather than
in general rules'.12 Neither utilitarian reductionism nor the absolutist
strictures of the new natural law are adequate to the complexity of the
moral realm.

There are, clearly, a number of reasons to think that contemporary nat-
ural law of the Finnis, Grisez, and George variety is not only compatible
with but supportive of various limitations on government power. This is
no great revelation. The important question is: how well does the new nat-
ural law view stack up against its rivals when it comes to justifying and
delimiting the proper role of government? Let us turn to the greatest point
of contention: the realm of personal privacy and sexual freedom.
III. SEXUAL MORALITY AND THE NEW NATURAL LAW

Finnis manages to blunt liberal objections to natural law teachings on sexuality by arguing that while 'public morality' is a legitimate political concern, this does not mean that government should promote virtue and punish vice 'as such'. Governments should maintain a 'social environment conducive to virtue,' not coercively deter evil-doing or legally mandate decent conduct. Governments should not, that is, be especially concerned to punish private vices through the criminal law. With respect to homosexuality, for example, the law should not criminally prosecute homosexual acts among consenting adults committed in secret, but it should supervise 'the public realm or environment,' within which young and old are morally educated and encouraged toward good or bad lives. It should do this by 'denying that "gay lifestyles" are a valid, humanly acceptable choice and form of life, and in doing whatever it properly can . . . to discourage such conduct.' Finnis suggests that the United States Supreme Court should have overturned the criminal prosecution of private homosexual acts in *Bowers v. Hardwick*, but only while distinguishing such permissibly private conduct from 'the advertising or marketing of homosexual services, the maintenance of places of resort for homosexual activity, or the promotion of homosexualist "lifestyles"'. The law should prohibit the public promotion and facilitation of homosexual activity, along with homosexual marriages and the 'adoption of children by homosexually active people'.

In all this, Finnis advocates for society at large a stance not unlike the 'don't ask, don't tell' policy recently adopted for the military in the United States. The aim is to maintain a public, morally educative environment hospitable to what is deemed good conduct, not to engage in zealous witch-hunts against those who keep their homosexuality private. While it is all to the good that neither Professor Finnis nor the Clinton Administration advocates witch-hunts against homosexuals, we must pause before celebrating the proposed policies.

Finnis argues that natural law, properly understood, shows that homosexual acts are a distraction from the good life properly understood, and so should be discouraged by public policy. Given the tenor of recent discussions of homosexuality in American politics, it is worth noting at the outset that Finnis goes out of his way to distinguish his position from the narrow prejudice and mere 'disgust' which characterize much popular opposition to equal rights for gays and lesbians. Most significantly, neither Finnis or Grisez suggests that homosexual acts are unique in being distractions from real human goods, or in justly being subject to legal discouragement. Indeed, these new natural lawyers strikingly treated gay
and lesbian sexual activity like most forms of heterosexual activity: just like all recreational sex, all sex outside of marriage, all contracepted sex and sex not open to the good of procreation, including all contracepted sex within a stable, permanent marriage.\textsuperscript{16}

The new natural law’s prohibitions on ‘recreational’ sexual activity are very broad, and are based on the contention that the only valuable sexual activity is activity that is open to procreation in heterosexual marriage. Openness to new life within stable, permanent marriage is what gives sex value and meaning: it is uniquely capable of making sex more than the mere use of bodies for pleasure.

The 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). Reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can actualize and allow them to experience their real common good—their marriage with two goods, parenthood and friendship\ldots\textsuperscript{17}

For Finnis, Grisez, and other new natural lawyers, all non-procreative, recreational sex amounts the mere instrumentalization of bodies for mutual use and pleasure, all are the moral equivalent of mutual masturbation: simultaneous individual gratifications with no shared good in common.\textsuperscript{18} This is as true of contracepted sex in marriage as it is of homosexual sodomy: all sex acts not open to procreation in marriage are incapable of participating in or expressing any shared goods such as friendship, and are not only valueless but distractions from real human goods.

Indeed, the case against recreational heterosexual sex may be even stronger than that against gay and lesbian sex. Uncontracepted heterosexual sex risks the great evil of bringing unwanted children into the world. Even when effectively contracepted, it is a choice against the great good of new life. Gay and lesbian sex does not share in either of these evils. Finnis and Grisez allow that people may be homosexual by nature, and so the goods of procreation and child rearing are not open to them.\textsuperscript{19} Homosexual conduct is not, then, a choice against the great integrating goods of heterosexual marriage (as are wrongful heterosexual acts) because these goods are not open to gays and lesbians.

The wrongfulness of gay sex is merely its ‘self-disintegrality’: the purported failure to act in a way that is consistent with a desire for the real goods that homosexual couples may share in common, goods such as friendship and mutual helping. Real goods can be embodied in homosexual as well as heterosexual friendships, but sex only distracts from them. When sex is chosen it is as a source of ‘subjective satisfactions’ through the use and instrumentalization of each other’s bodies.\textsuperscript{20}
The foregoing analysis (which we can accept for the moment in order to consider its implications) casts a very interesting light on contemporary popular attitudes toward sexuality. Natural law analysis reveals the gross and unreflective arbitrariness of public policies and proposals that, in the name of family values, fix their scornful attention on gays and lesbians. There is a crisis of the family in America, but what could be easier in the face of rampant heterosexual promiscuity, premarital sex, teenage pregnancy, and sky-rocketing divorce rates than to fasten our attention on a long despised class of people who bear no children?

One might reply that nowhere is promiscuity greater than in the gay male population. This could be true, though I have no empirical evidence to support this assertion and Finnis cites none. Richard Posner (who has studied a wide range of evidence) argues that there may be natural grounds for supposing that homosexual male couples will tend, on average, to have a harder time than heterosexual couples maintaining long-term relationships (though he does not, so far as I can see, compare homosexual and sterile childless heterosexual couples). Lesbian couples, on the other hand, are very stable. Supposing, as is possible, that lesbians have the lowest rates of infidelity, would we then be justified in establishing a three-tiered public moral pecking order with special honours for lesbian couples?

It would be hard to see how the mere fact (if it is one) that gay men have a harder time settling down in stable relationships could furnish a ground for discriminating against them. No doubt, there is promiscuity among gay men: too much, as elsewhere in society. Before we condemn these people we should consider how promiscuous men in general would be were their sexual desires not harnessed and controlled by their wives, children, and family life. If these inducements to stability were not available to heterosexual men—or imposed upon them as the case may be—how promiscuous would they be? So long as we refuse to extend to gay men the inducements to stability and self-control (such as marriage) available to heterosexuals, we should regard promiscuous gay men as victims of fate, circumstance, and public policy (at least in important part) rather than of any special moral depravity.

In any case, civilized societies have abandoned the notion of collective guilt. The fact is that not all homosexuals are promiscuous and not all promiscuous people are homosexual. If promiscuity is a social evil, let society oppose promiscuity wherever it appears. Indeed, if promiscuity is self-destructive and homosexual men are prone to it by nature, homosexuality might be regarded as a disability (albeit a fairly mild one). Rather than singling out people with this disability for special discrimination (something we do not normally regard as decent or proper) would it not be more honourable to try and improve these people’s lives as best we can?
The great merit of the new natural law's position is its fair-mindedness and broad sweep. If Finnis, Grisez and others criticize those who would seek to 'normalize' homosexuality and equalize our legal treatment of it (as I would), he poses an even greater challenge to the conventional wisdom that would single out homosexuality as peculiarly perverse and 'unnatural'. Finnis shows that on reflection such attitudes embody a double standard of permissiveness toward straights and censoriousness toward gays engaging in acts that are essentially the same. For Finnis, the wrongness of homosexuality is captured by its similarity with much heterosexual activity: all sexual activity which is not between married couples and open to procreation shares with homosexuality the essential characteristics of masturbation, the use of bodies for mere physical pleasure, the disengagement of sexuality from real, shared goods. Conceived sexual acts between happily married couples is essentially the same as homosexual sodomy.

An important implication of the foregoing account is that governments have just as much reason to act against all premarital and contraception heterosexual sex as they do against homosexuality. The new natural law speaks in favour only of very broadly based public actions against sexual immorality in general: divorce, contraception, and all sex outside of marriage, along with homosexuality. A government that rejects natural law teachings with respect to illicit heterosexual activity thereby jettisons the only natural law grounds for passing laws that discriminate against homosexual conduct. This is a great—and I would have thought insuperable—obstacle to any state that would rely on natural law as a ground for prohibiting homosexual conduct but not contraception, extra-marital sex, and so on.

Now, a possible rejoinder would be that simply because some justifiable moral strictures (against heterosexuals) have been relaxed, that is no reason to relax them all. But it is a reason when the strictures arbitrarily maintained are directed against a long despised minority. It is a reason when the majority is unwilling to impose on itself constraints that it imposes on a discrete and insular minority like homosexuals. It is a reason when a small minority is selectively saddled with restrictions that should apply with the same force to the majority.

The argument so far has entertained a hypothetical, namely, the plausibility of the new natural law's sexual teaching. Now we must turn to the core issue: are there good reasons to confine valuable sexual activity as narrowly as the natural lawyers would have it?

As we have seen, Finnis and Grisez argue that homosexual sex acts lack the 'unitive' quality of sex open to procreation in marriage. The choice of gays and lesbians 'to activate their reproductive organs' (and the same goes for heterosexuals using contraception or engaging in sodomy or
other deliberately non-procreative sex) 'cannot be an actualizing and 
experience of the marital good—as marital intercourse can, even 
between spouses who happen to be sterile—it can do no more than pro-
vide each partner with an individual gratification'. Homosexual sex not 
only foregoes opportunities to participate in real goods, it positively 
undermines the goods that homosexual friends may share in their non-
sexual relations: goodwill and affection can be expressed far more intelli-
gibly and effectively by acts such as conversation, or mutually beneficial 
help in work, domestic tasks, etc. Those who openly proclaim their active 
homosexuality must be seen, Finnis concludes, as 'deeply hostile to the 
self-understanding of those members of the community who are willing to 
commit themselves to real marriage'. Society should do what it can to 
discourage and stigmatize such conduct, short of criminalizing truly pri-
vate acts.

What are we to make of all this? It seems quite wrong to say that 
the essential nature of non-procreative sexual acts engaged in by couples in 
committed relationships—or even by people who have recently fallen in 
love—is necessarily as private, incommunicable, and subjective, as Finnis 
and Grisez maintain. The new natural lawyers exaggerate the purely sub-
jective, self-centred character of all non-procreative sexuality. And so, 
Finnis insists that 'whatever the generous hopes and dreams' of 'some 
same-sex partners,' their sexual 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 gives pleasures to a client 
in return for money, or (say) a man masturbates to give himself a fantasy of more 
human relationships after a gruelling day on the assembly line.

Finnis's contention is that homosexual acts at their best (between loving 
couples in committed relationships) can express and embody nothing 
more than anonymous bathhouse sex, a quick trip to a prostitute, or mas-
turbation. Is it even remotely plausible that there are no distinctions to be 
drawn here? And how can Finnis announce such confident and sweeping 
cclusions without any inquiry into the actual nature of homosexual rela-
tionships?

My guess is that most committed loving couples—whether gay or 
straight—are quite sensitive to the difference between loving sexual acts 
and mere mutual masturbation, and that they would regard the latter, 
with Finnis, as a real failure. Finnis is not all wrong: promiscuous, casual 
sex, engaged in with strangers may well have the valueless character he 
describes.

It is, however, simplistic and implausible to portray the essential nature 
of every form of non-procreative sexuality as no better than the least valu-
able form.
The great virtue of the new natural law’s position on sexuality, I said above, is its fair-mindedness and broad sweep. While this is generally true, the position is plagued by a major and unexplained inconsistency. As we have seen, an essential condition of good sex for the new natural lawyers is the biological unity of heterosexual couples whose acts are open to procreation. And yet, Finnis and Grisez argue that sexual union within a sterile marriage has intrinsic value: ‘marital union itself fulfills the spouses,’ as Grisez puts it. But as Andrew Koppelman asks, how can such a position be justified when the bodies of the elderly or sterile can form no ‘single reproductive principle’, no ‘real unity’? Sterile couples can only imitate the procreative act: there is for them no possibility of procreation. And yet, the new natural lawyers regard sex between involuntarily sterile or elderly married couples as not only permissible but good.

What is the point of sex in an infertile marriage? Not procreation: the partners know they are infertile. If they have sex, it is for pleasure and to express their love or friendship or some other shared good. It will be for precisely the same reasons that committed, loving gay couples have sex. Why are these good reasons for sterile or elderly married couples but not for gay and lesbian couples? And if, on the other hand, sex detracts from the real goods shared by homosexual couples, and indeed undermines their friendship, why is that not the case for infertile heterosexual couples as well? Why is not their experience of sexual intimacy as ‘private and incommunicable’ as that of gays?

How do we make sense of this rather glaring double standard? Perhaps because sterility is a condition beyond the control of couples rather than a choice? Because sterile heterosexual couples can do things that, were it not for conditions beyond their control, would result in procreation? But Grisez and Finnis allow that homosexuality is also an unchosen condition. So if the natural lawyers say that sterile heterosexual couples can have loving sex that is good, why not gays and lesbians in committed relations?

For the natural lawyers, the presence of the appropriate, complementary physical equipment is an essential condition of valuable sexual activity. The problem for homosexuals and those using contraceptives is that ‘their reproductive organs cannot make them a biological (and therefore personal) unit,’ whereas sterile heterosexuals who ‘unite their sexual organs in an act of sexual intercourse which, so far as they can make it, is of a kind suitable for generation, do function as a biological (and thus personal) unit,’ and thus actualize and experience real goods in common.

Of course, gays and lesbians do not have the physical equipment such that anyone could have children by doing what they can do in bed. They can, Finnis and Grisez repeatedly tell us, only imitate or fantasize the real procreative acts, and the real goods of marital sex. What the new natural lawyers fail to see is that exactly the same thing is true, albeit less vividly,
of sterile married couples: their reproductive organs do not unite them biologically, they only appear to do so. Finnis simply denies this: sterile heterosexuals can be united biologically, he insists, because their equipment allows them ‘to engage in the behaviour which, as behaviour, is suitable for generation’.

Is sterile heterosexual intercourse ‘as behaviour’ suitable for generation? Pointing a gun at someone and pulling the trigger is behaviour that is suitable for murder. Are such acts still suitable for murder, and do they share murder’s moral significance, if the gun is unloaded? If it is a water gun or a gun made of licorice? The National Rifle Association might have said, ‘guns don’t kill people, bullets kill people’. Likewise, penises and vaginas don’t unite biologically, sperm and eggs do (at least in a healthy uterus and under the right conditions). For the new natural lawyers, however, the crucial thing is penises and vaginas—whether they work or not!

Suppose one gay male has a sex-change operation (has his penis removed and a vagina installed). Is he then permitted on natural law grounds to have sex with another man? Or—leave aside the sex change operation—suppose a gay male eschews oral or anal sex in favour of intercrural sex (inserting the penis between the thighs of the partner) does this resemble sterile heterosexual behaviour closely enough to have ‘procreative significance’?

Is not all this a bit silly? Sex between sterile couples can in truth have no more ‘procreative significance’ than gay or lesbian sex. Sterile heterosexual sex has only the appearance but not the reality of biological unity. Finnis makes everything of the fact that heterosexual intercourse is in general the sort of behaviour appropriate to procreation. But such behaviour is not suitable for procreation in many cases and in some cases (the very old) it may bear less resemblance than gay sex to behaviour ‘suitable for generation’.

Many classes of people cannot experience the good of procreation. All of these can only imitate ‘procreative’ relations as best they can (if imitating procreation is still a moral imperative for them, which is certainly questionable). It seems simply arbitrary to ascribe such overwhelming moral significance to brute facts of biology, especially when those brute facts represent appearances (of biological unity) rather than reality. Is this really the ground upon which to erect so crucial a moral distinction?

All this reveals a strange feature of the new natural law’s version of teleological ethics, namely, its overbreadth. The new natural law asserts the universal validity of ends that are in general good for the species, even when those ends make no sense as applied to particular individuals. Consider the analogy between sex and eating. We eat and have sex to sustain and reproduce human life, but also because both activities are also pleasurable in themselves, and especially when shared with others: social
dining cements friendships, expresses affection, and so on. But suppose eating and nourishment are severed? Is eating for the same of mere pleasure unnatural or irrational? Koppelman suggests that chewing sugarless gum is to eating as masturbation is to sex. Is it immoral? Or as Andy Sabl has suggested to me, suppose a person lost his capacity to digest but not the capacity to eat. Nutrition could be delivered intravenously, but would it then be immoral to eat for the sake of pleasure, or perhaps for the sake of pleasure as well as the comradery of dining companions? Would it be incumbent on one in such a state to eat only a healthy, balanced diet, or would it be permissible to binge on chocolate to one’s heart’s content? Would it be necessary (as Sabl asks) ‘to go on eating beets and tofu because this would be the kind of eating which, “as eating,” is suitable for a human being’ though useless to the digestively-impaired individual? A moral injunction of ‘healthy’ eating, in this case, would appear to make no sense, though it might provide psychological comfort.

Moral judgement on the new natural law view is a blunt instrument, inattentive to the good of those who differ from the majority of the species. Why should we be required to generalize—or over-generalize—our ethical judgements in this way?\textsuperscript{33} In the political realm, of course, we have practical reasons—not a function of the pursuit of justice or rightness—to govern by general rules. We want to put people on notice as to what they must do to avoid running afoul of the law, and we simply lack the resources to decide each case on its individual merits. But why should our ethical judgements labour under such constraints?

The new natural law’s moral injunctions are, in some respects too broad. The new natural law’s account of valuable sexual activity is, in other ways, too narrow. The decisive feature of valuable sex on the natural lawyers’ account is its openness to procreation and the great good of new life. Even accepting this questionable claim for the moment, we might say that gays and lesbians can, in effect, share the same openness to real goods beyond mere physical pleasure. 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 kinds of loving relations that would result in procreation—were conditions different. Like sterile married couples, many would like nothing more than this. All 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 does not make moral judgements based on natural facts. It is hard to see how this double standard can be reconciled within the new natural law framework.

For Finnis and Grisez everything turns on ‘biological unity’ and the ‘organic complementarity’ of men and women. Sodomy is an incomplete realization of the ‘body’s capacity’. All of this sounds perilously close to
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by deriving an ‘ought’ from an ‘is’, or at least from certain selective ‘is’s’: from the ‘organic complementarity’ of (some) heterosexuals, from the observation (reminiscent of the old natural law) that the male member and the female opening were obviously made for each other. Meanwhile, other ‘natural facts’ are simply left aside, such as the mutual attraction of homosexuals (why is homosexual activity an incomplete realization of the ‘body’s capacity’ for one who is homosexual by nature, especially when compared with the celibacy the new natural lawyers would enjoin on homosexuals). If this is the real ground for the different treatment of infertile heterosexuals and homosexuals, then the much vaunted advances of the new natural law are a mirage.

Finnis ridicules the argument mentioned above (and made previously elsewhere), namely, that gays and lesbians can have sex that is, in a sense, open to procreation. ‘Here,’ Finnis charges, ‘fantasy has taken leave of reality. Anal or oral intercourse, whether between spouses or 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.’ This is very clever but misses the point. 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. Surely, the crucial thing about the loving sexual acts of sterile couples is not their openness to the sheer fantasy that their sexual acts are procreative, the crucial thing must be that their sex is open to goods such as friendship, mutual care, and so on. Surely, that is, their sterile union is valuable not because of goods that are absolutely unavailability to them and that they cannot share (procreation) but rather because of goods that they can attain and share (friendship, mutual help, etc.). Finnis’s argument leads, absurdly, to the opposite conclusion.

The most that can be said for sterile heterosexual couples is that they can have loving sex in a way that is open to goods beyond mere physical gratification. All of the goods that can be shared by sterile heterosexuals can also be shared by committed homosexual couples. Homosexuals do not choose against the good of procreation any more than do the elderly or sterile. Finnis fails, therefore, to damage the conclusion that homosexuals can—every bit as much as sterile heterosexual couples—have sex that is open to goods beyond mere self-gratification.

The new natural law’s sexual morality is caught in a bind of its own making. It does not want to describe the goods of sex purely in terms of procreation. It holds that sex is good within marriage (itself now considered a basic good), when sexual acts are open to new life: the good of new life must not be chosen against. So the circle of valuable sexuality is widened beyond the narrowly procreative, to bring in sterile and elderly couples. But how then can the circle exclude committed gay couples as
well? The basis of the distinction drawn by new natural lawyers is the presence of a penis and vagina. But sterile non-working sexual organs that give only the appearance of biological unity cannot bear the weight of this important moral distinction. Finnis and Grisez mislocate the proper ground for drawing a distinction of moral goodness. The appropriate ground is the degree of mutual commitment and stable engagement in shared goods beyond the mere physical pleasures of sex.

The real point of a natural law prepared to endorse sex as a good in sterile unions must be that sex is a good so long as it is bound up in enduring intimacies, love, and shared commitments. Finnis and Grisez have broken the link between procreation and permissible sexual activity. That done, it is hard to fathom their continued insistence on the overwhelming moral significance of a biological complementarity that is necessary for procreation but that is not necessary for the other goods that sterile couples (and homosexuals) can share. It is absurd to allocate these valuable properties on the basis of irrelevant biological facts (non-working complementary organs). The attempt to ascribe value only to heterosexual couples fails.

The inconsistencies of the new natural law should not be allowed to obscure the valuable insight that sexual pleasure just for the sake of sexual pleasure—brute gratification—may well tend toward the masturbatory, and may well tend to undermine the reciprocity necessary to loving relations. We may well, therefore, have good reason to encourage people to integrate their sexual activities into stable commitments to monogamous relationships. All this is as true for homosexuals as it is for heterosexuals.

Finnis himself signals the failure of his argument by falling back on unsupported empirical generalizations about homosexual relationships. Homosexual acts are likened, as we have seen, to ‘solitary masturbation’, to sex between strangers, and to a quick trick with a prostitute.36 No one remotely familiar with the variety of homosexual lives could engage in such gross generalizations, reminiscent of nothing so much as radical feminist Catherine Mackinnon’s equation of all heterosexual sex with rape and violence against women.37 Simplistic as they are, Finnis’s generalizations are revealing. Given the implausibility of the insistence that biological complementarity is all important, Finnis must count on it being the case that homosexual relationships embody no real goods: none of the goods that might be shared by sterile heterosexuals. These sweeping generalizations are the only ground left to Finnis as a basis for condemning homosexual conduct as such. Homosexual conduct must be nothing more than solitary masturbation or sex with a prostitute, or else the new natural lawyers’ wholesale condemnations make no sense. Heterosexual activity must be uniquely capable of expressing shared goods; otherwise, the radically different treatment of sterile heterosexuals and homosexuals hangs
on nothing more than the all too obviously flawed biological complementarity argument.

Finnis provides no evidence whatsoever to support his account of the nature of homosexual intimacy: no reports or investigations into how homosexuals experience their sexual relations. Instead of evidence Finnis provides only offhanded references to 'the modern "gay" ideology', an ideology that 'treats sexual capacities, organs, and acts as instruments to be put to whatever suits the purposes of the individual "self" who has them'.38 Here again, Finnis signals his argument's dependence on unexamined stereotype and over-generalization. Millions of homosexual lives and relationships are taken to be epitomized by a promiscuous, liberationist 'gay lifestyle', which rejects all sexual restraints and value judgements.39 In the end, Finnis's argument boils down to nothing more than this stereotype, for it is the only ground that really could support his sweeping moral condemnations, rendered without regard for the complexity, ambiguity, or diversity of actual lives.

If the crude stereotype is not true then the new natural law's sexual teaching falls apart. Promiscuity is the core of the stereotype, so one might have thought that Finnis would at least say something about the apparently substantial differences in behaviour between gay males and lesbians. Richard Posner cites evidence showing that lesbians have quite stable relationships and have intercourse less frequently than heterosexual couples.40 Even if one were to conclude—and this is certainly a point of scholarly controversy—that men tend by nature to be more promiscuous than women and that gay men will tend to have a more difficult time than heterosexuals settling down in stable relationships, we would still have to let lesbians off the hook.

Of course, as I have already said, a tendency toward promiscuity would hardly justify lumping all gay men and all homosexual conduct into one category, defined by the least admirable homosexual behaviour. Gay sex may tend toward the masturbatory and promiscuous somewhat more than heterosexual relationships (which may tend that way more than lesbian relationships). But what would we conclude from this? That homosexuality as such is to be condemned? Men tend to be more violent than women, but this does not justify the condemnation of men in general. It would be wrong to regard the essence of 'maleness' (or indeed, heterosexuality) as captured by its worst forms (domestic violence and rape). It is no better to characterize homosexuality in this way. We expect reasonable public policy not to condemn men as a class but to address the issue of domestic violence as such. With respect to sexuality we should, similarly, think seriously about working to curb promiscuity, whether gay or straight, and about how to elevate and stabilize sexual relationships in general. Relying on the stereotype of gay promiscuity is not only
unjust to non-promiscuous gays but a serious impediment to sound policy.

The inconsistent treatment of sterile heterosexuals and homosexuals is the thread that unravels the new natural law’s sexual teaching. The garment might be repaired, and the new natural law’s position made consistent, either through exclusion or inclusion. The exclusive strategy would extend the category of valueless sexual activity to cover sex between elderly and sterile couples. The natural lawyers could save their proscriptions against homosexuality in this way by arguing that, like gays and lesbians, elderly couples can enjoy mutual helping and friendship, but sex adds nothing to these goods, indeed it distracts from and destroys them. Sex between elderly and infertile couples would no longer be morally permissible, and they would be denied the right to marry. It is surely the case that the vast majority of elderly couples marry, after all, with the expectation that they will not bear children: indeed, if they thought they might some would not get married. If the natural lawyers want to remain steadfast in their attitude toward gays, then public policy should deter fornication by the elderly, deny them the right to marry, prohibit the ‘promotion, commendation, or facilitation’ of sex among the elderly (though not, as with gays, criminalizing sexual acts committed by the elderly in secret), and otherwise drive elderly and sterile fornicators into the closet and underground, along with gays and lesbians. This path to consistency is not completely without precedent.41

There is, luckily, an alternative path to reasoned consistency, and that is to broaden the scope of legitimate sexuality to include committed gay couples. Given the implausibility of the new natural law’s narrow analysis of the valuable forms of sexuality, the path of inclusion is surely to be preferred. As we have seen, the new natural lawyers have furnished no grounds for supposing that the goods shared by infertile and elderly couples cannot be shared by gays in committed relationships. They provide no reasonable grounds for regarding loving sex within committed relationships as morally equivalent to the most casual and promiscuous sex among strangers. The path of inclusion would acknowledge all this, and allow that even if being gay will be regarded by some (not completely without reason) as a kind of disability, it is no more so than infertility or age. Sexual activity within committed and loving relationships can, then, be endorsed as a genuine good for all.

The new natural law’s position on sexual morality falls on two counts. It falls first because of its extremely narrow account of valuable sexuality (so deeply at odds with the judgements of virtually everyone outside the Catholic hierarchy): an account that is unreasonably reductionist and puritanical. Secondly, the new natural law fails to offer any rational ground for treating sex within sterile heterosexual marriages differently from sex
within committed homosexual relationships. While broad and fair-minded in many respects, the new natural law’s sexual teaching founders on an arbitrariness tailored to the interests of the heterosexual majority.

To reject Finnis’s unreasonably narrow and (in part) arbitrarily defined strictures on sexuality does not require that one embrace a completely ‘non-judgemental’ attitude with respect to sexuality. There are reasonable elements within the natural law tradition that constitute good grounds for public measures to elevate and improve people’s sexual lives, both for their own good and the good of society.

While rejecting Finnis’s narrow prescriptions, we can still acknowledge that sexual desire can be a problem. There is something to the observation of Plato, Aristotle, and others that the relative intensity of the ‘animal pleasures’ means that most people will tend toward overdoing rather than undergoing not only sex but food, at least absent efforts at self-control and a well-developed character. Self-control and character development—crucial to a healthy and happy life—benefit greatly from social support, such as the inducements to stability that flow from the institution of marriage.42

Extending marriage to gays and lesbians is a way of allowing that the natural lawyers are not all wrong: promiscuous sex may well have the essentially masturbatory and distracting and valueless character that Finnis describes. We have legitimate public reasons to favour certain institutions that help order, stabilize and elevate sexual relations. But we should offer these inducements even-handedly to all whose real good can thereby be advanced: we offer them to the elderly and the sterile, to gays and lesbians, and not only to fertile heterosexuals. We provide everyone with help to stabilize and elevate their sexual relationships, and so to achieve the benefits that natural lawyers rightly claim for marriage. This allows us to accept and deploy a reasoned and defensible version of natural law.

IV. CONCLUSION: LIBERALISM, THE GOOD LIFE, AND ABORTION

We should reject the new natural law’s narrow sexual teaching, but not its deeper conviction that we can make judgements about the good life, and that such judgements have a legitimate role to play in the public policy of the liberal state. Respect for individual choice and freedom is one central imperative of liberal politics, but it is far from exhausting the legitimate public policy aims of a liberal state. I have endorsed, for example, attaching benefits to the status of marriage on the ground that we have good reasons for encouraging people to settle down in long-term relationships. The vice of the new natural law’s sexual teaching is not the wholesale
illegitimacy of embodying reasonable, secular judgements about better and worse lives in public policy; it is, rather, the clear weakness of the substantive case with respect to sexual morality.

The best way of thinking about political power in a democratic constitutionalist regime such as ours is as the shared property of reasonable citizens, who should be able to offer one another reasons that can publicly be seen to be good to justify the use of that power.43 Many natural law arguments (including those discussed above) are indeed acceptably public, as Finnis asserts: the reasons and evidence on which they are based are not overly complex or vague, and they can be shared openly with fellow citizens. The vice of the new natural law position described above is not its vagueness, complexity, or lack of public accessibility but, as we saw, its unreasonable narrowness and arbitrary extension. The new natural lawyers are right, therefore, to deny that liberalism is best identified with that straw man who is the principal exhibit and easy target of so many critics of liberalism, namely, neutralist liberalism.44

Rawls is nevertheless right, I think, to insist that we should avoid invoking reasonably contestable comprehensive moral and religious claims when fashioning the most basic principles that will inform the constitutional framework. This does not mean that Rawls—or liberalism properly understood—is similarly committed to excluding all such claims from politics as a whole. Though some of his critics have missed the point, Rawls develops his account of public reason as an appropriate basis for what he calls the ‘basic structure’ of society, not for politics as a whole.45

Even with respect to the ‘basic structure’ or the constitutional essentials, it would be a mistake to describe Rawls as committed to working without reference to human goods: he insists only that the conceptions of the good on which we rely when fashioning basic principles of justice should be widely acceptable to reasonable people. The constraints of wide acceptability may be, moreover, at lest somewhat relaxed with respect to mere policy questions that do not touch on fundamental rights and interests (just how much they are relaxed and in what way we need not consider here). Museums can be subsidized, the arts can be funded, marriage can be given a special status, and churches can be granted tax exemptions, even though all of these policies rest on judgements about human goods that are subject to reasonable disagreement. Marriage, museums, and many other policy issues, are not matters of basic justice. The sorts of arguments adduced in this chapter are (I believe) perfectly legitimate grounds for publicly supporting marriage within a liberal order: no one’s fundamental liberties are at stake and the goods appealed to (such as the value of an institution that encourages stable intimate relationships), while perhaps contestable, do not depend on a particular, highly sectarian religious view or secular ideal of human perfection.
Sexual Morality and the New Natural Law

If public support for marriage is permissible in the liberal state, that support is also subject to principled constraints. The basic liberties of those who choose not to marry, for example, must not be infringed upon, and the opportunity to marry must be made fairly available to all who can benefit. Public officials including judges should, moreover, take special measures to insure that the good of marriage and other public goods are not unfairly denied to some groups who we know are often victims of long-standing prejudice and discrimination.

Public provision of a good, such as marriage, while within the realm of legislative discretion may not be provided on discriminatory grounds. On this score, unfortunately, public policy in the United States stands accused of injustice. It would not be a basic injustice if marriage were altogether abolished (though I believe that would be a bad thing), but it is a basic injustice (and one worthy of judicial remedy) that gays and lesbians are being denied the good of marriage on grounds of prejudice abetted by weak philosophical arguments.

A closing word about abortion, by way of place-holder, perhaps, for a more adequate discussion. Finnis takes issue with my argument that a principled case for compromise may exist on some issues, such as abortion, which are difficult precisely because one finds powerful moral considerations on both sides. On such issues, I have suggested, it might be hasty to join Ronald Dworkin in concluding that the side with the strongest case has the right to win. On a matter such as abortion, this conclusion would be simplistic: when there really are weighty arguments and reasons on both sides and not simply reasons that are strongly held) winning properly might require the law to acknowledge and express the fact that the ‘losing’ side was far from being all wrong.

On this basis, I have endorsed and continue to endorse attempts to fashion something like the sort of compromise that the Supreme Court allowed to stand in Pennsylvania. One can argue about the propriety of state-mandated waiting periods or doctors’ consultations for women who want abortions. Nevertheless, it seems to me that the law-makers ought to do something to express the fact that opponents of abortion have weighty and serious moral concerns on their side. Doing so expresses the virtue—too often neglected in this morally-charged area of our politics—of moderation and the good of comity.

Finnis is simply all too ready to characterize the arguments of his opponents in the abortion debate (the pro-choice side) as ‘manifestations of prejudice’. In this he is the mirror image of zealots on the pro-choice side who believe that concern for the human foetus in its early stages must reflect religious conviction or a lack of concern for women’s freedom and equality. Zealots on both sides of the abortion debate view this area of moral world as too simple and stark. I admire Finnis’s unflinching pursuit
of the moral truth, and his transparent desire to get these difficult matters right. The sweep of his moral judgements, here as elsewhere, seem to me inadequate to the complexity of the moral world.

NOTES

1 My thanks to Andy Koppelman and Andy Sabl for their generous comments on earlier drafts.
4 Ibid., pp. 5–6.
5 Ibid., p. 7.
6 For an uncharacteristically lucid statement of his position, see Dewey, A Common Faith (New Haven, Conn., Yale U.P., 1934).
7 Ch. 1, p.3.
10 At least so long as we faced an expansionist power such as the old Soviet Union, rightly characterized by President Reagan as an ‘evil empire’.
12 Strauss, Natural Right and History (University of Chicago, 1953), p. 159, Strauss’s critique of Thomism seems to me cogent, esp., pp. 162–3.
13 Ch. 1, p. 6.
14 Ibid., p. 17, see also pp. 8–9.
15 Ibid., p. 9.
17 Ch. 1, p. 15.
18 Ibid., pp. 13–16, for Grisez’s elaborate account see Living a Christian Life, pp. 553–752.
19 Ch. 1, p. 12, Grisez, Christian Life, p. 653.
20 Grisez, pp. 653–4.
22 Ch. 1, p. 15.
23 Ibid., p. 16.
24 Ibid., p. 15.
26 I have benefited from his development of this analogy in ‘Homosexuality, Nature, and Morality’, unpublished, and from his important work, The Antidiscrimination Project (Yale U.P., 1996).
28 Ch. 1, pp. 15 and 16.
29 Ibid., n. 76.
30 I heard a stand-up comedian say this, but I cannot remember who. The analogy of sterility to unloaded guns is Koppelman’s, ‘Homosexuality’.
31 As in Finnis’s insistence that good sex must have not only the ‘generosity of acts of friendship but also the procreative significance,’ Ch. 1, p. 15.
32 I am greatly indebted in this paragraph to a private communication from Sabl, 13 June 1994. See also Koppelman’s ‘Homosexuality’.
35 Ch. 1, n. 76, p. 25.
36 Ch. 1, pp. 14–15.
38 Ch. 1, pp. 14 and 16–7.
39 Ibid., pp. 16–17.
40 Posner, Sex and Reason, pp. 91–2.
41 Fustel de Coulangé notes (as Sabl pointed out to me) that in some ancient cities it may have been obligatory for a man to divorce a wife who proved to be sterile, see The Ancient City (Johns Hopkins U.P., Baltimore, 1980). Philo of Alexandria condemned sex with an infertile partner (as Koppelman pointed out to me), likening it to copulation with a pig, see John Boswell, Homosexuality, Christianity, and Social Tolerance (University of Chicago Press, 1980), p. 148.
45 Rawls, Political Liberalism, p. 11. Sandel makes this mistake in his contribution to this volume.
46 Liberal Virtues, pp. 72–3.
47 See Ronald Dworkin, Taking Rights Seriously (Harvard U.P., 1977), and my discussion in Liberal Virtues, pp. 72–3, 84–95, and passim.
49 Ch. 1, p. 18.