

NEW NATURAL LAW THEORY VS. LIBERALISM:
A RESPONSE TO JOHN FINNIS ON SEXUAL ORIENTATION & THE LAW

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ABSTRACT

John Finnis, a *new* natural law theorist, argues that same-sex marriages should be discouraged and prohibited by the state because the concept of marriage between same-sex partners is irreconcilable with what he calls *the good of marriage*. I argue that Finnis' view that the state has a legitimate interest in discouraging particular private marital and sexual conduct between individuals is both incorrect and dangerous. I show that Finnis's argument turns on the flawed concept of biological unity in heterosexual intercourse and on weak empirical evidence regarding the unwillingness of homosexual males to be monogamous.

In the 4th century B.C.E., the philosopher Aristotle intertwined the common ancient belief of the law of nature with the concepts of rights and justice. This would ultimately come to be known as natural law theory or *jus naturale*. Regarded as the foundation of the Common Law legal system and of jurisprudence, natural law theory has had a significant yet metamorphic occurrence in ethical and legal philosophy throughout history. Where it stands today is still debated, but scholars such as John Finnis have established what might be considered a new natural law theory. But as new issues, altering traditional concepts of gender, sexual orientation, and marriage, emerge in society, these new natural law theorists have been forced to reconcile their theories with each of these altered concepts—and ultimately the current fragile amalgam consisting of the concepts of homosexuality, morality, the law, and the state’s appropriateness in dealing with such concepts—. An illustration of this point becomes apparent when these natural theorists are forced to address questions such as whether homosexuality is a moral practice and whether the concept of morality should dictate our laws. And if the concept of morality should dictate our laws, should homosexuality then be illegal? If not, should the state possess its own discretion in prohibiting certain affiliations of the practice like marriage and sodomy, for example? And finally if so, would society—now seemingly entranced more than ever before by the ideology of individual and human rights—legally uphold these natural law theories?

Thus, a debate has emerged. On one side, John Finnis and other new natural law theorists have readily denounced same-sex marriage immoral and unnatural because of physical and psychological constraints, among others. From the opposing side come the

liberals; scholars, such as Andrew Koppelman and Stephen Macedo, who believe that these natural law theoretical constraints are theologically and philosophically erroneous and cannot be justifiable because of their inherent irrefutable biases against homosexuality. This debate, however, seemed to peak in the early-to-mid 90's. Now almost two decades later, we are at the precipice of a generational shift that is sure to change the tone of this philosophical debate.

In this response to John Finnis on sexual orientation and the law, I will first give a short theoretical overview of Finnis' claims. I will then discuss the lack of merit, and danger according to John Stuart Mill, in Finnis' view that the state has a legitimate interest in discouraging particular private marital and sexual conduct between individuals. I will argue that Finnis' views pertaining to the significance of biological unity, a concept Finnis employs that regards sexual intercourse between a man and a woman (and of the genital type) to be the only form of sexual intercourse that satisfies the requirement to achieve *the good of marriage*, alone do not demonstrate the moral inappropriateness of same-sex marriage and essentially encompass inherent biases against same-sex couples. And finally, I will discuss the weakness in the empirical evidence Finnis presents in defending his theoretical concepts including the unsubstantiated claim that studies have proven the unwillingness of homosexual males to be monogamous with one another.

In 1994, John Finnis wrote an article titled *Law, Morality, and Sexual Orientation*. Before Finnis' theories can be gazed upon in a respectful yet critical way, it is important to understand the theories and theoretical constraints that he proposes. Finnis

begins by clarifying that modern legal theory forms a distinction between the government “supervising the private conduct of adults” and “supervising the public realm or environment.”¹ The importance of supervising the public realm includes the following: 1) it is this “environment in which young people are educated,”² 2) it is this environment that affects, either negatively or positively, those who have the responsibility to direct these young people away from “bad forms of life”³, and 3) “it is the milieu that encourages/helps or discourages/undermines their own resistance to being lured by temptation” in bad forms of life characterized slavery toward “impulse and gratification” rather than by autonomy and the element of self-control.⁴

Finnis proposes that *the good of marriage* exists as a *basic human good*, and that achieving this *good of marriage* requires marital intercourse.⁵ This is because through reproduction husband and wife are able to achieve what Finnis calls *fides*. Here, quoting Aquinas, Finnis states that, “*Fides* is the disposition and commitment of each of the spouses to cleave to—precisely, to be martially and thus bodily united with—the other and no other person.”⁶ Although made reference to by Finnis himself, for purposes of this response the proposition of husband and wife being *bodily united* will be referred to as *biological unity*. This idea of genital intercourse holds importance because it “enables couples to actualize and experience, and in that sense express, their marriage itself as a

¹ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 2.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ John Finnis, “The Good of Marriage and the Reality of Sexual Relations: Some Philosophical and Historical Observations,” *American Journal of Jurisprudence* 42, (1998): 1.

⁶ Finnis, *Law, Morality*, 14.

single reality with two blessings: children and mutual affection.”⁷ “Non-marital intercourse, especially but not only homosexual, has no such point and therefore is unacceptable.”⁸

This common good, which individuals in society should strive to achieve, is precisely marriage which consists of two goods: parenthood and friendship.⁹ Regardless of the actual result of biological parenthood, biological unity or reproductive organs, which allow for personal unity, are required.¹⁰ The reason that only the reproductive organs of a man and a woman can achieve this unity is based on how Finnis translates the views of Aquinas. To Finnis, Aquinas states that any other type (including for example, man and man, man and boy, woman and woman)¹¹ of sexual intercourse that is not of the genital type between man and woman because it is not *reasonable* or *rationaly appropriate*.¹² In his essay titled *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, Finnis states the following of Aquinas:

Aquinas will have made clear that he thinks the copulation of men with each other is “contrary to human nature” in this first sense, i.e. is unreasonable, so that the pleasure the sodomites take in it, being the pleasure of an unreasonable, morally wrong kind of act, is unnatural.¹³

⁷ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 8.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² John Finnis, “The Good of Marriage and the Reality of Sexual Relations: Some Philosophical and Historical Observations,” *American Journal of Jurisprudence* 42, (1998): 25.

¹³ Ibid., 25-26.

Finnis is quick to note that regardless of what the “hopes and dreams” of same-sex partners may be, their sexual acts cannot express anything other than sexual pleasure because this biological unity is physically unattainable and thus unrealistic to achieve.¹⁴ Sexual acts cannot in reality be self-giving unless they are acts by which a man and a woman actualize and experience the real giving of themselves to each other (“biologically, affectively, and in a volitional union in mutual commitment—open-ended and exclusive”).¹⁵

And finally, Finnis states that sexual acts must be marital and they are not marital unless they have both the generosity of acts of friendship and procreative significance, not requiring the result of offspring but instead acts of the reproductive kind.¹⁶

Let us begin by looking at what Finnis states in his essay regarding whether the state should have a responsibility to dictate activity of the public type including discouraging homosexuality in a public manner. In reference to this topic, he makes this distinction:

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

¹⁴ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 9.

¹⁵ Ibid.

¹⁶ Ibid.

people of integrated good character, and to be autonomous, self-controlled rather than slaves to impulse and sensual gratification.¹⁷

Finnis states that type (a) supervision, consisting of the private activities of adults with a few exceptions, is no longer a proper place for state intrusion. Regarding type (b) supervision, consisting of conduct occurring in the public realm or environment, Finnis states that this type of “supervision of the moral-cultural-educational environment is maintained as a very important part of the state's justification for claiming legitimately the loyalty of its decent citizens.”¹⁸ Here, Finnis views same-sex marriage as conduct properly discouraged by the state because of its so-called public nature. Finnis states that “the standard modern position involves a number of explicit or implicit judgments about the proper role of law and the compelling interests of political communities, and about the evil of homosexual conduct. Can these be defended by reflective, critical, publicly intelligible and rational arguments? I believe they can.”¹⁹

But what is the proper role regarding state dictation of the so-called public activity of homosexual conduct that Finnis is referring to? Finnis would like us to believe that permitting same-sex marriages (which would thus force associated homosexual conduct into the public realm) would somehow cause harm to society because it promotes the enslavement of ourselves toward impulse and sensual gratification. Finnis’ views however, assume that the state has a compelling interest to legally prescribe what marital engagements (for example, marriage or civil unions) consenting adults should partake in with one another. This assumption, quite frankly, brings to life a terrifying scenario. If the

¹⁷ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 2.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 3.

state is to dictate the conduct of our relationships because of what they might illustrate to society, then shouldn't the state dictate relationships on all fronts, not just the ones that pertain to homosexuality? I would argue then that according to Finnis, individuals that do not promote *the good* of rightful marriage, such as prostitutes and adulterers, should also not be allowed to rejoice in marriage with another individual. This is because a marriage between two adulterers or two prostitutes (or one from each category for that matter), would not be a "real" marriage because the practices of each individual in the marriage would undermine what Finnis calls "real" marriage. Regardless of whether a prostitute or an adulterer acts are immoral or not, an individual that acting as either would not satisfy the requirement of marriage, one in particular being exclusivity toward one's partner.²⁰ This assumption alone, if thought out, shakes the core foundations of this nation. The concepts of liberty and individualism would no longer exist. Finnis would like us to believe, however, that attaining our moral goods outweighs our need for liberty and individualism. John Stuart Mill, a foundational liberal, rightfully disagrees. Mill states that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."²¹ And while Finnis argues specifically that the state has a legitimate interest in the moral good of children (or young people, as Finnis refers to them)²² fearing that the immorality of same-sex couples directly impact

²⁰John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 9.

²¹ John Stuart Mill, *On Liberty*, 4th ed. (London: Longman, Roberts, and Green, 1869), 1, <http://www.bartleby.com/130/1.html>.

²² Finnis, *Law, Morality*, 2.

children by teaching behavior that condones “bad forms of life,”²³ a clear distinction must be made. Neither Mill nor I argue that the state should not be involved in cases that cause *physical* harm to children. Such an argument would be ludicrous. But the type of moral harm caused to children²⁴ that Finnis is suggesting occurs from the allowance of same-sex marriages is neither psychologically proven to actually exist nor any different than moral harm caused to children by a bad marriage, for example. Should the state then disband heterosexual marriages that cause moral harm to children? Possibly, but this presents even greater irreconcilable issues such as what the state should consider moral harm at all and, if such harm is deemed present, how much moral harm should merit such a disbandment of ones marriage by the state?

Mill, in *On Liberty*, which exposed the first concept of liberalism, discusses the foundational principles of what the state should and should not dictate in our lives. The Founding Fathers of the United States, as Mill points out, brought forth the philosophical notions of freedom from tyranny and the promotion of individualism. When the state begins to dictate the personal choices of individuals, Mill warns that tyranny can and undoubtedly will arise. Tyranny, which proliferates when the majority strips society of its individualism, “is now generally included among the evils against which society requires to be on its guard.”²⁵ The only exception that allows the state dictations to impact the personal conduct of individuals is only necessary to prevent harm to others. Finnis would argue that the harm to others is the prevention of attaining moral goods. If homosexuality

²³ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 2.

²⁴ *Ibid.*

²⁵ John Stuart Mill, *On Liberty*, 4th ed. (London: Longman, Roberts, and Green, 1869), 3, <http://www.bartleby.com/130/1.html>.

is inherent rather than a matter of choice, then the goods that Finnis refers to are only naturally accessible to certain groups of people. While Finnis may believe sexual orientation is a choice; many other scholars of this genre do not. It is also important to note that scientific evidence has shown no proof of either scenario (sexual preference being a choice or biological). If Finnis is to have us believe that the promotion of his concept of innate goods is a justifiable reason for the state to dictate personal conduct, I would argue that “true” innate goods that we all must strive to achieve cannot exist if such goods may or may not be achievable realizations to us all.

More appropriate philosophical goods, such as the Aristotelian concept of *eudaimonia* (translated as “happiness” or “flourishing”), are achievable realizations to us all.²⁶ Such goods do not require self-sacrifice by others to achieve them. However, the good of marriage, as Finnis would have it, contradicts this notion. In order to achieve the good of marriage, as Finnis would have it, same-sex couples are required to sacrifice their relationships of love, commitment, and exclusivity. This sacrifice by same-sex couples is also what is required for heterosexual couples to achieve the good of marriage for Finnis argues that marriage is devalued (and thus not a universal good) if the state does not prohibit same-sex marriage. I would argue that such a requirement should call into question whether marriage itself can be an innate good that we are all to achieve.

In large part, Finnis’ views on same-sex marriage come from its failure to satisfy the requirements of what Finnis calls *the good* that marriage is to achieve. Finnis states this regarding this good:

²⁶ Rosalind Hursthouse, “Virtue Ethics,” *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/ethics-virtue>, Virtue, Practical Wisdom, and Eudaimonia.

That common good is precisely their marriage with the two goods, parenthood and friendship, which are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by that act of genital union. But the common good of friends who are not and cannot be married (for example, man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit.²⁷

However, this concept of biological unity, stating that all sexual encounters not of the “one-flesh, two-part,” mutual, and exclusive are deemed not worthy of marital engagement, is a fallacy. As Koppelman suggests, this concept not only disregards many cases where an orgasmic result is physically not possible, but it disregards intention of those individuals. To Finnis, Koppelman states the following:

The relevance of that fact is, however, disputable. One might reply that the vagina of a woman whose diseased uterus was removed when she was twelve years old similarly “is not a reproductive organ.” It lacks reproductive powers. She and her husband are not capable of becoming “a complete organism that is capable of reproducing sexually.” Thus Macedo argues that the homosexual couple is, in fact, the moral equivalent of the infertile heterosexual couple: “In effect, gays can have sex in a way that is open to procreation, and to new life. They can be, and many are, prepared to engage in the kind of loving relations that would result in procreation-were conditions different. Like sterile married couples, many would like nothing better.”

Finnis, however, argues that these factors cannot be shared by same sex couples and states:

Of course, two, three, four, five or any number of persons of the same sex can band together to raise a child or children. That may, in some circumstances, be a praiseworthy commitment. It has nothing to do with marriage. Koppelman and Macedo remain discreetly silent on the question why the same-sex ‘marriage’ they offer to defend is to be between two persons rather than three, four, five, or more, all engaging in sex acts ‘faithfully’ with each other. They are equally silent

²⁷ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 8.

on the question why this group sex-partnership should remain constant in membership, rather than revolving like other partnerships.²⁸

To this I concede to Finnis' point that there is no biological difference between group-sex as Finnis calls it of two, three, four, five, or any number of persons of the same sex, but there is an emotional difference. This is similar to the difference between intercourse involving spouses that include a man and a woman and intercourse involving that same spouse and, now, a third party invited to contribute to the couple's sexual pleasure); that difference being exclusivity. Exclusivity which is required by Finnis in a *proper* marriage should be held to no lesser standard in a same-sex marriage. While Finnis suggests that the logic to marital exclusiveness between a man and woman is different than exclusiveness between two individual of the same sex in that the former "correspond coherently to a complex of interlocking, complementary good reasons: the good of marriage,"²⁹ I argue that this *good of marriage* relies on nothing more than the concept of biological unity, which encompasses inherent biases against homosexuality.

It is important to note that Aquinas, whose theories Finnis' invokes to make his conclusions, states that any intercourse between individuals is wrongful when they become "de-personalized and de-maritalized."³⁰ Finnis, illustrating Aquinas' views, states the following:

That is to say, if I choose this act of intercourse with my spouse, not for the sake of pleurably actualizing and expressing our marital commitment, but 'solely for pleasure', or solely for the sake of my health, or solely as a relief from temptations to masturbation or extra-marital sex, and would be just as (or more!) willing to be having intercourse with someone else—so that I am seeing in my spouse, in this act of

²⁸ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 21.

²⁹ *Ibid.*

³⁰ *Ibid.*, 14.

intercourse, no more than I would see in a goodtime girl or a gigolo or another acquaintance or someone else's spouse—then my sex act with my spouse is non-marital and is in principle seriously wrong.³¹

According to Finnis, this is always the case during acts of homosexual activity because such activity does not obviously involve one male and one female genitalia and is thus always considered masturbatory in nature. But it is not just homosexual activity that falls into this category of wrongful behavior. Finnis makes reference to any “sex act of a non-marital kind—e.g. adultery, fornication, intentionally sterilized intercourse, solitary masturbation or mutual masturbation (e.g. sodomy), and so forth.”³²

There is a distinction, however, that Finnis disregards in his reference to sex acts of the non-marital kind involving the difference between intentional sterilized intercourse and unintentional sterilized intercourse. And while both satisfy the good of marriage, the only difference is that of intention. When an individual intentionally conducts an activity (sexual activity in this case), there is a personal will to conduct that activity. Unintentional activity lacks a will for its completion. So here the difference between intentional sterilized intercourse and unintentional sterilized intercourse involves a will in achieving a particular goal; that goal being proper marital intercourse of the reproductive kind, which does not necessarily requiring actual reproduction. This “will” is the same “will” that Finnis states as insignificant in same-sex sexual intercourse.

Their [same-sex sexual] conduct thus differs radically from the acts of a husband and wife whose intercourse is masturbatory, for example sodomitic or by fellatio or coitus interruptus. In law such acts do not consummate a marriage, because in

³¹ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 14.

³² *Ibid.*, 15.

reality (whatever the couple's illusions of intimacy and self-giving in such acts) they do not actualize the one-flesh, two-part marital good.³³

The reasoning of Finnis suggests that one's intimacy and self-giving (or the part that is derived from one's mental will) is irrelevant in same-sex activity because such conduct continues to lack the requirement of the one-flesh, two-part marital good (and both—procreative significance and the generosity of acts of marriage and friendship involving one's intentional will—are required). Thus, it appears as though Finnis' entire theory of why same-sex intercourse is inherently *evil* centers solely on the concept of biological unity; a concept that is purely physical in nature. In this regard then, should Finnis' theory that rests solely on one's physical state be used in deciding what the state should legally encourage or discourage? Put another way, in order for same-sex intercourse and intentional sterilized intercourse to both be inherently evil they must both be of a same context (physical or mental, but not both). The reason for this involves the fact that one can be altered (the emotional connection) while one cannot (the physical). I will use the following example to illustrate this point. Finnis' theory regarding the difference between infertile couples and same-sex couple intercourse is the involving of biological unity. Sexual organs are no doubt a physical trait. They are at the core of the concept of biological unity. However, let's replace this with another physical trait instead such as race. Finnis' theory would thus lose all credence even in a laymen's mind, not to mention much of the same to a legal theorist.

³³ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 10-11.

Before discussing this point further, it would perhaps be significant to discuss this “good” referred to by Finnis. Finnis’ designation of the good of marriage is that of something society holds to be intrinsically valuable and should therefore flourish in all its glory. A part of this good of marriage is sexuality. Sexual activity, as Finnis even suggests, is an essential part of what makes marriage a good. It allows couples to bond on an emotional level and essentially express exclusive and mutual admiration for one another. Andrew Koppelman suggests this about sexual activity:

Sexuality makes possible the good of transmitting human life, but that is hardly the only source of the goodness of sex. It also can draw us toward friendship of a kind and degree that is unmatched by any other relationship to which one can aspire. Grisez is right to claim that the character of marital communion calls for a more mutual and dependable commitment than any other kind of friendship, and “that marrying, having children, and raising them are among the best things in human life, those prized for their own sakes, and that it is important to integrate one’s sexuality with other elements of one’s personality.”³⁴

These qualities which make marriage and sexuality goods, Koppelman and I suggest, are goods that homosexual couples need and want to express and venerate as well. Coming from a more emotion appeal for reason, I cannot help but wonder why homosexual couples are not allowed access to these goods? Neither Finnis nor Grisez has suggested an answer to this question that could not also be applied to infertile heterosexual couples.

Interestingly enough, Finnis states why infertile couples satisfy the requirement of the good of marriage in the following:

Given the bodily, emotional, intellectual, and volitional complementarities with which that combination of factors we call human evolution has equipped us as men and women, such a commitment can be reasonable as a participation in the

³⁴ Andrew Koppelman, “Is Marriage Inherently Heterosexual?,” *The American Journal of Jurisprudence* 51, no. 42 (1997): 6.

good of marriage in which these infertile spouses, if well-intentioned, would wish to have participated more fully than they can.”³⁵

In other words Finnis is suggesting that the difference here between infertile couples and same-sex couples is that infertile couples can satisfy *the good of marriage* based on *wishes* and *intentions* solely because of their biological physicality. However, while these *wishes* and *intentions* are of no use in satisfying the good of marriage for same-sex couples, they do for infertile couples. Simply put, intentions matter regardless of the situation. Koppelman makes this exact point in relation to these intentions. He states the following:

Finnis is certainly correct that the moral character of acts may crucially depend on natural facts. If someone points a gun at me and pulls the trigger, he exhibits the behavior which, as behavior, is suitable for shooting, but it still matters a lot whether the gun is loaded and whether he knows it. Intent matters: the act is a homicidal kind of act even if the actor mistakenly thinks the gun is loaded, when in fact it is not. Material reality matters, too: if, knowing the gun is unloaded, he points it and pulls the trigger, intending homicide, then indeed fantasy has taken leave of reality. But the only aspect of material reality that matters is whether the gun, as it now is, is in fact capable of killing. Just as, in the case of the gun, neither act is more homicidal than the other, so in the sexual cases, neither act is more reproductive than the other.³⁶

Of the factors Finnis mentions that allow for this contradiction (bodily, emotion, intellectual and volitional factors shared by sterile heterosexual couples), the *physical* (and strictly in the sense of Finnis’ narrowly defined *physical* derived from biological unity) is the only factor that can’t be shared by same-sex couples. But as previously mentioned, this same *physicality* isn’t shared by sterile heterosexuals either. Koppelman

³⁵ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 20.

³⁶ Andrew Koppelman, “Is Marriage Inherently Heterosexual?,” *The American Journal of Jurisprudence* 51, no. 42 (1997): 19.

suggests this same lack of logic in Finnis' views on homosexual partners and infertile partners in stating:

Sterile heterosexual couples too, one might argue, are incapable of becoming one procreative organism, because it is impossible that in them sperm and egg could be united. If "the organic complementarity of man and woman in respect to reproduction is the necessary condition for the very possibility of marriage," then the infertile heterosexual couple would seem to lack that complementarity in the same way as the homosexual couple. They may differ from the homosexual couple in that they seem to the untrained observer to be capable of becoming a "complete organism that is capable of reproducing sexually," but medical science can show that this is an illusion and that they are in fact like the homosexual couple in lacking that capacity.³⁷

Koppelman further states that if Finnis is going to suggest that homosexuals shouldn't get married because they are incapable of biological unity then Finnis is also suggesting that infertile heterosexual couples shouldn't be able to either. Taking an understanding of Finnis' views a step further, Koppelman also suggests that "this argument would imply a fertile person ought not to choose a sterile spouse, particularly when a fertile partner is also available. The illusion of marital communion would have been chosen instead of the reality."³⁸

Another distinction is also introduced by Macedo, but one instead involving, not a sterilized individual conducting sexual activity but, instead sexual activity involving fertile couples that use contraception. Macedo points out the irrationality of Finnis' views regarding state control and same-sex marriage by stating, "To the extent that the state has

³⁷ Andrew Koppelman, "Is Marriage Inherently Heterosexual?," *The American Journal of Jurisprudence* 51, no. 42 (1997): 6.

³⁸ *Ibid.*

no interest in discouraging the use of contraception, it has no interest in discouraging homosexuality.”³⁹

Regarding the commitment requirement referring to generosity of acts of friendship that Finnis lays out, Finnis states the following as proof that this requirement of generous acts is lacking in same-sex relationships:

The ‘gay’ ideology, even in the sanitized Koppelman/Macedo version, has no serious account whatever of why it makes sense to regard faithfulness—reservation of one’s sex acts exclusively for one’s spouse—as an intelligible, intelligent, and reasonable requirement. Only a small proportion of homosexual men who live as ‘gays’ seriously attempt anything even resembling marriage as a permanent commitment. Only a tiny proportion seriously attempt marital fidelity, the commitment to exclusiveness; the proportion who find that the attempt makes sense, in view of the other aspects of their ‘gay identity’, is even tinier. Thus, even at the level of behavior—i.e. even leaving aside its inherent sterility—gay ‘marriage’, precisely because it excludes or makes no sense of a commitment utterly central to marriage, is a sham.⁴⁰

In the footnote that supports this claim Finnis explains the study for which his conclusions regarding same-sex couples is based:

For example: David P. McWhirter and Andrew W. Mattison (both homosexual), *The Male Couple: How Relationships Develop* (Prentice Hall, 1984), 252-9, studied 156 male homosexual couples, most of who once expected to have a sexually exclusive relationship, and found that only seven of these couples claimed to have succeeded; and none of these seven had been together for even five years. Marshall Kirk and Hunter Madsen (both homosexual), *After the Ball: How America will Conquer its Fear and Hatred of Gays in the ‘90s* (Doubleday, 1989), 302-7, 318-32 clearly set out the psychological causes within homosexual men which account for their promiscuity and failure to maintain stable or faithful relationships; they thus provide grounds for rejecting the oft-heard assertion that these phenomena result from society’s failure to recognize ‘gay’ marriage.⁴¹

³⁹ Andrew Koppelman, “Is Marriage Inherently Heterosexual?,” *The American Journal of Jurisprudence* 51, no. 42 (1997): 6.

⁴⁰ John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 19-20.

⁴¹ *Ibid.*, 19, footnote 36.

It is important to note that these studies that Finnis uses as quasi-support for his conclusion are statically flawed. First, the studies use small-sampled proportions to validate their claim; 156 male homosexuals, for instance, is hardly a quantitative amount that is representative of the universal behaviors and thoughts of homosexual male couples. These studies, released over a decade before Finnis' essay titled *Law, Morality, and Sexual Orientation* was published, are also outdated. These studies are in dire need of strength if they are to prove Finnis' following statement:

Only a small proportion of homosexual men who live as 'gays' seriously attempt anything even resembling marriage as a permanent commitment. Only a tiny proportion seriously attempt marital fidelity, the commitment to exclusiveness; the proportion who find that the attempt makes sense, in view of the other aspects of their 'gay identity', is even tinier."⁴²

The problem with outdated sources on psychological phenomena that involve individuals of minority groups is that they are likely to be altered as norms fluctuate in society. Finnis' assertion backed by these studies becomes highly ridiculous given how the attitudes of society and its acceptance of particular groups affect the personal relationships of members within those particular groups. For example, if society continues to accept gay culture, it is logical to think this sort of acceptance is going to make homosexuals more comfortable and thus more likely to commit to one another. John P. De Cecco, in his book titled *Gay Relationships* explains this precisely by stating, "Gay liberation, by lessening social sanctions and increasing gay pride, is lowering

⁴² John Finnis, *Law, Morality, and Sexual Orientation*, ed. John Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, New York, London: Rowman and Littlefield, 1997), 19.

relationship costs and increasing rewards enough that more and more homosexual couples will live together in long-term relationships in future years.⁴³

Finally, I think that it should be noted that what is *natural* now has proved to be very different from what was thought to be *natural* in the days of Aquinas. Science has triumphed in finding many characteristics in the natural world that were not known to exist in the time of original natural law theorists. And while Finnis suggests that “Aquinas’ sex ethics are not founded on respect for given nature but rather on respect for reason and the human goods to which reason directs our choosing,”⁴⁴ it should not be forgotten that homo sapiens are animals and descendants of such. What science has found to naturally occur in both human and non-human form involves a tremendous amount of sexual diversity. Natural homosexual conduct, including the complete orgasmic copulation, has recently been observed in hundreds of species of animals. And while I will not take this argument further in fear of straying from the point, it illustrates that the laws of nature aren’t as concrete as once believed. Natural law theory therefore has a much more difficult time, now more so than ever, in using its ideology in dictating what human behavior is naturally appropriate or not, be it sexual or otherwise.

This argument for equal rights regarding marriage cannot be won if it comes down to a biological factor alone. And I don’t believe that this is a defeat for proponents of legalizing gay marriage on the philosophical front. Rather, it is a challenge to Neo-Aquinian natural law theorists to develop an argument that doesn’t simply exclude a large

⁴³ Randall W. Jones and John E. Bates, “Satisfaction in Male Homosexual Couples,” ed. John P. De Cecco, *Gay Relationships* (Philadelphia: Haworth Press, 1987) 237.

⁴⁴ John Finnis, “The Good of Marriage and the Reality of Sexual Relations: Some Philosophical and Historical Observations,” *American Journal of Jurisprudence* 42, (1998): 22.

proportion of the population in ascertaining the rights that others are rightly given based on factors, such as their genital makeup or sexual orientation, of which those individuals are not in control. Should we exclude populations to rights based on race, nationality, sexual orientation, or similar naturally occurring factors, as Finnis would say, to protect young people from inherent, illogical dangers that only Finnis and like-minded natural law theorists suggest will occur? I think not.

Challengers of the “gay marriage movement” suggest that marriage should only be between a man and a woman. Because marriage was once a strictly religious phenomenon, one might have even called it “a private entity” itself dictated by a particular private religious establishment. A few centuries ago when this was the case, I sadly admit this condonation would have been valid. It is similar to the current legality of a private dining club prohibiting certain religions from being seated or a private university practicing affirmative action based on a quota system, simply because they are considered “private entities.” But, today marriage is no longer solely a religious entity, but instead one that affects individual’s commerce and many other facets of one’s personal life. And while I’ve always believe the prohibition of same-sex marriages to be an atrociously unequal practice, now more so than ever archaic philosophies rooted in religion only practiced by the minority should not dictate the private lives of all individuals.

In conclusion, I will cease with a few very important points. First, Finnis’ good of marriage relies on one factor—that being biological unity—. Without it, as previously illustrated, Finnis’ theoretical constraints are substantially weakened. With it, these

constraints—which Koppelman, Macedo, and myself argue—are at most a collection of biased theories against same-sex couples because their applicability far extends to individuals beyond what Finnis suggests. Second, Finnis suggests that the good of marriage is not only something we should all strive to achieve (a knowing premise based on his interest in the state’s prohibition of gay marriage and the assumption that because of this interest he feels it a necessity for all of society to achieve), but also something that is achievable. It is important to realize that such a good should not be considered a true innate good because it is achievable by all. And finally, a compelling interest for a state to intervene in one’s life should only become acceptable when *physical* harm is done to others. If we are going to suggest that *moral* harm toward children is a means to violate Mill’s harm principle and eradicate marriage, as Finnis suggests, then we must then reconcile irreconcilable issues involving what classifies as true *moral* harm and how much of it validates eradication.

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