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THE MORALITY OF HOMOSEXUAL CONDUCT: A RESPONSE TO JOHN FINNIS*

MICHAEL J. PERRY**

> The final source for Christian ethical insight is [contemporary experience]. . . . I am referring primarily to the testimony of women and men whose sexual preference is for others of the same sex. Here, too, we have as yet no univocal voice putting to rest all of our questions regarding the status of same-sex relations. We do, however, have some clear and profound testimonies to the life-enhancing possibilities of same-sex relations and the integrating possibilities of sexual activity within these relations. We have the witness that homosexuality can be a way of embodying responsible human love and sustaining Christian friendship. Without grounds in scripture, tradition, or any other source of human knowledge for an absolute prohibition of same-sex relations, this witness alone is enough to demand of the Christian community that it reflect anew on the norms for homosexual love.[1]

In his essay, *Law, Morality, and "Sexual Orientation"*, John Fin-

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** Howard J. Trienens Chair in Law, Northwestern University. I am grateful to Tom Shaffer and John Robinson of the Notre Dame Law School for inviting me to present this paper at Notre Dame on Nov. 10, 1994. I am grateful, too, to Richard McCormick, S.J. of the Notre Dame Theology Department and Paul Weithman of the Notre Dame Philosophy Department for their illuminating discussion of the issues on the occasion of my visit to Notre Dame. Finally, I am grateful to many friends and colleagues—at Northwestern, Notre Dame, and elsewhere—for helpful comments.

After I had finished work on this paper, the following article, with which this paper has an affinity, was published: Andrew Sullivan, *Alone Again, Naturally: The Catholic Church and the Homosexual*, NEW REPUBLIC, Nov. 28, 1994, at 47. Mr. Sullivan, himself both Catholic and gay, is the editor of the NEW REPUBLIC.

1. Margaret A. Farley, R.S.M., *An Ethic for Same-Sex Relations*, in A CHALLENGE TO LOVE: GAY AND LESBIAN CATHOLICS IN THE CHURCH 93, 99-100 (Robert Nugent ed., 1983). (Professor Farley, a member of the Sisters of Mercy, is Gilbert L. Stark Professor of Christian Ethics at the Yale University Divinity School; she is also a past president of the Society of Christian Ethics.) *Cf.* JOHN MAHONEY, S.J., THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION 171 (1987) (arguing "there is also . . . the authority of Christian experience, for which there can be no substitute").

nis, the Professor of Law and Legal Philosophy at Oxford, argues that homosexual conduct between consenting adults is always morally wrong or bad.[2] (At one point Finnis uses the word "evil".[3]) He argues that such conduct is invariably morally bad—i.e., it is morally bad without regard to any particularities of context—"even for anyone unfortunate enough to have innate or quasi-innate homosexual inclinations."[4] (By homosexual conduct, Finnis means "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."[5])

What is Finnis' argument—and is it sound?

I.

Let me begin by identifying four matters that are *not* in dispute between Finnis and me.

First, it is not in dispute that "it is unjust for A to impose any kind of disadvantage on B simply because A believes (perhaps correctly) that B has sexual inclinations (which he may or may not act on) towards persons of the same sex."[6] Finnis agrees that it is unjust for A to discriminate against B "based merely on A's belief that B is sexually attracted to persons of the same sex."[7] To discriminate against a person on the basis of "a psychological or psychosomatic disposition inwardly orienting one *towards* homosexual activity" is, in Finnis' view, "unjust."[8]

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2. John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994) [hereinafter Finnis, L. REV.], *reprinted in* 9 NOTRE DAME J.L., ETHICS & PUB. POL'Y 11 (1995) [hereinafter Finnis, J.L. ETHICS & PUB. POL'Y].

3. Finnis, L. REV., *supra* note 2, at 1055; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 16.

4. Finnis, L. REV., *supra* note 2, at 1052; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 14.

5. Finnis, L. REV., *supra* note 2, at 1055; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 17.

6. Finnis, L. REV., *supra* note 2, at 1051; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 13.

7. Finnis, L. REV., *supra* note 2, at 1054; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 15.

8. Finnis, L. REV., *supra* note 2, at 1053-54; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 15-16. Finnis opposes laws against such discrimination on the ground that such laws are sometimes interpreted by courts and

> always interpreted by "gay rights" movements as going far beyond discrimination based merely on A's belief that B is sexually attracted to persons of the same sex. Instead (it is observed), "gay rights" movements interpret the phrase ["no discrimination based on sexual orientation"] as extending full legal protection to *public* activities intended specifically to promote, procure and facilitate homosexual *conduct*.

Second, it is not in dispute that homosexual conduct between consenting adults, like heterosexual conduct between consenting adults, can be morally bad, in the sense of unworthy of one who would be truly, fully human. For example, such conduct may be manipulative, exploitative, unfaithful, or compulsive. In my view, any sexual conduct between consenting adults is morally deficient to the extent it is unloving—i.e., to the extent it is not animated by a concern for the wellbeing of the other (whatever else it may be animated by); to the extent it is unloving, any sexual conduct, heterosexual or homosexual, is less worthy than it should be of one who would be truly, fully human.[9]

Third, it is not in dispute that, even assuming *arguendo* that homosexual conduct between consenting adults is always morally bad, it exceeds the legitimate authority of the state to criminalize such conduct (at least, if the conduct takes place in private). Finnis accepts—and, indeed, in his essay defends—"a conception of the proper role of government [that] exclude[s] the state from assuming a directly parental disciplinary role in relation to consenting *adults*."[10]

Fourth, it is not in dispute that even if the state cannot legitimately criminalize some particular conduct, it may nonetheless be the case that the state can legitimately judge the conduct to be immoral and, on the basis of that judgment, try to discourage the conduct or to protect others from it. I agree with Finnis that we should distinguish

> between (a) supervising the truly private conduct of adults and (b) supervising the *public realm or environment*. . . . While the type (a) supervision of truly private adult consensual conduct is now considered to be outside the state's normally proper role (with exceptions such as sado-masochistic bodily damage, and assistance in suicide), type (b) supervision of the moral-cultural-educational environment is maintained as a very important part of the state's justification for claiming legitimately the loyalty of decent

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Finnis, L. REV., *supra* note 2, at 1054; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 15-16. *See* Finnis, L. REV., *supra* note 2, at 1053-55; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 15-16.

9. *See* Farley, *supra* note 1, at 105 (quoted later; *see infra* note 39).

10. Finnis, L. REV., *supra* note 2, at 1052; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 14. Of course, to agree with Finnis that it exceeds the legitimate authority of the state to criminalize homosexual conduct (assuming *arguendo* such conduct is morally bad) is not necessarily to accept Finnis' rationale for that position. For Finnis' rationale, see Finnis, L. REV., *supra* note 2, at 1070-76; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 33-39.

citizens.[11]

What *is* in dispute between Finnis and me is simply whether homosexual conduct between consenting adults is, as Finnis claims it is, always morally bad. If such conduct is not invariably morally bad, then, with respect to "the public realm or environment", the state should not try to discourage the conduct or to protect others from it *on the theory that the conduct is invariably morally bad.* To do so would be for the state to proceed on the basis of a mistaken or false theory or judgment.

II.

Before turning to Finnis' argument, we should pause to notice what Finnis contends *about* his argument: that it is "reflective, critical, publicly intelligible, and rational".[12] In addressing the question "What is wrong with homosexual conduct?", Finnis denies that "the judgment that it is morally wrong [is] inevitably a manifestation either of mere hostility to a hated minority, or of purely religious, theological, and sectarian belief."[13] In an effort

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11. Finnis, L. REV., *supra* note 2, at 1053; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 14-15. *See* Finnis, L. REV., *supra* note 2, at 1053; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 14-15:

> The importance of [(b)] includes the following considerations: (1) this is the environment or public realm in which young people (of whatever sexual inclination) are educated; (2) it is the context in which and by which everyone with responsibility for the well being of young people is helped or hindered in assisting them to avoid bad forms of life; and (3) it is the milieu in which and by which all citizens are encouraged and helped, or discouraged and undermined, in their own resistance to being lured by temptation into falling away from their own aspirations to be people of integrated good character, and to be autonomous, self-controlled persons rather than slaves to impulse and sensual gratification. *Id.*

12. Finnis, L. REV., *supra* note 2, at 1055; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 16.

13. In denying that "the judgment that homosexual conduct is morally wrong is inevitably a manifestation . . . of mere hostility to a hated minority," Finnis is responding to views like Richard Posner's. *See* RICHARD POSNER, SEX AND REASON 346 (1992) (emphasis added):

> [S]tatutes which criminalize homosexual behavior express *an irrational fear and loathing of a group that has been subjected to discrimination, much like that directed against the Jews, with whom indeed homosexuals—who, like Jews, are despised more for who they are than for what they do—were frequently bracketed in medieval persecutions.* The statutes thus have a quality of invidiousness missing from statutes prohibiting abortion or contraception. The position of the homosexual is difficult at best, even in a tolerant society, which our society is not quite; and it is made worse, though probably not much worse, by statutes that condemn the homosexual's characteristic methods of sexual expression as vile

to show that his argument is not a narrowly Christian argument, much less a narrowly Catholic argument, much less a narrowly Thomist argument, Finnis examines at length the views of some of the classical Greek philosophers, including Socrates, Plato, and Aristotle, all of whom, according to Finnis, "reject[ed] all homosexual conduct."[14] "All three of the greatest Greek philosophers, Socrates, Plato and Aristotle, regarded homosexual *conduct* as intrinsically shameful, immoral, and indeed depraved or depraving."[15]

It is precisely because Finnis' argument aims to be "reflective, critical, publicly intelligible, and rational"—and because Finnis is himself a sophisticated moral philosopher (a natural lawyer)[16]—that his argument deserves serious examination. If Finnis cannot construct a sound nonreligious argument in support of the position he wants to defend, there is reason to doubt

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crimes . . . . There is a gratuitousness, an egregiousness, a cruelty, and a meanness about [such statutes].

Id.

About "purely religious, theological, and sectarian belief" Finnis says: "[Such] belief can ground no constitutionally valid determination disadvantaging those who do not conform to it". Finnis, L. REV., *supra* note 2, at 1055; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 17. It is not the case that such belief can never ground a constitutionally valid determination disadvantaging those who do not conform to the belief. The matter is more complicated than Finnis' comment here suggests. *See* Michael J. Perry, *Religion, Politics, and Human Rights*, DOCTRINE & LIFE, (forthcoming Jan. 1995).

14. Finnis, L. REV., *supra* note 2, at 1062; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 25.

15. Finnis, L. REV., *supra* note 2, at 1055; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 17. *See also* Finnis, L. REV., *supra* note 2, at 1055-63; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 16-25. Finnis also claims that "Immanuel Kant . . . likewise rejected all homosexual conduct . . . ." Finnis, L. REV., *supra* note 2, at 1063; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 25.

Much of Finnis' essay is an argument, principally with Martha Nussbaum, University Professor and Professor of Philosophy, Classics, and Comparative Literature at Brown University, about what the classical philosophers did or did not say about the morality of homosexual conduct. *See also* Gerard V. Bradley, *In the Case of Martha Nussbaum*, FIRST THINGS, June/July 1994, at 11. The reader interested in pursuing that aspect of Finnis' essay should consult Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994). Appendix 4 to Nussbaum's essay is co-authored by Nussbaum and Kenneth J. Dover. Appendix 4 begins: "Because we believe it is very important to counter erroneous accounts of ancient Greek homosexuality, and because Professor Finnis' citation of Dover as if he supports Finnis' position has made public clarification of Dover's position urgent, we jointly state our position below." *Id.* at 1641. (Both Finnis and Nussbaum presented their essays at the University of Notre Dame in 1994—though not on the same occasion.)

16. *See* JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

that such an argument exists.[17]

III.

Let's now examine Finnis' argument that homosexual conduct between consenting adults is always morally bad. Finnis' essay is twenty-eight pages long, but his argument about homosexual conduct consists of just eight pages: Finnis develops his argument over the course of thirteen paragraphs, beginning with the last paragraph on page 1062 of his essay (which I shall call "Paragraph 1") and finishing with the first full paragraph on page 1070 ("Paragraph 13"). I shall comment on his argument as it emerges, paragraph by paragraph. My focus is on what Finnis says about the morality of homosexual conduct, not on what Finnis says other writers say about the morality of such conduct.[18]

Paragraph 1

Finnis begins, in Paragraph 1, by stating "three fundamental theses" that, he says, are "[a]t the heart of the Platonic-Aristotelian and later ancient philosophical rejections of all homosexual conduct". The first two theses are, as we'll see, the crucial ones.

> (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 marriage. (2) Homosexual acts are radically and peculiarly non-marital, and for that reason intrinsically unreasonable and non-marital. (3) Furthermore, according to Plato, if not Aristotle, homosexual acts have a special similarity to solitary masturbation, and both types of radically non-marital acts are manifestly unworthy of the

17. Finnis states that his argument "is an application of the theory of morality and natural law developed over the past thirty years by Germain Grisez and others. A fuller exposition can be found in the chapter on marriage, sexual acts, and family life, in the new second volume of Grisez's great work on moral theology." Finnis, L. REV., *supra* note 2, at 1063; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 25. Finnis then cites, in footnote 35, to: "2 Germain Grisez, The Way of the Lord Jesus, *Living a Christian Life* 555-574, 633-680 (1993)." Finnis, L. REV., *supra* note 2, at 1063 n.35; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 25 n.35. In the course of writing this commentary on Finnis' essay, I have read the passages of Grisez's work cited by Finnis. (Grisez was one of my teachers at Georgetown University in the mid 1960s—though Grisez surely has no recollection of that fact.)

18. *See supra* note 15.

human being and immoral.[19]

Thesis (1) consists of two claims. The first is that "the commitment of a man and a woman to each other in the sexual union of marriage is intrinsically good and reasonable". (I heartily agree.) The second claim is that "the commitment of a man and a woman to each other in the sexual union of marriage . . . is incompatible with sexual relations outside marriage"—i.e., outside *such a* marriage, a *heterosexual* marriage. By "is incompatible with sexual relations outside [heterosexual] marriage", Finnis does not mean: "is incompatible with either the man or the woman having sexual relations outside their marriage." (Thus understood, the second claim would be quite irrelevant to the question of the morality of homosexual conduct between two persons neither of whom is married to another and who may even consider themselves bound to one another in a lifelong, monogamous relationship of faithful love.) Rather, Finnis means: "is incompatible with *anyone* having sexual relations outside the context of a heterosexual marriage." Thus understood, the second claim is directed not specifically against homosexual conduct, but against *any* sexual conduct, heterosexual as well as homosexual, outside the context of a heterosexual marriage. Thesis (2) presupposes thesis (1) as a major premise. If "the [intrinsically good and reasonable] commitment of a man and a woman to each other in the sexual union of marriage" were incompatible with anyone having sexual relations outside the context of a heterosexual marriage, then "[h]omosexual acts", which are an instance of sexual relations outside the context of a heterosexual marriage, would be incompatible with "the [intrinsically good and reasonable] commitment of a man and woman to each other in the sexual union of marriage."

Paragraphs 2-3

In Paragraph 2, Finnis tells us that he "now want[s] to offer an interpretation of the three theses which articulates them more clearly than was ever attempted by Plato or, so far as we can tell, by Aristotle."[20]

In Paragraph 3, Finnis writes: "Genital 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 inter-

19. Finnis, L. REV., *supra* note 2, at 1062-63; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 25.

20. Finnis, L. REV., *supra* note 2, at 1063; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 25.

course, especially but not only homosexual, has no such point and therefore is unacceptable."[21] Gertrude Stein said of Oakland: "There is no 'there' there." We may fairly wonder about Finnis' statement ("Non-marital intercourse . . . therefore is unacceptable") whether there is a "therefore" there. There may be, instead, merely a non-sequitur. At the end of Paragraph 1 we were left with this question: Why accept Finnis' claim that "the [intrinsically good and reasonable] commitment of a man and a woman to each other in the sexual union of marriage" is incompatible with anyone having sexual relations outside the context of a heterosexual marriage? Now, at the end of Paragraph 3, we are left with this question: Why accept Finnis' claim that in order to be "acceptable," sexual intercourse between two persons must enable them to "actualize and experience (and in that sense express)" their relationship "as a single reality with two blessings (children and mutual affection)"? The premise that seems to connect Finnis' two claims is this: The commitment of two persons to one another in a sexual union is "intrinsically good and reasonable" only if sexual intercourse between them enables them to "actualize and experience (and in that sense express)" their union "as a single reality with two blessings (children and mutual affection)." The general question we are left with at this point in Finnis' essay, therefore, is: Why accept that premise?

Finnis is right that the relationship of a man and a woman in marriage, a relationship that is partly sexual, is—or, at least, at its best can be—"a single reality." Why insist that no other relationship—i.e., no other relationship that is partly sexual—can be, even at its best, a single reality? Why not believe, instead, that any friendship, including one that is partly sexual, can constitute, at its best, a single reality? If any friendship can be, at its best, a single reality, then, depending on the nature of the friendship, which may or may not be partly sexual, one or another act (which, depending on the nature of the friendship, may or may not be sexual) may "enable them to actualize and experience (and in that sense express) their [friendship] itself, as a single reality with [its one or more] blessings," whatever those blessings may be (which depends on the nature of the friendship). Why doubt that at its best, any sexual union between two adults, whether heterosexual or homosexual—i.e., a sexual union that is lifelong, monogamous, faithful, and deeply loving[22]—can be a

21. Finnis, L. REV., *supra* note 2, at 1064; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 26.

22. When I refer to "lifelong" sexual unions both here and elsewhere in this essay, I am referring to sexual unions, whether heterosexual or homosexual, in which the partners hope and intend that their relationship will

single reality?

Paragraph 4

In Paragraph 4, Finnis writes: "[I]n sterile and fertile marriages alike, the communion, companionship, *societas* and *amicitia* of the spouses—their being married—*is* the very good of marriage, and is an intrinsic, basic human good, not merely instrumental to any other good."[23] He then refers to "this communion of married life" as an "integral amalgamation of the lives of two persons . . . ."[24] Finnis concludes the paragraph by stating, approvingly,

> the position that procreation and children are neither the *end* (whether primary or secondary) to which marriage is instrumental (as Augustine taught), nor instrumental to the good of the spouses (as much secular and 'liberal Christian' thought supposes), but rather: Parenthood and children and family are the intrinsic fulfillment of a communion which, because it is not merely instrumental, can exist and fulfill the spouses even if procreation happens to be impossible for them.[25]

Finnis fails to explain, in Paragraph 4, why it cannot be true of any lifelong, monogamous, faithful, and loving friendship that is (partly) sexual, whether it be between a man and a woman, a man and a man, or a woman and a woman, that "the communion, companionship, *societas* and *amicitia* of the friends—their being united in their friendship—*is* the very good of their friendship, and is an intrinsic, basic human good, not merely instrumental to any other good." He does not explain why it cannot be true of any lifelong, monogamous, faithful, loving friendship that is partly sexual that "this communion of friendship" is an "integral amalgamation of the lives of two persons."

Let's now turn to Finnis' statement that "[p]arenthood and children and family are the intrinsic fulfillment of a communion which, because it is not merely instrumental, can exist and fulfill the spouses even if procreation happens to be impossible for them." No doubt parenthood and children and family are the

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be lifelong, and in which they struggle with all the resources at their command to bring that hope and intention to fulfillment.

23. Finnis, L. REV., *supra* note 2, at 1064; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 27.

24. Finnis, L. REV., *supra* note 2, at 1064-65; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 27.

25. Finnis, L. REV., *supra* note 2, at 1065; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 27.

intrinsic fulfillment of a *certain kind of* communion—one in which the spouses want to have children and raise a family, perhaps even one in which the spouses have joined themselves expressly (though not solely) for that purpose, perhaps because they judge it to be (a part of) their vocation, their calling, to do so. But obviously not every (heterosexual) marriage is a communion *of that kind*; not every marriage is one in which the spouses want to have children; not every pair of spouses judge it to be their vocation to raise a family. Finnis acknowledges that "a communion . . . , because it is not merely instrumental, can exist and fulfill the spouses even if procreation happens to be impossible for them." He does not explain, in Paragraph 4, why a communion cannot exist and fulfill the spouses even if procreation is something they have chosen to forgo. (Perhaps they have chosen to forgo procreation for reasons of health—or perhaps because they have chosen to devote their lives to a demanding ministry that is realistically incompatible with their raising a family of their own. There can be morally *good* reasons, after all, for choosing to forgo procreation—reasons worthy of one who would be truly, fully human—just as there can be morally bad reasons. Even Finnis will allow that, for example, there can be morally good reasons for choosing to forgo procreation and instead become a celibate priest as well as morally bad reasons.) Nor does he explain why a lifelong, monogamous, faithful, and loving communion between a man and a man or a woman and a woman—a communion that is partly sexual—cannot exist and fulfill the partners even though procreation is in the nature of things not available to them (which they may or may not regret, depending on what they would choose if it were available to them).[26]

Paragraphs 5-6

In Paragraph 5, Finnis begins to get to the heart of the matter. He expressly recognizes and articulates the question he must address (and, in subsequent paragraphs, proceeeds to address): "Why cannot non-marital friendship be promoted and expressed by sexual acts? Why is the attempt to express affection by orgasmic non-marital sex the pursuit of an illusion?" Why is it "that

26. I am ignoring, for present purposes, this complication: Many gay and lesbian couples do raise families; sometimes they do so because they have freely sought and happily embraced the opportunity to do so. Indeed, some gay and lesbian couples raise children who were begotten to be raised by them. On the subject of gay and lesbian parenting, see, e.g., Kimberly Lenz, *We Are Family: Gay and Lesbian Parents Face Challenges and Harbor Familiar Hopes—Growth as Loving, Committed, Open Families*, CHI. PARENT, May 1994, at 21.

homosexual *conduct* (and indeed all extra-marital sexual gratification) is radically incapable of participating in, actualizing, the common good of friendship"?[27]

In Paragraph 6, Finnis commences his response:

> [T]he common good of friends who are not and cannot be married (for example, man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit. So their sexual acts together cannot do what they may hope and imagine. Because their activation of one or even of each of their reproductive organs cannot be an actualizing and experiencing of the *marital* good—as marital intercourse (intercourse between spouses in a marital way) can, even between spouses who *happen* to be sterile—it can do no more than provide each partner with an individual gratification. For want of a *common good* that could be 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.[28]

The fundamental problem with the foregoing passage is that Finnis falsely believes that even in the context of a homosexual friendship that is a lifelong, monogamous relationship of faithful love, homosexual conduct "can [never] do [any] more than provide each partner with an individual gratification." Homosexual conduct, like heterosexual conduct, *can* do more—much more—than provide each partner with "an individual gratification." Interpersonal sexual conduct, whether heterosexual or homosexual, can be a way of affirming and serving both the sexual and the emotional wellbeing of one's lover; as such, sexual conduct can both express, in a bodily (embodied) way, one's love for one's lover; indeed, at its best such conduct can be a generative matrix of the emotional strength one needs to live well—to live a truly, fully human life—and therefore to attend to one's

27. Finnis, L. REV., *supra* note 2, at 1065-66; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 28.

28. Finnis, L. REV., *supra* note 2, at 1066-67; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 28-29. Finnis says, in the footnote attached to this passage (footnote 47): "For the whole argument, see [Germain] Grisez, [2 The Way of the Lord Jesus, *Living a Christian Life* (1993),] at 634-39, 648-54, 662-64." *See* Finnis, L. REV., *supra* note 2, at 1065 n.47; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 29 n.47.

most challenging responsibilities, such as those that attend being a parent.[29] Sexual conduct can be all this (and more) even if it is not meant to be—indeed, *even if it is meant not to be*—procreative. Note, moreover, that the (authentic) wellbeing of one's lover—including both the sexual and the emotional wellbeing of one's lover—is a *common* good, a good not only for one's lover but also for oneself. This is so because what is (truly) good for one's lover is also good for oneself, just as it is the case that what is good for one's child, what is conducive to or even constitutive of one's child's wellbeing, is also, *because it is good for one's child*, good for oneself.

Finnis forthrightly acknowledges, in his essay, that his point is not confined to homosexual conduct, but applies to heterosexual conduct that is, in Finnis' words, "deliberately contracepted."[30] Finnis' position is (a) that "deliberately contracepted" heterosexual conduct cannot, not even in the context of a marriage, "do . . . more than provide each partner with an individual gratification" and (b) that the "choice to engage in such conduct thus dis-integrates each of them precisely as acting persons." One who, on the basis of his or her real-world experience—indeed, perhaps on the basis of his or her experience in marriage—disagrees with Finnis' point as applied to "deliberately contracepted" heterosexual conduct has good reason to be skeptical that Finnis' point as applied to homosexual conduct has any firmer grounding in real-world experience. There is an (inappropriately) abstract quality to Finnis' argument: Finnis seems to be arguing that it is *a priori* impossible that either homosexual conduct or "deliberately contracepted" heterosexual conduct (even in the context of a marriage) can do more than provide each partner with an individual gratification. What a strange claim.

The human sexual appetite is both natural and basic. That a *homosexual* sexual appetite is not natural for me does not entail that it is not natural for anyone, and that the *heterosexual* sexual appetite is natural for me does not entail that it is natural for everyone.[31] In choosing to satisfy the human sexual appetite,

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29. *See* Richard Westley, *We Are Makers of Love*, PRAYING, May-June 1994, at 28.

30. Finnis, L. REV., *supra* note 2, at 1068 n.50; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 31 n.50.

31. Consider here Thomas Aquinas's teaching on homosexual activity (*in coitu masculorum*):

> Now with regard to pleasures of either of these two kinds, there are some which are unnatural, absolutely speaking, but may be called natural from a particular point of view (*sed connaturales secundum quid*).

one is not catering to or indulging a pathological or a manufactured appetite the satisfaction of which is everywhere and always antithetical to one's authentic flourishing as a human being. Finnis does not elucidate why the choice of two persons to engage in sexual conduct in mutual satisfaction of their sexual appetite—in particular, the choice of two partners in a lifelong, monogamous relationship of faithful love to engage in sexual conduct in a way that affirms and serves the sexual and emotional wellbeing of one another—is *necessarily* dis-integrative of each of them "precisely as acting persons" just in virtue of the

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For is sometimes happens that one of the principles that is natural to the species as a whole has broken down in one of its individual members; the result can be that something which runs counter to the nature of the species as a rule, happens to be in harmony with nature for a particular individual (*fieri per accidens naturaie huic individuo*), as it becomes natural for a vessel of water which has been heated to give out heat. Thus something which is "against human nature," either as regards reason or as regards physical preservation, may happen to be in harmony with the natural needs of *this* man because in him nature is ailing. He may be ailing physically: either from some particular complaint, as fever-patients find sweet things bitter, and vice versa; or from some dispositional disorder, as some find pleasure in eating earth or coals. He may be ailing psychologically, as some men by habituation come to take pleasure in cannibalism, or in copulation with beasts or with their own sex (*in coitu bestiarum aut masculorum*), or in things not in accord with human nature.

THOMAS AQUINAS, SUMMA THEOLOGICA 1-2, 31-39, *quoted in* Gerald D. Coleman, S.S., *The Vatican Statement on Homosexuality*, 48 THEOLOGICAL STUD. 727, 733 (1987).

What is the contemporary Thomist to conclude when he or she learns what was unknown to Thomas (as well as, of course, to the biblical authors), namely, that a homosexual sexual orientation is normally innate *and not the yield of one or another "psychological ailment"* (which is not to deny that homosexuals, too—especially homosexuals who have born the many terrible burdens of a culture that is pervasively homophobic—may ail psychologically)? "Homosexuality is a variation in human sexual orientation that occurs consistently, even though with less frequency than heterosexuality." Coleman, *supra*, at 733-34. (Finnis acknowledges the innateness of homosexual sexual orientation. *See supra* text accompanying note 4.)

> [O]fficial Catholic rejection of homosexual acts antedates by far knowledge of homosexuality as a not-chosen and most often irreversible orientation. That leads to the interesting and provocative question: does this knowledge have *no influence whatsoever* on the assessment of homosexual behavior (acts) at the objective level? One has to wonder if the distinction between orientation and acts, acknowledged now by all official documents and pastorals, has not remained abstract and unexamined in these documents with respect to its possible implications.

RICHARD A. MCCORMICK, S.J., REFLECTIONS ON MORAL DILEMMAS SINCE VATICAN II 300 (1989). *See infra* text accompanying note 76 for John Noonan's statement, about "new insight.")

fact that the particular sexual conduct they choose to engage in is either nonprocreative or "deliberately contracepted."[32]

We can better understand what drives Finnis' position if we turn to a part of Paragraph 6 I've not yet quoted:

> 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, which (leaving aside the order of grace) are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by that act of genital union.[33]

What drives Finnis' position is his view—which is also the view of his mentor-collaborator, Germain Grisez[34]—that any sexual conduct between two persons, even persons married to one another, is morally illicit if it cannot or does not "actualize" and "allow them to experience" their relationship as, at least in part, a *procreative* union (a would-be if not actual procreative union). Let me put this Grisez-Finnis view into perspective for the reader by quoting a remarkable passage from what Finnis describes as "the new second volume of Grisez's great work on moral theology":[35] A married couple's sexual act is morally illicit "if either or both spouses do anything inconsistent with their act's being of itself suited to procreating (for example, *if spouses unable to engage in intercourse due to the husband's impotence masturbate each other to orgasm, if a couple trying to prevent the transmission of disease use a condom, or if either or both spouses do something in order to impede*

32. Why is conduct morally bad simply because it involves one in treating one's body "as an instrument to be used in the service of one's consciously experiencing self"? Assume that from time to time I choose to eat a food that is utterly without nutritional value (and so does me no physical good) but that is otherwise harmless and satisfies my appetite for a particular taste or sensation. Assume, too, that I do not thereby fail to eat, or make it more likely that someday I will fail to eat, the nutritional foods I need. Have I thereby done something that "dis-integrates me precisely as an acting person"? *Cf.* FINNIS, *supra* note 16, at 87 (discussing "play" as "[t]he third basic aspect of human well-being").

33. Finnis, L. REV., *supra* note 2, at 1066; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 28.

34. *See supra* note 28.

35. *See supra* note 17.

conception)."[36]

As I said, a remarkable passage. Not at all surprisingly, the Grisez-Finnis view is controversial and indeed widely rejected among Christians, even among Catholic Christians, few of whom today deny—indeed, many, probably most, Catholic moral theologians today affirm—that the sexual conduct of a husband and a wife can be morally licit if it "actualizes" and "allows them to experience" their marriage, not, or not *any longer*, or not *yet*, as a procreative union (actual or would-be), but simply, or *now* simply, as a sexual-spiritual union (i.e., a sexually-rooted and sexually-embodied spiritual union) of profound depth and richness.[37] The nonprocreative sexual conduct of a man and a woman in a lifelong, monogamous relationship of faithful love can be morally licit if it "actualizes" and "allows them to experience" their friendship as a sexual-spiritual union of profound depth and richness.[38] Why, then, can't the sexual conduct of a

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36. Grisez, *supra* note 17, at 636 (emphasis added).

37. *See* RICHARD P. MCBRIEN, CATHOLICISM 982-92 (rev. ed. 1994). *Cf.* Westley, *supra* note 29, at 32:

> Love making, good mindful sexuality is a spiritual art. It is the most difficult of the spiritual arts. Making love is a human enterprise, not a blind biological urge. What makes it difficult is that it *can* be just a blind biological urge. It takes discipline, commitment and hard work to wring the good growth out of it that is possible. The spiritual art is to take this biological thing and transform it into a growth toward love, to bring forth the great potential.

Id.

38. In an effort to achieve "the most charitable reconstruction of Finnis' argument", Paul Weithman states:

> Finnis' argument against homosexuality . . . depends on [the] claim . . . that human beings must never choose to act against the good realized by the 'biological (hence personal) units' constituted by voluntary, uncontracepted, heterosexual union. . . . [G]oods do seem worthy of respect and Finnis' claim that it is unreasonable to choose against them is plausible.

Weithman then adds that he believes that Finnis is wrong to conclude "that homosexual unions cannot actualize common goods." Paul Weithman, *A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics*, 9 NOTRE DAME J. L., ETHICS & PUB. POL'Y 75, 79 (1995). No doubt, a (true) good *is* worthy of respect, and it is at least presumptively unreasonable to choose against a good. But goods *in abstracto* are not goods at all; they are intellectual constructions. Goods, if they are goods at all, are concrete. And a concrete state of affairs, like "my conceiving a child" or "my getting pregnant", may be good for one or another person *but not good—even, perhaps, very bad—for one or another other person.* It is *not* unreasonable, even presumptively, for me to choose against a concrete state of affairs that is not good for me. (Of course, if my choosing against a concrete state of affairs that is not good for me involves my choosing against a concrete state of affairs that *is* good for someone else—or even choosing for a concrete state of affairs that is bad for someone else—the matter is more complicated. Choosing

man and a man or of a woman and a woman also be morally licit—why cannot it also be worthy of those who would be truly, fully human—if it actualizes and allows *them* to experience *their* friendship as a lifelong, monogamous, faithful, loving sexual-spiritual union of profound depth and richness?

The social and legal institutionalization of the position on the morality of homosexual conduct for which Finnis contends has not been conducive to the development of a moral culture in which there would be more homosexual relationships that are lifelong, monogamous relationships of faithful love. It would be perverse, therefore, for one who applauds that institutionalization to try to make hay of the fact that many homosexual relationships are not lifelong, monogamous, faithful, and loving. In any event, the question before us is not how many homosexual relationships are lifelong, monogamous relationships of faithful love. Not all heterosexual relationships—not even all heterosexual "marriages"—are such relationships. I don't know how many homosexual relationships are lifelong, monogamous, faithful, and loving, any more than I know how many heterosexual relationships are such relationships. The question is: Regardless of how many or how few homosexual relationships are lifelong, monogamous, faithful, and loving, is homosexual conduct *in the context of such a relationship* always morally illicit?

Paragraph 7

In Paragraph 7, Finnis responds to one of the complaints I have just made about Paragraph 6 (that there is an inappropriately abstract quality to his argument). His response is to deny the moral relevance of the sort of considerations—the sort of particularities of context—that are widely agreed, by Christians and others, to be not merely morally relevant, but morally determinative:[39]

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to have an abortion, for example, is much more problematic than choosing to engage in contracepted sex.)

39. In a preliminary version of his comments on this paper, Paul Weithman misread me. My claim here is *not* that "widely shared judgments" are morally determinative; it is *not* that "the popularity of a view about human sexuality . . . entail[s] its truth." Weithman, *supra* note 38 (preliminary version on file with author). What a conspicuously silly claim that would be! I quite agree that "popular judgments about human sexuality need always to be checked against the best intellectual work on the subject." *Id.* at 86. My claim, rather, is that various "particularities of context" (as I call them) are among the things that are morally determinative. The sort of contextual particularities I have in mind are just those that Margaret Farley obviously had in mind when she wrote this passage:

My answer [to the question of what norms should govern same-sex

> Reality is known in judgment, not in emotion, and *in reality*, whatever the generous hopes and dreams and thoughts of *giving* with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a grueling day on the assembly line. . . . [T]here is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it. Sexual acts cannot *in reality* be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other—in biological, affective and volitional union in mutual commitment, both open-ended and exclusive—which like Plato and Aristotle and most peoples we call marriage.[40]

The abstract quality of Finnis' argument against homosexual conduct, and the falseness of the premises his argument comprises, are perhaps nowhere more evident than in the preceding passage. One wonders what Finnis means by "reality" or "in reality." As if the *reality* of sexual acts—the *reality* of what they express and do—could possibly be determined without regard to whether those acts are inspired by, animated by, "generous hopes and dreams and thoughts of *giving*." It is (dare I say it) absurd,

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relations and activities] has been: the norms of justice—the norms which govern all human relationships and those which are particular to the intimacy of sexual relations. Most generally, the norms are respect for persons through respect for autonomy and rationality; respect for relationality through requirements of mutuality, equality, commitment, and fruitfulness. More specifically one might say things like: sex between two persons of the same sex (just as two persons of the opposite sex) should not be used in a way that exploits, objectifies, or dominates; homosexual (like heterosexual) rape, violence, or any harmful use of power against unwilling victims (or those incapacitated by reason of age, etc.) is never justified; freedom, integrity, privacy are values to be affirmed in every homosexual (as heterosexual) relationship; all in all, individuals are not to be harmed, and the common good is to be promoted. The Christian community will want and need to add those norms of faithfulness, forgiveness, of patience and hope, which are essential for any relationships between persons within the Church.

Farley, *supra* note 1, at 105.

40. Finnis, L. REV., *supra* note 2, at 1067; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 29-30.

even perverse, to suggest that from a moral perspective the reality of sexual conduct that takes place in and is expressive of a lifelong, monogamous homosexual relationship of faithful love—or the reality of "deliberately contracepted" sexual conduct that takes place in and is expressive of a lifelong, monogamous heterosexual relationship of faithful love—is essentially the same as the reality of the sexual conduct of "a prostitute pleasuring a client in return for money." (According to Finnis, "there is no important distinction in essential moral worthlessness" among those different types of sexual conduct.) Responding to the claim that "[h]omosexual acts, by definition and in principle, sever the connection between sexuality and procreation," Father Thomas H. Stahel, S.J., former executive editor of the Jesuit weekly *America* and now assistant to the president of Georgetown University, writes:

> But if homosexual acts are human acts, their significance is not restricted to their physical description or physical effects. If homosexuality, as practiced by Christians, could be shown to be procreative in some way that transcends the biological, we might attempt to assign it a teleology fitted to Christian morality. That is the crux. So it will not do to reduce the significance of human sexuality, whether straight or gay, to the physical act itself.[41]

Finnis writes that "[r]eality is known in judgment, not in emotion." The judgment/emotion opposition is simplistic and misleading. Sometimes an emotional response can impede one's reaching a sound judgment; sometimes, however, an emotional response not only precipitates the process of judgment, but also clarifies or illuminates the way to a sound judgment.[42] Let us agree, in any event, that "[r]eality is known in judgment." It is

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41. Thomas H. Stahel, S.J., *Transcending Biology*, COMMONWEAL, Mar. 11, 1994, at 2. Then, responding to the claim that "[f]or incarnational religion the intrinsically nonprocreative nature homosexual acts is a metaphysical dead-end," Father Stahel continues:

> Well, then, what about the intrinsically nonprocreative nature of my vowed chastity, my clerical celibacy? And as long as we are on the subject of the Incarnation, what are we to say of Jesus Christ?—who was born of a woman, all right, but not by a heterosexually procreative act? When [Paul] Baumann pushes the incarnational argument [against homosexuality] as he does, he only proves to me that we can be fundamentalistic about almost anything, even so beautiful a truth as the Incarnation.

Id.

42. Martha Nussbaum has suggested, in correspondence, that "one might add that Finnis's contrast between judgment and emotion would not win the approval of *any* ancient thinker; besides, it's bad philosophy." Letter from

nonetheless true that the abstract "reality" that Finnis seems to believe he knows *a priori* is far removed from the reality that many others believe they know *a posteriori*, on the basis of experience, whether their own experience or that of credible others whom they trust. It is far removed from the *experienced* reality that must inform our judgments about what conduct is, or is not, worthy of those who would be fully, truly human. The reality apprehended by many married couples who practice contraception, and by many homosexual couples, is directly contrary to the reality postulated by John Finnis (and by Germain Grisez and the religious-moral tradition Grisez re-presents).

Finnis is reduced to claiming that the reality apprehended by many married couples who practice contraception and by many homosexual couples, unlike the reality asserted by him, is illusory. Finnis refers to the married couple's "illusions of intimacy and self-giving in" acts of deliberately contracepted sex.[43] According to Finnis, the many married couples who engage in "deliberately contracepted" sex, including millions of Christian married couples (many of whom are, like Finnis, Catholic Christians),[44] are, if they think they are not doing something morally wrong, in the grip of an "illusion". In Finnis' view, no doubt, it is an illusion aided and abetted for the Christian couples by all those ministers and priests and theologians who do not submit to the position Finnis defends. By contrast, Finnis is, confidently and happily, in the grip of "reality"—which is known by him not in "emotion", but in "judgment". Finnis may want to reflect on the significance of the fact that only *one-quarter* of all American Catholic priests accepts the Church's official teaching on contraception—and only *a little more than half* of them (56%) accepts the Church's position on homosexual conduct.[45] Are all those dissenting priests—many of whom who daily minister to married

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Martha Nussbaum to author. For a book-length elaboration, see MARTHA C. NUSSBAUM, THE THERAPY OF DESIRE (1994).

43. Finnis, L. REV., *supra* note 2, at 1068; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 31.

44. *See, e.g.*, James Brooke, *With Church Preaching in Vain, Brazilians Embrace Birth Control*, N. Y. TIMES, Sept. 2, 1994, at A1:

> In a country where Catholics account for 75 percent of the nation's 154 million people, every relevant statistic shows that most people ignore the Catholic Church's teachings on family planning methods. In a survey of 2,076 Brazilian adults in June, 88 percent of respondents said they "don't follow" church teachings on birth control. . . . Among women from 25 to 44, the "don't follow" group expanded to 90 percent.

45. *See* Andrew M. Greeley, *A Sea of Paradoxes: Two Surveys of Priests*, AMERICA, July 16, 1994, at 6, 8.

couples or to homosexual couples or to both—in the grip of an "illusion", too?

The reader can decide for herself whose "reality" is an illusion: that apprehended by the heterosexual couples who engage in mutually affirming and nurturing but "deliberately contracepted" sexual conduct in the context of their marriages, and by the homosexual couples who engage in mutually affirming and nurturing sexual conduct in the context of their lifelong, monogamous relationships of faithful love—or, instead, that postulated by John Finnis, for whom "deliberately contracepted" sex in marriage and homosexual sex in a lifelong, monogamous relationship of faithful love is *equal in moral worthlessness* to the commercial sex of a prostitute with the prostitute's client. The serious question, in my view, is not who is in the grip of an "illusion" but why Finnis, unlike so many others, has not been able to break the grip of the particular illusion that holds him, why he has not been able to see through it.[46] According to the Grisez-

46. Paul Weithman writes: "If Perry recognizes the possibility that large numbers of people were in the grip of a sexually conservative illusion (as Russell and Lawrence alleged), then he must recognize the possibility that large numbers of people are in the grip of a sexually liberal one (as Finnis alleges)." Weithman, *supra* note 38, at 84. I do recognize the latter possibility. Indeed, I more than recognize it: I believe that large numbers of people in our society and elsewhere *are* in the grip of one or another "sexually liberal" illusion, at least for some period of their lives—and some of them for their entire lives. However, what particular illusion is it that deliberately contracepting married couples—or lifelong, monogamous, faithful, loving homosexual couples—might be in the grip of? I just don't discern the possible—i.e., the *realistically* possible—illusion. (Does Weithman?) The issue doesn't seem to me a serious one. *See* Sullivan, *supra* note **, at 55:

> [T]o dismiss the possibility of a loving union for homosexuals at all—to banish from the minds and hearts of countless gay men and women the idea that they, too, can find solace and love in one another—is to create the conditions for a human etiolation that no Christian community can contemplate without remorse. What finally convinced me of the wrongness of the Church's teachings was not that they were intellectually so confused, but that in the circumstances of my own life—and of the lives I discovered around me—they seemed so destructive of the possibilities of human love and self-realization. By crippling the potential for connection and growth, the Church's teachings created a dynamic that in practice led not to virtue but to pathology; by requiring the first lie in a human life, which would lead to an entire battery of others, they contorted human beings into caricatures of solitary eccentricity, frustrated bitterness, incapacitating anxiety—and helped to perpetuate all the human wickedness and cruelty and insensitivity that such lives inevitably carry in their wake. These doctrines could not in practice do what they wanted to do: they could not both affirm human dignity and deny human love.

Id. *Cf.* Lance Morrow, *A Convert's Confession*, TIME, Oct. 3, 1994, at 88: "Ameri-

Finnis view of the matter, recall, a married couple's sexual act is "in reality" morally worthless—no less so than is the commercial sex of the prostitute—"if either or both spouses do anything inconsistent with their act's being of itself suited to procreating (for example, *if spouses unable to engage in intercourse due to the husband's impotence masturbate each other to orgasm, if a couple trying to prevent the transmission of disease use a condom, or if either or both spouses do something in order to impede conception*)."[47]

Paragraphs 11-13

In Paragraphs 11-13,[48] which constitute a separate section (section VI) of Finnis' essay, Finnis makes two claims that he has not made in the preceding ten paragraphs. First, he claims that "[t]he deliberate genital coupling of persons of the same sex . . . is sterile and disposes the participants to an abdication of responsibility for the future of humankind."[49] This is a silly claim. After all, by itself the decision of a homosexual couple living in a lifelong, monogamous relationship of faithful love to engage in sexual conduct with one another no more necessarily disposes them "to an abdication of responsibility for the future of humankind" than by itself their decision not to engage in sexual conduct with one another necessarily disposes them to an acceptance of responsibility for the future of humankind. Indeed, the sexual conduct of a homosexual couple who are raising children,[50] like that of a "deliberately contracepting" heterosexual married couple who are raising children, may well be—and at its best certainly is—a source of the kind of mutual emotional nurture that helps them to raise the children in their charge with great love and strength.[51]

Finnis' second claim, in Paragraphs 11-13, is that homosexual conduct, even in the context of a lifelong, monogamous relationship of faithful love,

> treats human sexual capacities in a way which is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage in the understanding that its sexual joys are not

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can Catholics—and millions elsewhere—understand that the church is simply out to lunch on the subject of birth control." *Id.*

47. Grisez, *supra* note 17, at 636 (emphasis added).

48. Because Finnis does not introduce any new argumentative material in Paragraphs 8-10, I have proceeded to Paragraphs 11-13.

49. Finnis, L. REV., *supra* note 2, at 1069; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 31.

50. *See supra* note 26.

51. *See supra* note 29 and accompanying text.

> mere instruments or accompaniments to, or mere compensations for, the accomplishment of marriage's responsibilities, but rather enable the spouses to *actualize and experience* their intelligent commitment to share in those responsibilities, in that genuine self-giving. [It] treats human sexual capacities in a way which is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage. . . .[52]

The problem with this claim (and with the related claim Finnis makes in Paragraph 13) is Finnis' false belief that even in the context of a lifelong, monogamous relationship of faithful love, homosexual conduct "can do no more than provide each partner with an individual gratification."[53] Finnis seems oblivious to the fact that the mutually affirming and nurturing sexual love of two homosexual partners for one another—two partners living a lifelong, monogamous relationship of faithful love—does not presuppose (nor does it entail) that "sexual joys [in the context of marriage] are mere instruments or accompaniments to, or mere compensations for, the accomplishment of marriage's responsibilities." The reason that the mutually affirming and nurturing sexual love of two homosexual partners for one another does not presuppose what Finnis imagines it to presuppose is that the partners may well understand, based on their own lived experience, that far from being "mere instruments or accompaniments to, or mere compensations for, the accomplishment of [their relationship's] responsibilities," their sexual joys "enable [them] to *actualize and experience* their intelligent commitment to share in those responsibilities, in that genuine self-giving."[54]

By now it should be very clear that the logic of Finnis' position is such that, according to the position, "deliberately contracepted" sexual conduct by a married couple, no less than homosexual conduct, is "deeply hostile" to the self-understanding to which Finnis refers. But such conduct can scarcely be deeply hostile to the self-understanding of all those very many married couples—including a very substantial majority (80%) of Catholic couples of childbearing age in the United States[55]—who regularly engage in what Finnis calls "deliberately contracepted" sexual conduct. The reason that such conduct is not

52. Finnis, L. REV., *supra* note 2, at 1069-70; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 32.

53. Finnis, L. REV., *supra* note 2, at 1066; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 29.

54. Finnis, L. REV., *supra* note 2, at 1069-70; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 32.

55. *See* MCBRIEN, *supra* note 37, at 983.

hostile to their self-understanding is because, based on their own lived experience, they understand, though Finnis does not, that "deliberately contracepted" sex *can* do much more "than provide each partner with an individual gratification"—as can homosexual conduct. If, *contra* Finnis, "deliberately contracepted" sex is not "deeply hostile" to *their* self-understanding, why should homosexual sex that takes place in the context of a lifelong, monogamous relationship of faithful love be deeply hostile to their self-understanding? Compare, to Finnis' claim about the deep hostility of homosexual conduct to the self-understanding to which he refers, this comment by a Catholic "wife and mother" (Joan Sexton) in her letter to the editor of *Commonweal*, the American lay Catholic weekly:

> [Here are some] thoughts about the argument that gay marriage would endanger the institution of heterosexual marriage. . . .
>
> [I]t seems to me, as wife and mother, that it may be the most committed of hearts that would enter and stay in a marriage as a one-to-one relationship. I admire the courage of the homosexual person giving him/her self to one person, one body, one heart and to a lifelong struggle to understand and support that other. It's a promise that draws, from me, at least, respect and awe.
>
> And I suspect that such marriages could teach us a lot in terms of realizing the ideal of true friendship. It's interesting that the challenge of women on ordination has brought forth a fresh new look at what priesthood means; so the challenge of gay couples to be included in the institution of marriage promises a new look at what marriage means.[56]

Joan Sexton seems to have discerned something that has, so far, eluded the grasp of John Finnis.

IV.

Recall that Finnis means his argument to be, at every turn, "reflective, critical, publicly intelligible, and rational." (Finnis denies, recall, that "the judgment that [homosexual conduct] is [always] morally wrong [is] inevitably a manifestation . . . of purely religious, theological, and sectarian belief.") I am willing to concede that the argument Finnis presents *is* a nonreligious ("secu-

56. Joan Sexton, *Learning from Gays*, COMMONWEAL, June 17, 1994, at 28. Sexton also wrote, in the opening of her letter, that "the list of threats to modern Christian marriage is so long that gay marriage should rank about twenty-fourth, even for those who take it seriously." *Id.*

lar") argument, in the sense that the argument does not presuppose theistic premises; nor does Finnis (or Grisez) present the position for which he argues as the yield only of some epistemologically privileged insight, of some special ("graced") revelation (e.g., the Bible understood as the word of God).

Finnis' nonreligious argument is not sound. It is not an argument we should accept. Nor is it an argument that a person logically *can* accept—even a person who *wants* to accept it, who *wants* to believe that the position that homosexual conduct is always wrong can be rationally vindicated—*if* that person rejects Finnis's argument that "deliberately contracepted" sexual conduct is always morally bad: The Grisez-Finnis argument that "deliberately contracepted" sexual conduct is always morally bad and the Grisez-Finnis argument that homosexual conduct is always morally bad are essentially *the same argument.* They are the argument that any sexual conduct between two persons is always morally illicit if it cannot or does not "actualize" and "allow them to experience" their relationship as (at least in part) a *procreative* union.[57] One who rejects that argument but nonetheless wants to believe that homosexual conduct is always morally wrong will have to look elsewhere than to Finnis and Grisez for a sound argument. I doubt they will find such an argument anywhere.[58]

> Once sex is no longer confined to procreative genital acts . . . , then it is no longer possible to argue that sex/love between two persons of the same sex cannot be a valid embrace of bodily selves expressing love. If sex/love is centered primarily on communion between two persons rather than on biologistic concepts of procreative complementarity, then the love of two persons of the same sex need be no less than that of two persons of the opposite

57. Grisez's and Finnis' particular argument against homosexual conduct, connected as it is to their argument against "deliberately contracepted" sexual activity, is not idiosyncratic. That connection or linkage represents an official position of the Catholic Church, which teaches that a fundamental moral problem with all homosexual conduct is its nonprocreative character. *Cf.* Michael J. Farrell, *Feisty New Ireland Leaves the Church Panting to Keep Up,* NAT'L CATH. RPTR., July 29, 1994, at 7, 8 (quoting Archbishop Desmond Connell of Dublin, Ireland: "If, under the influence of the contraceptive culture, society accepts a view of marriage that releases the married couple from all commitment to procreation, it opens the way to the final debasement of marriage, the recognition of so-called homosexual marriages."). On contemporary talk among Catholics about "the contraceptive culture", see Helen Fitzgerald, *Needed: More, Not Less Talk About Sexuality,* COMMONWEAL, Nov. 4, 1994, at 42.

58. *Cf.* Nussbaum, *supra* note 15, at 1530 (commenting on "the secular argument of Roger Scruton").

sex. Nor need their experience of ecstatic bodily communion be less valuable.[59]

There remain, of course, various *religious* arguments against homosexual conduct—for example, arguments based on the Bible. Fundamentalist religious arguments of any kind, including fundamentalist religious arguments against homosexual conduct,[60] are deeply problematic, *even for those who count themselves religious.*[61] To be sure, not every argument against homosexual conduct based on the Bible—whether the Hebrew Bible, the

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59. Rosemary Ruether, *The Personalization of Sexuality, in* FROM MACHISMO TO MUTUALITY: ESSAYS ON SEXISM AND WOMAN-MAN LIBERATION 70, 83 (Eugene Bianchi & Rosemary Ruether, eds., 1976).

Weithman writes: "Why not think that very different moral considerations are relevant to the questions of whether to engage in orgasmic homosexual activity and whether to engage in heterosexual sex in a way designed to prevent conception?" Weithman, *supra* note 38, at 88. I think I understand the point Weithman is trying to make, but I would put it differently. Imagine three couples: (1) a heterosexual couple who are able to conceive and bear a child in the normal way and who know that they have that ability; (2) a heterosexual couple who are unable to conceive a child and who know that they have that disability; and (3) a homosexual couple. Couple (1) faces a question that simply does not arise for couple (2) or couple (3): Whether to engage in sex in a way designed to prevent conception? Obviously the considerations that bear on this question are different from the considerations that bear on the question whether to engage in sex at all, which is a question that may arise for all three couples. (Does Weithman mean to say more than this? In particular, does Weithman mean to allow for the possibility of a plausible moral perspective from which the following claim is defensible: "Even if orgasmic homosexual sexual conduct is not always morally wrong, deliberately contracepted heterosexual conduct *is* always morally wrong.")

60. *See* Brenda You, *A Holy War Against Gays,* CHI. TRIB., Apr. 26, 1994, § 5, at 1.

61. *See* Thomas F. O'Meara, O.P., FUNDAMENTALISM: A CATHOLIC PERSPECTIVE (1981). *See also* Eric Zorn, *Citing a Wrong to Block a Right,* CHI. TRIB., Apr. 21, 1994, § 2, at 1:

> [T]he favorite biblical passage of those who rail against homosexuality [is] Chapter 18, Verse 22 of Leviticus: "You shall not lie with a male, as with a woman; it is an abomination.
>
> Suffice it to say that this particular book—with its obsession with animal sacrifice, expressions of disgust at the uncleanliness of menstruating women, approval of the death penalty for blasphemers, acceptance of human slavery, endorsement of torture, and vilification of the disabled—is not otherwise considered a reliable legislative guide in contemporary society.
>
> The Bible's relevance in such debates is further clouded by [the way in which] one can find in it justification for any number of practices most of us frown on, including cannibalism (Deuteronomy 28), incest (Genesis 19), genocide (Numbers 31), self-mutilation (Matthew 18), and the execution of Sabbath breakers (Exodus 31).

Id.

New Testament, or both—is a fundamentalist argument. Nonetheless, as an impressive growing literature in contemporary Christian ethics argues, no biblically-based argument against homosexual conduct fails to be deeply problematic even for those who accept the authority of the Bible.[62]

V.

I want to conclude on a personal note, directed especially to other Christians—most especially to those whose religious tradition is Catholic.

Finnis' argument about homosexual conduct is not a narrowly Christian, much less a narrowly Catholic, argument.[63] But the position on the morality of homosexual conduct Finnis defends, like the position on the morality of "deliberately contracepted" sexual conduct he defends, is an "official" position of the Catholic Church. (Indeed, as I said, one and the same argument supports both positions.) Finnis and I are both Catholic; indeed, we are both Catholic parents who are raising our children in our shared religious tradition. When my children are older I will tell them why I believe the tradition is fundamentally in error both in judging that contraception is *always* immoral and in judging that homosexual conduct is *always* immoral. And at some point I will introduce my children to John Noonan's

62. *See, e.g.* MCBRIEN, *supra* note 37, at 993-97; MCCORMICK, *supra* note 31; Coleman, *supra* note 31; Jeffrey S. Siker, *How to Decide?: Homosexual Christians, the Bible, and Gentile Inclusion*, THEOLOGY TODAY, July 1994, at 219.

63. *Cf.* Basil Mitchell, *Should Law Be Christian?* LAW & JUSTICE, No. 96/97 (1988), at 12, 21 (emphasis in original):

> But, the objection may be pressed, can a religious body argue its case in a secular forum (i.e., one that is not already antecedently committed to the religion in question)? Either, it may be said, it will rely on Christian premises, which *ex hypothesi* opponents will not accept; or it will employ purely secular premises, in which case the ensuing law will not be Christian. In neither case will any genuine debate have taken place between Christians and non-Christians. The dichotomy, however, is altogether too neat to be convincing. It presupposes that there is and always must be a complete discontinuity between Christian and secular reasoning. Certainly this can occur—if, for example, the Christian is an extreme fundamentalist and the secular thinker regards individual preferences as the sole basis for morality. . . . But, . . . Christians would presumably want to argue (at least, many of them would) that the Christian revelation does not require us to interpret the nature of man in ways for which there is otherwise no warrant but rather affords a deeper understanding of man as he essentially is. If that is so, there is room for a genuine exchange of ideas.

Id.

recent, seminal article in *Theological Studies*: "Development in Moral Doctrine."[64] Discussing usury, marriage, slavery, and religious freedom, Noonan demonstrates:

> Wide shifts in the teaching of moral duties, once presented as part of Christian doctrine by the magisterium, have occurred. In each case one can see the displacement of a principle or principles that had been taken as dispositive—in the case of usury, that a loan confers no right to profit; in the case of marriage, that all marriages are indissoluble; in the case of slavery, that war gives a right to enslave and that ownership of a slave gives title to the slave's offspring; in the case of religious liberty, that error has no rights and that fidelity to the Christian faith may be physically enforced. . . . In the course of this displacement of one set of principles, what was forbidden became lawful (the cases of usury and marriage); what was permissible became unlawful (the case of slavery); and what was required became forbidden (the persecution of heretics).[65]

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64. *See* John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUD. 662 (1993). *See also* Peter Steinfels, *Beliefs*, N. Y. TIMES, Feb. 19, 1994, § 1, at 8 (commenting on Judge Noonan's article). Steinfels describes Judge Noonan, of the United States Court of Appeals for the Ninth Circuit, as "a jurist and scholar who defies familiar categories."

> A summa cum laude graduate of Harvard at 19, he received a Ph.D. in philosophy from the Catholic University of America in 1951 before returning to Harvard for his law degree in 1954 and eventually a teaching post at Harvard Law. [Noonan also taught at the law schools of Notre Dame and of the University of California at Berkeley.] In the 1960s he published an authoritative history of the Church's opposition to contraception, a book widely used to support the case for changing that position. In the 1970s he opposed the Supreme Court's ruling that upheld women's right to have abortions, and campaigned for a constitutional amendment to protect the unborn.
>
> Liberals brooded when President Ronald Reagan appointed him to the Federal bench in 1985. But as a judge, he has angered conservatives with his outspoken declarations on behalf of death row inmates seeking stays of execution and further court hearings.

Id. See also Kenneth Woodward, *Noonan's Life in the Law*, NEWSWEEK, Apr. 1, 1987, at 82.

65. Noonan, *supra* note 64, at 669. *See also* Seán Fagan, S.M., *Interpreting the Catechism*, 44 DOCTRINE & LIFE 412, 416-17 (1994):

> A catechism is supposed to "explain", but this one does not say why Catholics have to take such a rigid, absolutist stand against artificial contraception because it is papal teaching, but there is no reference to the explicit centuries-long papal teaching that Jews and heretics go to hell unless they convert to the Catholic faith, or to Pope Leo X, who declared that the burning of heretics is in accord with the will of the Holy Spirit. Six different popes justified and authorised the use of slavery. Pius XI, in an encyclical at least as important as *Humane*

If the official Catholic position were still that slavery is permissible, the position would be what it once was: fundamentally in error. If the official Catholic position were still that—and here I quote Judge Noonan—"the duty of a good ruler was to extirpate not only heresy but heretics"[66]—the position would be what it once was: fundamentally in error. "The vast institutional apparatus of the Church was put at the service of detecting heretics, who, if they persevered in their heresy or relapsed into it, would be executed at the stake. Hand and glove, Church and State collaborated in the terror by which heretics were purged."[67] "Eventually," we are told, "the church came to tolerate religious tolerance, but papal advisors continued to uphold state-enforced orthodoxy as an ideal."[68] If state-enforced religious orthodoxy were still the official Catholic ideal, the Church's position would be what it once was: fundamentally in error.

Why doubt that among still-official Catholic propositions and ideals, there are contemporary analogues of the proposition about slavery, the proposition about the extirpation of heretics, and the ideal of state-enforced religious orthodoxy? We dare not believe that the tradition has at last been purified and there remain no sinful, disfiguring propositions or ideals among still-official Catholic propositions and ideals. History has not ended. These three official positions of the Church seem to me fundamentally in error; indeed, the first and third positions seem to me little more than prejudice masquerading as theology:

- Women may not—*theologically* may not—be ordained as priests; they may not receive the sacrament of Holy Orders.[69]

Vitae, insisted that co-education is erroneous and pernicious, indeed against nature. The Catechism's presentation of natural law gives the impression that specific moral precepts can be read off from physical human nature, without any awareness of the fact that our very understanding of "nature" and what is "natural" can be coloured by our culture.

Id. Cf. John Honner, S.J., *Science v. Religion (II): Some Possible Answers*, COMMONWEAL, Sept. 23, 1994, at 14, 15 ("My own favorite example of ecclesiastical conservatism, coming from Australia as I do, occurred in the year 748, when Pope Zacharius condemned the idea of the Antipodes (the notion of the earth having opposite sides) and their human occupation as a perverse and iniquitous doctrine.")

66. Noonan, *supra* note 64, at 667.

67. *Id.*

68. Steinfels, *supra* note 64, at 8.

69. "This judgment is to be definitively held by all the church's faithful." John Paul II, *Apostolic Letter on Ordination and Women*, 24 ORIGINS 49, 51 (1994). Thus has John Paul II tried, futilely, to curtail debate in the Catholic Church about whether there is any theological impediment to women receiving the

• "Deliberately contracepted" sexual conduct is *always* immoral; it is immoral *without regard to any particularities of context.*[70]

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sacrament of Holy Orders. At least the Pope, pulled back by several "high-ranking bishops who gathered at a special Vatican meeting" before the apostolic letter was issued, stopped short of using the language of "infallibility". *See* Tom Fox, *Bishops Pull Pope Back from Brink*, NAT'L CATH. RPTR., June 17, 1994, at 3. *See also* Peter Hebblewaite, *A Search for Openings in the Absence of 'Infallible'*, NAT'L CATH. RPTR., June 17, 1994, at 10. For a statement of the Catholic Church's official position on the theological impossibility of ordaining women, see Liberia Editrice Vaticana, CATECHISM OF CATHOLIC CHURCH 394 (para. 1577) (United States Catholic Conference trans. 1994) [hereinafter CATECHISM]. For a discussion of the Church's official position, see McBrien, *supra* note 37, at 772-79. *Cf.* Elizabeth Schussler Fiorenza, *Introduction: Violence Against Women, Concilium*, 1994/1, at vii.

Recently, Canadian Archbishop Maurice Couture, has written:

> We perceive among many religious a profound discomfort with the anthropological approach underlying a number of more or less official texts of the church. To take it to the extreme, it is as if women are so different from men that they do not share the same human nature! By insisting on the "specific vocation" of women, and on "the wealth of feminine nature" . . . and on what constitutes their "personal dignity" . . . , it sometimes seems to be an elegant way of keeping women away from those roles traditionally reserved in the church to men.

Maurice Couture R.S.V., *Consecrated Women: Equality in the Church*, 24 ORIGINS 358, 359 (1994). In a recent *Time* essay, Lance Morrow (who is a convert to Catholicism) has written:

> Despite my respect for the church and my contempt for some of the overstimulated moral idiocy of the secular world, I think that in two areas—1) contraception and 2) ordination and the role of women—the church has gone needlessly, dangerously astray. . . .
>
> Strange that the church's leaders, with their intellectual tools and 20 centuries' experience, would fall into what might be called the Fallacy of Incidentals. Women are not ordained priests because Christ, in human form, was a man and chose male apostles. But surely maleness was incidental to the essence of Christ's teaching and importance. Those who build cathedrals of principle, unassailable traditions, around an unimportant or incidental distinction—one that is rooted in custom of distant time and, interminably preserved, becomes essentially inhuman—are doomed.
>
> The continuing damage done to the Catholic Church by the exclusion of women from the priesthood is hard to estimate. What is lost by keeping women out of the full priestly life amounts to a tragedy for the church. In that policy, a world of opportunity has been closed; life that might have flourished, women's souls sharing in the heart of the church, has been shut down.

Morrow, *supra* note 46, at 88.

70. For a statement of the Catholic Church's official position, see CATECHISM, *supra* note 69, at 570 (para. 2370). For a discussion of the Church's official position, see McBrien, *supra* note 37, at 982-92. For a discussion of Pope Paul VI's encyclical on contraception, *Humanae Vitae* (1968), and especially of

> • A sexual bond between two persons of the same sex is *always* sinful; in particular, the homosexual bond is sinful *even if it is embedded in and expressive of a lifelong, monogamous relationship of faithful love—indeed, even if it is a generative matrix of such a relationship, of such love.*[71]

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its effect on Roman Catholic moral theology, see MAHONEY, *supra* note 1, ch. 7. A recent comment by Redemptorist Father Bernard Häring on Pope John Paul II's encyclical *Veritatis Splendor* is worth reporting here. (Häring, about eighty years old, is arguably the Catholic Church's preeminent moral theologian.)

> *Veritatis Splendor* contains many beautiful things. But almost all real splendor is lost when it becomes evident that the whole document is directed above all towards one goal: to endorse total assent and submission to all utterances of the pope—and above all on one crucial point: that the use of any artificial means for regulating birth is intrinsically evil and sinful, without exception, even in circumstances where contraception would be a lesser evil.

Bernard Häring, *A Distrust That Wounds*, TABLET (London), Oct. 16, 1993, at 1332.

71. For a statement of the Catholic Church's official position, see CATECHISM, *supra* note 69, at 566 (para. 2357); *see also id.* (paras. 2358-59). Pope John Paul II has recently reasserted the Church's official position on homosexual conduct. *See* Alan Cowell, *Pope Calls Gay Marriage Threat to Family*, N. Y. TIMES, Feb. 23, 1994, at A5. *See also The Homosexual Movement: A Response by the Ramsey Colloquium*, FIRST THINGS, Mar. 1994, at 15. For a powerful "counter-response" to the position of "the Ramsey colloquium," *see* the letter from various members of the National Association of College and University Chaplains, FIRST THINGS, Sept. 1994, at 2.

Richard A. McCormick, S.J., a member of the theology faculty at the University of Notre Dame, has criticized the Church's official position, and has offered a position I find much more sound. *See* MCCORMICK, *supra* note 31. *See also* MCBRIEN, *supra* note 37, at 993-97. (Father McBrien is also a member, and former chair, of the theology faculty at the University of Notre Dame.) Some contemporary Catholics have written sympathetically about the *theological* possibility of "gay marriages". In addition to the essays by Margaret Farley (*see supra* note 1) and Rosemary Ruether, (*see supra* note 57), *see* RICHARD WESTLEY, MORALITY AND ITS BEYOND 169-98 & 222-28 (1984); Sydney Callahan, *Why I Changed My Mind: Thinking About Gay Marriage*, COMMONWEAL, Apr. 22, 1994, at 6; Daniel Maguire, *The Morality of Homosexual Marriage*, *in* A CHALLENGE TO LOVE: GAY AND LESBIAN CATHOLICS IN THE CHURCH, *supra* note 1, at 118. According to Maguire, "The marital good of exclusive, committed, enduring, generous, and faithful love is a human good. We have no moral right to declare it off limits to persons whom God has made gay." *Id.* at 133. Westley has concluded that:

> [Homosexual] unions too might well be classified as 1) marriages; 2) marriages in the Lord; and 3) sacramental marriages. At least, let us Christians not too quickly rule out *the possibility in principle* of homosexuals achieving such satisfying human relationships, even the sacramental one. . . . [T]here is nothing at all in the requirements for a "marriage in the Lord" or a "sacramental marriage" . . . that would automatically disqualify homosexuals.

WESTLEY, *supra*, at 227.

It is consoling that one finds so much good sense among many of the

The claim that "faithful" Catholics once owed "religious assent" to the disfiguring propositions about slavery, the extirpation of heretics, or state-enforced religious orthodoxy—or that faithful Catholics today owe religious assent to the contemporary analogues of such propositions—presupposes a deeply problematic ecclesiology.[72] That, however, is an issue for another day.[73]

Catholics who have recently written letters to *Commonweal* on the subject of homosexuality. *See, e.g.*, Sexton, *supra* note 56 (commenting on Sydney Callahan's piece).

John Noonan's essay is quite relevant to the question of the Catholic Church's position on homosexuality, though in the essay Noonan is not addressing that or any other contemporary issue in particular. (Noonan addressed the issue of homosexuality—and several other issues—in an earlier essay. *See* John Noonan, *Genital Good*, 8 COMMUNIO 198, 212-21 (1981).) Consider, for example, this passage:

> Experience as such, taken as "raw experience," the mere participation in this or that phenomenon, is . . . not the key. Raw experience carries with it no evaluation. But experience, *suffered or perceived in the light of human nature and of the gospel*, can be judged good or bad. It was the experience of unfreedom, in the gospel's light, that made the contrary shine clear.

Noonan, *supra* note 64, at 676 (emphasis added). *See also* Westley, *supra* note 29, at 31:

> Forgotten is the old theological dictum that the "teaching" church can only teach what the "believing" church believes. Having it the wrong way around skews everything; it discounts the religious experience of all us believers and allows the church to be the curator of all truth, so that no more truth can get into the enterprise. But I believe that God is revealing God's self to us all the time. We have to get our antennae back up.

Id. What does the "believing" church believe, not only about homosexual conduct, but also about contraception? *See supra* note 43 and accompanying text for a partial answer (beliefs of American Catholic priests).

72. *See* Thomas Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859, 1862 n.13 (1993) ("Ecclesiology is the branch of theology that deals with what the Church (*ecclesia*) should be.")

73. For a statement of the claim about "faithful" Catholics and "religious assent", see Gerard V. Bradley, *Grounds for Assent*, COMMONWEAL, Sept. 9, 1994, at 29. On the difficult question of Catholic identity—of what it means for someone or something (e.g., a university) to be "Catholic"—see James Provost & Knut Walf, eds., *Catholic Identity*, CONCILIUM, 1994/5. Suffice it to say that the matter of Catholic identity and religious assent is more difficult—more complicated—than Bradley allows. *See, e.g.*, Norbert Greinacher, *Catholic Identity in the Third Epoch of Church History*, CONCILIUM, 1994/5, at 3. *See also* Margaret O'Brien Steinfels, *Dissent & Communion: You Can't Have One Without the Other*, COMMONWEAL Nov. 18, 1994, at 9. She writes:

> If one doubts whether real communion implies dissent, imagine a church where dissent had been rendered unthinkable, impermissible, or inexpressible. Would such a church be likely to resemble the interpersonal, vital, ever deepening, always outstretching encounter of

(What is the intended, if implicit, antonym of "faithful" in the claim that faithful Catholics owe religious assent to such propositions? "Faithless"?[74] May I suggest that a more appropriate antonym is that between "mindful" and "mindless"?[75])

May my children come to see such disfiguring theology and morality for what it is. May they come to see through it. And may my children learn what countless Catholics (and other Christians) were never taught in the course of their spiritual formation—what they were never taught either as children *or even as adults*:

> One cannot predict future changes; one can only follow present light and in that light be morally certain that some obligations will never alter. The great commandments of love of God and of neighbor, the great principles of justice and charity continue to govern all development. God is unchanging, but the demands of the New Testament are different from those of the Old, and while no other revela-

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> hearts and minds that is communion? Or would it be more likely to resemble the bureaucracy of government, the conformity of a corporation, the discipline of an army, or even the ideological unanimity of a totalitarian political movement?

Id. at 11. *Cf.* Richard A. McCormick, S.J., *Two Letters and an Inference*, AMERICA, Aug. 27, 1994, at 15.

74. Or is the intended antonym "unfaithful"? (To be "faithless" is to be without faith. To be "unfaithful" to someone or something is to be untrue to someone or something.) On one way in which the Church itself can be "unfaithful", *see infra* note 76.

75. There is a sense in which a "mindless" Catholicism is "unfaithful" to the Catholic tradition. As David Hollenbach, S.J., has explained,

> Faith and understanding go hand in hand in both the Catholic and Calvinist views of the matter. They are not adversarial but reciprocally illuminating. As [David] Tracy puts it, Catholic social thought seeks to correlate arguments drawn from the distinctively religious symbols of Christianity with arguments based on shared public experience. This effort at correlation moves back and forth on a two-way street. It rests on a conviction that the classic symbols of Christianity can uncover meaning in personal and social existence that common sense and uncontroversial science fail to see. So it invites those outside the church to place their self-understanding at risk by what Tracy calls conversation with such "classics."

David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 894 (1993). Hollenbach then adds, following Tracy: "At the same time, the believer's self-understanding is also placed at risk because it can be challenged to development or even fundamental change by dialogue with the other—whether this be a secular agnostic, a Christian from another tradition, or a Jew, Muslim, or Buddhist." *Id.* at 894-95. I add, with an eye on the issue that has engaged me here: Or whether this be a lesbian or a gay man, perhaps even a Christian lesbian or a Christian gay man, living in a lifelong, monogamous relationship of faithful love.

> tion supplements the New, it is evident from the case of slavery alone that it has taken time to ascertain what the demands of the New really are. All will be judged by the demands of the day in which they live. It is not within human competence to say with certainty who was or will be saved; all will be judged as they have conscientiously acted. In new conditions, with new insight, an old rule need not be preserved in order to honor a past discipline.
>
> . . .
>
> In the Church there can always be fresh appeal to Christ, there is always the possibility of probing new depths of insight. . . . Must we not, then, frankly admit that change is something that plays a role in Catholic moral teaching? . . . Yes, if the principle of change is the person of Christ.[76]

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76. Noonan, *supra* note 64, at 676-77. *See also* MAHONEY, *supra* note 1, at 327 (emphasis added):

> At any stage in history all that is available to the Church is its continual meditation on the Word of God in the light of contemporary experience and of the knowledge and insights into reality which it possesses at the time. To be faithful to that set of circumstances . . . is the charge and the challenge which Christ has given to his Church. But if there is a historical shift, through improvement in scholarship or knowledge, or through an entry of society into a significantly different age, then what that same fidelity requires of the Church is that it respond to the historical shift, such that it might be not only mistaken *but also unfaithful* in declining to do so.

Id.

After I finished drafting this essay, I read in *America* an article by Richard L. Smith, the conclusion to which—a true story—seems a fitting coda to this essay:

> The devoutly Catholic mother of a young man in his late 20's was devastated to learn that her son was dying of AIDS in San Francisco. Over the years, she had tried to keep in touch with him, but, for reasons she could not fully understand, he had become progressively aloof from her. Now, with the news of his illness, she quickly travelled from her home in the Midwest to see him, perhaps for the last time.
>
> As is frequently the case, the news of her son's diagnosis was the first inkling she had that her son was gay, and this realization compounded her grief and sadness. Upon arriving at his San Francisco home, she was greeted at the door by his lover, whom she had never even heard about. He warmly welcomed her, took her coat, and led her immediately to her son's bedroom.
>
> She stayed several days at the bedside of her son, playing cards and watching television with him, helping with his care, talking to his doctor. But despite her satisfaction in being able to share that time with him, it was obvious that she remained disturbed about her son's homosexuality. This was particularly apparent in the rigidity and coldness with which she responded whenever his lover came into the room.

After a few days, she suggested to her son that it was time to call a priest, and her son agreed. Shortly after arriving at the house, the priest recognized the reason behind the mother's anxiety. After praying with her and her son, he stayed for a chat. He asked her about her life in the Midwest. Eventually he asked her how she had come to meet her husband, now deceased for several years. She began to reminisce about the time they first met, the hat he was wearing, the cafe where they went on their first date. She talked about the bittersweet early years of their marriage, the financial struggles they endured and the painful fact that her family had not accepted her husband, feeling that he was somehow beneath them.

As the visit continued, the priest eventually turned to the young man with AIDS. He asked him how he had come to meet his lover. Slowly, the young man began to tell his story of how they met at a party, where they went on their first dates, hiking trips they took and their decision finally to establish a home together.

As his mother listened to her son, a subtle miracle began to occur. She began to recognize some profound similarities in their two stories. Despite the obvious differences between them, they both seemed to be part of a universe more vast than she had previously imagined. It was not so much that she began consciously to reformulate her ethical construction of her son's homosexuality. Nothing so abstract as all that. Rather, she began to understand that her son had simply but truly fallen in love with another man—just as she had once fallen in love with her husband. How amazing! How wonderful!

Somehow, as she listened to her son speak about his lover, her ethical categories and cultural boundaries, while still intact, seemed much less important. What seemed far more significant was the wonderful and amusing mystery of love and life that could hold both her and her son, each with their own uniqueness.

The AIDS epidemic is a moment when the gay community and the Catholic Church come together in the face of immense human pain. We can hope that, without abdicating their respective identities and values, these two cultures can nevertheless find here a common ground on which to meet. In this tragic moment, may the structure of war give way to the structure of dialogue. May extravagant compassion be extended, profound truths be shared, rich stories be told and amazing discoveries be made about the vastness of love and life.

Richard L. Smith, *Gays and the Bishops: Searching for Common Ground*, AMERICA, Sept. 24, 1994, at 12, 17.