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Natural Law and the Regulation of Sexuality: A Critique

Dr. Brent L. Pickett¹

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Today, natural law theory offers the most common intellectual defense for the differential treatment of gays and lesbians. Leading natural law theorists, such as John Finnis,² Robert George,³ and Richard Duncan,⁴ have eagerly inserted themselves into debates about law and sexuality. If their arguments are sound, it is permissible to treat gays and lesbians differentially as a matter of law. Natural law theorists defend a range of policies in this regard, from anti-sodomy laws, to allowing persons to discriminate against gays and lesbians in employment and housing, to a fierce opposition to same-sex unions or, in their watered-down version, civil unions. In general, natural law theorists believe that it is rational for the state to ‘discourage’ homosexuality through such policies. Furthermore, they believe that other laws regulating sexuality are permissible and potentially beneficial, such as forbidding the sale of contraceptives to unmarried persons.

I will argue that the natural-law understanding of sexuality, and its application to the law, is deeply flawed, in regards to homosexuality and sodomy. I begin by laying out some of the foundations of the natural law position. Central to the position is an account of human goods that are seen as good in themselves, and hence as rational bases for choice and human action. In regards to sexuality, the two most important goods, at least from the natural law perspective, are those of marriage and personal integration. I argue that a real appreciation of the role of these two goods in human life would lead to a practical political stance very different than the one put forward by contemporary natural law theorists. Much of the argument here is concerned with showing how the natural law position, taken on its own terms, should actually support a position that is, for example, at least as skeptical of modern corporate practices as it is of consensual sodomy. Second, I argue that the account of the human goods offered by natural law theorists is very culturally specific and even partially contingent, even though it claims to be premised upon timeless reason and an unchanging account of human goods. This argument involves a historical foray into ancient Greek understandings of sexuality in order to get a sense of the range of

¹ Ph.D., University of Colorado at Boulder 1995; M.A., University of Colorado at Boulder 1991; B.A., Wichita State University 1989.

² See, e.g., *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993) (John Finnis served as an expert witness).

³ Robert George has written articles against state recognition of same-sex marriages and in support of anti-sodomy laws. See generally, Brief of Amicus Curiae Center for Law and Justice International at 19, *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (No. 20-102) (citing ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY, 165, 166 (1993)).

⁴ See Richard Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345 (1997) (providing an interesting analysis of the legal and cultural significance of *Romer*). Duncan persuasively argues that the *Romer* decision is of little constitutional import, though he takes it as very revealing of contemporary cultural battles. See also, Brief of Amicus Curiae States of Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and Virginia, *Romer v. Evans*, 517 U.S. 620 (1995) (No. 94-1039) (arguing for the constitutionality of Amendment Two of the Colorado State Constitution).

understandings across time. If this critical point is correct, natural law theory does not have good grounds for much of its condemnation of a whole range of sexual practices.

There is already an ongoing debate over natural law that is dominated by natural law theorists and liberals.⁵ The perspective that I offer here is unique in that, as a civic republican (or perhaps ‘communitarian’), there are many aspects of natural law theory to which I am sympathetic.⁶ These include, but are not limited to, a willingness to talk about virtue and a concern for the cultivation of civic virtue, a belief that there are genuine human goods that are at least partially universal in scope (and partially incommensurable), and a conviction that those goods help to establish reasons for action (and criteria by which to judge actions). One difference here, however, is that the account of human goods I would defend is much more open to cultural variation, without being relativistic. Given that there is a good range of agreement between civic republicans and natural law theorists, due no doubt in part to some shared influence from Aristotle, the disagreement between these positions is worth exploring. Perhaps too there is a greater chance of persuasion.

The Natural Law Understanding of Sexuality

In the thirteenth century, Thomas Aquinas made the most influential formulation of natural law theory. It is still the classic statement of this position; contemporary theorists alter and amend it, yet still cling to its central precepts. Integrating an Aristotelian approach with Christian theology, Aquinas emphasized the centrality of certain human goods, including marriage.⁷ Even though he must have been aware of at least some of the great variety in marriage practices across time and space, his conception is very reflective of the late medieval Christian ideal.⁸ At the center of his view of marriage is the idea of *fides*, which in part means monogamy (it is the Latin root for fidelity), but which encompasses mutual regard and love.⁹ Aquinas writes about marriage as the ‘greatest friendship’ which, while realized in marital sex, is oriented towards running a household, procreation, and the nurturing of children.¹⁰

While Aquinas did not write much about some aspects of sexuality, such as same-sex sexual relations, he did write at length about various sex acts as sins.¹¹ For Aquinas, sexuality that was within the bounds of marriage *and* which helped to further what he saw as the distinctive goods of marriage, mainly love, companionship, and legitimate offspring, was permissible, and even good.¹² All sex outside the bounds of marriage, whether pre-marital or

⁵ See generally, NATURAL LAW, LIBERALISM, AND MORALITY (Robert George, ed., 1996).

⁶ The central contemporary proponents of the civil republican position I am referring to here are Charles Taylor and Michael Sandel. See MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (discussing civic republicanism); MICHAEL SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); CHARLES TAYLOR, 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS (1985); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

⁷ See JOHN FINNIS, AQUINAS 143-54 (1998) (discussing Aquinas’ approach on the issue).

⁸ Aquinas overtly places his writing in dialogue (or disputation) with ancient philosophers, especially Aristotle, and medieval writers, including Islamic theologian-philosophers, such as Ibn Rushd. See generally, THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS (Richard Reagan trans., 2002).

⁹ FINNIS, *supra* note 7, at 144-48.

¹⁰ FINNIS, *supra* note 7, at 146.

¹¹ *Id.* at 148-54.

¹² *Id.* at 146-47.

extra-marital, is thus immoral (although some acts may be worse than others). In contrast, loving, non-contracepted vaginal intercourse within a marriage is not merely permissible, it is good in itself, even apart from the pleasure and intimacy it brings. In this way, “marital acts” are just sex, where “just” is meant in its moral sense. Aquinas did not argue that procreation was a necessary part of moral or just sex; married couples could enjoy sex without the motive of having children, and sex in marriages where one or both partners is sterile¹³ is also potentially just (given a motive of expressing love). As an aside, it is interesting to note that so far Aquinas’ view actually need not rule out homosexual sex. For example, up to this point, a Thomist could embrace same-sex marriage, and then apply the same reasoning, simply seeing the couple as a reproductively sterile, yet still fully loving and companionate union.

It is important that Aquinas added a requirement that for any given sex act to be moral it must be of a generative kind.¹⁴ That is, since only the emission of semen in a vagina can result in natural reproduction, only sex acts of that type are generative, even if a given sex act does not lead to reproduction, and even if it is impossible due to infertility. The consequence of this addition is to rule out the possibility, of course, that homosexual sex could ever be moral (even if done within a loving marriage), in addition to forbidding any non-vaginal sex for opposite-sex married couples. What is the justification for this important addition? This question is made all the more pressing in that Aquinas allows that the breadth of the moral rules applied to individuals may vary considerably, since the nature of persons also varies to some extent.¹⁵ That is, to take an example using homosexuality, since Aquinas allows that individual natures vary, one could simply argue that one is, by nature, emotionally and physically attracted to persons of one’s own gender, and hence to pursue same-sex relationships is “natural.”¹⁶ Unfortunately, Aquinas does not spell out a justification for this generative requirement.¹⁷

Although the specifics of the defense of the generative requirement offered by various contemporary natural law theorists vary, the common elements are strong.¹⁸ As Thomists, their argument rests largely upon an account of human goods. The two most important are personal integration and marriage. Personal integration, in this view, is the idea that humans, as agents, need to have integration between their intentions as agents and their embodied selves.¹⁹ Thus, to

¹³ For example, where the woman is postmenopausal.

¹⁴ FINNIS, *supra* note 7, at 150, 180-81 nn.c-e.

¹⁵ “[I]t is owing to the various conditions of men that certain acts are virtuous for some, as being proportioned and becoming to them, while they are vicious for others, as not being proportioned to them.” 2 BASIC WRITINGS OF ST. THOMAS AQUINAS 776 (1945).

¹⁶ See generally, ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995).

¹⁷ One line of defense for Aquinas’ “generative type” requirement is that sex acts that involve either homosexuality, heterosexual sodomy, or which use contraception, frustrate the purpose of the sex organs, which is reproductive. This argument, often called the “perverted faculty argument,” is perhaps implicit in Aquinas. It has, however, come under sharp attack. For a well-constructed example of this, see Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, in SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 227 (David M. Estlund and Martha C. Nussbaum, ed., 1997). The best recent defenders of a Thomistic natural law approach are attempting to move beyond it. See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 48 (1979) (characterizing the “perverted faculty argument” as “ridiculous”); ROBERT GEORGE, IN DEFENSE OF NATURAL LAW (1999) (dismissing the “perverted faculty argument”).

¹⁸ See John Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049 (1994). See generally, GEORGE, *supra* note 17.

¹⁹ GEORGE, *supra* note 17, at 147-51.

use one's or another's body as a mere means to one's own pleasure, as they argue happens with masturbation, causes 'dis-integration' of the self.²⁰ That is, one's intention then is just to use a body (one's own or another's) as a mere means to the end of pleasure, and this detracts from personal integration. It is important to note that the argument is not against pleasure, since the pleasure of what they term marital union, which is—in part—a decidedly physical pleasure, is something they are happy to affirm. What is harmful, and therefore immoral, on this view is that instead of having as the end a real human good or goods, such as the goods of marriage and openness to procreation, pleasure in and of itself has become the end. This is what is damaging, or 'dis-integrating'.

Yet one could easily reply that two persons of the same sex engaging in sexual union does not necessarily imply any sort of 'use' of the other as a mere means to one's own pleasure. Instead, in the context of a long-term, companionate union, it is just as expressive of love and affection as any heterosexual sex. If John Geddes Lawrence and Tyron Garner, the petitioners in *Lawrence v. Texas*,²¹ are in a committed relationship, their sex would be "just" too. Hence, natural law theorists respond that sexual union in the context of the realization of marriage as an important human good is the only permissible expression of sexuality.²² Yet this argument requires a very particular explanation of how marriage is a good, since it puts procreation at the center of marriage as its "natural fulfillment".²³ Natural law theorists must emphasize procreation if they want to support their objection to homosexual sex. If, for example, they were to place love and mutual support for human flourishing at the center, it is clear that many same-sex couples would meet this standard. Hence their sexual acts would be morally just.

Furthermore, natural law theorists could not simply revert to the argument of raising children, since that too is done within same-sex unions. Instead, the biological act of reproduction is given a leading role, along with companionship and the nurturing of children. Thus, the best way of understanding the natural law view of marriage²⁴ is that while it is a single human good, it is a complex or multi-faceted one. Hence, it would not suffice to call love the central aspect of a marriage, nor would it be the raising of children.²⁵ Yet this raises another potential problem, because this line of argument implies that childless marriages are impoverished. After all, if natural law theorists argue that same-sex relationships are necessarily impoverished because of the biological incapacity to reproduce, it would apply just as well to opposite-sex couples where one or both partners are sterile. Still, at least some contemporary natural rights theorists recognize that their position does mean that childless marriages are incomplete or unfulfilled, and are willing to accept that.²⁶

The Implications of Human Goods: Marriage and Integration of the Self

From the foregoing discussion it is possible to see how the human goods of marriage and integration of the self are central to the natural law position on sexuality. I will take them in

²⁰ *Id.*

²¹ 123 S. Ct. 247 (2003).

²² GEORGE, *supra* note 17, at 139-53, 167-73; FINNIS, *supra* note 17.

²³ GEORGE, *supra* note 17, at 168.

²⁴ Certainly, for contemporary theorists, though, I think this is accurate for Aquinas too.

²⁵ And surely raising children in a household where the spouses do not love one another is harmful.

²⁶ GEORGE, *supra* note 17, at 168.

turn. My point here is not to deny that they are goods. Instead, it is what follows from them as important goods that is surely different from what these theorists emphasize. In this way, my approach differs from that of liberals, who typically try to rule out comprehensive accounts of the good as the basis for social policy or basic institutions. Furthermore, as a preliminary remark which reflects this difference in approach, it is worth noting that even though the list of human goods recognized by natural law theorists is rich and very plausible, there is one significant omission. The life of active citizenship is reduced to a mere instrumental means to achieving other goods.²⁷ In general, I think this fits the pattern of contemporary natural law theorists elevating the life of production and reproduction, that of work and family, over everything else. In contrast, I would contend that while citizenship is often denigrated today, a lack of it is likely one of our collective problems. The Aristotelian position on this, where active membership in a political community is a significant human good in its own right, is compelling.²⁸

While marriage—at least when it is working well—can often be a joy and a source of personal and mutual enrichment, the view of marriage put forward by natural law theorists seems to be idealized. Perhaps this is because the messy reality of marriage today, with half of all marriages ending in divorce, and an even greater percentage experiencing infidelity by one or both partners, plus spousal abuse, etc., might not do the moral heavy lifting they need. George, for one, agrees that marriage, and hence by extension the family, is in poor shape today.²⁹ The reason for the decline, he contends, is the lack of morals laws he so ardently defends.³⁰ If, however, we roll back the clock a century, to a time when pornography was not generally available, sodomy was much more broadly prohibited than today, and same-sex attraction was driven far underground, do we arrive at a system of marriage that George (or the rest of us) should support? I do not think so. Even though divorce rates were certainly lower at that time, there is good reason to think that was a result of social coercion, rather than a reflection of how ideal marriage was then.

Again, my point is not to deny that marriage can be, and often indeed is, a real good. Instead, it is that marriage is simply one good among many. There are many other goods, such as privacy, personal autonomy, artistic excellence, etc. Natural law theorists make exactly this point, but when the issue becomes one that remotely involves marriage, suddenly almost every other good is tossed overboard in the name of it. A more reasonable approach, and one that I believe would be more consistent in terms of the structure of the moral theory underpinning natural law, would recognize that in the name of fighting a (I believe losing) battle on sexual morality, natural law theorists are sacrificing other critical goods. For example, this is the case with the cause of limited government. To see how this is so, it is necessary to briefly discuss the natural law understanding of morals laws.

Natural law theorists, again following Aquinas (and Aristotle), believe that immoral acts can be prohibited by law, even if they only involve (to use a liberal term they do not accept) self-

²⁷ See, e.g., John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, in *NATURAL LAW, LIBERALISM, AND MORALITY I* (Robert George ed., 1996) (arguing that political life is merely a means to other goods).

²⁸ See generally, MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY*, ch. 12 (1986) (exploring Aristotle's arguments).

²⁹ See ROBERT GEORGE, *MAKING MEN MORAL* 36-37 (1993).

³⁰ See *id.* at 27.

harm.³¹ The goal is the cultivation of virtue in citizens, and, failing that, at least the prevention of greater vice. The potential benefits of such morals legislation are multiple, including the prevention of self-corruption or the emulation of negative examples, and educating persons about right and wrong.³² Proponents of this position, however, are quick to point out that there may be compelling prudential reasons for not prohibiting immoral conduct in specific cases. For example, while Robert George believes that contracepted sex is always immoral, he does not believe that the sale of contraceptives should be banned for married persons (though he implies that it should be prohibited for the unmarried).³³ The range of potential prudential reasons for not sanctioning immoral conduct is quite varied. For example, a law that would require broad infringements upon persons' privacy would probably be unwise. Likewise, legislators should not support laws that, because they are deeply out of touch with broader public views, are more likely to encourage contempt for the law, rather than increasing virtue.

One point that follows from this is that, since the laws must be responsive to the condition of the populace (that is, whether it is generally virtuous or vicious), there is no set of morals laws that should be applied in all times and places. What is to be hoped for, however, from the perspective of those like Finnis and George, is that law will help to mold and habituate citizens and citizens-to-be into greater virtue, allowing even more morals legislation to be enacted. From their perspective, morals legislation holds out the hope of a virtuous circle of citizen improvement, where stricter laws help to properly shape citizens, which would then alter the prudential considerations, allowing even stricter moral laws. From the contrary view, of course, this is simply a slippery slope of increasingly draconian laws that infringe upon important freedoms.³⁴

Yet the range of laws supported by contemporary natural law theorists is already strikingly broad. This is so even though they believe that the American populace is fairly corrupt and prone to vice.³⁵ Reconciling the litany of morals laws they favor with the limited government they also favor is difficult.³⁶ For example, it is difficult to see how a limited government would try to legally prohibit consensual sodomy (gay or straight), *and* likewise prohibit the sale of contraceptives to unmarried persons, *and* pursue a war against pornography (in addition to the already unsuccessful war on drugs). All of these are policies supported by contemporary natural law theorists, yet such a government does not seem to me terribly limited.

³¹ See, e.g., *id.* at 1-18.

³² See *id.* at 1.

³³ GEORGE, *supra* note 17, at 151-53.

³⁴ Richard Duncan offers a very interesting position here. He adheres to a natural law position, yet also believes that the American political system is in such grave disorder, in part due to the vicious nature of American culture, that a libertarian position is the better option. Admittedly, he takes this stance for prudential reasons, since he believes that governmental interference is more often harmful than salutary, hence a general reduction in government is best. Still, it shows the range of possible practical positions that can flow from a natural law approach. Unlike many, I take this as a sign of strength for this theory. Richard F. Duncan, *On Liberty and Life in Babylon: A Pilgrim's Pragmatic Proposal*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 354, 354-68 (Michael W. McConnell et al. eds., 2001).

³⁵ GEORGE, *supra* note 29, at 36-37, 190-91.

³⁶ Natural law theorists today overtly accept and defend limited government, which is one area where they diverge from Aquinas. See, e.g., Finnis, *supra* note 27. Finnis' defense of limited government is itself limited, however. A much more forthright defense of natural law theory as supportive of limited government and a strong conception of rights is made by Robert George. GEORGE, *supra* note 29.

Since marriage is a real good, it does make sense to construct social policies to help it thrive, but there are profound limits upon what social policy can do in this realm. Furthermore, the types of policies that are often defended in the name of “marriage and the family,” including by natural law theorists, seem to have little if anything to do with marriage or families. Instead of advocating policies such as free pre-natal care and universal healthcare for children, we get lengthy defenses of why employers should be able to discriminate against gays and lesbians. Instead of analyzing how to make corporate policies more parent-friendly without unduly burdening business, detailed casuistry is offered as to why consensual sodomy is gravely immoral.³⁷

The same points are true in regards to the second good put forward by natural law theorists in regards to human sexuality; that is, that persons need to be integrated between their embodied and intentional selves. Again, this seems (at least to me) a real good. It is morally troubling when “one treats the body as a mere extrinsic means: one regards the body as something outside or apart from the subject, and so as a mere object. A certain contempt for the body inheres in such choices.”³⁸ For example, by accepting personal integration as a genuine good, I think it follows that prostitution is morally problematic. In effect, sex workers are forced into viewing their own bodies, and the bodies of their customers, in a purely extrinsic fashion. It must be deeply self-alienating, in addition to destructive of their other interpersonal relationships. Something similar is likely true for those who frequent prostitutes, since it involves the mere use of another as a means for gratification. Prudential considerations are still relevant here,³⁹ but they must be weighed against the moral concerns.

I would go further, perhaps, than natural law theorists in pushing concern for the good of personal integration. There are deep and very problematic aspects of modern culture that push us towards the reduction of the body to a mere means.⁴⁰ Modern philosophy has too often opted for a purely instrumentalist approach to nature.⁴¹ Hence our physical beings (as Kantians would put it, our phenomenal as opposed to our noumenal selves), which are a part of nature, thus by extension become part of this instrumentalist manipulation. Capitalism too encourages such an instrumentalist approach to humans and their bodies. To take only one contemporary and egregious example, meat packing plants make the processing line run too fast, which dramatically increases worker injuries.⁴² It also leads to the frequent spilling of the stomach and intestinal contents of the cattle, which is how meat becomes infected with the virulent form of *E. coli*.⁴³ “A certain contempt for the body,” by both worker and consumer, “inheres in such” profit-

³⁷ See GEORGE, *supra* note 17. George spends at least a fifth of text arguing against same-sex marriage and in support of anti-sodomy laws.

³⁸ *Id.* at 164.

³⁹ Take, for example, a legalized prostitution industry that is more easily regulated in terms of the health and safety of its workers and clients.

⁴⁰ This is powerfully explored, albeit overdrawn, in MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1979). The rather Kantian language here, of the body as a “mere means” is, however, not Foucault’s.

⁴¹ This issue is analyzed well by Charles Taylor. See Taylor, *supra* note 6, at ch. 25.

⁴² ERIC SCHLOSSER, *FAST FOOD NATION* 173-74 (2001).

⁴³ *Id.* at 203.

maximizing “choices.”⁴⁴ Furthermore, the scale and gravity of the mistreatment of the body in these workplaces is profound.⁴⁵

Although this is not the place for a lengthy discussion of how modern meatpacking plants cultivate a contempt for the body and cause personal disintegration, and do so in a way that dramatizes broader marketplace imperatives, it is worth supporting this claim with more evidence. “Every year about one out of three meatpacking workers in this country [s]uffers an injury or work-related illness that requires medical attention beyond first aid.”⁴⁶ Yet the scale of injuries is almost certainly under-reported. The annual bonuses for supervisors are based in part upon injury rates, but since a slower line means less profits, the changes that would create a safer workplace are left undone.⁴⁷ Instead, workers are pressured to not report injuries.⁴⁸ Eric Schlosser records how one worker lost two fingers in a plant accident and was back at work the next week.⁴⁹ “‘If one hand is no good,’ the supervisor told him, ‘use the other.’”⁵⁰ If this is not contempt for the body, it is unclear what would be. The list of such workplace abuses could be lengthened as well as the type of workers subjected to them, such as with immigrant farmworkers.

Again, while George, Finnis and others point to a genuine human good, do they defend policies that really promote it? Do they address significant cultural practices and social institutions that have a reductive and demeaning grip on the body? Or do they just marshal an argument to defend a (rather narrow-minded) cultural fixation, thus hijacking a real human good in the name of a misplaced concern (e.g., the prevention of masturbation)? Is consensual sodomy, especially between committed persons (regardless of opposite or same-sex), really the most fundamental abuse of the body today? From the volume of space spent on it, the answer implied by the natural law theorists is “yes.” It is an answer that strikes me as nothing less than astonishing and unbelievable. If personal integration is such an important good that the harming of it via acts of sodomy justifies criminal penalty, it must also, in order to be minimally consistent, be taken as a profound good in places aside from the bedroom. Yet I cannot find a single place where natural law theorists apply this good to the workplace. It is these types of lapses and lacunae in their arguments that fuel the suspicion that underlying the natural law position today is an animus against gays, lesbians, and other sexual and cultural minorities.

As a final point on this issue of the implications of the human good of personal integration, if we grant that there is a plurality of incommensurable goods one consequence is that no one good should be pursued so zealously that it begins to damage seriously other goods.⁵¹ Again, I agree that personal integration is a real good. Yet is it such a critical good that it does the moral heavy lifting required to get the conclusions natural law theorists reach? For the sake

⁴⁴ See *supra* note 38 and accompanying text.

⁴⁵ *Id.* at ch. 8.

⁴⁶ *Id.* at 172.

⁴⁷ *Id.* at 175.

⁴⁸ *Id.*

⁴⁹ *Id.* at 177.

⁵⁰ *Id.*

⁵¹ This is a theme that runs throughout the work of Isaiah Berlin. Even though Berlin was not at all a natural law theorist, in his commitment to a plurality of incommensurable goods, and exploration of the consequences of that moral view, there are few or no equals. See ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 167-72 (1970).

of argument, let me (temporarily) grant that non-procreative and non-marital sex involves treating the body as a mere means. Does this justify anti-sodomy laws? Or a more general discrimination against gays and lesbians? Because, to point out the obvious, such laws have real social costs, sacrificing other genuine goods. Having a “permanent minority”⁵² legally treated as second class citizens harms social unity. Anti-sodomy laws also strike at the principle of limited government and the notion that persons have privacy rights. Banning the sale of contraceptives to unmarried persons, given AIDS, syphilis, and other pathogens, is a health policy nightmare. These too are critical goods to be considered and weighed. Natural law theorists’ openness to prudential concerns certainly allows this; their underlying moral theory demands it.

As another example of the conflict of human goods, consider the goods of marriage and personal integration. As drawn by natural law theorists, there is in practice the certainty of conflict between these two goods in some situations. Obviously, sex between two (or more) persons can move from masturbation to oral sex to vaginal intercourse. Sometimes, in a sense, this is “necessary” to the successful completion of the sex act.⁵³ As men age, penile function typically declines. But it is not a simple on-off switch. Usually erections become more difficult to achieve, yet still are possible. With assistance from his partner (via masturbation and/or fellatio) an erection sufficient for intercourse may be achieved. Likewise, as women age, especially after menopause, the amount of natural lubrication they secrete often declines. Cunnilingus may supplement, with saliva, that lubrication and facilitate intercourse. A rigid anti-masturbation and anti-sodomy position denies, in practice, the biological reality of declining sexual function with age. Hence, even though natural law theorists hold that procreative, non-contracepted sex between loving spouses is a good even absent pleasure, a “giving what is due” to use Aquinas’ phrase,⁵⁴ the strictures they believe pertain actually make it difficult to realize this good. After all, if a man needs direct stimulation of his penis in order to achieve an erection sufficient for intercourse, yet such manipulation is morally unacceptable, in practice a condition of impotence has been morally forced upon that marriage.

As far as I am aware, John Finnis has never shown flexibility on this issue. Yet Robert George has. It merits quoting the relevant passage:

By “sodomy” here is meant: (1) anal or oral intercourse between persons of the same sex; or (2) anal or oral intercourse between persons of opposite sexes (even if married), *if it is intended to bring about complete sexual satisfaction apart from penile-vaginal intercourse*. ... If Susan, for example, masturbates John to orgasm or applies oral stimulation to him to bring him to orgasm, no real unity has been effected.⁵⁵

⁵² I am not aware of anyone, even on the far Christian right, who argues that the whole set of policies desired in order to “discourage” homosexuality will actually end it. The desire clearly is just to drive it underground. As a thought experiment, those who use this language and favor the policy of “discouraging” homosexuality should ask themselves, “What if a set of coercive policies were enacted to discourage heterosexuality? Would I give up my heterosexuality? Would I stop being an ‘active’ heterosexual?” Since the answers are almost certainly “no” to these questions, about the same degree of success can be anticipated for anti-gay policies too.

⁵³ By “successful” I mean the orgasm of one or both partners. Clearly, sex acts that do not culminate in orgasm can still be seen as rewarding by the participants, but orgasm is a common standard.

⁵⁴ FINNIS, *supra* note 7, at 144.

⁵⁵ GEORGE, *supra* note 17, at 170 (emphasis added).

There are several noteworthy points here. George clearly implies that there is a morally relevant distinction between heterosexual sodomy performed to orgasm versus that performed as a prelude to vaginal intercourse. Throughout his work there is a defense of a strong anti-sodomy position, yet suddenly a quite significant loophole is offered, though he does not explain why he thinks it exists. I will call this loophole the “non-orgasmic waiver,” though it needs to be understood as also integrating George’s other conditions; that is, that the couple is a married heterosexual one. Second, even though he carves out moral permissibility for non-orgasmic heterosexual sodomy, no such waiver is found for homosexual non-orgasmic sodomy. For someone as concerned with close argumentation as Robert George, to introduce such qualifications without comment is striking. I find this softening of his position, or at least apparent latitude, salutary. Yet it does introduce contradictions into his position.

What makes the moment of orgasm so special? Why is it that oral or anal sex short of orgasm can be engaged in, as long as things are at least intended to be completed with vaginal intercourse? One thing to note is that under his definition, an act of, say, fellatio which is not intended to bring about orgasm yet which does (perhaps the spouse did not pick up on how close her husband was to what D. H. Lawrence would call his “crisis”) would still not count as sodomy. That is, as long as (heterosexual) anal or oral sex is not intended to be orgasmic, it is not sodomy, even if it inadvertently becomes orgasmic and is the only sexual act performed. Allowing “intention” into his argument is a crucial move. In order to get the extrinsic versus intrinsic distinction to do what he wants, George (and Finnis, et.al.) repeatedly state that even if the partners are deeply loving and do not intend to use one another, acts of sodomy still do not count as acts which respect the integration of the person. Instead, they use the body as a mere means, *regardless of their intentions*. Now, suddenly, there is the possibility of heterosexual anal sex to orgasm that does not count as “mere use.” And the basis for the distinction is intention.

The non-orgasmic waiver is also problematic for the overall position in another way. Natural law theorists repeatedly contrast the “real” biological union of non-contracepted vaginal intercourse with the “illusion” of union with any other type of intercourse. Moreover, the “illusion” of sodomy is so grave that it makes persons believe that they are engaged in sexual relations with another that are potentially unitive, while what is “actually” happening is nothing more than masturbation. This is dis-integration of the self (for both participants), yet it is also demeaning to the relationship (assuming that one is involved): “such acts do not really foster bodily communion between the participants, and may actually drive them apart, since the gratifications are private experiences, not shared activities.”⁵⁶ Given this justification for opposition to sodomy, there is no reason for the non-orgasmic waiver. Instead, such a position is incoherent. Finnis’ hard-line position against all sodomy is more internally coherent, although it is implausible and even morally repugnant, in part for the reasons mentioned above.

George’s heterosexual non-orgasmic waiver also has legal implications. If the moral sanction against sodomy is the justification for anti-sodomy laws, George’s softening of the natural law position renders those laws, as applied to married heterosexuals, null. If sodomy

⁵⁶ *Id.* at 171.

without the intent of orgasm while engaged in that act is morally permissible, no legal prohibition could be enforced if the law was drawn in the same manner that George draws the moral lines. George, however, would likely approve of anti-sodomy laws which only applied to same-sex and unmarried heterosexual sodomy.

The Categories of Sexuality: Just How Natural is Natural Law?

Since I agree with George and Finnis about the human goods in question, marriage, and personal integration, albeit with the caveats briefly given above, it would seem like I might follow them in their specific conclusions, even while putting them into a rather different ideological context. The result would be, I believe, an interesting position. In many ways it would replicate much of John Paul II's position: culturally conservative on issues such as abortion, homosexuality, and sexuality as sanctioned exclusively within marriage (and even restrictions there, such as the avoidance of contraceptives), yet combined with a rather leftist economic stance, skeptical of capitalism, especially in its more unregulated forms, concerned with universality of access to quality healthcare, and critical of the growing inequality of wealth. Given that, in particular, Finnis and George tend to be rather deferential to the Catholic Church's teaching,⁵⁷ it is somewhat surprising that they do not take their position in this direction.⁵⁸

Yet this is not the line of argument I wish to take. That is because the categories of sexuality that natural law theory requires for the arguments examined above strike me as, with one exception, cultural constructs rather than natural kinds. Hence, the account of human goods that is offered should be seen as partially socially constructed. Again, in contrast to a typical liberal approach, which places the right as prior to the good, I am in agreement with natural law theorists that comprehensive accounts of the human good can be reasoned, and a rational basis for public policy. Civic republicans, however, are inclined to see these goods as more deeply socially constructed than natural law allows. Yet to make the case for social construction it is necessary to go into some history, to examine how another society understood sexuality rather differently. Although there are many examples that could be used to support this point, ancient Greece is probably ideal. In part this is because it has been, by now, fairly well researched, and because some natural law theorists invoke the names of Plato and Aristotle to lend further credence to their position.⁵⁹

As has been frequently noted, the ancient Greeks did not have terms or concepts that correspond to the contemporary dichotomy of "heterosexual" and "homosexual."⁶⁰ Probably the most frequent assumption of sexual orientation in ancient Greece was that persons can respond

⁵⁷ And, I suspect, ideologically supportive of John Paul II's conservatism on many issues.

⁵⁸ GEORGE, *supra* note 17, at 281 (writing rather dismissively of Sullivan, "He thinks that he has caught the *magisterium* of the Church in a contradiction.")

⁵⁹ Finnis, *supra* note 27. Finnis also argued that Plato and Aristotle were critical of homosexuality in the affidavit he submitted in *Romer*. But see, MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 299 (1999) (rebutting Finnis' claims).

⁶⁰ There is a wealth of material from ancient Greece pertinent to issues of sexuality, ranging from dialogues of Plato, such as the *Symposium*, to plays by Aristophanes, and Greek artwork and vases. What I present herein is a brief description of ancient Greek attitudes, but it is important to recognize that there was regional variation. For example, in parts of Ionia there were general strictures against same-sex *eros*, while in Elis and Boiotia (e.g., Thebes), it was approved of and even celebrated. See KENNETH DOVER, GREEK HOMOSEXUALITY 192-96 (1989); DAVID HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY (1990).

erotically to beauty in either sex.⁶¹ Some persons were noted for their exclusive interests in persons of one gender. For example, Alexander the Great and the founder of Stoicism, Zeno of Citium, were known for their exclusive interest in boys and other men.⁶² Such persons, however, were generally portrayed as the exception. Furthermore, the issue of what gender one is attracted to was seen as an issue of taste or preference, rather than as a moral issue.⁶³ Gender just becomes irrelevant “detail” and instead excellence in character and beauty is most important.

Even though the gender that one was erotically attracted to (at any specific time, given the assumption that persons will likely be attracted to persons of both sexes) was not important, other issues were salient, such as whether one exercised moderation.⁶⁴ Status concerns were also of the highest importance.⁶⁵ Given that only free men had full status, women and male slaves were not problematic sexual partners.⁶⁶ Sex between freemen, however, was problematic for status.⁶⁷

The central distinction in ancient Greek sexual relations was between taking an active or insertive role, versus a passive or penetrated one.⁶⁸ The passive role was acceptable only for inferiors, such as women, slaves, or male youths who were not yet citizens.⁶⁹ Hence, the cultural ideal of a same-sex relationship was between an older man, probably in his 20’s or 30’s, known as the *erastes*, and a boy whose beard had not yet begun to grow, the *eromenos* or *paidika*.⁷⁰ In this relationship there was courtship ritual, involving gifts (such as a rooster), and other norms.⁷¹ The *erastes* had to show that he had nobler interests in the boy, rather than a purely sexual concern.⁷² The boy was not to submit too easily, and if pursued by more than one man, was to show discretion and pick the more noble one.⁷³ There is also evidence (such as physical depictions on vases) that penetration was often avoided by having the *erastes* face his beloved and place his penis between the thighs of the *eromenos*, which is known as intercrural sex.⁷⁴ The relationship was to be temporary and should end upon the boy reaching adulthood.⁷⁵ To continue in a submissive role even while one should be an equal citizen was considered

⁶¹ Diogenes Laeurtius, for example, wrote of Alcibiades, the Athenian general and politician of the 5th century B.C., “in his adolescence he drew away the husbands from their wives, and as a young man the wives from their husbands.” DAVID GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 144 (1988).

⁶² *Id.* at 145.

⁶³ For example, a character in Plutarch’s *Erotikos (Dialogue on Love)* argues “the noble lover of beauty engages in love wherever he sees excellence and splendid natural endowment without regard for any difference in physiological detail.” *Id.* at 146.

⁶⁴ *Id.* at 151.

⁶⁵ *Id.* at 147-50; DOVER, *supra* note 60, at 84.

⁶⁶ GREENBERG, *supra* note 61, at 147.

⁶⁷ *Id.*

⁶⁸ *Id.*; DOVER, *supra* note 60, at 16.

⁶⁹ GREENBERG, *supra* note 61, at 149.

⁷⁰ *Id.* at 147. A good discussion of this is provided by Dover in the context of his analysis of Plato’s *Symposium*. DOVER, *supra* note 60, at 81-91.

⁷¹ DOVER, *supra* note 60, at 91-100.

⁷² *Id.* at 91.

⁷³ This is a theme in Pausanias’ speech in Plato’s *Symposium*. Pausanias, moreover, presents his remarks as a description of Athenian norms of his day.

⁷⁴ DOVER, *supra* note 60, at 98-99.

⁷⁵ See DOVER, *supra* note 60.

troubling, although there certainly were many adult male same-sex relationships that were noted and not strongly stigmatized.⁷⁶

Just as the ancient Greek understanding of sexuality was quite different from ours, so too was their understanding of marriage. As the noted classical scholar John Boswell put it, “It is particularly difficult, perhaps impossible, to map onto the grid of premodern heterosexual relationships what modern speakers understand by ‘marriage’....”⁷⁷ Whereas love is seen as the motive force today in marriage, both in terms of bringing one about and keeping it together, such a linkage did not hold in ancient Greece, or indeed in most premodern societies. Instead, property concerns and the production of legitimate heirs were two central concerns in ancient Greece.⁷⁸

The contrasts between our society and ancient Greek society in how the sexual-emotional domain is categorized are striking. For instance, contemporary natural law theorists emphasize distinctions such as heterosexual versus homosexual, and marital versus non-marital. For the ancient Greeks, the former distinction was unavailable, and they would contrast instead insertive versus passive.⁷⁹ The latter distinction was available to them, and was crucial for women. The punishments for extramarital sex were severe, for both the woman and the man with whom she had the assignment.⁸⁰ For men, however, it simply did not have the relevance it does today. Likewise, for the ancient Greeks questions of status were paramount. In contrast, today (including in natural law theory) such issues have fallen away. There are also differences in how sexuality is expressed. Oral sex was very frowned upon, for status rather than moral reasons, in ancient Greece,⁸¹ while intercrural sex is generally unknown today.

For natural law theorists, these contrasts are likely not problematic. The response is simply that their central category, that of procreative marital sex, was available to the ancient Greeks.⁸² Hence, the moral distinctions underlying the natural law position on sexuality were known by the ancient Greeks, even if some of the peripheral distinctions were not. It is notable,

⁷⁶ While the passive role was thus seen as problematic, to be attracted to men was often taken as a sign of masculinity. Greek gods, such as Zeus, had stories of same-sex exploits attributed to them, as did other key figures in Greek myth and literature, such as Achilles and Hercules. Plato, in the *Symposium*, argues for an army to be comprised of same-sex lovers. Thebes did form such a regiment, the Sacred Band of Thebes, formed of 500 soldiers. They were renowned in the ancient world for their valor in battle. DOVER, *supra* note 60, at 192, 196-99. Also see, PLATO, SYMPOSIUM 62 (Penguin, 1951), where Aristophanes’ speech praises men attracted to other men as “the most manly.”

⁷⁷ JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 9 (1994). Much of the material here about marriage in ancient Greece is derived from this book.

⁷⁸ It is also not surprising that the deeply patriarchal nature of ancient Greek society was reflected and reinforced through its marriage practices. For example, the groom and the father of the bride said the marriage vows, since the woman was the equivalent of a piece of property that was being passed from the latter to the former. As part of the vows, the father of the bride said ‘I give you my daughter for the plowing of legitimate children.’ NUSSBAUM, *supra* note 28, at 57-58.

⁷⁹ John Boswell, *Sexual and Ethical Categories in Premodern Europe*, in HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION 15, 17 (David McWhirter, et al. eds., 1990); see also DOVER, *supra* note 60, at 66.

⁸⁰ DOVER, *supra* note 60, at 105-06.

⁸¹ *Id.* at 101-02.

⁸² Boswell, *supra* note 79, makes clear that it was available, but it was not central to the typical ancient understanding.

however, that no ancient Greek thinker arrived at the position of contemporary natural law theorists.

What is relevant here, however, is not the mere difference in categories, but rather what the difference in categories reveals about sexuality in general. Much of what we take to be self-evident or simply given by nature in this domain—for example, the heterosexual/homosexual distinction, or marriage as motivated by love—should be seen as socially constructed within some broad biological limits.⁸³ This extends even to what is seen as sexual versus non-sexual.⁸⁴ This idea has profound consequences for the natural law position. If sexuality is in good part socially constructed, and it is intimately tied to certain goods, such as marriage and personal integration, it means that those goods too are partially socially constructed. Hence, if human goods provide reason for choice and action, the fact that goods can vary considerably over time in how they are understood within a culture, and across cultures, means that there is rational variation in choice and action.

The argument against sodomy, including same-sex acts, has a difficult challenge to meet. While sodomy cannot lead to procreation, natural law theorists realize that they have to defend the very strong and controversial claim that “there is not any other human good instantiated by such acts” either.⁸⁵ The existence of other goods that could be realized by same-sex erotic acts would provide moral reasons for engaging in such acts in some circumstances. Yet the ancient Greeks certainly had the position that same-sex relations promoted a number of goods, goods that contemporary natural law theorists recognize too, albeit often in a somewhat different form. Take, for example, Phaedrus’ speech in Plato’s *Symposium*.⁸⁶ Phaedrus, specifically addressing same-sex relations between an *erastes* and an *eromenos*, states that, if the relationship is a noble one, there can be no greater benefit for the beloved.⁸⁷ The things that will be learned in such a relationship, and the nobility of action, are of the highest importance for the development of the best character. Phaedrus goes on to argue for the military importance of same-sex relationships, plausibly contending that they will promote bravery and heroism.⁸⁸

Since Plato’s Phaedrus is extolling what is a widely-shared ideal, at least among his listeners in ancient Greece, how are we to understand actions guided by this understanding? There is a moving fictional depiction of such a relationship in Mary Renault’s *The Last of the Wine*.⁸⁹ Lysis is an officer in the Athenian army, and his beloved, the narrator Alexias, is inspired to greater nobility in action by his feelings for Lysis. The natural law claim would have to be that Alexias and Lysis are in the grip of a deep illusion. More profoundly, the claim extends beyond these two to the whole of ancient Greek culture. Even though the cultural ideal of that society stated that it was permissible, even good, to have same-sex relations under certain

⁸³ This has been widely discussed for the past quarter of a century. While I can do no more than gesture towards a full position here, and briefly outline a contrasting cultural understanding to buttress the claim, the social construction of sexuality has been comprehensively articulated by others. HALPERIN, *supra* note 60; NUSSBAUM, *supra* note 59, at ch. 10.

⁸⁴ For example, partial or complete nudity is non-sexual in some cultures, and highly sexualized in others.

⁸⁵ GEORGE, *supra* note 17, at 177.

⁸⁶ Plato, THE SYMPOSIUM 178a-180b (Seth Benardete trans., University of Chicago Press 2d ed. 2001).

⁸⁷ *Id.* at 178c.

⁸⁸ *Id.* at 179a-b.

⁸⁹ MARY RENAUULT, THE LAST OF THE WINE (1956).

conditions, this ideal simply led masses of persons into immoral and destructive acts. How, then, did this cultural ideal survive for centuries? Are we to understand ancient Greek society as that depraved?

Perhaps the natural law response is that entire cultures can fall into deep misunderstandings, including through erecting illusory cultural ideals.⁹⁰ That is certainly plausible, even likely. There are two aspects of natural law theory, however, that make that claim difficult in the example I have used. First, natural law theory holds that human reason can find objective reasons for rational and moral action.⁹¹ Furthermore, following Aquinas, it tends to be optimistic that persons will tend more towards virtue than vice, although there clearly are grounds for worry about the depraving parts of a culture.⁹² Certainly the traditional view of ancient Greece is that it was a society concerned with reason, even though it also had irrational aspects. Second, if we are to understand ancient Greek society as morally corrupt and sexually depraved, why then do natural law theorists so frequently invoke the ancients in general, and Plato and Aristotle, in particular? Would it not be odd to hold that ancient Greece was corrupt, yet be proud that one's own intellectual lineage can be traced back to such a culture?

What follows from the view I am laying out is that, given variation in human goods and how those goods are conceptualized, it makes sense to recognize a corresponding variety in moral choice and permissible action. Furthermore, this goes beyond allowing for differences between cultures. Instead, it has to apply at least partially within cultures, especially since modern societies such as the United States have marked variation in cultural patterns from one locale to another. Yet, what natural law theorists are doing is taking an overly narrow, in both a cultural and moral sense, conception of human goods and applying it ruthlessly across all persons in all situations.

In order to deny that *any* important goods can be realized or instantiated by homosexual sex acts, natural law theorists focus upon the sex act itself. The act in itself is presented as 'dis-integrating' and any sense by lovers such as Lysis and Alexias (or Lawrence and Garner) that it is part of a larger union or good is an "illusion." In contrast, their presentation of married heterosexual vaginal intercourse proceeds through a focus upon the context of the sex act in a long-term companionate union. This reductive approach to homosexuality paired with an expansive understanding of married heterosexual sex is mirrored in contemporary American jurisprudence. For example, the majority decision in *Bowers* stated that the question before the Court was whether or not there is "a fundamental right to engage in homosexual sodomy."⁹³ Similarly, Scalia's dissent in *Lawrence* focuses narrowly upon the sex act for gays, but upon marriage for heterosexuals.⁹⁴ The same is true in George and Bradley's *amicus curae* brief in

⁹⁰ On the one hand, natural law theorists assert that certain human goods and moral ideals are self-evident, and yet also recognize that those goods and ideals are often systematically ignored or abridged. See Finnis, *supra* note 7, at 33-50.

⁹¹ GEORGE, *supra* note 17, at 1-3 (providing a quick summary).

⁹² AQUINAS, *supra* note 15, at 775.

⁹³ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

⁹⁴ *Lawrence v. Texas*, 123 S. Ct. 2472, 2488-98 (2003) (Scalia, J. dissenting.)

that case.⁹⁵ This reductive approach is rhetorically necessary, since the denial that *any* important goods can be realized in the context of a loving same-sex relationship rings so hollow. In contrast, Kennedy's majority decision takes in a broader view.⁹⁶ An expansive understanding of gays and lesbians as persons with dignity and meaningful relationships is presented. It is no coincidence that this broader view underpins a decision that struck down anti-sodomy laws.

Conclusion

If the argument here is sound, at the very least there is no rational justification for anti-sodomy laws. Nor is there solid ground for several of the other natural law positions involving the regulation of sexuality, in particular the banning of contraceptives for unmarried persons. Furthermore, and more radically, I would contend (though it is only implicit in what I argued above) that there are good reasons for natural law theorists to support same-sex marriage. Marriage is, after all, a genuine good. Why deny it to millions of persons? Why, even worse, try to force those persons into heterosexual marriages only so that those marriages can then be a mockery of what a marriage should be? Does it not follow that such marriages violate some of the deepest values natural law theorists espouse? There are gay marriages today in America. The real issue here is whether the state will recognize these unions. As other countries move to recognize same-sex unions, with Canada now joining that list, we will soon learn that such legal recognition does not weaken the family. Other societies have similarly recognized such unions, due in part to the belief that such relationships realize important goods.⁹⁷

On one point natural law theorists are entirely correct: if homosexual sodomy is seen as morally acceptable, it begins a slippery slope that could very well lead to same-sex marriage. After all, if homosexual sodomy is permissible, it means that same-sex relationships are too. If they are permissible, it becomes but a small step to recognize the important goods they realize. Thus the ground is laid for the state recognition of gay marriages. Scalia's dissent in *Lawrence* repeatedly raises the specter of gay marriages arising from the overturning of *Bowers*: "[the majority's] reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."⁹⁸ Hence, for at least tactical reasons natural law proponents feel pressed to defend statutes such as Texas' anti-sodomy law. In striking down this law, Supreme Court Justice Anthony Kennedy wrote that the Court decision in *Bowers* was misguided in that it only saw homosexual sodomy as a discrete act, separated from any relationship it may reflect or embody.⁹⁹ This is demeaning, "just as it would demean a *married couple* were it to be said marriage is simply about a right to have sexual intercourse."¹⁰⁰ The Supreme Court is hence now on record as equating same-sex relationships to heterosexual marriages in at least one sense. The day will come when the Court will recognize the equivalence in every sense.

⁹⁵ Brief of Amicus Curiae Family Research Council, Inc., and Focus on the Family at 20-23, *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (No. 20-102). Contrast the passages concerning the sanctity of heterosexual marriage with the passages alluding to "same-sex deviate acts."

⁹⁶ *Id.* at 2472-88.

⁹⁷ WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 15-50 (1996).

⁹⁸ *Lawrence*, 123 S.Ct. at 2496.

⁹⁹ *Id.* at 2478.

¹⁰⁰ *Id.* (emphasis added).