

## Law, Morality, and "Sexual Orientation"

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### I

During the past thirty years there has emerged a standard form of legal regulation of sexual conduct. This "standard modern position" has two limbs. On the one hand, the state is not authorised to, and does not, make it a punishable offence for adult consenting persons to engage, in private, in immoral sexual acts (for example, homosexual acts). On the other hand, states do have the authority to discourage, say, homosexual conduct and "orientation" (i.e. overtly manifested active willingness to engage in homosexual conduct). And typically, though not universally, they do so. That is to say, they maintain various criminal and administrative laws and policies which have as part of their purpose the discouraging of such conduct. Many of these laws, regulations, and policies discriminate (i.e. distinguish) between heterosexual and homosexual conduct adversely to the latter.

The concern of the standard modern position itself is not with inclinations but entirely with certain decisions to express or manifest deliberate promotion of, or readiness to engage in, homosexual activity/conduct, including promotion of forms of life (e.g. purportedly marital cohabitation) which both encourage such activity and present it as a valid or acceptable alternative to the committed heterosexual union which the state recognises as marriage. Subject only to the written or unwritten constitutional requirement of freedom of discussion of ideas, the state laws and state policies which I have outlined are intended to discourage decisions which are thus deliberately oriented towards homosexual conduct and are manifested in public ways.

The standard modern position considers that the state's proper responsibility for upholding true worth (morality) is a responsibility subsidiary (auxiliary) to the primary responsibility of parents and non-political voluntary associations. This conception of the proper role of government has been taken to exclude the state from assuming a directly parental disciplinary role in relation to consenting adults. That role was one

which political theory and practice formerly ascribed to the state on the assumption that the role followed by logical necessity from the truth that the state should encourage true worth and discourage immorality. That assumption is now judged to be mistaken (a judgment for which I have argued in various places).

So the modern theory and practice draws a distinction not drawn in the former legal arrangements, a distinction between (a) supervising the truly private conduct of adults and (b) supervising the public realm or environment. The importance of the latter includes the following considerations: (i) this is the environment or public realm in which young people (of whatever sexual inclination) are educated; (ii) it is the context in which and by which everyone with responsibility for the wellbeing of young people is helped or hindered in assisting them to avoid bad forms of life; (iii) it is the milieu in which and by which all citizens are encouraged and helped, or discouraged and undermined, in their own resistance to being lured by temptation into falling away from their own aspirations to be people of integrated good character, and to be autonomous, self-controlled rather than slaves to impulse and sensual gratification.

Type (a) supervision of truly private adult consensual conduct is now considered to be outside the state's normally proper role (with exceptions such as sado-masochistic bodily damage, and apparent but not real exceptions such as assisting in suicide). But type (b) supervision of the moral-cultural-educational environment is maintained as a very important part of the state's justification for claiming legitimately the loyalty of its decent citizens.

The standard modern position is part of a politico-legal order which systematically outlaws many forms of discrimination. Thus the European Convention on Human Rights (model for many national adopted over the past thirty-five years) provides that the protection of the rights it sets out is to be enjoyed without discrimination on any ground such as "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

But the standard modern position deliberately rejects proposals to include in such lists the item "sexual orientation". For the phrase "sexual orientation" is radically

equivocal. Particularly as used by promoters of "gay rights", it ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) a psychological or psychosomatic disposition inwardly orienting one towards homosexual activity; (II) the deliberate decision so to orient one's public behavior as to express or manifest one's active interest in and endorsement of homosexual conduct and/or forms of life which presumptively involve such conduct.

Indeed, laws or proposed laws outlawing "discrimination based on sexual orientation" are always interpreted by "gay rights" movements as going far beyond discrimination based merely on (i) A's belief that B is sexually attracted to persons of the same sex. Such movements interpret the phrase as extending full legal protection to (ii) public activities intended specifically to promote, procure and facilitate homosexual conduct.

So, while the standard position accepts that discrimination on the basis of type I dispositions is unjust, it judges that there are compelling reasons both to deny that such injustice would be appropriately remedied by laws against "discrimination based on sexual orientation", and to hold that such a "remedy" would work significant discrimination and injustice against (and would indeed damage) families, associations and institutions which have organised themselves to live out and transmit ideals of family life that include a high conception of the worth of truly conjugal sexual intercourse.

## II

The standard modern position involves a number of explicit or implicit judgments about the proper role of law and the compelling interests of political communities, and about the evil of homosexual conduct. Can these be defended by reflective, critical, publicly intelligible and rational arguments? I believe they can. The judgment that it is morally wrong need not be a manifestation either of mere hostility to a hated minority, or of purely religious, theological, and sectarian belief.

I have been using and shall continue to use the terms "homosexual activity", "homosexual acts" and "homosexual conduct" synonymously, to refer to bodily acts, on the body of a person of the same sex, which are engaged in with a view to securing

orgasmic sexual satisfaction for one or more of the parties.

Let me begin by noticing a too little noticed fact. All three of the greatest Greek philosophers, Socrates, Plato and Aristotle, regarded homosexual conduct as intrinsically shameful, immoral, and indeed depraved or depraving. That is to say, all three rejected the linchpin of modern "gay" ideology and lifestyle.

Socrates is portrayed by Plato (and by Xenophon) as having strong homosexual (as well as heterosexual) inclinations or interest, and as promoting an ideal of homosexual romance between men and youths, but at the same time as utterly rejecting homosexual conduct. This is made clear in Sir Kenneth Dover's book Greek Homosexuality<sup>1</sup>; in Dover's summarising words: "Xenophon's Socrates lacks the sensibility and urbanity of the Platonic Socrates, but there is no doubt that both of them condemn homosexual copulation."<sup>2</sup> It is also made clear by Gregory Vlastos in his last book, precisely on Socrates: In Socratic erôs involving relationships of affection between men and boys or youths, intimacy is limited to mind- and eye-contact and "terminal gratification" is forbidden<sup>3</sup> (and a fortiori in relationships between adult males, since virtually all Athenians regarded sex acts between adult males as intrinsically shameful)<sup>4</sup>. Vlastos thus makes it clear that Socrates forbids precisely what I have been calling homosexual conduct.

What, then, about Plato? Well, the same Plato who in his Symposium wrote a famous celebration of romantic and spiritual man-boy erotic relationships, made very clear that all forms of sexual conduct outside heterosexual marriage are shameful, wrongful and harmful. This is particularly evident from his treatment of the matter in his last work, the Laws, but is also sufficiently clear in the Republic and the Phaedrus, and even in the Symposium itself. This is affirmed unequivocally both by Dover and by Vlastos, neither of whom favours these views of Plato. According to Vlastos, for

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<sup>1</sup>Harvard University Press, 1978, pp. 154-159. See also the letter from Sir Kenneth Dover to John Finnis, dated 23 January 1994, in Finnis, 'Law, Morality, and "Sexual Orientation"' Notre Dame Law Review 69 (1994) 1049 at 1057, 1059.

<sup>2</sup>Ibid., p.159.

<sup>3</sup>*Socrates, Ironist and Moral Philosopher* (Cornell U.P., 1991), 38-39.

<sup>4</sup>Clifford Hindley and David Cohen, "Debate: Law, Society and Homosexuality in Classical Athens", *Past & Present* 133 (1991) 167 at 179-80, 188 n.14.

example, Plato--

saw anal intercourse as 'contrary to nature,' [footnote: Ph[ae]dr[us] 251A1, L[aws] 636-7] a degradation not only of man's humanity, but even of his animality..."<sup>5</sup>

It is for Plato, Vlastos adds, a type of act far more serious than any mere going "contrary to the rules".<sup>6</sup>

As for Aristotle, there is widespread scholarly agreement that he rejected homosexual conduct. In fact, such conduct is frequently represented by Aristotle (in some cases directly and in other cases by a lecturer's hint) as intrinsically perverse, shameful and harmful both to the individuals involved and to society itself.<sup>7</sup>

Although the ideology of homosexual love (with its accompanying devaluation of women) continued to have philosophical defenders down to the end of classical Greek civilisation, there equally continued to be influential philosophical writers, wholly untouched by Judeo-Christian tradition, who taught that homosexual conduct is not only intrinsically shameful but also inconsistent with a proper recognition of the equality of women with men in intrinsic worth. (The ancients did not fail to note that Socrates' homoerotic orientation, for all its admirable chastity -- abstention from homosexual conduct -- went along with a neglect to treat his wife as an equal.) A good example of such late classical writing is Plutarch's Erotikos (Dialogue on Love) 751 C-D,

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<sup>5</sup>In the footnote, Vlastos complains that by *para physin*, "contrary to nature", Plato here and in 836B-C meant something "far stronger" than the phrase "against the rules", which Dover had used in a 1966 article on *eros* and *nomos*. Sometime before the revised edition, Vlastos and Dover corresponded about this complaint, and Vlastos records a letter from Dover:

What [Plato] did believe was that the act was "unnatural", in the sense "against the rules"; it was a morally ignorant exploitation of pleasure beyond what was "granted" (*kata physin apodedosthai*, [Lg] 636C4), the product of an *akrateia* ([636]C6 which can be aggravated by habituation and bad example. His comparison of homosexuality with incest ([Laws 837E8-838E1) is particularly revealing.

And Vlastos immediately remarks that Dover's allusion to Plato's comparison of homosexuality with incest shows that Dover acknowledges the great force with which Plato is condemning what Vlastos called "anal intercourse" and Dover, loosely, "the act" and "homosexuality".

<sup>6</sup>Anthony Price's valuable book, *Love and Friendship in Plato and Aristotle* at p.89 firmly rejects Vlastos's theory that Socrates and Plato, though forbidding homosexual acts, accepted that lovers could nevertheless rightly engage in the sort of petting spoken of in *Phaedrus* 255e.

<sup>7</sup>See *Nicomachean Ethics* VII,5:1148b29; *Politics* II,1:1262a33-39, together with the hints in II,6:1269b28 and II,7:1272a25. See e.g. Price, op. cit. p.225, citing Plato, *Republic* 403b4-6 and Aristotle, *Politics* 1262a32-7).

766E-771D, written probably some time in the early second century, but certainly free from Judaeo-Christian influence. Plutarch's vast literary-historical and philosophical corpus of writings is an effort to recapture and recapitulate the highest achievements of classical civilisation, and had a very substantial influence on Western thought down to recent times. I shall say more about Plutarch's thought on these matters below.

Another example is the Stoic, Musonius Rufus (who taught at Rome c.80 AD and again was not influenced by Jewish or Christian thought). He rejects all homosexual conduct as shameful. Sexual conduct is decent and acceptable only within marriage. The point of marriage includes not only procreation and raising of children but also, integrally and essentially, a complete community of life and mutual care and affection between husband and wife.

At the heart of the Platonic-Aristotelian and later ancient philosophical rejections of all homosexual conduct, and thus of the modern "gay" ideology, are three fundamental theses: (1) The commitment of a man and woman to each other in the sexual union of marriage is intrinsically good and reasonable, and is incompatible with sexual relations outside marriage. (2) Homosexual acts are radically and peculiarly non-marital, and for that reason intrinsically unreasonable and unnatural. (3) Furthermore, according to Plato, if not Aristotle, homosexual acts have a special similarity to solitary masturbation,<sup>8</sup> and both types of radically non-marital act are manifestly unworthy of the human being and immoral.

### III

I want now to offer an interpretation of these three theses which articulates them more clearly than was ever attempted by Plato or, so far as we can tell, by Aristotle. It is, I think, an interpretation faithful to what they do say, but takes up suggestions in Plutarch and in the eighteenth century Enlightenment philosophy of Immanuel Kant (who likewise rejected all homosexual conduct), though even these writers' indications, too, remain relatively terse. My account also articulates thoughts which have historically been implicit in the judgments of many non-philosophical people, and which

have been held to justify the laws adopted in many nations and states both before and after the period when Christian beliefs as such were politically and socially dominant. And it is an application of the theory of morality and natural law developed over the past thirty years by Germain Grisez and others. A fuller exposition can be found in the chapter on marriage, sexual acts, and family life, in the new second volume of Grisez's great work on moral theology.<sup>9</sup>

Plato's mature concern, in the Laws, for familiarity, affection and love between spouses in a chastely exclusive marriage, Aristotle's representation of marriage as an intrinsically desirable friendship between quasi-equals, and as a state of life even more natural to human beings than political life,<sup>10</sup> and Musonius Rufus's conception of the inseparable double goods of marriage all find expression in Plutarch's celebration of marriage -- as a union not of mere instinct but of reasonable love, and not merely for procreation but for mutual help, goodwill and cooperation for their own sake.<sup>11</sup> Plutarch's severe critiques of homosexual conduct (and of the disparagement of women implicit in homosexual ideology),<sup>12</sup> develop Plato's critique of homosexual and all other extra-marital sexual conduct. Like Musonius Rufus, Plutarch does so by bringing much closer to explicit articulation the following thought. Genital intercourse between spouses enables them to actualise and experience (and in that sense express) their

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<sup>8</sup> See Plato, *Gorgias* 494-5, especially 494e1-5, 495b3.

<sup>9</sup> Germain Grisez, *The Way of the Lord Jesus* volume 2, *Living a Christian Life* (Franciscan Press, Quincy, 1993) especially pp. 555-574, 633-680.

<sup>10</sup> *Ethics* VIII,12: 1162a16-30; see also the probably pseudo-Aristotle, *Oeconomica* I,3-4: 1343b12-1344a22; III.

<sup>11</sup> Plutarch reads this conception back to the dawn of Athenian civilisation and, doubtless anachronistically, ascribes it to the great original Athenian law-giver, Solon: marriage should be "a union of life between man and woman "for the delights of love and the getting of children": Plutarch, *Life of Solon* 20, 4. See also Plutarch, *Erotikos* 769: "In the case of lawful wives, physical union is the beginning of friendship, a sharing, as it were, in great mysteries. Pleasure is short [or unimportant: *mikron*], but the respect and kindness and mutual affection and loyalty that daily spring from it convicts neither the Delphians of raving when they call Aphrodite 'Harmony' nor Homer when he designates such a union 'friendship'. It also proves that Solon was a very experienced legislator of marriage laws. He prescribed that a man should consort with his wife not less than three times a month -- not for the pleasure surely, but as cities renew their mutual agreements from time to time, just so he must have wished this to be a renewal of marriage and with such an act of tenderness to wipe out the complaints that accumulate from everyday living."

<sup>12</sup> See *Erotikos* 768D-770A

marriage itself, as a single reality with two blessings (children and mutual affection).<sup>13</sup> Non-marital intercourse, especially but not only homosexual, has no such point and therefore is unacceptable.

Why cannot non-marital friendship be promoted and expressed by sexual acts? Why is the attempt to express affection by orgasmic non-marital sex the pursuit of an illusion? Why did Plato and Socrates, Xenophon, Aristotle, Musonius Rufus, and Plutarch, right at the heart of their reflections on the homoerotic culture around them, make the very deliberate and careful judgment that homosexual conduct (and indeed all extra-marital sexual gratification) is radically incapable of participating in, actualising, the common good of friendship?

Implicit in the philosophical and common-sense rejection of extra-marital sex is the answer to these questions. 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. So their union in a sexual act of the reproductive kind (whether or not actually reproductive or even capable of resulting in generation in this instance) can actualise and allow them to experience their real common good. That common good is precisely their marriage with the two goods, parenthood and friendship, which are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by that act of genital union. But the common good of friends who are not and cannot be married (for example, man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit.<sup>14</sup> So

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<sup>13</sup> The core of this argument can be clarified by comparing it with St. Augustine's treatment of marriage in his *De Bono Coniugali*. There the good of marital communion is presented primarily as an instrumental good, in the service of the procreation and education of children: see Finnis, 'Law, Morality, and "Sexual Orientation"' Notre Dame Law Review 69 (1994) 1049 at 1064-5.

<sup>14</sup> Steven Macedo, "The New Natural Lawyers", The Harvard Crimson, October 28, 1993, writes: "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." Here fantasy has taken leave of reality. Anal or oral intercourse, whether between spouses or between males, is no more a



their sexual acts together cannot do what they may hope and imagine. Because their activation of one or even each of their reproductive organs cannot be an actualising and experiencing of the marital good--as marital intercourse (intercourse between spouses in a marital way) can, even between spouses who happen to be sterile--it can do no more than provide each partner with an individual gratification. For want of a common good that could be actualised and experienced by and in this bodily union, that conduct involves the partners in treating their bodies as instruments to be used in the service of their consciously experiencing selves; their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.<sup>15</sup>

Reality is known in judgment, not in emotion. In 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 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. This is, I believe, the substance of Plato's judgment -- at that moment in the Gorgias 494-495 which is also decisive for the moral and political philosophical critique of hedonism<sup>16</sup> -- that there is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it. Sexual acts cannot not in reality be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other -- in biological, affective, and volitional union in mutual commitment, both open-ended and exclusive -- which like Plato and Aristotle and most peoples we call *marriage*.

In short, sexual acts are not unitive in their significance unless they are marital

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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 behaviour that unites biologically because it is the behaviour which, as behaviour, is suitable for generation. (See also fn. 32 below.)

<sup>15</sup>For the whole argument, see Grisez, *Living a Christian Life* 634-39, 648-54, 662-4

<sup>16</sup>Gorgias 494-5, especially 494e1-5, 495b3.

(actualizing the all-level unity of marriage) and (since the common good of marriage has two aspects) they are not marital unless they have not only the generosity of acts of friendship but also the procreative significance, not necessarily of being intended to generate or capable in the circumstances of generating but at least of being, as human conduct, acts of the reproductive kind -- actualizations, so far as the spouses then and there can, of the reproductive function in which they are biologically and thus personally one.

The ancient philosophers do not much discuss the case of sterile marriages, or the fact (well known to them) that for long periods of time (e.g. throughout pregnancy) the sexual acts of a married couple are naturally incapable of resulting in reproduction. They appear to take for granted what the subsequent Christian tradition certainly did, that such sterility does not render the conjugal sexual acts of the spouses non-marital. (Plutarch indicates that intercourse with a sterile spouse is a desirable mark of marital esteem and affection.)<sup>17</sup> For: a husband and wife who unite their reproductive organs in an act of sexual intercourse which, so far as they then can make it, is of a kind suitable for generation, do function as a biological (and thus personal) unit and thus can be actualising and experiencing the two-in-one-flesh common good and reality of marriage, even when some biological condition happens to prevent that unity resulting in generation of a child. Their conduct thus differs radically from the acts of a husband and wife whose intercourse is masturbatory, for example sodomitic or by fellatio or coitus

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<sup>17</sup>Plutarch, *Life of Solon* 20,3. The post-Christian moral philosophy of Kant identified the wrongfulness of masturbation and homosexual (and bestial) conduct as consisting in the instrumentalisation of one's body, and thus ("since a person is an absolute unity") the "wrong to humanity in our own person". But Kant, though he emphasises the equality of husband and wife (impossible in concubinage or more casual prostitution), did not integrate this insight with an understanding of marriage as a single two-part good involving, inseparably, friendship as well as procreation. Hence he was puzzled by the question why marital intercourse is right when the woman is pregnant or beyond the menopause. See Immanuel Kant, *The Metaphysics of Morals* 277-279, 220-222 ([1797] translated by Mary Gregor, Cambridge University Press, 1991, pages 96-98, 220-222).

(The deep source of his puzzlement is his refusal to allow intelligible goods any structural role in his ethics, a refusal which sets him against a classical moral philosophy such as Aristotle's, and indeed against any adequate theory of natural law, and in turn is connected with his dualistic separation of body from mind and body, a separation which conflicts with his own insight, just quoted, that the person is a real unity.)

interruptus.<sup>18</sup> In law such acts do not consummate a marriage, because in reality (whatever the couple's illusions of intimacy and self-giving in such acts) they do not actualise the one-flesh, two-part marital good.

Does this account seek to "make moral judgments based on natural facts"?<sup>19</sup> Yes and no. No, in the sense that it does not seek to infer normative conclusions or theses from only non-normative (natural-fact) premises. Nor does it appeal to any norm of the form "Respect natural facts or natural functions". But yes, it is to the realities of our constitution, intentions and circumstances that the argument applies the relevant practical reasons (especially that marriage and inner integrity are basic human goods) and moral principles (especially that one may never intend to destroy, damage, impede, or violate any basic human good, or prefer an illusory instantiation of a basic human good to a real instantiation of that or some other human good).

#### IV

Societies such as classical Athens and contemporary England (and virtually every other) draw a distinction between behaviour found merely (perhaps extremely) offensive (such as eating excrement), and behavior to be repudiated as destructive of human character and relationships. Copulation of humans with animals is repudiated because it treats human sexual activity and satisfaction as something appropriately sought in a manner as divorced from the expressing of an intelligible common good as is the instinctive coupling of beasts -- and so treats human bodily life, in one of its most intense activities, as appropriately lived as merely animal. The deliberate genital coupling of persons of the same sex is repudiated for a very similar reason. It is not simply that it is sterile and disposes the participants to an abdication of responsibility

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<sup>18</sup>Or deliberately contracepted, which I omit from the list in the text only because it would no doubt not now be accepted by secular civil law as preventing consummation -- a failure of understanding. See also footnote 35 above.

<sup>19</sup>Macedo, loc. cit., "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 theory does not make moral judgments based on natural facts." Macedo's phrase "based on" equivocates between the first premises of normative arguments (which must be normative) and the other premise(s) (which can and normally should be factual and where appropriate can refer to natural facts such as that the human mouth is not a reproductive organ).

for the future of humankind. Nor is it simply that it cannot really actualise the mutual devotion which some homosexual persons hope to manifest and experience by it, and that it harms the personalities of its participants by its dis-integrative manipulation of different parts of their one personal reality. It is also that it treats human sexual capacities in a way which is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage in the understanding that its sexual joys are not mere instruments or accompaniments to, or mere compensations for, the accomplishment of marriage's responsibilities, but rather enable the spouses to actualise and experience their intelligent commitment to share in those responsibilities, in that genuine self-giving.

Now, as I noted in section I, "homosexual orientation", in one of the two main senses of that highly equivocal term, is precisely the deliberate willingness to promote and engage in homosexual acts -- the state of mind, will, and character whose self-interpretation came to be expressed in the deplorable but helpfully revealing name "gay". So this willingness, and the whole "gay" ideology, treats human sexual capacities in a way which is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage.

Homosexual orientation in this sense is, in fact, a standing denial of the intrinsic aptness of sexual intercourse to actualise and in that sense give expression to the exclusiveness and open-ended commitment of marriage as something good in itself. All who accept that homosexual acts can be a humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments for gratifying the individual "self" who has them. Such an acceptance is commonly (and in my opinion rightly) judged to be an active threat to the stability of existing and future marriages; it makes nonsense, for example, of the view that adultery is inconsistent with conjugal love, in an important way and intrinsically—not merely because it may involve deception. A political community which judges that the stability and protective and educative generosity of family life are of fundamental importance to the whole community's present and future can rightly judge that it has compelling reasons for judging that homosexual conduct -- a "gay lifestyle" – is never a valid, humanly

acceptable choice and form of life, in denying that same-sex partners are capable of marrying, and in doing whatever it properly can, as a community with uniquely wide but still subsidiary functions (see section 1 above), to discourage such conduct.<sup>20</sup>

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<sup>20</sup> The criminal law upheld in *Bowers v Hardwick* seems to me unsound in principle. But there was a sound and important distinction of principle which the Supreme Court of the United States overlooked in moving from *Griswold v. Connecticut* 381 US 479 (1965) (*private use* of contraceptives by spouses) to *Eisenstadt v. Baird* 405US 438 (1970) (*public distribution* of contraceptives to unmarried people). (The law struck down in *Griswold* was the law forbidding use of contraceptives even by married persons; Griswold's conviction as an accessory to such use fell with the fall of the substantive law against the principals in such use. Very different, in principle, would have been a law directly forbidding Griswold's activities as a public promoter of contraceptive information and supplies.) The truth and relevance of that distinction, and its high importance for the common good, would be overlooked again if laws criminalising private acts of sodomy between adults were to be struck down by the Court on any ground which would also constitutionally require the law to tolerate the advertising or marketing of homosexual services, the maintenance of places of resort for homosexual activity, or the promotion of homosexualist "lifestyles" via education and public media of communication, or to recognise homosexual "marriages" or permit the adoption of children by homosexually active people, and so forth.

The preceding sections of this essay—an essay which bears the marks of its origin in 1993 as an affidavit of evidence in the ‘Colorado Amendment 2 case’, *Evans v. Romer*—were published (in a rather longer version) in 1994 and have attracted various responses including the essay by Andrew Koppelman in the present collection. Koppelman takes it for granted that the kind of argument developed in my essay, the argument of ‘the new natural lawyers’, is radically different from (and, he claims, less coherent than) ‘Aquinas’ insistence on natural teleology’. He is right in thinking that, like Grisez, George, and Bradley, I reject as fallacious (and never argue on the basis of) any proposition like ‘natural functions or tendencies are moral standards and ought to guide deliberation and choice’. But, though this fallacy is certainly to be found from time to time in the tradition, Koppelman is mistaken in thinking that Aquinas’ sex ethics depends upon it.

The question of sex ethics which seems to have interested Aquinas far more than any other is: When must sex acts *between spouses*, even acts of intercourse of the generative kind, be regarded as seriously wrongful? His answer is, in effect: When such acts are de-personalised, and de-maritalised. That is to say, if I choose this act of intercourse with my spouse, not for the sake of pleurably actualising and expressing our marital commitment, but ‘*solely* for pleasure’, or *solely* for the sake of my health, or *solely* as a relief from temptations to masturbation or extra-marital sex, and *would be just as (or more!) willing* to be having intercourse with someone else—so that I am seeing in my spouse, in this act of intercourse, no more than I would see in a goodtime girl or a gigolo or another acquaintance or someone else’s spouse—then my sex act with my spouse is *non-marital* and is in principle seriously wrong.<sup>21</sup> It is contrary to reason, and therefore<sup>22</sup> contrary to nature. It is contrary to reason because it is contrary to—dis-

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<sup>21</sup> See Aquinas, IV *Sent.* q. 26 q. 1 a. 4c (= *Summa Theologiae* Supp. q. 41 a. 4c); d. 31 q. 2 a. 2 (= Supp. q. 41 a. 5) ad 2 & ad 4; q. 2 a. 3c (= Supp. q. 49 a. 6c) & tit. & obj. 1; *Commentary on I Corinthians*, c.7 ad v. 6 [329]; *Summa Theologiae* II-II q. 154 a. 8 ad 2; *De Malo* q. 15 a. 1c. For a much fuller treatment of Aquinas’ sex ethics, see Finnis, *Aquinas* (Oxford University Press, 1998). ch VII.2.

<sup>22</sup> All extra-marital sex (and even conditional assent {consensus} to it) is contrary to nature *inasmuch as (and because)* it is contrary to reason’s requirements: e.g. *De Malo*. q. 15 a. 1 ad 7.

integrated from—an intrinsic good to which we are directed by one of the first principles of practical reason (and therefore of natural law), a good which may therefore be called primary, fundamental, or basic: the good of marriage itself.<sup>23</sup>

Why are sex acts (seeking the orgasm of one or more of the parties) unreasonable unless marital? Implicit in Aquinas' often misunderstood<sup>24</sup> work is a rarely recognised train of thought, substantially as follows.

Marriage, in which a man and a woman would find their friendship and devotion to each other fulfilled in their procreation, nurture, protection, education and moral formation of their children,<sup>25</sup> is an intrinsic, basic human good. Sexual intercourse between the spouses, provided it is authentically marital, actualises and promotes the spouses' mutual commitment in marriage (their marital *fides*). But my sex act with my spouse will not be truly marital—and will not authentically actualise, and allow us in a non-illusory way to experience, our marriage—if I engage in it while I *would be willing* in some circumstance(s) to engage in a sex act of a non-marital kind—e.g. adultery, fornication, intentionally sterilised intercourse, solitary masturbation or mutual masturbation (e.g. sodomy), and so forth. To regard any of such types of sex act as morally acceptable is to regard one or more of them as something I might under some circumstances engage in, and this state of mind undermines the marital character of my sex acts with my spouse. In short, the complete *exclusion* of non-marital sex acts from the range of acceptable human options is a pre-condition for the truly marital character

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<sup>23</sup> See Aquinas, *Summa Theologiae* I-II q. 94 a. 2c. In his treatment of sex ethics, Aquinas usually refers to the good of marriage, insofar as it is always at stake in the spouses' sexual activity, as the good of *fides*, i.e. of *mutual commitment in marriage*. The literal translation of *fides* would be faith(fulness), but in English this suggests merely absence of infidelity (i.e. of sexual relations with other persons), whereas Aquinas explains (IV *Sent.* d. 31 q. 1 a. 2c & ad 3 (= Supp. q. 49 a. 2c & ad 3); *Commentary on I Cor.* c. 7.1 ad v. 2 [318]) that marital *fides* involves also, and primarily, a positive willingness to be maritally, including sexually, united (on a basis of mutuality and absolute equality in initiating or requesting intercourse).

<sup>24</sup> Thoroughly misunderstood and misrepresented in John T. Noonan, *Contraception* (Harvard U.P., 1965, 1986); John Boswell, *Christianity, Social Tolerance, and Homosexuality* (University of Chicago Press, 1980). Koppelman's view of Aquinas has (not unreasonably, but certainly unfortunately) been reliant upon these writers: see the longer version of his present essay: Koppelman, 'Is Marriage Inherently Heterosexual?', 42 *American Journal of Jurisprudence* (1997); and for a discussion of Noonan's and Boswell's misreadings, see Finnis, 'The Good of Marriage: Some Historical and Philosophical Observations', 42 *American Journal of Jurisprudence* 42 (1998) 97-134.

<sup>25</sup> The marriage of a couple who have reason to believe that they are incapable of generating

of any spouses' intercourse. Blindness or indifference to the inherent wrongness of non-marital sex acts renders non-marital the choosing and carrying out of even those actual sex acts which in all other respects are marital in kind.

Moreover, without the possibility of truly marital intercourse the good of marriage is seriously impaired. Any willingness to (counter-factually or actually) engage in non-marital sex radically undermines my marriage itself. For it disintegrates the intelligibility of my marriage; our sex acts no longer truly actualise and enable us authentically to experience our *marriage*; they are unhinged from the other aspects of our mutual commitment and project. And this unhinging or dis-integration threatens—runs contrary to—both of the goods inherent in the complex basic good of marriage:<sup>26</sup> not only the good of friendship and *fides* but also the good of procreation and of the children whose education etc. so depends on the context of a *good* marriage. So any kind of assent—even if conditional—to non-marital sex is unreasonable. (Indeed, all sexual immorality, including all willingness to treat it as a potentially acceptable option, is contrary to love-of-neighbour, i.e. of children).<sup>27</sup> And so it is immoral, and out of line with human nature (and, Aquinas adds, with God's intentions about human conduct).<sup>28</sup>

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children is considered, once the basic lines of the argument are in place, below.

<sup>26</sup> Marriage is a complex but unified good inasmuch as its unitive goodness is inseparable from its procreative significance (even where procreation is *per accidens* impossible). Aquinas' train of thought sets out one way of understanding and acknowledging this inseparability.

<sup>27</sup> See *De Malo* q. 15 a. 2 ad 4; *IV Sent.* d. 33 q. 1 a. 3 sol. 2 (= *Supp.* q. 65 a. 4c).

<sup>28</sup> Koppelman says that for Aquinas homosexual acts are uniquely monstrous. That is an exaggeration; for Aquinas, bestiality is a worse type of surrender to unreasonable, dis-integrated desire for pleasure, and rape and adultery are characteristically much worse in terms of injustice. Considered simply as sexually unreasonable, acts of sexual vice are, *other things being equal*, worse the more distant they are from the truly marital type of act: *IV Sent.* d. 41 a. 4 sol. 3c; see also *De Malo* q. 15 a. 1c. Aquinas seems to be correct in thinking that homosexual sex acts are a type particularly distant from the marital: they are between persons who *could never be married*. (Indeed, this seems to be part of the reason why the word 'gay' was co-opted by the homosexual ideology.) A businessman copulating with a call-girl, though he is engaged in seriously wrongful sexual vice, can imagine himself being married to this woman, and engaging with her in behaviour of the same kind as spouses at some time in the future. But men committing or contemplating sex acts (even buggery) with each other cannot *rationally* think of those acts as acts of the kind Aquinas (rightly) considers the reproductive and marital kind. (See n. 14 above and text near n. 38 below). Of course, in grading the gravity of *types* of sexual vice, Aquinas is not attempting to estimate the culpability of particular acts of particular persons, culpability which may sometimes be much diminished by passion that fetters freedom and/or by confusion of mind (e.g. ideology, fantasy) that obscures rational deliberation towards choice.



This line of thought may seem complex when spelled out on the page. But it is no more than the articulation of married people's common-sense appreciation of the offensiveness of adultery and of being treated by one's spouse as a mere object of sexual relief, sexual servicing, de-personalised sex—'he/she doesn't love me, he/she only wants me for my body [or: as a baby-maker]'.<sup>29</sup> The traditional sex ethic which, despite all backsliding, was fairly perspicuous to almost everyone until the acceptance by many people of divorce-for-remarriage and contraception began to obscure its coherence a few decades ago, is no more and no less than a drawing out of the implications of this same reasonable thought: the intending, giving, and/or receiving of pleasure in sex acts is reasonably respectful of and coherent with intelligible human goods *only* when those acts are fully expressive of and (so far as my willing goes) instantiations of the complex good of marriage. Acts of the kind that same-sex partners engage in (intended to culminate in orgasmic satisfaction by finger in vagina, penis in mouth, etc., etc.) remain non-marital, and so unreasonable and wrong, when performed in like manner by a married couple.

Every married couple is sterile most of the time. Outside one or two remote tribes, that has always been well known, even when the limited periods of fertility in the female cycle were mislocated. Koppelman and Macedo absurdly think that *most of the time*, therefore, (a) the couple's genitals are not reproductive organs at all,<sup>30</sup> and (b) the couple's intercourse cannot be of a reproductive kind. The same line of thought also drives these writers towards the equally arbitrary conclusion that a man and a woman can never be biologically united—only sperm and egg can be biologically united! While in this reductivist, word-legislating mood, one might declare that sperm and egg unite only physically and only their pronuclei are *biologically* united. But it would be more realistic to acknowledge that the whole process of copulation, involving as it does the brains of the man and woman, their nerves, blood, vaginal and other secretions, and

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<sup>29</sup> On regarding one's wife as a baby-maker, see Robert P. George and Gerard V. Bradley, 'Marriage and the Liberal Imagination', 84 Georgetown Law Journal 301-320 (1995) at 305 text and n. 19.

<sup>30</sup> Koppelman sometimes, inconsistently, speaks as if they are not reproductive if and only if they belong to people who are completely sterile e.g. 'a woman whose diseased uterus has been removed'.

coordinated activity (such that conception is much less likely to result from rape) is biological through and through. The dualism embraced by Koppelman and Macedo<sup>31</sup> neatly shows how far humanness itself—the radical *unity* of body (‘biology’), sense, emotion, reason, and will—becomes unintelligible once one loses one’s grip on the way in which a marital sexual act, uniting *us*<sup>32</sup> in a *particular bodily* (and therefore biological) way can really *actualise*, express, and enable us truly to experience something as *intelligent and voluntary* as a freely chosen commitment to serving each other as friends in a form of life adapted to serving also (if fortune so provides) our children as the living embodiments and fruit peculiarly appropriate to our kind of (comm)union.<sup>33</sup>

Sexual acts which are marital are ‘of the reproductive kind’ because in willing such an act one wills sexual behaviour which is (a) the very same as causes generation (intended or unintended) in every case of human *sexual* reproduction, and (b) the very same as one would will if one were intending precisely sexual reproduction as a goal of a particular marital sexual act. This kind of act is a ‘natural kind’, in the morally relevant sense of ‘natural’, not (as Koppelman supposes) if and only if one is intending or attempting an *outcome*, viz. reproduction or procreation. Rather it is a distinct rational kind—and therefore in the morally relevant sense a natural kind—because (i) in engaging in it one is intending a *marital* act, (ii) its being of the reproductive kind is a necessary though not sufficient condition of it being marital, and (iii) marriage is a rational and natural kind of institution. One’s reason for action—one’s rational motive—is precisely the complex good of *marriage*.

For: marriage is rational and natural primarily because it is the institution which physically, biologically, emotionally, and in every other practical way is peculiarly apt to promote suitably the reproduction of the couple by the generation, nurture, and education of ultimately mature offspring. And here we touch on another point of importance in understanding and evaluating the version of ‘gay’ ideology defended by

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<sup>31</sup> See also the response to Macedo on this point by George and Bradley, op. cit. supra n. 29, at 311 n. 32.

<sup>32</sup> The organic unity which is instantiated in an act of the reproductive kind is not, as Macedo and Koppelman reductively imagine, the unity of penis and vagina. It is the unity of the persons in the intentional, consensual *act* of seminal emission in the woman’s reproductive tract.

<sup>33</sup> See further George and Bradley, op. cit., supra n. 29 at 304 text and n. 16.

Koppelman and Macedo. These writers claim that sex acts between persons of the same sex can be truly marital, and that to perform such acts two such persons can indeed marry each other. They want us to evaluate homosexual sex acts by focussing upon this sort of activity of this sort of couple. Koppelman adopts Sidney Callahan's claim that *when engaged in 'with a faithful partner'*, such same-sex sex acts 'produce...intense intimacy, bodily confirmation, mutual sanctification, and fulfilling happiness'. It seems rather careless of Koppelman to accept that 'mutual sanctification' is 'produced' by sex acts in a universe he proclaims to be 'disenchanted'.

But more interesting is his failure to explain why this and the other effects allegedly 'produced' by sex acts<sup>34</sup> depend upon the faithfulness of one's partner, or partners,<sup>35</sup> and, I assume, upon one's own faithfulness.

The 'gay' ideology, even in the sanitised Koppelman/Macedo version, has no serious account whatever of why it makes sense to regard faithfulness—reservation of one's sex acts exclusively for one's spouse—as an intelligible, intelligent, and reasonable requirement. Only a small proportion of homosexual men who live as 'gays' seriously attempt anything even resembling marriage as a permanent commitment. Only a tiny proportion seriously attempt marital fidelity, the commitment to exclusiveness; the proportion who find that the attempt makes sense, in view of the other aspects of their 'gay identity', is even tinier.<sup>36</sup> Thus, even at the level of behaviour—i.e. even leaving

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<sup>34</sup> The idea that the value of sex must be in the desirable effects it produces is criticised by George and Bradley, who rightly understand the value of *marital intercourse* as more than merely instrumental, i.e. as intrinsic. As they point out, the view defended by Koppelman and Macedo 'presupposes that the point and value of sex can only be instrumental'. Op. cit. supra at n. 29, at 304-5.

<sup>35</sup> Not yet disentangled from the Catholicism she is 'changing her mind' away from, Callahan just takes for granted that there will only be one partner. As we shall see, the assumption is groundless.

<sup>36</sup> For example: David P. McWhirter and Andrew W. Mattison (both homosexual), *The Male Couple: How Relationships Develop* (Prentice Hall, 1984), 252-9, studied 156 male homosexual couples, most of who once expected to have a sexually exclusive relationship, and found that only seven of these couples claimed to have succeeded; and none of these seven had been together for even five years. Marshall Kirk and Hunter Madsen (both homosexual), *After the Ball: How America will Conquer its Fear and Hatred of Gays in the '90s* (Doubleday, 1989), 302-7, 318-32 clearly set out the psychological causes *within* homosexual men which account for their promiscuity and failure to maintain stable or faithful relationships; they thus provide grounds for rejecting the oft-heard assertion that these phenomena result from society's failure to recognise 'gay' marriage. Readers should consult Kirk and Madsen, 280-356, for a detailed description of characteristic 'gay' lifestyles which gives descriptive and explanatory substance to, *inter alia*, the bare statistics earlier reported in Alan P. Bell and Martin S. Weinberg, *Homosexualities: A Study in Diversity among Men and Women* (Simon & Schuster, 1978), 81-93, 308-9:

aside its inherent sterility—gay ‘marriage’, precisely because it excludes or makes no sense of a *commitment* utterly central to *marriage*, is a sham.

And this is no mere happenstance. The reason why marriage involves the commitment to permanence and exclusiveness in the spouses’ sexual union is that, as an institution or form of life, it is fundamentally shaped by its dynamism towards, appropriateness for, and fulfilment in, the generation, nurture, and education of children who each can only have two parents and who are fittingly the primary responsibility (and object of devotion) of *those two parents*. Apart from this orientation towards children, the institution of marriage, characterised by marital *fides* (faithfulness), would make little or no sense. Given this orientation, the marital form of life does make good sense, and the marital sexual acts which actualise, express, and enable the spouses to experience that form of life make good sense, too.

Moreover, a man and a woman *who can engage in precisely the marital acts with precisely the same behaviour and intentions*, but who have reason to believe that in their case those very same acts will never result in children, can still opt for this *form of life* as one that makes good sense. Given the bodily, emotional, intellectual, and volitional complementarities with which that combination of factors we call human evolution<sup>37</sup> has equipped us as men and women, such a commitment can be reasonable as a participation in the good of marriage in which these infertile spouses, if well-intentioned, would wish to have participated more fully than they can.<sup>38</sup> By their model of fidelity within a relationship involving acts of the reproductive kind, these infertile marriages are, moreover, strongly supportive of marriage as a valuable social institution.

But same-sex partners cannot engage in acts of the reproductive kind, i.e. in marital sexual intercourse. The permanent, exclusive commitment of marriage, which

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among the 574 white male homosexuals studied, 97% had already had at least three sexual partners, 75% at least one hundred, and 28% at least one thousand.

<sup>37</sup> Koppelman (like Strauss) has not fully, or at all, come to grips with the radically teleological character of contemporary ‘Darwinian’ biology’s account of the molecular-biological genetic primordia, fundaments, or engine of evolution. But that, like the half-truth of the ‘disenchantment’ of the universe, is an issue with no bearing on the present argument.

<sup>38</sup> Those, however, who search out infertile spouses, choosing them *precisely for their infertility*, may well be manifesting the kind of contempt for the marital good which Philo Judaeus condemned in the rather confused passage from which Koppelman and Boswell quote some over-heated

presupposes bodily union as the biological actuation of the multi-level (bodily, emotional, intellectual, and volitional) marital relationship, makes no sense for them. Of course, two, three, four, five or any number of persons of the same sex can band together to raise a child or children. That may, in some circumstances, be a praiseworthy commitment. It has nothing to do with marriage. Koppelman and Macedo remain discreetly silent on the question why the same-sex ‘marriage’ they offer to defend is to be between two persons rather than three, four, five, or more, all engaging in sex acts ‘faithfully’ with each other. They are equally silent on the question why this group sex-partnership should remain constant in membership, rather than revolving like other partnerships.

The plain fact is that those who propound ‘gay’ ideology have no principled moral case to offer against (prudent and moderate) promiscuity, indeed the getting of orgasmic sexual pleasure in whatever friendly touch or welcoming orifice (human or otherwise) one may opportunely find it. In debate with opponents of their ideology, these proponents are fond of postulating an idealised (two-person, lifelong...) category of relationship—‘gay marriage’—and of challenging their opponents to say how such a relationship differs from *marriage* at least where husband and wife know themselves to be infertile. As I have argued, the principal difference is very simple and fundamental: the artificially delimited (two-person, lifelong...) category named ‘gay marriage’ or ‘same-sex marriage’ corresponds to no intrinsic reason or set of reasons at all. It has few presentable counterparts in the real world outside the artifice of debate. *Marriage*, on the other hand, is the category of relationships, activities, satisfactions, and responsibilities which can be intelligently and reasonably chosen by a man and a woman, and adopted as their integral commitment, because the components of the category respond and correspond coherently to a complex of interlocking, complementary good reasons: the good of marriage. True and valid sexual morality is nothing more, and nothing less, than an unfolding of what is involved in understanding, promoting, and respecting that basic human good, and of the conditions for instantiating it in a real, non-illusory way—in the marital act.