LECTURES

LAW, MORALITY, AND "SEXUAL ORIENTATION"*

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I.

During the past thirty years there has emerged in Europe a standard form of legal regulation of sexual conduct. This standard form or scheme, which I shall call the "standard modern [European] position," is accepted by the European Court of Human Rights and the European Commission of Human Rights (the two supra-national judicial and quasi-judicial institutions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), to which almost all European states are party, whether or not they are also party to the European [Economic] Community now known as the European Union). The standard modern European position has two limbs. On the one hand, the state is not authorized to, and does not, make it a punishable offence for adult consenting persons to engage, in private, in immoral sexual acts (for example, homosexual acts). On the other hand, states do have the authority to discourage, say, homosexual conduct and "orientation" (i.e. overtly manifested active willingness to engage in homosexual conduct). And typically, though not universally, they do so. That is to say, they maintain various criminal and administrative laws and policies which have as part of their purpose the discouraging of such conduct. Many of these laws, regulations, and policies discriminate (i.e. distinguish) between heterosexual and homosexual conduct adversely to the latter.

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In England, for example, well after Parliament's decriminalization of private adult homosexual conduct by the Sexual Offences Act 1967, the highest court (the House of Lords) reaffirmed that a jury may lawfully convict on a charge of conspiring to corrupt public morals by publishing advertisements by private individuals of their availability for (non-commercial) private homosexual acts.[1] The Court of Appeal has constantly reaffirmed, notably in 1977, 1981 and 1990,[2] that public soliciting of adult males by adult males falls within the statutory prohibition of "importun[ing] in a public place for an immoral purpose."[3] Parliament has peacefully accepted both these judicial interpretations of the constitutional, statutory and common law position. It has also voted more than once to maintain the legal position whereby the age of consent for lawful intercourse is 21 for homosexual but 16 for heterosexual intercourse;[4] in February 1994 the House of Commons voted to make the homosexual age of consent 18, which would reduce but retain the differentiation between homosexual and heterosexual conduct.[5] In 1988, Parliament specifically prohibited local governments in England from doing anything to "intentionally promote homosexuality" or "promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship."[6] The provisions of English law relating to marriage and to adoption similarly manifest a purpose or at least a willingness to discourage homosexual conduct and impede its promotion by any form of invitatory activity other than between consenting adults and in a truly private milieu.

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1. Knuller (Publishing, Printing and Promotions) Ltd. v. Director of Pub. Prosecutions, [1973] A.C. 435 (1972).

2. Regina v. Goddard, 92 Crim. App. R. 185 (1990); Regina v. Gray 74 Crim. App. R. 324 (1981); Regina v. Ford, 66 Crim. App. R. 46 (1977).

3. Sexual Offences Act 1956, 4 & 5 Eliz. 2, ch. 69, § 32 (Eng.).

4. *Id.* § 6(1) (heterosexual acts: age of consent 16); Sexual Offences Act, 1967, ch. 60, § 1(1) (Eng.) (homosexual acts: age of consent 21).

5. The bill has yet to be passed by the House of Lords. [The bill has since been passed by the House of Lords; *see* Criminal Justice and Public Order Act 1994, ch. 33, § 145 (Eng.), enacted and in force November 3, 1994.]

6. The statute states:

2A(1) A local authority shall not—

(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;

(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship. Local Government Act 1986, ch. 10, § 2A (Eng.), *inserted by* Local Government Act 1988, ch. 9, § 28 (Eng.).

A "maintained school" is any school funded by a local governmental authority and includes most of the schools in England.

The English position as outlined above is in full conformity with the position upheld by the European human rights institutions. When the European Court of Human Rights in 1981 adopted (and in 1988 reaffirmed) the position which Parliament in England had taken in 1967, it ruled that penal prohibition of private adult homosexual activity is not necessary for the securing of the state's legitimate aim of protecting morals.[7] In doing so, the court expressly left unscathed, and in principle confirmed, the decision of March 13, 1980 of the European Commission of Human Rights (and of the Commission on October 12, 1978 and the Council of Ministers by Resolution DH (79) 5 of June 12, 1979) that states can properly prohibit private consensual homosexual acts involving a male under 21 notwithstanding the Convention right of non-discrimination in the legal protection of rights and notwithstanding that the state law in question made 16 the "age of consent" for heterosexual intercourse (and 18 the age of majority for other purposes).

The Commission has subsequently reaffirmed that decision and has declared unarguable ("inadmissible" for further judicial process) complaints made, under the Convention's anti-discrimination provisions, against the long-standing Swiss law which criminalizes homosexual prostitution (male or female) but not heterosexual prostitution.[8]

II.

The standard modern [European] position is consistent with the view that (apart perhaps from special cases and contexts) 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. (Special cases are more likely to arise, for example, where B's inclination is towards "man-boy love," i.e. pederasty.) The position does not give B the widest conceivable legal protection against such unjust discrimination (just as it generally does not give wide protection against needless acts of adverse private discrimination in housing or employment to people with unpopular or eccentric political views). But the position does not itself encourage, sponsor or impose any such unjust burden. (And it is

7. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 21 (ser.A) (1981); Norris v. Ireland, 142 Eur. Ct. H.R. 20 (ser.A) (1988).

8. Application 11680/85, decision of March 10, 1988, unpublished; *see* MIREILLE DELMAS-MARTY, THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 253-54 (1992).

accompanied by many legal protections for homosexual persons with respect to assaults, threats, unreasonable discrimination by public bodies and officials, etc.)

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

The standard modern position differs from the position which it replaced, which made adult consensual sodomy and like acts crimes per se. States which adhere to the standard modern position make it clear by laws and policies such as I have referred to that the state has by no means renounced its legitimate concern with public morality and the education of children and young people towards truly worthwhile and against alluring but bad forms of conduct and life. Nor have such states renounced the judgment that a life involving homosexual conduct is bad even for anyone unfortunate enough to have innate or quasi-innate homosexual inclinations.

The difference between the standard modern position and the position it has replaced can be expressed as follows. The standard modern position considers that the state's proper responsibility for upholding true worth (morality) is a responsibility *subsidiary* (auxiliary) to the *primary* responsibility of parents and non-political voluntary associations. The subsidiary character of government is widely emphasized and increasingly accepted, at least in principle, in contemporary European politics. (It was, for example, a cornerstone of the Treaty of Maastricht of 1992.) This conception of the proper role of government has been taken to exclude the state from assuming a directly parental disciplinary role in relation to consenting *adults*. That role was one which political theory and practice formerly ascribed to the state on the assumption that the role followed by logical necessity from the truth that the state should encourage true worth and discourage immorality. That assumption is now judged to be mistaken (a judgment for which I shall argue in the final part of this lecture).

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: (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; (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.

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 its decent citizens.

III.

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

But the standard modern position deliberately rejects proposals to include in such lists the item "sexual orientation." The explanation commonly given (correctly, in my opinion) is this. The phrase "sexual orientation" is radically equivocal. Particularly as used by promoters of "gay rights," the phrase ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) a psychological or psychosomatic disposition inwardly orienting one *towards* homosexual activity; (II) the deliberate decision so to orient one's public *behavior* as to express or *manifest* one's active interest in and endorsement of homosexual *conduct* and/or forms of life which presumptively involve such conduct.

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

It has been noticed in public circles in Europe that such laws have indeed been interpreted by American courts as having just such an implication. An example which has been widely reported is the Georgetown University case,[9] requiring a religiously affiliated educational institution to give equal access to its facilities to organizations "participating in and promoting homosexual lifestyles [which necessarily include homosexual conduct]" in manifest opposition to the moral beliefs and teachings of the religion with which that institution professed an association.

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

It is in fact accepted by almost everyone, on both sides of the political debate, that the adoption of a law framed to prohibit "discrimination on grounds of sexual orientation" would require the prompt abandonment of all attempts by the political community to discourage homosexual conduct by means of educational policies, restrictions on prostitution, non-recognition of homosexual "marriages" and adoptions, and so forth. It is judged (and in my view soundly) that the law itself would perforce have changed from teaching, in many ways, that homosexual conduct is bad to teaching, massively, that it is a type of sexual activity as good as any other (and per se much less involved with onerous responsibilities than is the sexual union of husband and wife or, in perhaps other ways, the life of those who live in unmarried chastity).

9. Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987).

IV.

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. Since even the advocates of "gay rights" do not seriously assert that the state can never have any compelling interests in public morality or the moral formation of its young people or the moral environment in which parents, other educators, and young people themselves must undertake this formation, I shall in this lecture focus rather on the underlying issue which receives far too little public discussion: What is wrong with homosexual conduct? Is the judgment that it is morally wrong inevitably a manifestation either of mere hostility to a hated minority, or of purely religious, theological, and sectarian belief which can ground no constitutionally valid determination disadvantaging those who do not conform to it?

I have been using and shall continue to use the terms "homosexual activity," "homosexual acts" and "homosexual conduct" synonymously, to refer to bodily acts, on the body of a person of the same sex, which are engaged in with a view to securing orgasmic sexual satisfaction for one or more of the parties.

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

Socrates is portrayed by Plato (and by Xenophon) as having strong homosexual (as well as heterosexual) inclinations or interest, and as promoting an ideal of homosexual romance between men and youths, but at the same time as utterly rejecting homosexual conduct. This is made clear in Sir Kenneth Dover's book *Greek Homosexuality*;[10] in Dover's summarizing words: "Xenophon's Socrates lacks the sensibility and urbanity of the Platonic Socrates, but there is no doubt that both of them condemn homosexual copulation."[11] It is also made clear by Gregory Vlastos in his last book, precisely on Socrates: In Socratic *eros* involving relationships of affection between men and boys or youths, intimacy is limited to mind- and eye-contact and "terminal gratifi-

10. KENNETH J. DOVER, GREEK HOMOSEXUALITY 154-59 (1978).
11. *Id.* at 159.

cation" is forbidden[12] (and *a fortiori* in relationships between adult males, since virtually all Athenians regarded sex acts between adult males as intrinsically shameful).[13] Vlastos thus makes it clear that Socrates forbids precisely what I have been calling homosexual conduct.

In the recent Amendment 2 case in Colorado, *Evans v. Romer,*[14] the widely influential classical philosopher Professor Martha Nussbaum gave oral and written evidence on these matters, as expert witness for plaintiffs who seek to overturn a provision of the Colorado Constitution which provides that no official body in Colorado may adopt any law or policy "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of . . . a claim to minority status, quota preferences, protected status or claim of discrimination." In her oral testimony (on October 15, 1993), she flatly denied that Dover's book *Greek Homosexuality* came to the conclusion that Socrates condemned homosexual copulation. Dover concluded only, she said, that Socrates condemned the seduction of students. A few days later, the Princeton legal and political-theoretical scholar Professor Robert George gave evidence to show that Dover's book unequivocally concludes that Socrates, as portrayed by our two sources Plato and Xenophon, condemned homosexual copulation as such, and did not confine the prohibition to any particular relationships. Professor Nussbaum promptly wrote[15] to George asserting that that was false testimony given in reckless disregard of the truth. Demanding peremptorily that George retract before the close of the trial on October 22, 1993, she claimed that Dover himself would person-

12. GREGORY VLASTOS, SOCRATES, IRONIST AND MORAL PHILOSOPHER 38-39 (1991).

13. Clifford Hindley & David Cohen, *Debate: Law, Society, and Homosexuality in Classical Athens,* 133 PAST & PRESENT 167, 179-80, 188 n.14 (1991).

14. No. 92CV7223 (D. Den., filed Nov. 12, 1992).

15. Letter from Martha Nussbaum, Professor of Philosophy and Classics, Brown University (Oct. 20, 1993). The letter was faxed on October 21, 1993. [On the various misuses of scholarship by Professor Nussbaum in connection with the Colorado Amendment 2 litigation, some of which are outlined in text accompanying notes 14-34a, see John M. Finnis, *"Shameless Acts" in Colorado: Abuse of Scholarship in Constitutional Cases,* 7 ACAD. QUESTIONS 10, 19-41 (1994). In Martha C. Nussbaum, *Platonic Love and Colorado Laws: The Relevance of Ancient Greek Norms to Modern Sexual Controversies,* 80 VA. L. REV. 1515 (1994) (*cited in* Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis,* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41, 45 n.15 (1995)), which appeared after my present article's original publication and after *"Shameless Acts"* went to print, Professor Nussbaum fails to confront, let alone refute or undermine, my charges of misuse of scholarship.]

ally support her reading of his conclusion about Socrates. In the event, Dover wrote to me on January 23, 1994, and authorizes me to quote him:

> It is certainly my opinion that the Socrates of Plato and Xenophon condemned homosexual copulation as such, and did not confine the prohibition to any particular relationships. I certainly meant to say that on pp. 159f. of my book.[16]

What, then, about Plato? Well, the same Plato who in his *Symposium* wrote a famous celebration of *romantic* and *spiritual* man-boy erotic relationships, made very clear that all forms of sexual *conduct* outside heterosexual marriage are shameful, wrongful and harmful. This is particularly evident from his treatment of the matter in his last work, the *Laws*, but is also sufficiently clear in the *Republic* and the *Phaedrus*, and even in the *Symposium* itself. This is affirmed unequivocally both by Dover

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16. Letter from Kenneth J. Dover (Jan. 23, 1994) (on file with author). [In an appendix to Nussbaum, *Platonic Love*, *supra* note 15, Nussbaum and Dover, writing jointly, state that "Finnis' use of Dover's letter [in the passage to which the present footnote is attached] to support Finnis' own position is inappropriate" because "condemns" (and presumably "prohibit[s]" — which they omit from their quotation from Dover's letter) "does not mean 'condemns as wicked and depraving.' " *Id.* at 1645. Here and in other passages they have foisted the word "wicked" onto my text in place of the word "shameful." I have never contended that Socrates or Plato thought homosexual sex acts wicked — just shameful, immoral and indeed depraved or depraving (and if the latter terms are thought too strong, I am content with "shameful and immoral"). The Dover-Nussbaum appendix states that in various ways (only vaguely specified), Dover now wishes to revise the assessment of Socrates and Plato which he stated in both editions of his book. *Id.* at 1645, 1648. In his book, Dover led up to his conclusion about Socrates by noting [1] that in PLATO, EUTHYDEMUS 282b, Socrates "significant[ly]" insinuates that sex between male lovers is dishonorable, and [2] that "[a]ccording to Xen[ophon] *Mem[orabilia Socratis]* i 2.29f enmity between Kritias and Socrates arose from the following incident:

> [Socrates] saw that Kritias was in love with Euthydemos and wanting to deal with [Euthydemos] in the manner of those who enjoy the body for sexual intercourse. . . . Socrates, in the presence of Euthydemos and many other people, said that he thought Kritias was no better off than a pig if he wanted to scratch himself against Euthydemos as piglets do against stones."

DOVER, *supra* note 10, at 159. In their appendix, Dover and Nussbaum now try to evade the significance of this scathing insinuation that sex between male lovers is shameful, pig-like conduct (a suggestion which neither Plato's nor Xenophon's Socrates makes in relation to marital intercourse); they do so by offering, instead of a quotation from Dover or Xenophon, the following paraphrase of Xenophon's punchline, a paraphrase which I quote in full: "sexual gratification resembles scratching an itch, it is a relief from tension, not a good in itself"! Nussbaum, *Platonic Love*, *supra* note 15, at 1646. This is characteristic of the neutering of inconvenient texts throughout Nussbaum's article.]

and by Vlastos, neither of whom has any favor for these views of Plato. According to Vlastos, for example, Plato:

> saw anal intercourse as "contrary to nature," [footnote: *Ph[ae]dr[us]* 251A1, *L[aws]* 636-7] a degradation not only of man's humanity, but even of his animality . . . .[17]

It is for Plato, Vlastos adds, a type of act far more serious than any mere going "contrary to the rules."[18]

On Plato, Martha Nussbaum's oral evidence took a remarkable course. She claimed that the translation of *Laws* 636[19] which had been quoted to the court in my affidavit was inaccurate; instead of the phrase "those guilty of such enormities," it should have read, in morally neutral terms, "those who first ventured to do these things." Therefore, none of the translations of or references to Plato in my affidavit could be relied upon, and Plato in fact approved of homosexual conduct. Robert George then gave evidence that all the existing English translations, without exception, translate the relevant Greek phrase with some pejorative term, or use a pejorative term about the same conduct at an equivalent point in the previous sentence; and that in particular

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17. GREGORY VLASTOS, PLATONIC STUDIES 25 (2d ed. 1981). In the footnote, Vlastos complains that by *para phusin*, "contrary to nature", Plato here and in 836B-C meant something "far stronger" than the phrase "against the rules", which Dover had used in a 1966 article on *eros* and *nomos*. Sometime before the revised edition, Vlastos and Dover corresponded about this complaint, and Vlastos records a letter from Dover:

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

Id. at 424. And Vlastos immediately remarks that Dover's allusion to Plato's comparison of homosexuality with incest shows that Dover acknowledges the great force with which Plato is condemning what Vlastos called "anal intercourse" and Dover, loosely, "the act" and "homosexuality". *Id.* at 25, 424. [Among the many pieces of relevant evidence left unconsidered in the Dover-Nussbaum critique of the present article, *supra* note 16, are the passages from Vlastos and Dover just quoted.]

18. *Id.* at 25. I want to add, out of respect for Plato, that Anthony Price's valuable book firmly rejects Vlastos' theory that Socrates and Plato, though forbidding homosexual acts, accepted that lovers could nevertheless rightly engage in the sort of petting spoken of in Phaedrus 255e. ANTHONY W. PRICE, LOVE AND FRIENDSHIP IN PLATO AND ARISTOTLE 89-94 (1989).

19. "When male unites with female for procreation the pleasure experienced is held to be natural, but unnatural when male mates with male or female with female, and those first guilty of these enormities were impelled by their weakness for pleasure." PLATO, LAWS I, 636C, at 41 (R.G. Bury trans., 1926).

the philologist Sir Kenneth Dover translates the relevant Greek word, *tolmema*, as "crime" (meaning moral crime). So in her affidavit, delivered on the last day of the trial, Professor Nussbaum stated that Liddell & Scott, "the authoritative Greek dictionary relied on by all scholars in this area," translates *tolmema* with only the favorable or neutral terms "an adventure, enterprise, deed of daring."[20] In fact, however, Liddell & Scott translates it "adventure, enterprise, daring or shameless act."[21] What Nussbaum had done was quote from the 1897 edition of the dictionary, an edition entirely superseded in 1940, doing so without disclosing to the court the date or edition. In short, she put a dictionary before the court precisely as "the authoritative dictionary relied on by all scholars in the area," but the quotation which she said was from that dictionary was in fact from a dictionary which is not authoritative or relied upon by any scholars. And she did so because to have quoted from the real "authoritative dictionary" would have destroyed the fundamental contention of her oral evidence about Plato, while to have allowed the court to know the truth about the long-superseded nineteenth century source of her lexicography would have deprived her testimony of the appearance of authoritative support which it so badly needed to offset the devastating counter-witness of Dover.

In her oral testimony, she flatly denied that Dover's study of Plato concludes that Plato condemned all homosexual copulation. No, she said, Dover concluded only that Plato condemned sex involving bribery or prostitution. Once again, Dover, having been put on notice of that contention, permits me to quote his letter of January 23, 1994: "Plato condemns all homosexual copulation (pp. 165-8 in my book)."[22]

A key element in Plato's condemnation of homosexual conduct is his repeated judgment, in the *Phaedrus* and the *Laws*, that it is *para phusin*, contrary to nature. On this matter, Professor Nussbaum's testimony was clear:

> the terms tendentiously translated "according to nature" and "unnatural" or "contrary to nature" actually refer (in my own expert opinion and the consensus of recent scholars such as Price, whose study of the passage [in the *Laws*]

20. Affidavit of Martha C. Nussbaum, at ¶ 10, Evans v. Romer, No. 92CV7223 (D.Den., filed Nov. 12, 1992) (Oct. 21, 1993) (served Oct. 22, 1993).

21. LIDDELL & SCOTT, A GREEK-ENGLISH LEXICON 1803 (Sir Henry Stuart Jones & Roderick McKenzie eds., 9th ed. 1940, Supp. 1968) (1992).

22. Dover, *supra* note 16.

> has been widely accepted) to "birth" and not "nature" in any normative moral sense.[23]

This claim about a consensus of recent scholars rejecting as tendentious the translation "unnatural" or "contrary to nature," or supporting Nussbaum's outlandish translation of *para phusin*, was pure fabrication. According to Nussbaum herself, the "modern consensus" on the matter formed itself around Price's "widely accepted" study. Very well. But what Nussbaum says about Price's study of the passage is, shockingly, the exact reverse of the truth. That study unhesitatingly translates *para phusin*, in *Laws* 636 and 841, as "unnatural". For example, its translation of 636c is: "homosexual intercourse, between males or females, seems to be an unnatural [*para phusin*] crime [*tolmema*] of the first rank."[24]

Let me summarize how Professor Nussbaum treated Price's "widely accepted" study. Price's book translates these uses of *para phusin* as "unnatural," and yet her statements under oath unambiguously imply that it rejects that translation as tendentious. The conclusions of the book's long appendix on "Plato's Sexual Morality" are squarely based on Price's reasoned judgment that "unnatural" in these passages both conveyed and entailed Plato's essential *moral* judgments on sexual conduct, yet Nussbaum swears that it supports her denial that the term had "any normative moral sense" and her assertion that it signified for Plato no more than inconsistency with a temporary pro-natalist colonial politics. Nussbaum implicitly claims the support of Price's book for her fundamental contention that the sexual morality put to the court by Robert George and by me is purely theological, Catholic and indeed narrowly Thomist in origin, and "simply has no precedent in the ancient Greek secular exemplars of natural

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23. Nussbaum, *supra* note 20, at ¶ 54. This "consensus of recent scholars such as Price" becomes in the opening sentence of the following paragraph "the modern consensus". An earlier reference makes it clear that the reference to Price's "widely accepted" study of the passage is to his book, LOVE AND FRIENDSHIP IN PLATO AND ARISTOTLE, *supra* note 18. The book was reviewed by Professor Nussbaum in the *Times Literary Supplement* in February, 1990. Throughout her discussion of the *Laws* in ¶¶ 51-55, Nussbaum refers to "the passage," without ever identifying it or attending to the fact that in my affidavit dated October 8, 1993, I had cited four passages, and had quoted two widely separated passages each of which applies to homosexual acts the phrase on which she is commenting in ¶ 54, *para phusin*. The only passage she has explicitly cited to the court is the *Laws* 636 passage in book I, but some confused remarks in ¶ 52, and the drift of ¶ 54, suggest that she may have had *Laws* VIII, 841 uppermost in her mind in ¶ 54. It should not be overlooked that the discordance between homosexual acts and *phusis* is plainly asserted by Plato's mouthpiece also in *Laws* VIII, 836 & 838.

24. PRICE, *supra* note 18, at 230.

law argumentation"[25] including Plato[26]; yet Price's book in fact argues, prominently and very explicitly, that Plato's main positions on the morality of sexual conduct, evidenced by the *Republic* and the *Phaedrus* as well as by the *Laws*, were (rather to Price's regret) substantially the same as the positions maintained in the Catholic tradition's understanding of natural law.[27]

The fabrication of the imaginary "modern consensus" about *para phusin* also required Professor Nussbaum to withhold from the court the fact that the other scholarly authorities most prominently and frequently appealed to in her testimony—Dover, Price, Vlastos, Winkler—all concur in using the terms "unnatural" or "contrary to nature" to translate *para phusin* as predicated of homosexual acts in *Laws*.[28] All treat this translation as entirely uncontroversial. All judge that *para phusin*, as used by Plato in the *Laws*, must be understood as the core of a very firm and unqualified condemnation of homosexual conduct. All explicitly or implicitly reject out of hand Nussbaum's assertion that "the passage" in the *Laws* "says nothing at all about sexual acts among non-married people." Like even Halperin and Winkler (the openly "gay" scholars also appealed to in Nussbaum's affidavit), Dover, Price, and (as we shall see) Vlastos all judge that to know or tell Plato's views on the morality, the immorality, of all such non-marital conduct as homosexual sex acts, one need go no further than these unmistakably clear passages in the *Laws*, texts with which every other text of Plato can readily be seen to be consistent.[29]

As for Aristotle, Dover's discussion is less satisfactory; it neglects a number of relevant passages. Still, it does not contradict the scholarly consensus that Aristotle rejected homosexual conduct. In fact, such conduct is frequently represented by Aristotle (in some cases directly and in other cases by a lecturer's hint) as intrinsically perverse, shameful and harmful both to the individuals involved and to society itself.[30]

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25. Nussbaum, *supra* note 20, at ¶ 14.

26. *Id.* at ¶ 67.

27. PRICE, *supra* note 18, at 229-235 (note the references to Paul VI and John Paul II, at 233, 235).

28. DOVER, *supra* note 10, at 165-68; VLASTOS, *supra* note 17, at 25, 425; JOHN J. WINKLER, THE CONSTRAINTS OF DESIRE 18, 21n. (1990).

29. *See* DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 91 (1990); WINKLER, *supra* note 28, at 18, 21.

30. *See* ARISTOTLE, NICOMACHEAN ETHICS VII, 5:1148b29; ARISTOTLE, POLITICS II, 1:1252a33-39, together with the hints in II, 6:1269b28 and II, 7:1272a25.

On Aristotle, the manipulations in Nussbaum's affidavit were as thoroughgoing as we should by now expect. She associated Price's book with her affidavit's assertions that Aristotle approved and endorsed homosexual acts. But in reality the Aristotle of Price's book is "rather shocked" even by Plato's *Republic*'s carefully and famously restricted suggestion that "the lover may kiss and touch the beloved, with his consent, *just like a son.*"[31] The final sentences of Price's reflections on Aristotle's view of erotic love conclude that, for Aristotle, such love is properly either marital or pederastic; on the same page Price reminds us that for Aristotle pederasty is not only as transient as boyhood but also "should keep to its higher forms, 'looking rather than loving' as Plato had put it."[32] It is not to include homosexual sex acts. What do we find Nussbaum saying? "I agree with Price's conclusion," she says, proceeding to quote Price's final sentences, but slicing off, without any indication, the first fourteen words so that in place of Price's reference to marriage and "pederasty" (thus understood as *excluding* sex acts) she can substitute her own words "heterosexual and homosexual relations" (understood as *including* sex acts between males *of any age*). A similar falsifying and unsignalled truncation occurs in her affidavit's only quotation from Aristotle himself, and all the other passages of Aristotle that she cites are manifestly abused and misrepresented.

Although the ideology of homosexual love (with its accompanying devaluation of women) continued to have philosophical defenders down to the end of classical Greek civilization, there equally continued to be influential philosophical writers, wholly untouched by Judaeo-Christian tradition, who taught that homosexual conduct is not only intrinsically shameful but also inconsistent with a proper recognition of the equality of women with men in intrinsic worth. (The ancients did not fail to note that Socrates' homoerotic orientation, for all its admirable chastity—abstention from homosexual conduct—went along with a neglect to treat his wife as an equal.) A good example of such late classical writing is Plutarch's *Erotikos*,[33] written probably some time in the early second century, but certainly free from Judaeo-Christian influence. Plutarch's vast literary-historical and philosophical corpus of writings is an effort to recapture and recapitulate the highest achievements of classical civilization, and had a very substantial influence on Western thought down to recent

31. PRICE, *supra* note 18, at 224-25 (citing PLATO, REPUBLIC 403b4-6 and ARISTOTLE, POLITICS, 1262a32-7).

32. *Id.* (quoting PLATO, LAWS VIII, 837C4-5).

33. PLUTARCH, EROTIKOS, *Dialogue on Love*, 751C-D, 766E-771D.

times. I shall say more about Plutarch's thought on these matters below.

Another example is the Stoic, Musonius Rufus (who taught at Rome circa 80 A.D. and again was not influenced by Jewish or Christian thought). He rejects all homosexual conduct as shameful. Sexual conduct is decent and acceptable only within marriage. The point of marriage includes not only procreation and the raising of children, but also, integrally and essentially, a complete community of life and mutual care and affection between husband and wife.[34]

At the heart of the Platonic-Aristotelian and later ancient philosophical rejections of all homosexual conduct, and thus of the modern "gay" ideology, are three fundamental theses: (1) The commitment of a man and woman to each other in the sexual union of marriage is intrinsically good and reasonable, and is incompatible with sexual relations outside marriage.[34a] (2) Homosexual acts are radically and peculiarly non-marital, and for that reason intrinsically unreasonable and unnatural. (3) Furthermore, according to Plato, if not Aristotle, homosexual acts have a special similarity to solitary masturbation, and both types of radically non-marital act are manifestly unworthy of the human being and immoral.

V.

I want now to offer an interpretation of these three theses which articulates them more clearly than was ever attempted by Plato or, so far as we can tell, by Aristotle. It is, I think, an interpretation faithful to what they do say, but takes up suggestions in Plutarch and in the eighteenth century Enlightenment philosophy of Immanuel Kant (who likewise rejected all homosexual conduct), though even these writers' indications, too, remain relatively terse. My account also articulates thoughts which have historically been implicit in the judgments of many non-philosophical people, and which have been held to justify the laws adopted in many nations and states both before and after the period when Christian beliefs as such were politically and socially dominant. And it is an application of the theory of morality and natural law developed over the past thirty years by

34. Musonius Rufus, *Discourses* XII and XIIIA, *in* Cora E. Lutz, *Musonius Rufus "the Roman Socrates,"* X YALE CLASSICAL STUDIES 85-89 (1947).

[34a. The obvious and intended meaning of this sentence is precisely what Perry says "Finnis does not mean". Perry, *supra* note 15, at 47. Perry's failure to grasp and engage with the *argument* conveyed in my text begins right here, at the beginning.]

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.[35]

Plato's mature concern, in the *Laws*, for familiarity, affection and love between spouses in a chastely exclusive marriage, Aristotle's representation of marriage as an intrinsically desirable friendship between quasi-equals, and as a state of life even more natural to human beings than political life,[36] and Musonius Rufus's conception of the inseparable double goods of marriage, all find expression in Plutarch's celebration of marriage—as a union not of mere instinct but of reasonable love, and not merely for procreation but for mutual help, goodwill and cooperation for their own sake.[37] Plutarch's severe critiques of homosexual conduct (and of the disparagement of women implicit in homosexual ideology),[38] develop Plato's critique of homosexual and all other extra-marital sexual conduct. Like Musonius Rufus, Plutarch does so by bringing much closer to explicit articulation the following thought. Genital intercourse between spouses enables them to actualize and experience (and in that sense express) their marriage itself, as a single reality with two blessings (children and mutual affection).[39] Non-marital intercourse, espe-

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35. 2 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS, *Living a Christian Life* 555-574, 633-680 (1993).

36. ARISTOTLE, NICOMACHEAN ETHICS, VIII,12: 1162a16-30; *see also* the probably pseudo-Aristotle, *Oeconomica* I, 3-4: 1343b12-1344a22; III.

37. Plutarch reads this conception back to the dawn of Athenian civilization and, doubtless anachronistically, ascribes it to the great original Athenian law-giver, Solon: Marriage should be "a union of life between man and woman for the delights of love and the getting of children." PLUTARCH, LIFE OF SOLON 20, 4. *See also* PLUTARCH, EROTIKOS 769:

> In the case of lawful wives, physical union is the beginning of friendship, a sharing, as it were, in great mysteries. [The] pleasure is short [or unimportant: *mikron*], but the respect and kindness and mutual affection and loyalty that daily spring from it [conjugal sex] convicts neither the Delphians of raving when they call Aphrodite 'Harmony' nor Homer when he designates such a union 'friendship'. It also proves that Solon was a very experienced legislator of marriage laws. He prescribed that a man should consort with his wife not less than three times a month—not for the pleasure surely, but as cities renew their mutual agreements from time to time, just so he must have wished this to be a renewal of marriage and with such an act of tenderness to wipe out the complaints that accumulate from everyday living.

38. *See* PLUTARCH, EROTIKOS 768D-770A; IX MORALIA 427 (Loeb ed., 1961); *see also* the fine translation in D.A. RUSSELL, PLUTARCH 92 (1973).

39. Plutarch speaks of the union of husband and wife as an "integral amalgamation" [*di' holon krasis*]. PLUTARCH, EROTIKOS 769F; CONIUGALIA PRAECEPTA 142F.

cially but not only homosexual, has no such point and therefore is unacceptable.

The core of this argument can be clarified by comparing it with Saint Augustine's treatment of marriage in his *De Bono Coniugali*. The good of marital communion is here an instrumental good, in the service of the procreation and education of children so that the intrinsic, non-instrumental good of friendship will be promoted and realized by the propagation of the human race, and the intrinsic good of inner integration be promoted and realized by the "remedying" of the disordered desires of concupiscence.[40] Now, when considering sterile marriages, Augustine had identified a further good of marriage, the natural *societas* (companionship) of the two sexes.[41] Had he truly integrated this into his synthesis, he would have recognized that in 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. And this communion of married life, this integral amalgamation of the lives of the two persons (as Plutarch[42] put it before John Paul II),[43] has as its intrinsic elements, as essential *parts* of one and the same good, the goods and ends to which the theological tradition, following Augustine, for a long time subordinated that communion. It took a long and gradual process of development of doctrine, through the Catechism of the Council of Trent, the teachings of Pius XI and Pius XII, and eventually those of Vatican II—a process brilliantly illuminated by Germain Grisez[44]—to bring the tradition to 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.

Now if, as the recent encyclical on the foundations of morality, *Veritatis Splendor*, teaches, "the communion of persons in marriage" which is violated by every act of adultery is itself a

40. ST. AUGUSTINE, DE BONO CONIUGALI, 9.9.

41. *Id.* at 3.3.

42. PLUTARCH, EROTIKOS 769f; CONIUGALIA PRAECEPTA 142f.

43. John Paul II, Address to Young Married Couples at Taranto (October 1989), *quoted in* GRISEZ, *supra* note 35, at 571 n.46 ("a great project: *fusing* your persons to the point of becoming 'one flesh' ").

44. GRISEZ, *supra* note 35, at 556-569.

"fundamental human good,"[45] there fall into place not only the elements of the classic philosophical judgments on non-marital sexual conduct but also the similar judgments reached about such conduct by decent people who cannot articulate explanatory premises for those judgments, which they reach rather by an insight into what is and is not *consistent with* realities whose goodness they experience and understand at least sufficiently to will and choose. In particular, there fall into place the elements of an answer to the question: Why cannot non-marital friendship be promoted and expressed by sexual acts? Why is the attempt to express affection by orgasmic non-marital sex the pursuit of an illusion? Why did Plato and Socrates, Xenophon, Aristotle, Musonius Rufus, and Plutarch, right at the heart of their reflections on the homoerotic culture around them, make the very deliberate and careful judgment that homosexual *conduct* (and indeed all extra-marital sexual gratification) is radically incapable of participating in, actualizing, the common good of friendship?

Implicit in the philosophical and common-sense rejection of extra-marital sex is the answer: 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. 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.[46] So their sexual acts

45. JOHN PAUL II, VERITATIS SPLENDOR ¶¶ 13, 48 (1984); *see also id.* at ¶¶ 50, 67, 78, 79.

46. Steven Macedo, *The New Natural Lawyers*, THE HARV. CRIMSON, Oct. 28, 1993, writes:

> In effect, gays can have sex in a way that is open to procreation, and to new life. They can be, and many are, prepared to engage in the kind of loving relations that would result in procreation—were conditions different. Like sterile married couples, many would like nothing better.

Here, fantasy has taken leave of reality. Anal or oral intercourse, whether between spouses or between males, is no more a biological union "open to pro-

together cannot do what they may hope and imagine. Because their activation of one or even each of their reproductive organs cannot be an actualizing and experiencing of the *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.[47]

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 gruelling day on the assembly line. This is, I believe, the substance of Plato's judgment—at that moment in the *Gorgias* which is also decisive for the moral and political philosophical critique of hedonism[48]—that there is no important distinction in essential moral worthlessness between solitary masturbation, being

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creation" than is intercourse with a goat by a shepherd who fantasizes about breeding a faun; each "would" yield the desired mutant "were conditions different". Biological union between humans is the inseminatory union of male genital organ with female genital organ; in most circumstances it does not result in generation, but it is the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation.

47. For the whole argument, see GRISEZ, *supra* note 35, at 634-39, 648-54, 662-4.

48. PLATO, GORGIAS 494-5, especially 494e1-5, 495b3. [The phrase "no important distinction in essential moral worthlessness" articulates the judgment on masturbation and sodomy, as types of choice, which is clearly implicit in this passage of the *Gorgias*, read with attention. As the present sentence and the preceding sentence of my text taken together indicate, I want to go below the surface of *Plato's* judgment here, to find in it the more precise claim made in that preceding sentence. Neither I nor Grisez ever make the silly claim (repeatedly attributed to us by Perry) that they (however confusedly) intend their sex acts to be generously marital and the whole reality involved in sexual conduct engaged in as commercial explotation of impersonal lust. It should go without saying that the badness of choosing a morally bad type of act is affected (though not eliminated) by good motivations and can be mitigated also by other aspects of the context (circumstances). My concern in this section of my article is not with degrees of culpability of particular acts, nor even with the question of the differing or similar gravity of various types of sexual acts

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.

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

The ancient philosophers do not much discuss the case of sterile marriages, or the fact (well known to them) that for long periods of time (e.g. throughout pregnancy) the sexual acts of a married couple are naturally incapable of resulting in reproduction. They appear to take for granted what the subsequent Christian tradition certainly did, that such sterility does not render the conjugal sexual acts of the spouses non-marital. (Plutarch indicates that intercourse with a sterile spouse is a desirable mark of marital esteem and affection.)[49] For: A husband and wife who unite their reproductive organs in an act of sexual intercourse which, so far as they then can make it, is of a kind suitable for

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considered as types, but exclusively with the question whether certain types of acts are morally right or wrong.]

49. PLUTARCH, LIFE OF SOLON, 20,3. The post-Christian moral philosophy of Kant identified the wrongfulness of masturbation and homosexual (and bestial) conduct as consisting in the instrumentalisation of one's body, and thus ("since a person is an absolute unity") the "wrong to humanity in our own person." But Kant, though he emphasizes the equality of husband and wife (impossible in concubinage or more casual prostitution), did not integrate this insight with an understanding of marriage as a single two-part good involving, inseparably, friendship as well as procreation. Hence he was puzzled by the question why marital intercourse is right when the woman is pregnant or beyond the menopause. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 277-79, 424-26 (Mary Gregor trans., Cambridge Univ. Press 1991, 96-97, 220-22) (1797). The deep source of his puzzlement is his refusal to allow intelligible goods any structural role in his ethics, a refusal which sets him against a classical moral philosophy such as Aristotle's, and indeed against any adequate theory of natural law, and in turn is connected with his dualistic separation of body from mind and body, a separation which conflicts with his own insight, just quoted, that the person is a real unity.

generation, do function as a biological (and thus personal) unit and thus can be actualizing and experiencing the two-in-one-flesh common good and reality of marriage, even when some biological condition happens to prevent that unity resulting in generation of a child. Their conduct thus differs radically from the acts of a husband and wife whose intercourse is masturbatory, for example sodomitic or by fellatio or coitus interruptus.[50] In law such acts do not consummate a marriage, because in reality (whatever the couple's illusions of intimacy and self-giving in such acts) they do not actualize the one-flesh, two-part marital good.

Does this account seek to "make moral judgments based on natural facts"?[51] Yes and no. No, in the sense that it does not seek to infer normative conclusions or theses from non-normative (natural-fact) premises. Nor does it appeal to any norm of the form "Respect natural facts or natural functions." But yes, it does apply the relevant practical reasons (especially that marriage and inner integrity are basic human goods) and moral principles (especially that one may never *intend* to destroy, damage, impede, or violate any basic human good, or prefer an illusory instantiation of a basic human good to a real instantiation of that or some other human good) to facts about the human personal organism.

VI.

Societies such as classical Athens and contemporary England (and virtually every other) draw a distinction between behavior found merely (perhaps extremely) offensive (such as eating excrement), and behavior to be repudiated as destructive of human character and relationships. Copulation of humans with animals is repudiated because it treats human sexual activity and satisfaction as something appropriately sought in a manner as

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50. Or deliberately contracepted, which I omit from the list in the text only because it would no doubt not now be accepted by secular civil law as preventing consummation—a failure of understanding. *See* discussion, *supra* note 46.

51. Macedo, *supra* note 46, at 2:

> All we can say is that conditions would have to be more radically different in the case of gay and lesbian couples than sterile married couples for new life to result from sex . . . but what is the moral force of that? The new natural law theory does not make moral judgments based on natural facts.

Macedo's phrase "based on" equivocates between the first premises of normative arguments (which must be normative) and the other premise(s) (which can and normally should be factual and, where appropriate, can refer to natural facts such as that the human mouth is not a reproductive organ).

divorced from the actualizing of an intelligible common good as is the instinctive coupling of beasts—and so treats human bodily life, in one of its most intense activities, as appropriately lived as merely animal. The deliberate genital coupling of persons of the same sex is repudiated for a very similar reason. It is not simply that it is sterile and disposes the participants to an abdication of responsibility for the future of humankind. Nor is it simply that it cannot *really* actualize the mutual devotion which some homosexual persons hope to manifest and experience by it, and that it harms the personalities of its participants by its dis-integrative manipulation of different parts of their one personal reality. It is also that it treats human sexual capacities in a way which is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage in the understanding that its sexual joys are not mere instruments or accompaniments to, or mere compensations for, the accomplishment of marriage's responsibilities, but rather enable the spouses to *actualize and experience* their intelligent commitment to share in those responsibilities, in that genuine self-giving.

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

Homosexual orientation in this sense is, in fact, a standing denial of the intrinsic aptness of sexual intercourse to actualize and in that sense give expression to the exclusiveness and open-ended commitment of marriage as something good in itself. All who accept that homosexual acts can be a humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments for gratifying the individual "selves" who have them. Such an acceptance is commonly (and in my opinion rightly) judged to be an active threat to the stability of existing and future marriages; it makes nonsense, for example, of the view that adultery is per se (and not merely because it may involve deception), and in an important way, inconsistent with conjugal love. A political community which judges that the stability and protective and educative generosity of family life is of fundamental importance to that community's present and future can rightly judge that it has a compelling interest in denying that

homosexual conduct—a "gay lifestyle"—is a valid, humanly acceptable choice and form of life, and in doing whatever it *properly* can, as a community with uniquely wide but still subsidiary functions, to discourage such conduct.

VII.

I promised to defend the judgment that the government of political communities is subsidiary, and rationally limited not only by constitutional law and by the moral norms which limit every decent person's deliberation and choice, but also by the inherent limits of its general justifying aim, purpose or rationale. That rationale is, of course, the common good of the political community. And that common good, I shall argue, is not basic, intrinsic or constitutive, but rather is instrumental.

Every community is constituted by the communication and cooperation between its members. To say that a community has a common good is simply to say that communication and cooperation have a point which the members more or less concur in understanding, valuing and pursuing. There are three types of common good which each provide the constitutive point of a distinctive type of open-ended community and directly instantiate a basic human good: (1) the affectionate mutual help and shared enjoyment of the friendship and *communio* of "real friends"; (2) the sharing of husband and wife in married life, united as complementary, bodily persons whose activities make them apt for parenthood—the *communio* of spouses and, if their marriage is fruitful, their children; (3) the *communio* of religious believers cooperating in the devotion and service called for by what they believe to be the accessible truths about the ultimate source of meaning, value and other realities, and about the ways in which human beings can be in harmony with that ultimate source. Other human communities *either* are dedicated to accomplishing a specific goal or set of goals (like a university or hospital) and so are not in the open-ended service of their members, *or* have a common good which is instrumental rather than basic. One should notice here that association and cooperation, even when oriented towards goals which are both specific and instrumentally rather than basically and intrinsically good (as, e.g., in a business enterprise), have a more than merely instrumental character inasmuch as they instantiate the basic good of friendship in one or other of its central or non-central forms.

The political community—properly understood as one of the forms of collaboration needed for the sake of the basic goods identified in the first principles of natural law—is a community

cooperating in the service of a common good which is instrumental, not itself basic. True, it is a good which is "great and godlike"[52] in its ambitious range: "to secure the whole ensemble of material and other conditions, including forms of collaboration, that tend to favor, facilitate, and foster the realization by each individual [in that community] of his or her personal development"[53] (which will in each case include, constitutively, the flourishing of the family, friendship and other communities to which that person belongs). True too, its proper range includes the regulation of friendships, marriage, families, and religious associations, as well as of all the many organizations and associations which are dedicated to specific goals or which, like the state itself, have only an instrumental (e.g. an economic) common good. But such regulation of these associations should never (in the case of the associations with a non-instrumental common good) or only exceptionally (in the case of instrumental associations) be intended to take over the formation, direction or management of these personal initiatives and interpersonal associations. Rather, its purpose must be to carry out the *subsidiary* (i.e. helping, from the Latin *subsidium*, help) function[54] of assisting individuals and groups to coordinate their activities for the objectives and commitments they have chosen, and to do so in ways consistent with the other aspects of the common good of this community, uniquely complex, far-reaching and demanding in its rationale, its requirements of cooperation, and its monopolization of force: the political community.[55]

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52. ARISTOTLE, NICOMACHEAN ETHICS, I,1: 1094b9.

53. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 147 (1980). As I indicate, this account of the common good of the political community is close to that worked out by French commentators on Aquinas in the early mid-twentieth century. *Id.* at 160. A similar account was adopted by the Second Vatican Council: "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment." GAUDIUM ET SPES ¶ 26 (1965); *see also* DIGNITATIS HUMANAE ¶ 6 (1965).

54. *See* FINNIS, *supra* note 53, at 146-47, 159.

55. Of course, the common good of the political community has important elements which are scarcely shared with any other community within the polity: for example, the restoration of justice by punishment of those who have offended against just laws; the coercive repelling and restraint of those whose conduct (including negligent omissions) unfairly threatens the interests of others, particularly those interests identified as moral ("human") or legal rights, and corresponding compulsory measures to secure restitution, compensation or reparation for violations of rights; and the specifying and upholding of a system of holding or property rights which respects the various interests, immediate and vested or remote and contingent, which everyone has in each holding. But the fact that these and various other elements of the political common good are peculiar to the political community and the proper

The fundamentally instrumental character of the political common good is indicated by both parts of the Second Vatican Council's teaching about religious liberty, a teaching considered by the Council to be a matter of natural law (i.e. of "reason itself").[56] The *first* part of the teaching is that everyone has the right not to be coerced in matters of religious belief and practice. For, to know the truth about the ultimate matters compendiously called by the Council "religious," and to adhere to and put into practice the truth one has come to know, is so significant a good and so basic a responsibility, and the attainment of that "good of the human spirit"[57] is so inherently and non-substitutably a matter of *personal* assent and *conscientious* decision, that if a government intervenes coercively in people's search for true religious beliefs, or in people's expression of the beliefs they suppose true, it will harm those people and violate their dignity even when its intervention is based on the correct premise that their search has been negligently conducted and/or has led them into false beliefs. Religious acts, according to the Council, "transcend" the sphere which is proper to government; government is to care for the temporal common good, and this includes [the subsidiary function of] acknowledging and fostering the religious life of its citizens; but governments have no responsibility or right to direct religious acts, and "exceed their proper *limits*" if they presume to do so.[58]

The *second* part of the Council's teaching concerns the proper restrictions on religious freedom, namely those restrictions which are

> required for [i] the effective *protection of the rights* of all citizens and of their peaceful coexistence, [ii] a sufficient care for the authentic *public peace* of an ordered common life in true justice, and [iii] a proper upholding of *public morality*. All these factors constitute the fundamental part of the common good, and come under the notion of *ordre public*.[59]

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responsibility of its leaders, the government, in no way entails that these elements are basic human goods or that the political common good is other than in itself instrumental.

56. DIGNITATIS HUMANAE ¶ 2. In the succeeding part, the Declaration treats the matter as one of divine revelation. *Id.* at ¶¶ 9-14.

57. It is one of the *animi humani bona* mentioned in *id.*, ¶ 1.

58. "Potestas igitur civilis, cuius finis proprius est bonum commune temporale curare, religiosam quidem civium vitam agnoscere eique favere debet, sed *limites suos excedere* dicenda est, si actus religiosos dirigere vel impedire praesumat." *Id.* at ¶ 3.

59. *Id.* at ¶ 7.

Here, too, the political common good is presented as instrumental, serving the protection of human and legal rights, *public* peace and *public* morality—in other words, the preservation of a social environment conducive to virtue. Government is precisely not presented here as dedicated to the commanding of virtue and the repressing of vice, as such, even though virtue (and vice) are of supreme and constitutive importance for the well-being (or otherwise) of individual persons and the worth (or otherwise) of their associations.

Is the Council's natural law teaching right? Or should we rather adhere to the uncomplicated theory of Aquinas's treatise *On Princely Government*, that government should command whatever leads people towards their ultimate (heavenly) end, forbid whatever deflects them from it, and coercively deter people from evil-doing and induce them to morally decent conduct?[60] Perhaps the most suasive short statement of that teaching is still Aristotle's famous attack on theories which, like the sophist Lycophron's, treat the state as a mere mutual insurance arrangement?[61] But in two crucial respects, at least, Aristotle (and with him the tradition) has taken things too easily.

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60. DE REGIMINE PRINCIPUM c.14 (. . . ab iniquitate coerceat et ad opera virtuosa inducat). This thesis is qualified, though not abandoned, in other works of Aquinas. Thus *Summa Theologiae* II-II q.104 a.5c teaches that human government has no authority over people's minds and the interior motions of their wills. *Id.* I-II q.96 a.2 teaches that governmental pursuit of virtue should be gradual and should not ask too much of the average citizen (who is not virtuous).

61. It states:

> [T]he *polis* was formed not for the sake of life only but rather for the good life . . . and . . . its purpose is not [merely] military alliance for defence . . . and it does not exist [merely] for the sake of trade and business relations . . . any *polis* which is truly so called, and is not one merely in name, must have virtue/excellence as an object of its care [*peri aretes epimeles einai*: be solicitous about virtue]. Otherwise a polis sinks into a mere alliance, differing only in space from other forms of alliance where the members live at a distance from each other. Otherwise, too, the law becomes a mere social contract [*syntheke*: covenant]—or (in the phrase of the sophist Lycophron) 'a guarantor of justice as between one man and another'—instead of being, as it should be, such as will make [*poiein*] the citizens good and just . . . . The polis is not merely a sharing of a common locality for the purpose of preventing mutual injury and exchanging goods. These are necessary preconditions of the existence of a polis . . but a polis is a *communio* [*koinonia*] of clans [and neighborhoods] in living well, with the object of a full and self-sufficient [*autarkous*] life . . . it must therefore be for the sake of truly good (*kalon*) actions, not of merely living together.

ARISTOTLE, POLITICS, III.5: 1280a32, a35, 1280b7-13, b30-31, b34, 1281a1-4.

First: If the object, point or common good of the political community were indeed a self-sufficient life, and if self-sufficiency (*autarcheia*) were indeed what Aristotle defines it to be—a life lacking in nothing, of complete fulfillment[62]—then we would have to say that the political community has a point it cannot hope to achieve, a common good utterly beyond its reach. For subsequent philosophical reflection has confirmed what one might suspect from Aristotle's own manifest oscillation between different conceptions of *eudaimonia* (and thus of *autarcheia*): Integral human fulfillment is nothing less than the fulfillment of (in principle) all human persons in all communities and cannot be achieved in any community short of the heavenly kingdom, a community envisaged not by unaided reason (natural law theory) but only by virtue of divine revelation and attainable only by a divine gift which transcends the capacities of nature. To be sure, integral human fulfillment can and should be a conception central to a natural law theory of morality and thus of politics, and should be envisaged as a kind of ideal community (to which will answer the reality of the Kingdom which Christian faith's first moral norm directs us to seek).[63] But that ideal community is not, as early natural law theories such as Aristotle's prematurely proposed, the political community.

Second: When Aristotle speaks of "making" people good, he constantly[64] uses the word *poiesis* which he has so often contrasted with *praxis* and reserved for techniques ("arts") of manipulating matter.[65] But helping citizens to choose and act in line with integral human fulfillment must involve something which goes beyond any art or technique. For only individual acting persons can by their own choices make themselves good or

62. ARISTOTLE, NICOMACHEAN ETHICS, I, 7:1097b8. This, incidentally, differs widely from what STEPHEN MACEDO, LIBERAL VIRTUES 215-17 (1990), means by "an autarchic person."

63. For nothing less than integral human fulfillment, the fulfillment of all persons in all the basic human goods, answers to reason's full knowledge of, and the will's full interest in, the human good in which one can participate by action. And so the first principle of a sound morality must be: In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and will those and only those possibilities whose willing is compatible with integral human fulfillment. To say that immorality is constituted by cutting back on, fettering, reason by passions is equivalent to saying that the sway of feelings over reason constitutes immorality by deflecting one to objectives not in line with integral human fulfillment. This ideal community is thus the good will's most fundamental orientating ideal.

64. Apart from the passage just cited, see ARISTOTLE, NICOMACHEAN ETHICS, I, 10; 1099b32; II, 1: 110364; X, 9: 1180b24.

65. *E.g.* ARISTOTLE, NICOMACHEAN ETHICS, VI, 5: 1140a2; ARISTOTLE, POLITICS, 1, 2: 1254a5.

evil. Not that their life should or can be individualistic; their deliberating and choosing will be shaped, and helped or hindered, by the language of their culture, by their family, their friends, their associates and enemies, the customs of their communities, the laws of their polity, and by the impress of human influences of many kinds from beyond their homeland. Their choices will involve them in relationships just or unjust, generous or illiberal, vengeful or charitable, with other persons in all these communities. And as members of all these communities they have some responsibility to encourage their fellow-members in morally good and discourage them from morally bad conduct.

To be sure, the political community is a cooperation which undertakes the unique tasks of giving coercive protection to all individuals and lawful associations within its domain, and of securing an economic and cultural environment in which all these persons and groups can pursue their own proper good. To be sure, this common good of the political community makes it far more than a mere arrangement for "preventing mutual injury and exchanging goods." But it is one thing to maintain, as reason requires, that the political community's rationale requires that its public managing structure, the state, should deliberately and publicly identify, encourage, facilitate and support the truly worthwhile (including moral virtue), should deliberately and publicly identify, discourage and hinder the harmful and evil, and should, by its criminal prohibitions and sanctions (as well as its other laws and policies), assist people with parental responsibilities to educate children and young people in virtue and to discourage their vices. It is another thing to maintain that that rationale requires or authorizes the state to direct people to virtue and deter them from vice by making even secret and truly consensual adult acts of vice a punishable offence against the state's laws.[66]

So there was a sound and important distinction of principle which the Supreme Court of the United States overlooked in moving from *Griswold v. Connecticut*[67] (private use of contraceptives by *spouses*) to *Eisenstadt v. Baird* (*public distribution* of contra-

66. So a third way in which Aristotle takes things too easily is his slide from upholding government's responsibility to assist or substitute for the direct parental discipline of youth, to claiming that this responsibility continues, and in the same direct coercive form, "to cover the whole of a lifetime, since most people obey necessity rather than argument, and punishments rather than the sense of what is truly worthwhile." ARISTOTLE, NICOMACHEAN ETHICS, X.9:1180a1-3.

67. 381 U.S. 479 (1965).

ceptives to *unmarried* people).[68] The truth and relevance of that distinction, and its high importance for the common good, would be overlooked again if laws criminalizing private acts of sodomy between adults were to be struck down by the Court on any ground which would also constitutionally require the law to tolerate the advertising or marketing of homosexual services, the maintenance of places of resort for homosexual activity, or the promotion of homosexualist "lifestyles" via education and public media of communication, or to recognize homosexual "marriages" or permit the adoption of children by homosexually active people, and so forth.

68. 405 U.S. 438 (1972). The law struck down in *Griswold* was the law forbidding use of contraceptives even by married persons; Griswold's conviction as an accessory to such use fell with the fall of the substantive law against the principals in such use. Very different, in principle, would have been a law directly forbidding Griswold's activities as a public promoter of contraceptive information and supplies. If American constitutional law fails to recognize such distinctions, it shows, I suggest, its want of sound principle.