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## Articles

### DEFENDING THE PUBLIC GOOD AND TRADITIONAL SOCIETY: NON-SCRIPTURAL RELIGIOUS OBJECTIONS TO SAME-SEX MARRIAGE

Donald H.J. Hermann\*

#### I. INTRODUCTION

The legal status of same-sex couples in the United States has changed dramatically over the last decade.<sup>1</sup> A significant legal development affecting the recognition of same-sex marriages was the decision of the United States Supreme Court in 2003, holding that state statutes prohibiting private consensual sex between adults, including adults of the same sex, were unconstitutional.<sup>2</sup> In the same year, the Massachusetts Supreme Judicial Court declared that denying same-sex couples the right to marry violated the state constitution.<sup>3</sup> The claim to a right of same-sex marriage, as well as registered domestic partnerships and civil unions, involves relatively new, and controversial, claims to legal recognition of same-sex relationships, or what some term “unions between homosexual persons.”<sup>4</sup> This legal recognition has become a

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<sup>1</sup> See *Baker v. State*, 744 A.2d 864, 888-89 (Vt. 1999) (concluding that the Vermont Supreme Court was the first state court to hold that the state constitution required same-sex couples to have all the rights and benefits of marriage); William N. Eskridge, Jr., *Six Myths that Confuse the Marriage Equality Debate*, 46 VAL. U. L. REV. 103, 110 (2011); Lauren Gambino, *Pennsylvania's Same-Sex Couples Celebrate Right to Marry and Divorce*, GUARDIAN (May 23, 2014), <http://www.theguardian.com/world/2014/may/23/pennsylvania-same-sex-marriage-divorce-governor-judge>, archived at <http://perma.cc/V67M-FC54>. As of January 6, 2014, thirty-six states recognize same-sex marriage. *Florida Joins the Wave on Same-Sex Marriage*, N.Y. TIMES (Jan. 6, 2015), available at [http://www.nytimes.com/2015/01/07/opinion/florida-joins-the-wave-on-same-sex-marriage.html?\\_r=0](http://www.nytimes.com/2015/01/07/opinion/florida-joins-the-wave-on-same-sex-marriage.html?_r=0), archived at <http://perma.cc/TP9J-8T5F>.

<sup>2</sup> *Lawrence v. Texas*, 539 U.S. 653, 578 (2003).

<sup>3</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

<sup>4</sup> See, e.g., *id.* at 980 (“Gay and lesbian couples living together openly, and official recognition of them as their children’s sole parents, comprise a very recent phenomenon . . .”); see also Gary C. Furst, *Will the Religious Freedom Restoration Act Be Strike Three Against Peremptory Challenges?*, 30 VAL. U. L. REV. 701, 729 (1996) (“The Supreme

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source of controversy in the general society, particularly in Europe and America.<sup>5</sup>

Claims for recognition of same-sex relationships gave rise to significant discussions in various Christian denominations in the United States, including the Episcopal Church, the Presbyterian Church, and the Lutheran Church.<sup>6</sup> It is, however, the Roman Catholic Church that provided the most significant challenge to same-sex unions. Most of the early critiques of these relationships on religious grounds were based on

Court has never held that the right to engage in a homosexual lifestyle is a fundamental right or that homosexuals as a group deserve special protections.”(citing *Bowers v. Harwick*, 478 U.S. 186 (1986)).

<sup>5</sup> See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* 5 (Oxford U. Press 2006) (“[T]he United States was not the only country in which the debate over same-sex marriage was taking place . . . gays and lesbians in Denmark and elsewhere in Scandinavia began their public campaign [in the 1960s] for the right to marry.”). “Lesbian and gay Americans, their friends, and their families strongly support same-sex marriage, while a large number of traditional family value Americans are dead set against it.” *Id.* at 13.

<sup>6</sup> See *TO SET OUR HOPE ON CHRIST: A RESPONSE TO THE INVITATION OF WINDSOR REPORT* ¶135, 25 (Episcopal Church Center 2005) [hereinafter *TO SET OUR HOPE ON CHRIST*] (expressing the view of the Episcopal Church); *SPECIAL COMMITTEE TO STUDY ISSUES OF CIVIL UNION AND CHRISTIAN MARRIAGE* 13 (Office of Gen. Assembly Presbyterian Church (USA) 2010) [hereinafter *SPECIAL COMMITTEE TO STUDY ISSUES*] (explaining the views of the Presbyterian Church). The Episcopal Church believes that:

For some time now, some members of our Church have been perceiving that same-sex relations as well as heterosexual relations can be manifestations of holiness, goodness, and enduring fidelity—just as same-sex relations as well as heterosexual relations can be manifestations of abuse, promiscuity, and many other kinds of sin.

*TO SET OUR HOPE ON CHRIST*, *supra*, at 25. The Presbyterian Church released an approved report stating that:

We recognize that our interpretations of Scripture lead us to different conclusions regarding homosexual behavior and same-gender partnerships. We hold that the Christian life is one of sanctification, and we confess that Scripture holds out a transforming hope of radical change in Jesus Christ that requires us to be dead to sin and alive to all that is good. For some of us, that means same-gender couples should be encouraged to abstain from sexual relations; for others of us, that means that same-gender couples should be encouraged to enter into faithful, covenanted, lifelong partnerships.

*SPECIAL COMMITTEE TO STUDY ISSUES*, *supra*, at 13. The Lutheran position was set out in *Sex, Marriage, and Family: A Contemporary Christian Perspective*, where it is asserted that: “[t]he Lutheran Church in American study affirms the traditional view of marriage as between one man and one woman is God’s intention.” *SEX, MARRIAGE, AND FAMILY: A CONTEMPORARY CHRISTIAN PERSPECTIVE* 10 (Cedric W. Tilberg ed., 1970). *But see* *CHRISTIAN BATALDEN SCHAREN, MARRIED IN THE SIGHT OF GOD: THEOLOGY, ETHICS, AND CHURCH DEBATES OVER HOMOSEXUALITY* 147 (U. Press of Am. 2000) (“the burden of proof is on the [Lutheran] church to show why it should not support, encourage, and bless such covenantal unions [of gay and lesbian couples] as authentic embodiments of our best teaching on sexuality and marriage”).

Scriptural authority.<sup>7</sup> The significance of the Roman Catholic arguments, discussed in this Article, is their basis primarily in natural law, a more philosophical or theological critique, which emphasizes biological complementarity and the proper end or purpose of sexual relations, and secondly, claims about the common good. These arguments make a significant contribution to the general societal discussion of the claims of same-sex partners to recognition of their relationships; they also represent the most compelling contemporary religious objections to legal recognition of same-sex marriage.<sup>8</sup>

The courts and legislatures that addressed the issue of same-sex marriage expressed awareness of the importance of this issue to churches and other religious institutions. For example, the Supreme Judicial Court of Massachusetts in its *Goodridge* opinion observed:

Many people hold deep-seated religious, moral and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally

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<sup>7</sup> See PETER J. GOMES, *THE GOOD BOOK: READING THE BIBLE WITH MIND AND HEART* 145 (1996) (describing the view of those who condemn homosexuality). A biblical based condemnation of homosexuality is often expressed this way:

Nearly every such person who acknowledges an aversion to homosexuality does so on the basis of what he or she believes the Bible to say, and in their minds there is no doubt whatsoever about what the Bible says, and what the Bible means. The argument goes something like this: [h]omosexuality is an abomination, and the homosexual is a sinner. At Sodom and Gomorrah God punished the cities for the sin of homosexuality. Saint Paul and the early Christians were equally opposed to homosexuality, and homosexual practices are condemned in the New Testament church. Therefore, if we are to be faithful to the “clear teaching of the scripture, we too must condemn homosexuality; it is the last moral absolute, and we compromise it at our own peril.”

*Id.*

<sup>8</sup> See CONGREGATION FOR THE DOCTRINE OF THE FAITH: *CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS 1* (Pauline Books & Media 2003), available at [http://www.clgs.org/files\\_clgs/article\\_cdfconsiderations.pdf](http://www.clgs.org/files_clgs/article_cdfconsiderations.pdf), archived at <http://perma.cc/9CLY-XL63> [hereinafter CDF, *CONSIDERATIONS*]. The CDF *Considerations* states:

The present considerations . . . provide arguments drawn from reason . . . . Since this question relates to the natural moral law, the arguments that follow are addressed not only to those who believe in Christ, but to all persons committed to promoting and defending the common good of society.

*Id.*; see also Terence J. Lau & William A. Wines, *Take Two Tablets and Do Not Call for Judicial Review Until Our Heads Clear: The Supreme Court Prepares to Demolish the “Wall of Separation” Between Church and State*, 43 VAL. U. L. REV. 595, 610–11 (2009) (“a number of religious groups do not view homosexuality as immoral or wrong”).

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strong religious, moral and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define liberty of all, not to mandate our moral code."<sup>9</sup>

There is also awareness that some churches and religious institutions fear that legal recognition of same-sex marriage will result in their being required to participate in or otherwise sanction such unions. The Supreme Court of California in its *In Re Marriage Cases* expressed an awareness of this concern; however, the court opinion maintained that recognition of same-sex marriage in state law did not impinge upon the religious belief or practice of any religious sect. The opinion stated that:

Finally, affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.<sup>10</sup>

Nevertheless, despite such assurance from judges and legislators that legal recognition of same-sex unions will not implicate churches or religious institutions, there continues to be significant opposition by religious authorities to state recognition of same-sex marriage.

Various religious denominations initially based their opposition on an understanding that the Hebrew Bible and the New Testament's condemned homosexuality and, by extension, condemned same-sex unions.<sup>11</sup> Advocacy by religious leaders based on scripture, however,

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<sup>9</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (citing *Lawrence v. Texas*, 539 U.S. 653, 571 (2003), quoting *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 850 (1992)).

<sup>10</sup> *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008).

<sup>11</sup> Religious condemnation of homosexuality has been based on several scriptural texts including: Genesis, Leviticus, Corinthians, Timothy, and Romans. *Genesis* 19:1-11 (New Century Version) (denouncing the sexual attacks on male visitors to Sodom); *Leviticus* 20:13

clashed with the First Amendment to the United States Constitution and the establishment clause which imposes strict restriction on the use of religious authority as the basis for state law; any law which has a religious base must show a primary secular effect.<sup>12</sup> This led religious critics of same-sex marriage to revise their arguments and cast them as claims that such laws violated the community moral sense.<sup>13</sup> However, challenges to same-sex marriage laws as immoral became untenable as a result of the United States Supreme Court's decision in *Lawrence v. Texas*, where the Court recognized the majority's view that a practice is immoral is "not a sufficient reason for upholding a law prohibiting the practice."<sup>14</sup>

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(New Century Version) ("If a man has sexual relations with another man as a man does with a woman, these two men have done a hateful sin. They must be put to death."); 1 *Corinthians* 6:9-11 (New Century Version) (condemning Sodomites); 1 *Timothy* 1:8-11 (disapproving immorality with boys and men); Romans 1:22-27 ("[M]en stopped having natural sex and began wanting each other. Men did shameful things with other men, and in their bodies they received the punishment for those wrongs."); see also MARION L. SOARDS, *SCRIPTURE & HOMOSEXUALITY: BIBLICAL AUTHORITY AND THE CHURCH TODAY* 23-24 (Westminster John Knox Press 1955) (stating that the New Testament denounced homosexual activity).

<sup>12</sup> *Stone v. Graham*, 499 U.S. 39, 41 (1980). The United States Supreme Court has grappled with the constitutionality of statutes that have a relationship to scripture and have established the requirement that any such law be a primary secular purpose. *Id.* The Court recognized the primary religious nature of the Bible in *Stone v. Graham*, when it found a state statute requiring posting of the Ten Commandments in each classroom unconstitutional. *Id.* The Court observed, "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters . . ." *Id.* (footnote omitted). In *School District of Abington Township v. Schempp*, the Court found unconstitutional a statute requiring the reading of passages from the Bible at the beginning of each school day. 374 U.S. 203, 203 (1963). The Court noted that "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid . . ." *Id.* at 224. In *McGowan v. Maryland*, the Court found constitutional a Maryland criminal statute known as Sunday Closing laws. 366 U.S. 420, 450-54 (1961). While recognizing the Scriptural basis of this legislation, the Court held that providing time for family activities, rest, and entertainment established a secular purpose. *Id.* at 450. So long as such laws were not used to coerce religious practice, the Court found them constitutional. *Id.* at 454.

<sup>13</sup> See Robert P. George & Gerald V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 301 (1995) (arguing that "homosexual sodomy, is intrinsically nonmarital and immoral"). However, contraception is also non-marital and immoral, but the authors maintain that there is a significant distinction that justifies the state in not recognizing same-sex marriage. *Id.* See generally David L. Gray, *4 Reasons Why Artificial Birth Control is Immoral and Unnecessary*, DAVIDGRAY (July 22, 2011), <http://www.davidlgray.info/blog/2011/07/four-reasons-why-artificial-birth-control-is-immoral-and-unnecessa/>, archived at <http://perma.cc/ZJV3-NQVQ> (expressing arguments from Scripture for the reasons contraceptives are immoral).

<sup>14</sup> *Lawrence*, 539 U.S. at 577-78.

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Religious critics of same-sex marriage laws cannot effectively base their position on scriptural authority or an assertion of social condemnation of homosexuality as immoral. There must be a showing of some significant social detriment resulting from same-sex marriage to justify withholding a claim to the right to marry. This makes the arguments of the Roman Catholic Church significant since the teaching Authority or Magisterium of the Church asserts that its opposition is based not simply on scriptural authority or a religious view of morality, but concern for the common good and maintenance of a non-theistic understanding of natural law.<sup>15</sup>

This Article will identify the most significant arguments developed by the Magisterium of the Roman Catholic Church in opposition to recognition of same-sex marriage, excluding those arguments based primarily on Scripture. In addition to consideration of specific arguments addressed to same-sex unions, Part II provides consideration to the Church's teaching on homosexuality, which underlies its position on the subject of same-sex marriage.<sup>16</sup> Next, a review will be made of the arguments by traditionalist theologians and new natural law advocates who defend the Magisterium's position.<sup>17</sup> These include, for example, the importance of biological complementarity and the proper end or purpose of sexual relations and their relation to marriage as the basis for society.<sup>18</sup> This will be followed by an examination of the revisionist theologians' critique of the Magisterium's position and the arguments they have developed in support of their acceptance of the claim for the legalization of same-sex marriage.<sup>19</sup> These include arguments based on an understanding of holistic complementarity, a naturalist understanding of homosexuality, and a broader and more empirically based understanding of the relationship between marriage and the

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<sup>15</sup> See C.J. McCloskey III, *The Magisterium and Catholic Social Training*, EARLY CHURCH FATHERS (Aug. 10, 2014, 12:00 AM), <http://earlychurchfathers.wordpress.com/2014/08/10/the-magisterium-and-catholic-social-teaching/>, archived at <http://perma.cc/6JW7-239B> (explaining the Catholic Social Doctrine).

<sup>16</sup> See *infra* notes 49–80 and accompanying text (discussing two documents created by the Congregation for the Doctrine of the Faith).

<sup>17</sup> See *infra* notes 81–148 and accompanying text (analyzing the ideas and concepts of individuals such as John Finnis, John Paul II, Germain Grisez, David Avila, Robert Batule, Russell Shaw, and Stanley Kurtz).

<sup>18</sup> See *infra* notes 86–88 and accompanying text (stating that there are some who believe that procreation largely controls the boundaries for marriage).

<sup>19</sup> See *infra* notes 149–89 and accompanying text (providing criticism of the Magisterium from Daniel Maguire, Jack Bonsor, Todd Salzman, and Michael Lawler).

common good.<sup>20</sup> Finally, a concluding assessment will provide the persuasiveness of religious based arguments for and against recognition of same-sex marriage.<sup>21</sup>

## II. TEACHINGS OF THE MAGISTERIUM

### A. *Considerations Regarding Proposals to Give Recognition to Unions Between Homosexual Persons*

In 2003, the teaching office of the Magisterium of the Roman Catholic Church, the Congregation for the Doctrine of the Faith (“CDF”), published *Considerations Regarding Proposals to Give Recognition to Unions Between Homosexual Persons*.<sup>22</sup> While the primary focus of this Article is opposition to “recognition of homosexual unions,” the next section of this Article discusses the underlying, or more fundamental, concern with the morality of homosexual sexual acts.<sup>23</sup> Part I of the CDF document, dealing with same-sex unions, argues that marriage by its nature is limited to a couple which is sexually or biologically complementary and whose sexual relations are open to procreation.<sup>24</sup> By contrast, the CDF maintains that homosexual unions involving homosexual sexual acts are closed to the possibility of reproduction and “do not proceed from a genuine affective and sexual complementarity.”<sup>25</sup> Later in this Article, consideration will be given to the opposing argument that biological complementarity and ability to procreate are not essential aspects of marriage or of the relationship properly understood for which legal recognition is being sought by same-sex partners.<sup>26</sup>

The CDF warns in Part II of *Considerations* that not only should there be no legal recognition of homosexual unions, but that “*de facto* tolerance” of such unions compromises the public good by exposing young persons to mistaken ideas about sexuality.<sup>27</sup> Moreover, the claim is made that same-sex couples cannot provide the home environment

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<sup>20</sup> See *infra* notes 174–76 and accompanying text (expressing the theory that homosexuality is not a chosen lifestyle, but is something that an individual will discover throughout his or her life).

<sup>21</sup> See *infra* notes 190–200 (concluding that the Magisterium fails to recognize the good that can be found from homosexual relationships).

<sup>22</sup> CDF, *CONSIDERATIONS*, *supra* note 8.

<sup>23</sup> *Id.* (emphasis removed); see *supra* Part II.A (discussing the proposals which support homosexual unions).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See *infra* notes 177–89 and accompanying text (providing a discussion of the critics’ arguments against the Magisterium’s current view of homosexual relationships).

<sup>27</sup> CDF, *CONSIDERATIONS*, *supra* note 8, at 2–3.

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most conducive to child development.<sup>28</sup> The injury to the public good is a result of the misguidance of children by a bad example involving public recognition of the acceptability of homosexual acts. Moreover, because children with same-sex parents are denied the appropriate and necessary influences for their psychological development, which occurs by having the contributions of both a male and a female parent.<sup>29</sup>

Part III of *Considerations* sets out arguments against legal recognition of homosexual unions based on right reason, the biological and anthropological order, and the social order and the legal order.<sup>30</sup> Basically, the argument is that civil law cannot contradict right reason or the natural law and still have binding effect of obedience on the conscience of the citizen.<sup>31</sup> Laws recognizing same-sex marriage violate the natural law because the effects of such civil laws are an assault on marriage as an institution resulting in an undermining of the common good.<sup>32</sup> Primarily, this is because recognition of same-sex unions necessarily involves public validation of homosexual behavior. The conclusion reached is that “[l]egal recognition of homosexual unions would obscure certain basic moral values and cause a devaluation of the institution of marriage.”<sup>33</sup> The underlying premise is that the high status of traditional marriage is undermined by recognition of the alternative of same-sex marriage as its equivalent. The argument is that traditional marriage is debased when same-sex marriage is accepted as its equal.

The argument from right reason and natural law theory is rooted in the biological and anthropological view taken by *Considerations*: (1) homosexual unions lack procreative capacity; (2) the use of artificial reproduction by homosexuals involves an affront to human dignity; and (3) such same-sex unions lack the conjugal dimension which enables transmission of new life and promotes mutual assistance.<sup>34</sup> The raising of children by same-sex parents is viewed as necessarily harmful to such children.<sup>35</sup> The absence of sexual complementarity is viewed as creating obstacles to normal development of children.<sup>36</sup> The claim is that ideal heterosexual child rearing necessarily includes a male and a female component. Consequently, adoption by same-sex persons is viewed as

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<sup>28</sup> *Id.*

<sup>29</sup> *See id.* (expressing the potential concerns with children who are not raised with both a mother and father).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> CDF, CONSIDERATIONS, *supra* note 8, at 4.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

doing violence to children, because a same-sex parent environment is not conducive to proper human development, as a result of lack of either a male or a female element. Later, this Article considers the contrary claims that children raised by same-sex parents suffer no detriment to their development or subsequent performance, as measured by researchers using tools of psychological and behavioral evaluation.<sup>37</sup>

*Considerations* maintains that recognition of homosexual unions would radically transform the institution of marriage by separating procreation and the raising of children from the institution of marriage.<sup>38</sup> Of course, one response is that not all marriages do or can involve children. For example, a marriage involving a sterile partner or a post-menopausal wife are incapable of procreation, although marriages involving such a person are permitted by both civil law and Roman Catholic canon law. Moreover, any couple can in fact incorporate children into their family by adoption or through the use of artificial reproduction technology. Nevertheless, *Considerations* essentially maintains a definition of marriage as limited to a union of one man and one woman who have the potentiality to procreate through natural intercourse.<sup>39</sup> The assertion is made that “[t]he inevitable consequence of legal recognition of homosexual unions would be the redefinition of marriage . . . .”<sup>40</sup> *Considerations* avoids the charge that such a definitional argument by its nature is circular by additionally identifying the essential factors of openness to procreation and possible childrearing, which are both available only in a heterosexual marriage; same-sex marriages by their nature will be childless unless there is access to adoption or reproductive technologies. Both of the latter means of establishing a family involving children are distinct from natural childbearing involving natural coital intercourse, which is impossible in the case of a homosexual union.

Anticipating the charge that the opposition to recognition of homosexual unions involves a failure to extend civil rights to, and results in, discrimination against homosexual persons, *Considerations* explicitly rejects the claim of those urging homosexual union is required by respect for the autonomy of, and non-discrimination, against homosexual persons.<sup>41</sup> The argument in *Considerations* is that homosexual unions are significantly distinguishable from traditional marriage so that it is not

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<sup>37</sup> See *infra* notes 190–200 and accompanying text (providing counterarguments to the idea that homosexual couples have a negative impact on the young children they are raising).

<sup>38</sup> CDF, CONSIDERATIONS, *supra* note 8, at 4.

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.*

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reasonable to claim that such unions are as equal to or the same as marriage, so as to require equal treatment.<sup>42</sup> Some revisionist theologians discussed in this Article argue that there is, in fact, a basis for similarity between same-sex and heterosexual relationships in terms of sexual relationship, primarily as expressions of conjugal love and intimacy with the consequence that opposition to same-sex unions does involve discriminatory treatment of homosexual persons whose intimate sexual relations and commitment are treated differently than those of heterosexuals.<sup>43</sup>

*Considerations* goes on to assert that since married couples contribute to the continued population of society, this makes it appropriate for the state to limit its recognition of the institution of marriage to the traditional heterosexual couple who are potentially capable of natural procreation.<sup>44</sup> This makes heterosexual marriage foundational to traditional society. Same-sex couples are incapable of making a contribution to the population through their sexual relations. This view emphasizes the producing of children as the principal reason for state recognition of a marriage, rather than the establishment of the household, or a family, as an independent economic and social unit, which reduces the possible need for state paternalism which might otherwise be required by an ill or dependent individual, whether homosexual or heterosexual, who lacked the support resulting from a bond of mutual interdependence provided by marriage. Nevertheless, to the extent that same-sex couples may legitimately claim any of the legal advantages of marriage resulting from state recognition of heterosexual

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<sup>42</sup> *Id.*

<sup>43</sup> See *infra* notes 177-89 and accompanying text (discussing the teachings of Salzman and Lawler).

<sup>44</sup> CDF, CONSIDERATIONS, *supra* note 8, at 5. The Court of Appeals of New York in *Hernandez v. Robles* upheld the favored treatment of opposite sex couples on the basis that natural intercourse between members of the opposite sex increase the likelihood of the birth of children who need care and that this justifies extending exclusively to their parents the right to marry. 7 N.Y. 3d. 338, 367 (2006). The opinion of the court reads:

The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationship between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus the promoting stability in opposite-sex relationship will help children more. This is one reason why the Legislature could relationally offer the benefits to opposite-sex couples only.

*Id.* at 359.

marriage, because they have established a household possibly including children, *Considerations* suggests homosexual persons can obtain the type of benefits available through marrying by the use of various provisions of the law dealing with the ownership of property (joint ownership), medical decision making and visitation (advance directives), and inheritance (wills).<sup>45</sup> These legal provisions involve costs and other burdens for an unmarried couple. Nevertheless, with such legal recourse available in the law, the argument is made that any charge of discrimination is mooted since the differences between heterosexual marriage and same-sex couples justifies the required use of different legal resources to vindicate the valid interests of the homosexual couple.

Part IV of *Considerations* maintains that Catholics are obliged to oppose legal recognition of homosexual unions.<sup>46</sup> Catholic politicians and lawmakers must vote against such legal recognition and seek repeal of such legislation if it has already been enacted.<sup>47</sup> This exhortation raises issues about the role of conscience and whether the issue of same-sex unions in fact implicates the common good in the way the Church teaches. Nevertheless, *Considerations* takes the view that the common good requires the refusal to recognize same-sex unions.<sup>48</sup>

B. *Persona Humana and Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*

The key Magisterial document on homosexuality is the CDF's 1986 *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*.<sup>49</sup> This document reaffirmed and expanded the distinctions made earlier in the 1975 *Declaration on Certain Questions Concerning Sexual Ethics: Persona Humana* between the homosexual condition and individual homosexual acts.<sup>50</sup> Homosexual acts are said to be "intrinsically disordered" because they involve sexual acts which do not have the possibility of producing an offspring postulated as an essential

<sup>45</sup> CDF, *CONSIDERATIONS*, *supra* note 8, at 5.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 6.

<sup>49</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS AND NON-DISCRIMINATION AGAINST HOMOSEXUAL PERSONS 7 (1998), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html), archived at <http://perma.cc/7UHA-WUY2> [hereinafter CDF, PASTORAL CARE OF HOMOSEXUAL PERSONS].

<sup>50</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON CERTAIN QUESTIONS CONCERNING SEXUAL ETHICS: PERSONA HUMANA 9 (1977), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19751229\\_persona-humana\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html), archived at <http://perma.cc/TRG5-FXBA> [hereinafter CDF, PERSONA HUMANA].

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feature of the human sexual act.<sup>51</sup> In the terms of *Persona Humana*, homosexual acts are viewed as disordered because they are deprived of their essential and indispensable finality of human sexual intercourse.<sup>52</sup> Of course, it may be argued in the alternative that sexual acts vary and have many dimensions but most significantly are expressions of love, intimacy, and commitment, and that the possibility of procreation is only one feature of sexual acts. However, the Magisterium's view is that openness to the possibility of procreation is a necessary element of any legitimate sexual act.<sup>53</sup> Both human nature and sexual acts are to be understood in terms of fixed and permanent principles of natural law, where "limits [are] imposed by the immutable principles based upon every human person's constitutive elements and [essential] relations."<sup>54</sup> An alternate view of natural law emphasizes human development and social change and evolution as significant factors for an understanding of natural law that accommodates history and social evolution.<sup>55</sup> This Article later discusses this view.<sup>56</sup>

The Magisterium claims its approach is not only rooted in natural law but also has support from the natural sciences.<sup>57</sup> In *Persona Humana*, sensitivity is shown toward the claim that, at least for some persons, homosexuality is not a matter of choice but a deep rooted condition which has likely genetic, psychological, or other foundational components.<sup>58</sup> According to the Magisterium:

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 6.

<sup>54</sup> *Id.* at 5.

<sup>55</sup> See JOHN MAHONEY, *THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION* 79-82 (1987) (discussing varying concepts arising from the theory of natural law).

<sup>56</sup> See *infra* notes 170-76 and accompanying text (discussing the evolutionary theory).

<sup>57</sup> See CDF, *PASTORAL CARE OF HOMOSEXUAL PERSONS*, *supra* note 49, at 7 ("[W]e will focus our reflection within the distinctive context of the Catholic moral perspective . . . which finds support in the more secure findings of the natural sciences . . .").

<sup>58</sup> See *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 378-79 (William Paul et al. eds., 1982) (summing up the conclusion made regarding homosexuality). The Final Report of the Society for the Psychological Study of Social Issues Task Force on Sexual Orientation concluded:

While psychoanalytic concepts show considerable promise for the understanding of homosexuality's interaction with other aspects of personality, other models (such as social psychological and developmental ones) also have much to contribute. Biological models involving an interaction between genetic factors (that is, predispositions) and environmental ones are promising and require further study.

*Id.*

A distinction is drawn, and it seems with some reason, between homosexuals whose tendency comes from a false education, from a lack of normal sexual development, from habit, from bad example, or from other similar causes, and is transitory or at least not incurable; and homosexuals who are definitively such because of some kind of innate instinct or pathological constitution judged to be incurable.<sup>59</sup>

One might assume that the recognition of these differences between various homosexual persons would lead to a moral distinction that recognizes a significantly different behavior rooted in a deep innate unchangeable aspect of the human personality. However, there is no distinction between these two classes of homosexual persons in the judgment of their acts. Nevertheless, homosexual persons are offered pastoral care comprised of “understanding and sustained in the hope of overcoming their personal difficulties.”<sup>60</sup> Despite the possibility of an innate genetic or biological basis for homosexuality, Church teaching holds that homosexual acts are intrinsically disordered and can in no case be approved of, and “no pastoral method can be employed which would give moral justification to these acts on the grounds that they would be consonant with the condition of such [homosexual] people.”<sup>61</sup>

The teaching of *Persona Humana* reiterates the central principle of *On Pastoral Care*, which states, “[a]lthough the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency ordered toward an intrinsic moral evil [homosexual act], and thus the inclination itself must be seen as an objective disorder.”<sup>62</sup> While this view does not judge the homosexual person as evil, it does seem to say that the person who is homosexual has an evil or sinful inclination. Moreover, it is noteworthy that not only does this view characterize human acts as evil, it collapses the distinction between ontic evil or pre-moral evil and moral evil. In the context of homosexual acts, ontic or pre-moral evil involves consideration of something objectionable (like cutting off an arm) which can only be judged as a moral evil by considering the context or circumstances (compare cutting off an arm as torture with an amputation to save a person’s life). The view being taken in *On Pastoral Care* is that no matter what the context and no matter what the circumstances, homosexual sexual acts are to be considered as moral

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<sup>59</sup> CDF, *PERSONA HUMANA*, *supra* note 50, at 8.

<sup>60</sup> *Id.* at 9.

<sup>61</sup> *Id.*

<sup>62</sup> CDF, *PASTORAL CARE OF THE HOMOSEXUAL PERSONS*, *supra* note 49, at 8.

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evil.<sup>63</sup> This view provides a major focus of criticism by revisionist theologians who have reflected on this statement and would distinguish ontic from moral evil in the case of homosexual acts occurring in circumstances such as a long term loving and committed relationship existing between same-sex partners, as opposed to homosexual acts outside of such a relationship.

One of the purposes achieved by the publication of *On Pastoral Care* was to counter what was viewed as a too liberal interpretation of *Persona Humana*. The Magisterium wanted to make it clear “lest [anyone] be led to believe that the living out of this orientation in homosexual activity is a morally acceptable option. It is not.”<sup>64</sup> While *On Pastoral Care* continues to rely on the Magisterium’s use of natural law to support its condemnation of homosexual acts, it gives significant attention to Scriptural treatment of the subject.<sup>65</sup> While a consideration of arguments based on scripture are beyond the scope of this Article, it is noteworthy that there is explicit rejection of any new exegesis or use of the historical-critical approach to interpretation of scripture which would assert anything other than an unbroken tradition of Scriptural condemnation of homosexuality.

In addition to the natural law and Scriptural based analysis, *On Pastoral Care* invokes a sacramental understanding of marriage:

To choose someone of the same-sex for one’s sexual activity is to annul the rich symbolism and meaning, not to mention the goals, of the Creator’s sexual design. Homosexual activity is not a complementary union, able to transmit life, and so it thwarts the call to life of that form of self-giving which the Gospel says is the essence of Christian [marriage].<sup>66</sup>

There is a presumption that the homosexual is an individual whose experience is one of isolation who engages in self-regarding sexual activity. By implication, this view of heterosexual union involves a very physicalistic understanding of self-giving in human relations since it postulates an act of sexual self-giving, which is authentic only in circumstances of genital unity with pre-creational possibility; it ignores the significance and possibility of psychological aspects of sexual self-giving, including love and affection.<sup>67</sup> The physicalist view taken here

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 10.

<sup>66</sup> *Id.* at 11.

<sup>67</sup> *Id.* at 12.

leads to the conclusion that the homosexual is incapable of a “self-giving” same-sex relation, and instead is merely “self-indulgent” “when they engage in homosexual activity they confirm within themselves a disordered sexual inclination which is essentially self-indulgent.”<sup>68</sup> Moreover, the individuals who constitute the homosexual couple are not only self-indulgent, they are necessarily unfulfilled and unhappy “[a]s in every moral disorder, homosexual activity prevents one’s own fulfillment and happiness by acting contrary to the creative wisdom of God.”<sup>69</sup> The conclusion is that homosexuals are incapable of a loving committed relationship with the possibility of personal and mutual fulfillment in their sexual relations. This is the view that there is no such thing as an active, happy homosexual.

In *On the Pastoral Care*, there is a denunciation of groups within and without the Church which try to pressure the Church “to accept the homosexual condition as though it were not disordered and to condone homosexual activity.”<sup>70</sup> Not only are such influences condemned, but there is an effort to identify threats to the common good posed by homosexual acts. First, “the practice of homosexuality may seriously threaten the lives and well-being of a large number of people.”<sup>71</sup> This also seems to suggest that homosexuals spread disease and cause AIDS. Second, “[t]he view that homosexual activity is equivalent . . . of conjugal love, has a direct impact on society’s understanding of the nature and rights of the family and puts them in jeopardy.”<sup>72</sup> This suggests that homosexuality is similar to lenient divorce laws in weakening the bonds of heterosexual marriage. A similar argument is that same-sex marriage weakens marriage because it does not involve the aspect of natural procreativity. Third, “to claim that the homosexual condition is not disordered [leads to] . . . other distorted notions and [sexual] practices gain[ing] ground.”<sup>73</sup> This suggests the assertion that acceptance of homosexuality will lead to claims for acceptance of incest, polygamy, bestiality, and other forms of currently proscribed sexual practices. This view was echoed by Justice Scalia, who wrote in his dissent in *Lawrence v. Texas*, that legal rejection of laws punishing homosexual acts will lead to legal recognition of their right to engage in other “immoral” sexual practices.<sup>74</sup> Justice Scalia wrote: “[s]tate laws against bigamy, same sex marriage, adult incest, prostitution, masturbation, adultery, fornication,

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<sup>68</sup> CDF, PASTORAL CARE OF THE HOMOSEXUAL PERSONS, *supra* note 49, at 11.

<sup>69</sup> *Id.* at 12.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 13.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 14.

<sup>74</sup> *Lawrence v. Texas*, 539 U.S. 558, 589–90 (Scalia, J., dissenting)

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bestiality and obscenity are likewise [behaviors] sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question . . . ."<sup>75</sup>

Finally, expanding on the earlier discussion of homosexual orientation in *Persona Humana*, the issue is raised whether homosexual behavior is compelled or to be understood as being the result of human compulsion:

What is at all costs to be avoided in the unfounded and demeaning assumption that the sexual behavior of homosexual persons is always and totally compulsive and therefore inculpable. What is essential is that the fundamental liberty which characterizes the human person and gives him his dignity be recognized as belonging to the homosexual person as well.<sup>76</sup>

Here there is a slight suggestion that homosexuality is a psychological condition subject to possible "cure." The psychiatric community challenges this view.<sup>77</sup> The stronger suggestion is that homosexual persons have the ability to control their behavior by sacrifice and that abstinence is the moral choice that ought to be made; "[t]o refuse to sacrifice one's own will in obedience to the will of the Lord is effectively to prevent salvation."<sup>78</sup> Finally, the Magisterium makes it clear that a person's sexual orientation is an aspect of personality and not equated with the essence of the individual human person; the Church "refuses to consider the person as a 'heterosexual' or a 'homosexual' and insists that every person has a fundamental [human] identity."<sup>79</sup> Many would agree that sexual identity or sexual orientation does not capture the significance of the whole person. Yet, the question remains whether sexual identity is a basic, significant, and perhaps essential aspect of the human person.<sup>80</sup> By separating sexual orientation from human identity

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<sup>75</sup> *Id.* at 590.

<sup>76</sup> CDF, PASTORAL CARE OF THE HOMOSEXUAL PERSONS, *supra* note 49, at 14-15.

<sup>77</sup> See Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY RESEARCH 149-60 (John C. Gonsiorek & James Weinrich eds., 1991) (discussing that even reparative therapists have conceded that their therapy rarely purges the patient of all homosexual desire, and there is no hard empirical evidence that it has any long-term effect on any patients).

<sup>78</sup> CDF, PASTORAL CARE OF HOMOSEXUAL PERSONS, *supra* note 49, at 15.

<sup>79</sup> *Id.* at 18.

<sup>80</sup> See Gregory Baum, *Catholic Homosexuals: The Self-Affirmation of Gay Catholics Raises Many Theological Questions*, 99 COMMONWEAL 479, 481 (1974) ("[I]t is the task of men and women who discover a homosexual inclination in themselves to discern whether they are

and by separating sexual acts from a person's identity, it is easier to maintain the act and status distinction which is at the heart of the Magisterium's teaching about the appropriate separation of the homosexual condition, inclination or status, which is to be met with compassion from homosexual acts or behavior that is subject to condemnation.

### III. NEW NATURAL LAW AND TRADITIONALIST SUPPORT OF THE TEACHING OF THE MAGISTERIUM

#### A. *New Natural Law Teaching on Homosexuality Opposed to Same-Sex Marriage*

John Finnis, a professor of law and legal philosophy at Oxford, provided a significant natural law analysis justifying the condemnation of homosexual acts, which supports the teaching of the Magisterium on homosexuality and same-sex marriage.<sup>81</sup> Finnis adopts a non-theistic approach to natural law. While natural law is used to support the religious objection to same-sex marriage, the natural law objection is not being presented as a religious objection.

Finnis begins by asserting that the major Greek philosophers, including Socrates, Plato, and Aristotle condemned homosexual conduct "as intrinsically shameful, immoral, and indeed depraved and depraving."<sup>82</sup> It is important for Finnis to establish an ancient Greek bias against homosexuality because of the close nexus between contemporary natural law theory and ancient Greek philosophy. If Socrates engaged in homosexual acts, can it be asserted that such acts violate human nature since Socrates contributed to the bedrock of a non-theistic understanding of natural law?

Finnis identifies three principal reasons for the Platonic-Aristotelian condemnation of homosexual conduct:

- (1) The commitment of a man and a woman to each other in the sexual union of marriage is intrinsically good and reasonable, and is incompatible with sexual relations outside of marriage.
- (2) Homosexual acts are

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caught in a phase which prevents them from fulfilling their real possibilities, or whether homosexuality is a constitutive element of their personality structure.").

<sup>81</sup> See generally John Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049-76 (1994) (examining the condemnation of homosexual acts).

<sup>82</sup> *Id.* at 1055. Finnis equates the terms "homosexual activity," "homosexual acts," and "homosexual conduct" and defines them as referring "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." *Id.*

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radically and peculiarly non-marital, and for that reason intrinsically unreasonable and unnatural. (3) . . . [H]omosexual acts have a special similarity to solitary masturbation, and both types of radically non-marital act[s] are manifestly unworthy of the human being and immoral.<sup>83</sup>

The positive support for marriage by the ancient Greeks include: (1) valuing the “familiarity, affection[,] and love between spouses in a chastely exclusive marriage”; (2) a recognition of marriage as “an intrinsically desirable friendship between quasi-equals”; and (3) a view 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>84</sup> These three values are not exclusive to heterosexual marriage, but are in fact the benefits sought by same-sex couples seeking to marry.

The next issue for Finnis is to justify the exclusiveness of genital sex to marriage. This involves recognition of the unitive nature of marital sex which simultaneously supports procreation and mutual love; “[g]enital intercourse between spouses enables them to actualize and experience (and in that sense express) their marriage itself, as a single reality with two blessings (children and mutual affection). Non-marital intercourse, especially but not only homosexual, has no such point and therefore is unacceptable.”<sup>85</sup>

Finnis draws on St. Augustine’s *De Bono Coniugali* to identify instrumental aspects of marriage, such as “procreation and education of children[,]” and non-instrumental aspects including: friendship promoted by propagation, remedying the “disordered desire of concupiscence[,]” and the natural companionship of the two sexes.<sup>86</sup> This later effect of marriage gives legitimacy to sterile marriages and distinguishes them from same-sex unions. Finnis asserts: “in sterile and fertile marriages alike, the communion, companionship, *societas* and *amicitia* [of members of the two sexes]—their being married—is the very good of marriage, and is an intrinsic, basic human good, not merely instrumental to any other good.”<sup>87</sup> Finnis’s discussion suggests that it is wrong to assert that procreation is the end to which marriage is instrumental, but rather “[p]arenthood and children and family are the

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<sup>83</sup> *Id.* at 1062–63.

<sup>84</sup> *Id.* at 1063.

<sup>85</sup> *Id.* at 1064.

<sup>86</sup> See Finnis, *supra* note 81, at 1064 (discussing St. Augustine views of marriage in *De Bono Coniugali*).

<sup>87</sup> *Id.*

intrinsic fulfillment of a communion which, because it is not merely instrumental, can exist and fulfill the spouses [in a special social sense] even if procreation happens to be impossible for them.”<sup>88</sup>

Finnis comes to the central issue of whether sexual acts between same-sex partners can be legitimate expressions of non-marital friendship, love, and affection establishing the communion which he argues is fulfilling to spouses. Finnis asks: “[w]hy is the attempt to express affection by . . . non-marital sex the pursuit of an illusion?”<sup>89</sup> Finnis’ answer focuses on the biological reality of the union of the reproductive organs of husband and wife in forming a *personal reality* or a *personal unit* capable of reproduction and friendship.<sup>90</sup> Without the relationship of marriage and without the complementarity of reproductive organs involved in intercourse, there is not only the absence of the personal unit, but the individuals are using their sexual organs merely for gratification:

The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow them to *experience* their *real common good*—*their marriage* with the two goods, parenthood and friendship.<sup>91</sup>

On the other hand two persons who are good friends and cannot marry (i.e. the same-sex couples) who engage in sexual relations cannot have children together and “their reproductive organs cannot make them a biological (and therefore personal) unit.”<sup>92</sup>

According to Finnis, since same-sex unions cannot experience the sexual act as a reproductive act, it is no more than an act of individual gratification:

[S]exual acts [of same-sex partners] together cannot do what they may hope and imagine. Because their activation of one or even each of their reproductive organs cannot be an actualizing and experiencing of the

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<sup>88</sup> *Id.* at 1065.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1066.

<sup>91</sup> *Id.*

<sup>92</sup> Finnis, *supra* note 81, at 1066.

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*marital* good—as martial intercourse (intercourse between spouses in a martial way) can, even between spouses who *happen* to be sterile—it can do no more than provide each partner with an individual gratification.<sup>93</sup>

Finnis limits the legitimate use of reproductive organs to realizing a marital relationship that is open to the common good of reproduction.

Finnis characterizes sex relations between same-sex partners as reducing their bodies and reproductive organs to self-gratification and isolated selves rather than as a couple expressing mutuality of affection:

For want of a *common good* [procreation] that could be actualized 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>94</sup>

Thus, Finnis ultimately denies that same-sex relations can involve mutuality of love, affection, and recognition of the other in their personhood. Sexual acts of homosexuals are reduced to their physical character:

[No matter the] 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

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<sup>93</sup> *Id.* Finnis specifically rejects the claim that same-sex unions are open to procreation were conditions different in the same way sterile couples would accept offspring:

Anal and oral intercourse, whether between spouses or between males, is not a biological union ‘open to procreation’ . . . . Biological union between humans is the inseminatory union of male genital organ with female genital organ; in most circumstances it does not result in generation, but it is the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation.

*Id.*

<sup>94</sup> *Id.* at 1066–67.

more human relationship after a grueling day in the assembly line.”<sup>95</sup>

Finnis denies any significance to a homosexual’s possible loving and committed relationship, thus for Finnis, all homosexual sexual acts are reduced to solitary sexual acts: “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.”<sup>96</sup>

Finnis concludes that only marital sexual acts are moral and such acts must be of the reproductive kind:

[S]exual acts are not unitive in their significance unless they are marital (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—actualization, so far as the spouses then and there can, of the reproductive function in which they are biologically and thus personally one.<sup>97</sup>

The emphasis of Finnis on the unitive function of heterosexual marital intercourse, which he maintains must be open to the possibility of procreation, discounts the possibility of the unitive experience of most sexual acts and diminishes the significance of expressions of love, affection, and mutual self-giving that may occur in any sexual act. Instead, Finnis seems to emphasize physical aspects of heterosexual marital conjugal acts by essential coital relations, insemination, and conception. Finnis’ account does not seem to coincide with the emotional and psychological aspects of “making love” by many married and unmarried couples, whether heterosexual or homosexual.

*B. The Theology of Sexual Difference Opposed to Same-Sex Marriage*

The new natural law theory primarily opposes same-sex marriage from the position that an openness to procreation is an essential element of marriage. An alternative basis for opposition to same-sex marriage is the theology of sexual difference or sexual complementarity. Pope John

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<sup>95</sup> *Id.* at 1067.

<sup>96</sup> *Id.*

<sup>97</sup> Finnis, *supra* note 81, at 1067.

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Paul II provided significant support for this view in his *Theology of the Body*.<sup>98</sup> According to John Paul II, “[t]he theology of the body, which is linked from the beginning with the creation of man in the image of God, becomes in some way also a theology of sex, or rather a theology of masculinity and femininity.”<sup>99</sup> There are two important aspects of gender; these are the double aspects “of man’s somatic constitution (. . . she is flesh from my flesh and bone from my bones)” and the meaning of the human body which attains completion in “reciprocal enrichment” through the relationship of the two sexes.<sup>100</sup> This relationship of the two sexes in turn depends on sexual difference or “two incarnations” which involve: “two reciprocally completing ways of ‘being a body’ and at the same time of being human—as two complementary dimensions of self-knowledge and self-determination and, at the same time, two complementary ways of being conscious of the meaning of the body.”<sup>101</sup>

It is the “presence of the feminine element, next to the masculine and together with it, [that] signifies an enrichment for man.”<sup>102</sup> In marriage that sexual difference and complementarity is realized: “masculinity and femininity, as that characteristic of man—male and female—that allows them, when they become one flesh, to place their whole humanity at the same time under the blessing of fruitfulness” which returns them “to [the] union in humanity . . . [that] allows them to recognize each other reciprocally.”<sup>103</sup>

Germain Grisez developed the theology of the complementarity nature of female and male as a basis for understanding the nature and significance of marriage.<sup>104</sup> Grisez developed a highly differentiated notion of sexual difference that underlies the concept of complementarity function in which “both sexes are naturally needed to fulfill complementary social roles.”<sup>105</sup> This role differentiation is rather specific:

[W]hile fathers should share in the care of their small children, the primary responsibility in this matter naturally falls to mothers; and while women can help

<sup>98</sup> JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY 165 (2006).

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* (quoting Genesis 2:23).

<sup>101</sup> *Id.* at 166 (internal quotation marks omitted).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 167.

<sup>104</sup> *See generally* GERMAIN GRISEZ, THE WAY OF THE LORD JESUS, VOLUME TWO: LIVING A CHRISTIAN LIFE (1993) (discussing the roles of men and women in society).

<sup>105</sup> *Id.* at 388.

deal with challenges which must be repelled by physical force, generally men are better suited by nature to organize such actions and execute them.<sup>106</sup>

It is the view that essential sexual differences underlie the sexually differentiated roles which are central to the definition of marriage, as between one man and one woman: “[t]his affirmation of the difference between men and women implies the legitimacy of sexually differentiated roles in marriage.”<sup>107</sup> According to Grisez: “[b]y differentiating the sexes, God plainly intends to differentiate the spouses’ roles” and “this natural differentiation serves the good of marriage and family.”<sup>108</sup> The view that this difference in roles is rooted in “biological necessities” is at the heart of this argument: “[n]ot only physiologically but psychologically, women naturally are adapted to this nurturing role.”<sup>109</sup> This sexual difference does not only play a role in fulfilling the complementary nature of marriage, but is essential to proper and effective child rearing.<sup>110</sup> Grisez does not deny a role for the male in child rearing, but sees it as complementary and additive: “the development of children not only calls for the fulfillment of both roles but for their differentiation.”<sup>111</sup> These roles involve both nurturing and challenging as “[b]oth parents can and should share to some extent in doing both things, but neither can do both fully at the same time[;] . . . the spouses must accept different responsibilities and carry them out consistently for the good of their children.”<sup>112</sup> Nevertheless, even if it is important for parents to take on these differing roles, there is of course the possibility of meeting the needs of nurturing and challenging and being taken on by either of the partners to a same-sex marriage.

The argument about sexual difference and its significance in the debate about same-sex unions is the subject of an article by Daniel Avila, the Associate Director for Policy and Research for the Massachusetts Catholic Conference in Boston.<sup>113</sup> Avila notes that the California Supreme Court decision in 2008 recognized same-sex partners’ right to

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 617.

<sup>108</sup> *Id.* at 626.

<sup>109</sup> *Id.* at 627.

<sup>110</sup> GRISEZ, *supra* note 104, at 628.

<sup>111</sup> *See id.* (expressing that both parents have an important role in child rearing).

<sup>112</sup> *Id.*

<sup>113</sup> *See* Daniel Avila, *Sexual Difference and Marriage: An Urgent Need for New Studies*, 9 NAT’L CATH. BIOETHICS Q. 441, 441–42 (2009) (discussing sexual differences and their relation to same-sex marriage).

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state protected marriage because marriage “could not be limited by any reference to sexual difference.”<sup>114</sup> The California court found that same-sex family relationships are comparable in stature and equal in dignity to family relationships of opposite sex couples.<sup>115</sup> The court found that a refusal to recognize a marriage “based on sex differences supposedly masks an unfairness and inequality,” because sexual difference of partners is irrelevant to marriage.<sup>116</sup>

Avila argues that the California court was wrong in rejecting sexual difference as essential to marriage, but he admits that the defenders of Catholic doctrine, recognizing the significance of sexual difference, have not developed their argument by proof of the significance of sexual difference in the raising of children.<sup>117</sup> According to Avila: “[d]efenders of traditional marriage must be prepared to offer reasons why society must continue to recognize sexual difference as a fundamental attribute of marriage, argued in terms that carry authority and meaning in today’s post-Christian ethos.”<sup>118</sup>

Avila makes clear that sexual difference is seen as a basic characteristic of marriage. Pope John Paul II is cited for teaching that “the natural dimension of masculinity and femininity is crucial for understanding the essence of marriage.”<sup>119</sup> Pope Benedict XVI is cited for the view that “marriage has a truth of its own[;] . . . the sexually different reality of the man and of the woman with their profound needs for complementarity, definitive self-giving and exclusivity.”<sup>120</sup> Moreover, the Congregation for the Doctrine of the Faith has provided a further reason for the requirement of sexual difference and complementarity in marriage:

[T]he absence of sexual complementarity in these [same-sex] unions creates obstacles in the normal development

<sup>114</sup> See *id.* at 442 (citing *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008)). “This decision has been reversed by Proposition 8, a voter-initiated constitutional amendment that defines marriage as a union of man and woman, but leaves intact California laws granting equal recognition to same-sex relationships.” *Id.*; see also *Petition for Writ of Certiorari*, 755 F.3d 1193 (No. 14124), <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-124.htm>, archived at <http://perma.cc/Q38N-5BPT> (setting out the proceedings for the pending case).

<sup>115</sup> *In re Marriage Cases*, 183 P.3d at 452.

<sup>116</sup> See Avila, *supra* note 113, at 442 (noting that sex differences are being used as a form of discrimination) (citing *In re Marriage Cases*, 183 P.3d at 452).

<sup>117</sup> *Id.* at 442, 444.

<sup>118</sup> *Id.* at 442.

<sup>119</sup> *Id.* (citing John Paul II, Address to the prelate auditors, officials and advocates of the Tribunal of the Roman Rota (Feb. 1, 2001)).

<sup>120</sup> *Id.* at 443 (citing Benedict XVI, Address to the members of the Tribunal of the Roman Rota (Jan. 27, 2007)).

of children who would be placed in these unions. They would be deprived of the experience of either fatherhood or motherhood . . . [and] their condition of dependency would be used to place them in an environment that is not conducive to their full human development.<sup>121</sup>

Avila maintains the argument that marriage demands sexual difference and complementarity cannot rest on the mere assertion that marriage is by tradition or definition between a man and a woman.<sup>122</sup> Rather, he claims there is a need to provide significantly more content to such terms as “masculinity, femininity, motherhood, fatherhood, complementarity, normal, and full human development.”<sup>123</sup> Some of the questions that must be addressed include:

Is the sex of an individual just an accidental feature in terms of its relevance to the institutional design, purposes, privileges, and benefits of marriage? Or is there something uniquely substantial in sexual difference and in the love that arises from and is based on sexual complementarity that must govern policy and practice?<sup>124</sup>

Avila concludes that the defenders of sexual difference need to do more “to identify and verify the defining traits of masculinity and femininity and, by extension, the essence of fatherhood and motherhood.”<sup>125</sup> This would seem to require empirical research, rather than mere assertion of tradition and presuppositions. Avila admits that some critics argue that the theory of sexual difference is based on stereotypes, while other critics claim there is no difference between men and women beyond physiology.<sup>126</sup> Yet, others claim love and not gender make relationships marital, or that physiological sex differences such as those involved in pregnancy are no more significant than other presumed differences that can give rise to the complementarity which forms the basis of same-sex relations that can qualify as marriage.<sup>127</sup>

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<sup>121</sup> *Id.* (citing Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons* (June 3, 2003)).

<sup>122</sup> Avila, *supra* note 113, at 444.

<sup>123</sup> *Id.* (internal quotation marks omitted).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 445.

<sup>127</sup> *Id.*

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## C. Same-Sex Marriage is Contrary to the Common Good

The concept of the common good is central to Roman Catholic Social teaching.<sup>128</sup> The concept was implicitly acknowledged by Pope Leo XIII in his encyclical *Reverentissimus in Christo* in 1891 and by Pope Pius XI in *Quadragesimo Anno* in 1931.<sup>129</sup> Pope John XXIII gave explicit recognition to the concept in his encyclical *Mater et Magistra* in 1961 where the Pope stated that the government is justified in acting on behalf of the common good.<sup>130</sup> In his encyclical *Pacem in Terris* in 1963, Pope John XXIII explicitly recognized that the common good is intimately tied to human nature.<sup>131</sup>

Robert Batule, a professor of systematic theology at the University of the Immaculate Conception in Lloyd Harbor, New York, has argued that “[t]he common good is inexorably applicable to marriage and the family.”<sup>132</sup> He maintains that the partners to a marriage merge their personal goods, and that the result is their personal goods in marriage are submerged in a contribution to “a common good.”<sup>133</sup> According to Batule’s argument, “[a]n undeniable good of marriage is the children [that are begotten and raised] . . . establishing an especially important element of social posterity.”<sup>134</sup> Batule goes on to argue that “the only

<sup>128</sup> See J. MILBURN THOMPSON, INTRODUCING CATHOLIC SOCIAL THOUGHT 59–60 (2010) (addressing the concept of the common good).

<sup>129</sup> See generally Pope Leo XIII, *Rerum Novarum: Rights and Duties of Capital and Labor*, VATICAN (May 15, 1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html), archived at <http://perma.cc/8VHA-9M7W> (discussing the common good as it relates to Catholic teaching); Pope Pius XI, *Quadragesimo Anno: Encyclical on Pope Pius XI on Reconstruction of the Social Order To Our Venerable Brethren, the Patriarchs, Primate, Archbishops, Bishops, and Other Ordinaries in Peace and Communion with the Apostolic See, and Likewise to all the Faithful of the Catholic World*, VATICAN (May 15, 1931), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html), archived at <http://perma.cc/A3HV-7B6D> (acknowledging the concept of the common good).

<sup>130</sup> See generally Pope John XXIII, *Mater et Magistra: Encyclical of Pope John XXIII on Christianity and Social Progress*, VATICAN (May 15, 1961), available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_15051961\\_mater\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_15051961_mater_en.html), archived at <http://perma.cc/8TFV-Z2XA> (calling the State to act for the common good).

<sup>131</sup> See generally Pope John XXIII, *Pacem in Terris: Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty*, VATICAN (Apr. 11, 1963), available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html), archived at <http://perma.cc/3TRC-VTXX> (connecting the common good to human nature).

<sup>132</sup> Robert J. Batule, *Defending Marriage: How Faith and Reason are of the Same Mind*, 66 *PRIEST* 36, 41 (2010).

<sup>133</sup> See *id.* (discussing the common good in relation to marriage).

<sup>134</sup> *Id.*

origin that adequately safeguards children's identity is the necessary, intimate, integral, mutual[,] and permanent union of spouses."<sup>135</sup> The assertion is that the heterosexual marriage which produces children is "the context which most readily provides emotional security and guarantees greater unity and continuity in the process of social integration."<sup>136</sup> Accordingly, other forms of the family unit are detrimental to child development: "growing up in an intact two-parent family is an important source of advantage [for children]."<sup>137</sup>

Batule maintains that same-sex couples are not capable of biologically producing children, although reproductive technologies, surrogates, or adoption can provide children for the same-sex couple.<sup>138</sup> Batule claims that such children raised by same-sex parents do not thrive to the same extent as children in traditional families and studies that claim otherwise are flawed.<sup>139</sup> Batule argues that: "children raised by a married mother and father fare better than children raised by same-sex partners[;] . . . [c]hildren do best when raised by their own married mother and father."<sup>140</sup> Batule concludes that the common good is best served by limiting marriage to the couple whose relationship is open to procreation, rather than accepting the concept of marriage as primarily a private, emotional relationship which he sees as the fundamental basis of same-sex partners claim to a right to marriage.<sup>141</sup>

Russell Shaw, in *An Argument Against Gay Marriage*, goes farther than arguing heterosexual marriage is superior to same-sex marriage by asserting recognition of same-sex marriage will weaken heterosexual marriage: "the case for legalizing gay marriage rests on the ideology of cultural relativism. And this is an ideology whose principle practical effect is progressively to undermine and ultimately to dissolve social institutions and relationships based on ideas like 'natural' and 'nature,' 'true' and 'truth.'"<sup>142</sup> The basic argument is that from the point of view

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<sup>135</sup> See *id.* (citing Pontifical Council for the Family, *Family, Marriage, and De Facto Unions*, 30 ORIGINS 475-88 (2000)).

<sup>136</sup> *Id.*

<sup>137</sup> See *id.* (citing Barbara Dafoe Whitehead, *Dan Quayle Was Right*, 271 ATLANTIC MONTHLY 50, 80 (1993)).

<sup>138</sup> See Batule, *supra* note 132, at 41-42 (providing Batule's theories on same-sex couples and children).

<sup>139</sup> *Id.* (addressing parenting in heterosexual families and the defects in studies regarding same-sex parents).

<sup>140</sup> See *id.* (citing Maggie Gallagher & Joshua Baker, *Do Moms and Dads Matter? Evidence From the Social Sciences on Family Structure and the Best Interests of the Child*, 4 U. MD. L.J. 174, 174, 180 (2004)).

<sup>141</sup> *Id.*

<sup>142</sup> Russell Shaw, *An Argument Against Gay Marriage*, 80 COLUMBIA 19, 19 (2000).

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of cultural relativism, marriage is a social construct open to alteration and reformulation:

[I]t makes no sense to say, “A marriage is by nature a relationship between a woman and a man.” The reason it makes no sense is that the idea of “nature” itself has no meaning. “Nature” and “natural relationships” are words people use in speaking of certain social conventions. There is no bedrock reality to which they refer.<sup>143</sup>

Stanley Kurtz, a research fellow at the Hoover Institution, does not disagree with Shaw that recognition of same-sex marriage threatens the social consensus on the morality of marriage.<sup>144</sup> Kurtz writes: “[g]ay marriage would set in motion a series of threats to the ethos of monogamy from which the institution of marriage may never recover.”<sup>145</sup> However, Kurtz recognizes that the general abandonment of the taboo against homosexuality and the claims to personal freedom by homosexuals to the right to marry justify recognition of same-sex marriage; Kurtz concludes: “I would rather accept some disruption in family stability than go back to the days when homosexuality itself was deeply tabooed. The increase in freedom and fairness is worth it.”<sup>146</sup>

Russell Shaw, however, argues that preserving traditional marriage is essential for the important goal of mentoring society and that “the best argument against legalizing same-sex marriage is the harm done to traditional marriage.”<sup>147</sup> Shaw concludes: “No-fault divorce provides the precedent here. Changing the meaning of marriage to accommodate libertarian morality—which essentially is what happened on this case—contributed to the weakening of traditional marriage visible in statistics in recent decades.”<sup>148</sup>

Kurtz’s position seems to be based on the view that men are less monogamous than women, so that a marriage of two men would be less stable than a heterosexual marriage. Of course by implication, a lesbian marriage would be the most stable. Even if Kurtz is correct in his

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<sup>143</sup> *Id.*

<sup>144</sup> Stanley Kurtz, *The Libertarian Question: Incest, Homosexuality, and Adultery*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 265 (Robert M. Baird & Stuart E. Rosenbaum eds., 2d ed. 2004).

<sup>145</sup> *Id.* at 268.

<sup>146</sup> See *id.* at 267 (discussing societal taboos surrounding marriage).

<sup>147</sup> Robert Shaw, *Marriage and the New Morality*, VIRTUEONLINE (Aug. 27, 2010), available at <http://www.virtueonline.org/marriage-and-new-morality-russell-shaw>, archived at <http://perma.cc/F9F7-MHBR>.

<sup>148</sup> *Id.*

assessment of male human nature, there is no evidence that marriage might not curb male promiscuity. Moreover, there is no evidence that any instability in same-sex marriage would cause heterosexual husbands to wander.

Shaw's argument against same-sex marriage is based on the common good view of procreating and child rearing as the principle social benefit of legal recognition of the family unit. Instead, it can be argued that the family, or household, forms the social bedrock of society because of the mutual dependence and responsibility of members of the family for each other. Opposition to same-sex marriage preserves the status of isolated homosexuals which serves as a basis for the traditional criticism of homosexual acts. Same-sex marriage creates a social relation in which the homosexual couple may experience monogamy, mutual love, affection, and support. Same-sex marriages establish additional families providing for their members, including their children, reducing the need for social services and welfare, which would otherwise be required for individuals denied the opportunity to form family units.

#### IV. REVISIONIST CHALLENGE TO TEACHING OF THE MAGISTERIUM

##### A. *Challenge to Homosexuality as an Objective Disorder*

There is significant disagreement between the Magisterium and many contemporary Roman Catholic theologians on the subject of homosexuality. Some theologians concede to the Magisterium's teaching that heterosexual relations are normative, but urge an accepting pastoral approach for homosexual persons.<sup>149</sup> Others suggest that the morality of sexual acts, whether heterosexual or homosexual, depends on the quality of the relationship between the sexual partners.<sup>150</sup>

Some theologians suggest that homosexual relations are as normal as heterosexual relations. For example, Daniel Maguire, a theologian teaching at Marquette University, argues that homosexuality is natural and "part of God's plan for creation—some people are heterosexual and some are homosexual—this is the way God made us."<sup>151</sup> Similarly, "[t]he desire to bond lovingly and sexually with persons of the same sex

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<sup>149</sup> See generally Lisa Sowle Cahill, *Moral Methodology: A Case Study*, in INTRODUCTION TO CHRISTIAN ETHICS 551–62 (Ronald P. Hamel & Kenneth R. Hines eds., 1989) (discussing an approach based on Christian ethics which provides an adequate Christian response to homosexuality).

<sup>150</sup> Gregory Baum, *Catholic Homosexuals*, 99 COMMONWEAL 479, 479–82 (1974).

<sup>151</sup> Daniel C. Maguire, *A Catholic Defense of Same-Sex Marriage*, RELIGIOUS CONSULTATION ON POPULATION, REPRODUCTIVE HEALTH AND ETHICS (Apr. 20, 2006), [http://www.religiousconsultation.org/Catholic\\_defense\\_of\\_same\\_sex\\_marriage.htm](http://www.religiousconsultation.org/Catholic_defense_of_same_sex_marriage.htm), archived at <http://perma.cc/VG35-69MH>.

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or of the opposite sex, is a fact of life, a fact of God's creation, and we have no right to call it unholy."<sup>152</sup>

While acknowledging the condemnation of homosexual sex and same-sex marriage in documents issued by the Congregation for the Doctrine of the Faith, Maguire maintains that this teaching is wrong.<sup>153</sup> Maguire identifies three sources of church teaching, "or three "magisteria" of the Magisterium: "the *hierarchy*, the *theologians*, and the *wisdom and experience of the laity*."<sup>154</sup> Maguire asserts that over the course of history each of these sources has erred.<sup>155</sup> Today, Maguire argues, many theologians and a significant segment of the laity reject the Vatican teaching on homosexuality.<sup>156</sup> Facing this disagreement Maguire maintains that one can invoke the tradition of Probabilism that provides: "[w]hen there is debate on a moral issue [such as same-sex unions, and], where there are good reasons and good authorities on both sides of the debate, Catholics are free to make up their own minds."<sup>157</sup> Maguire concludes that since condemning homosexuals to an involuntary life of celibacy would be cruel and absurd, it is reasonable to reject the Magisterium's position on homosexuality.<sup>158</sup>

Jack Bonsor, a lecturer in theology at Santa Clara University, engages the teaching of the Magisterium on homosexuality with a more nuanced argument.<sup>159</sup> Bonsor begins with the presumption that sexual orientation is not chosen, but rather is a deep-rooted condition or instinct that is discovered.<sup>160</sup> According to Bonsor, sexuality involves more than erotic passion, but also involves "friendship, intimacy, and romantic relationships."<sup>161</sup> Bonsor challenges the Magisterium's judgment that homosexuality, or the homosexual inclination, is an objective disorder.<sup>162</sup> According to Bonsor, the Magisterium roots its view in the metaphysical anthropology of Thomas Aquinas.<sup>163</sup> Aquinas sees the soul as the cause of "[h]uman sexual desire [when it] is directed toward the good of

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* The "experience of the laity" is referred to in Latin as the *sensus fidelium*. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Maguire, *supra* note 151.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See Jack A. Bonsor, *Homosexual, Orientation and Anthropology: Reflections on the Category "Objective Disorder,"* 59 THEOLOGICAL STUD. 60, 61-62 (1998) (proposing that Magisterium's justifications are at odds with its conclusions regarding homosexuality and same-sex marriage).

<sup>160</sup> *Id.* at 60.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 61.

<sup>163</sup> *Id.* at 65-66.

human procreation.”<sup>164</sup> In Aquinas’ view, this is true for all humans at all times because for every human being, the soul is the form of the body directly created by God.<sup>165</sup> God’s direct action is not part of human development or evolution.<sup>166</sup> Thus, for each person God directly creates and infuses a soul into the evolved human individual.<sup>167</sup> The ordered soul possesses the natural inclinations such as the urge toward procreation.<sup>168</sup> Bonsor identifies this as the theological ground for the Magisterium’s “universal claim that homosexual orientation is an objective disorder.”<sup>169</sup>

While the Magisterium has embraced human evolutionary theory at the physical level, Bonsor argues that it maintains the view of “the direct creation of the soul” as part of its metaphysical anthropology.<sup>170</sup> Bonsor points out that when considering homosexual orientation, the Magisterium’s view of evolutionary science is restricted by the metaphysics of direct infusion of the soul along with a literal understanding of *Genesis*, in which Adam’s sin directly affects human biology by producing the homosexual inclination infecting the directly-infused soul.<sup>171</sup> To the contrary, Bonsor argues that self-consciousness and thought evolve by similar natural processes as physical evolution.<sup>172</sup> Bonsor concludes: “[i]f human nature evolves, perhaps homosexual orientation is a possibility served up by nature for human sexuality, intimacy, and love. Perhaps homosexual orientation falls within divine providence, a providence that works within a cosmos wherein nature pursues multiple and diverse possibilities.”<sup>173</sup>

Margaret Farley acknowledges that an understanding of homosexuality as an inborn characteristic, such as the evolutionary or adaptive feature recognized by Bonsor, has been an important reason for some religious traditions’ acceptance of homosexuals.<sup>174</sup> Farley quotes one commentator: “since homosexuality is not chosen, it cannot be immoral . . . [since] God would not demand of human beings something

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<sup>164</sup> *Id.*

<sup>165</sup> Bonsor, *supra* note 159, at 66.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 70.

<sup>168</sup> *Id.* at 66.

<sup>169</sup> *Id.* at 70.

<sup>170</sup> *Id.* at 71.

<sup>171</sup> Bonsor, *supra* note 159, at 72.

<sup>172</sup> *Id.* at 76.

<sup>173</sup> *Id.* at 79.

<sup>174</sup> MARGARET A. FARLEY, *JUST LOVE: A FRAMEWORK FOR CHRISTIAN SEXUAL ETHICS* 294 (2006).

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they cannot possibly obey.”<sup>175</sup> On the other hand, Farley wants to maintain that human sexuality is highly complex, takes a variety of forms, and that social justice demands respect for the way individuals realize their sexual orientation or preference.<sup>176</sup>

*B. Challenge to Procreation and Biological Complementarity as Necessary Elements of Marriage*

Some of the most sophisticated and compelling criticisms of Magisterial teaching on homosexuality and same-sex marriage are provided by Todd A. Salzman, a theologian teaching at Creighton University, and Michael Lawler, an Emeritus professor of theology at Creighton.<sup>177</sup> Salzman and Lawler challenge the claim that procreation is an essential element of marriage, since children are a possibility and not indispensable consequence of marriage.<sup>178</sup> Moreover, they maintain that sexual intercourse should not be viewed as exclusively for biological procreation, but also for expression of love and affection.<sup>179</sup> Salzman and Lawler argue that even the teaching of the Magisterium has moved from the primarily procreative model of marriage to “a more personal model of conjugal love and intimacy.”<sup>180</sup> According to Salzman and Lawler:

<sup>175</sup> See *id.* (quoting Judith Plaskow, *Lesbian and Gay Rights: Asking the Right Questions*, 9 *TIKKUN* 31, 31 (1992)).

<sup>176</sup> *Id.* at 294–95.

<sup>177</sup> See generally Todd A. Salzman & Michael G. Lawler, *New Natural Law Theory and Foundational Sexual Ethical Principles: A Critique and a Proposal*, 47 *HEYTHROP J.* 182–205 (2006) (critiquing the foundational principles of The New Natural Law Theory and arguing alternative principles that would justify sexual acts of homosexual couples); Todd A. Salzman & Michael G. Lawler, *Quaestio Disputata: Catholic Social Ethics: Complementarity and the Truly Human*, 67 *THEOLOGICAL STUDIES* 625–52 (2006) [hereinafter *Quaestio Disputata*] (discussing the types of complementarity that the Magisterium finds in a truly human sexual act); TODD A. SALZMAN & MICHAEL G. LAWLER, *SEXUAL ETHICS: A THEOLOGICAL INTRODUCTION* 155–90 (2012) [hereinafter *SEXUAL ETHICS*] (discussing the Bible, homosexuality, and the Magisterial teaching); TODD A. SALZMAN & MICHAEL G. LAWLER, *THE SEXUAL PERSON: TOWARD A RENEWED CATHOLIC ANTHROPOLOGY* 214–35 (2008) (analyzing an empirical theology approach to addressing traditional norms); Todd A. Salzman & Michael G. Lawler, *Theology, Science, and Sexual Anthropology: An Investigation*, in *TO DISCERN CREATION IN A SCATTERING WORLD* 297–316 (Board of Ephemerides Theologicae Lovanienses 2013) (evaluating the current situation of theological anthropology); Todd A. Salzman & Michael G. Lawler, *Truly Human Sexual Acts: A Response to Patrick Lee and Robert George*, 69 *THEOLOGICAL STUDIES* 663–80 (2008) (responding to Mr. Lee and Mr. George’s classicist approach to sexual norms and sexual orientation).

<sup>178</sup> See *SEXUAL ETHICS*, *supra* note 177, at 98 (“[C]hildren add nothing to that plenitude, except that they make the spouses father and mother. Children are added to marriage as ‘a possible and not an indispensable consequence of marriage.’”).

<sup>179</sup> *Id.* at 99.

<sup>180</sup> *Id.* at 102.

[Conjugal] love is uniquely expressed and perfected through the marital act [whether open to procreation or not]. The actions within marriage by which the couples are united intimately and chastely are noble and worthy ones. Expressed in a manner which is truly human, these actions signify and promote that mutual self-giving by which spouses enrich each . . . .<sup>181</sup>

Salzman and Lawler directly address the requirement of sexual complementarity central to the CDF *Considerations* dealing with same-sex unions.<sup>182</sup> Salzman and Lawler observe that the concept of complementarity has significance in two primary ways in the Magisterial teaching: first, as biological complementarity including heterogenital and reproductive; and second, as personal and psychological complementarity.<sup>183</sup> Salzman and Lawler observe: “[t]he [M]agisterium condemns homosexual acts because they do not exhibit heterogenital and reproductive complementarities and, because they do not exhibit these biological complementarities, they are ontologically incapable of realizing personal complementarity, regardless of the meaning of the act for a homosexual couple.”<sup>184</sup> Salzman and Lawler argue that heterogenital and biological complementarity may be features of a marriage, but are not necessary elements of a marriage.<sup>185</sup> They maintain that “monogamous, loving, committed, homosexual couples . . . do experience affective and communion complementarity in and through their homosexual acts.”<sup>186</sup> With this understanding of the legitimacy of non-procreative sexual acts and the essential interpersonal character of marriage, Salzman and Lawler find no persuasive argument against same-sex marriage.<sup>187</sup>

The view of Salzman and Lawler that the Magisterium’s view of biological complementarity is essentially flawed is a logical conclusion from their premise that procreation is not an essential element of marriage.<sup>188</sup> They argue that to the contrary:

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<sup>181</sup> *Id.* at 107.

<sup>182</sup> See *Quaestio Disputata*, *supra* note 177, at 627–29 (discussing three concerns found in Pope Paul II’s theology).

<sup>183</sup> *Id.* at 629–30.

<sup>184</sup> *Id.* at 644–45.

<sup>185</sup> *Id.* at 645–46.

<sup>186</sup> *Id.* at 645.

<sup>187</sup> *Id.* at 645–46.

<sup>188</sup> See *Quaestio Disputata*, *supra* note 177, at 646 (“Though they cannot exhibit genital complementarity homosexual individuals can exhibit the holistic complementarity.”).

[T]he needed complementarity for a truly sexual act [and marriage] is *holistic* complementarity that unites people bodily, affectively, spiritually, and personally in light of a person's sexual orientation. Heterogenital complementarity is needed for reproduction, but it is not needed for the sexual, affective, spiritual, and personal connection between two people that the recent Catholic tradition acknowledges as an end of marriage equal to procreation.<sup>189</sup>

The complementarity which plays an important part in married life has psychological and social dimensions that are not dependent on genital difference or reflect social mandated stereotypes. Homosexual couples express psychological and emotional differences which form the basis for their complementarity, while being committed to the same shared lives lived by heterosexual couples.

C. *Same-Sex Families, the Common Good, and Child Raising*

The Magisterium maintains that same-sex unions are detrimental to the common good primarily because same-sex parents deny children a developmental environment that includes both male and female parents. Stephen Pope, a professor of theology at Boston College, challenges this position.<sup>190</sup> Pope objects to the CDF's language in *Considerations* that states that the same-sex family does "violence" to the children in it because the environment is not "conducive to their full development."<sup>191</sup> Pope maintains that this language involves distortion and "implies that foster parents, single parents, and parents with serious physical or psychological handicaps, no matter how hard they try, are guilty of inflicting 'violence' on their children since they, too, consent to raise their children under less than optimal conditions."<sup>192</sup>

Pope's main argument is that the choice for many children is not between an environment with heterosexual rather than homosexual parents, but instead, between placement with a same-sex couple as an

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<sup>189</sup> *Id.* at 645–46.

<sup>190</sup> See Stephen Pope, *The Vatican's Blunt Instrument*, CLGS (Aug. 9, 2003), <http://www.clgs.org/resource-library/vaticans-blunt-instrument>, archived at <http://perma.cc/P8NX-LT9Q> ("In the single most criticized claim in this document, the CDF holds that allowing children to be adopted by same-sex couples subjects them to 'violence,' at least in the sense that it would not be 'conducive to their full human development.'").

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

alternative to an institution.<sup>193</sup> Pope maintains: “[t]he [CDF] document fails to give the slightest acknowledgement of the profound, long-lasting concrete good that is provided by some gay adoptive parents to their children.”<sup>194</sup> According to Pope, the CDF fails to recognize the contribution to the common good resulting from “[an] adoption by a same-sex couple committed to providing a stable, loving[,] and respectful family environment for a child’s upbringing.”<sup>195</sup>

The fundamental flaw in the Magisterium’s claim that same-sex parents are a detriment to their children is that it is not based on empirical evidence. In fact, studies of children raised by same-sex parents have “failed to produce conclusive evidence that the children of lesbian mothers or gay fathers have significant difficulties in development relative to children of heterosexual parents.”<sup>196</sup>

The early studies on same-sex parenting were subject to various methodological criticisms, including reliance on small and nonrandom samples, and researcher bias.<sup>197</sup> However, more recent studies are considered scientifically valid; these studies test children directly, as well as relying on parent’s reports and evaluations from teachers.<sup>198</sup> These studies reveal “no significant differences between children of lesbian mothers and children of heterosexual mothers in anxiety, depression, self-esteem, and numerous other measures of social and psychological adjustment.”<sup>199</sup> To date, those studies recognized as scientifically valid have revealed no differences between children reared in same-sex couple households and those reared in heterosexual households in the level of cognitive functioning, the level of parental investment in children, and other indicators of well-being.<sup>200</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL’Y 191, 197–98 (1995).

<sup>197</sup> See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 844–52 (1997) (critiquing studies with results favoring same-sex parent because of methodological flaws).

<sup>198</sup> See generally Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 175–76 (2001) (providing data and conclusions of the studies).

<sup>199</sup> *Id.* at 171.

<sup>200</sup> *Id.* at 176.

V. CONCLUDING ASSESSMENT OF THE TEACHING OF THE MAGISTERIUM ON  
HOMOSEXUALITY AND SAME-SEX UNIONS

The Magisterium's teaching recognizes homosexuality as a sexual orientation and a possible deep rooted condition. Thus, this understanding of homosexuality suggests it is not a matter of choice of sexual partners or choice of lifestyle. However, the view that is taken of homosexuals and homosexual acts is limited to the individual person who, for the most part, is viewed as seeking personal gratification from sexual acts. There is an explicit view of homosexual acts as necessarily solitary and non-unitive. There has been, however, a significant change in society that now accepts homosexual couples enjoying a life of intimate association based on love, affection, and mutual support. Homosexual sex acts take on a new meaning when considered as expressions of the love, affection, and support of sexual partners, rather than isolated acts of homosexual persons.

Once one recognizes that homosexuality involves a deep-seated aspect of the person and personality, it makes no sense to criminally prosecute the conduct that is an expression of the personality. It also questions whether the expression of such a personality characteristic in conduct in an intimate relationship should be considered immoral. Moreover, when homosexual acts are seen as expression of inter-personal intimacy, rather than acts of personal gratification, one can see validity to a claim that the varying inter-personal relationships should be recognized as moral. Even if one continues to maintain the position that homosexuality is a disorder and that the homosexual act is an ontic or pre-moral evil, it would seem appropriate to consider the content and circumstances of the homosexual act as an expression of the monogamous commitment of love, affection, and support between the members of the homosexual couple, so that a homosexual act ultimately can be viewed as moral.

This Article examined the Magisterium's arguments against same-sex unions that are based on understandings derived from moral theology and anthropology, but did not closely examine religious arguments based on Scripture or sacramental belief. I would maintain that the Magisterium's non-Scriptural arguments against the state recognizing same-sex unions by extending civil marriage to homosexuals are not persuasive. Challenges to these claims have been set out in this Article's commentary on the Magisterial documents and in the review of revisionist theologians' arguments.

The objective of the Magisterium of the Roman Catholic Church in publishing *Consideration Regarding Proposals to Give Recognition to Unions Between Homosexual Persons* was to provide a convincing, non-scriptural

argument that would persuade the rational legislator or judge to reject claims for access to same-sex marriage. These arguments depend on psychological and anthropological assumptions that are open to reasonable debate.

The Magisterium's teachings reveal a limited understanding of the meaning of sexual relations in contemporary life, take the view that homosexuality involves an isolated individual seeking experiences of personal gratification, and adopts an understanding of gender roles as stereotypical and traditional. Ultimately, the Magisterium's position on same-sex marriage depends on premises about genital complementarity between the sexes which provides the possibility of procreation and gender complementarity that facilitates childbearing. Those premises are subject to the convincing criticism that they involve a restricted physicalistic understanding of sexual relations, gender stereotyping, and an excessively limited view of the nature of intimate sexual relationships. The Magisterium's arguments cumulatively fail to establish a compelling foundation for opposing legally recognized same-sex marriage. As a result of the church's views that sexual acts in a marriage involve mutual love and support, and since canon law does not prohibit sterile persons from marrying, the Magisterium implicitly recognizes that the ability to procreate is not an essential factor of marriage; thus the persuasiveness of the Magisterium's argument against legal recognition of same-sex marriage is further undermined by its own teaching. Ultimately, the Roman Catholic Church Magisterium's failure to recognize that today many same-sex parties express a committed, monogamous, and loving relationship, and often form a family with children contributing to the common good; this fact further undermines the Catholic Church's opposition to legal recognition of same-sex marriage.

Recognition of same-sex marriage would further the state's interest in establishing families and households that facilitate individual members providing for each other out of love and commitment to mutually care for each other. The common good is served by reducing the likelihood of society's need to care for those who would otherwise become dependent and require public support. Moreover, legal recognition of same-sex marriage can provide such families social support and access to legal and community resources important for caring for and educating children and for facilitating the mutual support of the individuals who have joined themselves together in a loving relationship. The common good is furthered by the establishment of the household resulting from legal recognition of same-sex marriages involving loving partners, often raising children, producing families committed to mutual support, and affectionate caring for each other.

