DEPOSING FINNIS

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I. INTRODUCTION

In this Article I will join issue with John Finnis, who (in partnership with other Catholic moralists) has developed an ambitious and attractive reformulation and restatement of the defining insights of

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the natural law tradition. Because of Finnis's work, longstanding debates between Catholic and Protestant positions in theological ethics will be sharpened, and the terms of disputes within the family of natural law positions will be clarified. Finnis's complex ideas about the abilities and disabilities of reason in moral thought are bound to stimulate new rounds of discussion. And certain questions flowing from Finnis's work will provoke fruitful disagreement among ethicists. What course of reflection, study, and self-scrutiny enables and improves discernment of the intelligible goods? Just which goods, stated at what level of generality, are available to the practical reasoner? Under what descriptions do actions take these goods as their objects, or repudiate them? And from a more specifically Christian perspective: how far may ethics be modeled, as Finnis (following Aquinas) would have it, upon the status of human persons as made in the image and likeness of God?[1] To what extent is it necessary to take as one's primary reference point, instead, the status of human persons as equally subject to God's saving grace?

Topics such as these, absorbing enough when considered from the perspective of personal morality, take on even greater significance when they are raised in political and legal debates about community responsibilities and individual rights. Finnis has entered these debates, not only in the broader brushstrokes of his political and legal theory but also in careful engagement with contemporary issues such as euthanasia, contraception, and nuclear deterrence. His leading idea is that of the common good, which requires "that *each* and everyone's well-being, in each of its basic aspects, must be considered and favoured at *all* times by those responsible for co-ordinating the common life."[2] Correlatively, the principle of subsidiarity holds that "the proper function of association is to help the participants in the association to help themselves or, more precisely, to constitute themselves through the individual initiatives of choosing commitments. . . ."[3]

The stakes for debates about sexual ethics are raised dramatically by these latter claims. While no one, says Finnis, has a right that others act or not act sexually in certain ways, the community is entitled to act on behalf of the common good, to secure conditions under

1. JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 74 (1991) [hereinafter MORAL ABSOLUTES] (*quoting* Thomas Aquinas, Summa Theologica 1-2 prol. and q1 a.1c); *see also* MORAL ABSOLUTES at 99.

2. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 214 (1980).

3. *Id.* at 146.

which people may pursue their sexuality in an integrated way, consistent with a fair and open love of worthy goods.[4] I hope that it will be evident, then, that when Finnis entered a deposition on behalf of the state of Colorado in a lawsuit testing the constitutionality of the state's effort to discourage homosexual in favor of heterosexual conduct and orientation, he was motivated by the central concerns of his natural law theory.

By studying the arguments Finnis made in his deposition in that case, taking care to situate those arguments in his ample scholarly writings, we may further the main task of this Symposium, which is to explore the relevance of natural law for American constitutional law. For the issues to be decided in the Colorado case were questions of constitutional law, and Finnis clearly meant his natural law arguments to be responsive to at least some of those questions.

In section II, I will identify some of the constitutional issues presented in the case, sort out some of the ways in which natural law theories address such issues, and locate the deposition's claims in these contexts. By reviewing criticisms that Martha Nussbaum has leveled at Finnis's arguments, I will identify the posture toward those arguments that I believe to be soundest in method.

Section III identifies some of the framing proposals about morality and political authority that Finnis brings to his arguments in defense of the Colorado law. While I will indicate some questions or reservations about some of the proposals, to lay a groundwork for the more specific criticisms to follow, my main aim in this section is just to state these proposals succinctly. Without attending to these guiding ideas of Finnis's natural law theory, it would be easy to mistake just what claims Finnis is and is not making about the moral reasonableness of laws discouraging homosexual conduct or orientation.

Sections IV and V comprise the main engagement with Finnis. In section IV, I will take issue with Finnis's ethical appraisal of homosexuality. Finnis, it will be seen, likens homosexual conduct to masturbation, and finds both forms of action personally dis-integrative. I will challenge this appraisal in two ways. First, I will show that under a more sensitive approach to the description of kinds of acts and kinds of goods, masturbation cannot be given the sort of categorical moral evaluation that Finnis attempts. Thus, on Finnis's assumption that homosexuality is like masturbation, those who engage in same-sex

4. *Id.* at 216-17.

lovemaking are not for that reason to be reproached. Second, I argue that the equation of homosexual conduct with masturbation evinces another insensitivity to the interpretive issues surrounding the identification of kinds of acts and kinds of goods.

In section V, I will return to the question that occupied the trial court on remand: the constitutional measure of the state law's reasonableness. Finnis warranted, in his deposition, that legal policies discouraging homosexual conduct and orientation (in certain ways) "can be defended on the basis of reflective, critical, publicly intelligible arguments which meet the highest standards and demands of rationality."[5] I will ask whether Finnis's arguments are reasonable in the right way, or to the right degree, to meet constitutional requirements.

II. THE CASE AND THE DEPOSITION

A. THE ISSUES IN *EVANS V. ROMER*

The voters of Colorado, by initiative state constitutional amendment, prohibited the enactment or enforcement of state civil rights laws barring discrimination on the basis of homosexual or bisexual conduct or orientation.[6] Plaintiffs claimed that this amendment deprived homosexuals and bisexuals of the equal protection of the laws, in violation of the Fourteenth Amendment.[7] The Colorado Supreme Court in *Evans v. Romer* ("*Evans I*")[8] held that any law that infringes the right to participate equally in the political process by "fencing out" an independently identifiable class of persons must be subjected to strict scrutiny,[9] found that the amendment infringed the participation rights of the affected groups, and remanded the case to the trial court to determine whether the amendment was narrowly tailored to serve a compelling state interest. On remand, the trial court

5. Affidavit of John Mitchell Finnis at 15 (October 1993), filed in Evans v. Romer, No. 92-7223, 1993 WL 51886 (Colo. Dist. Ct. Dec. 14, 1993) [hereinafter Finnis Deposition].

6. Colorado's "Amendment 2," entitled "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation," provided:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

7. U.S. CONST. amend. XIV.

8. 854 P.2d 1270 (Colo. 1993).

9. *Id.* at 1282.

considered six state interests that the state contended were compelling, and heard expert testimony and considered depositions from a number of leading scholars.[10]

On behalf of the state, Finnis entered a deposition whose claims may be organized under two main arguments.[11] First, a very substantial philosophical tradition, anchored in classical Greek thought, and

10. The expert testimony addressed such questions as whether the amendment reflected prejudice, especially religious prejudice, against homosexuals; whether the use of state power to discourage homosexuality was consistent with the traditions of western civilization and with the practices of modern western nations; whether, on principles of liberal political theory, the state may act for moral reasons to protect harms to self; and whether there are sound moral reasons for a state to discourage homosexual conduct in favor of heterosexual activity, or heterosexual union within marriage. Most of these questions ultimately concerned the nature and weight of the state's actual or hypothetical interest in disadvantaging homosexual orientation or conduct in comparison with heterosexual.

While the question of whether the state's interests are compelling and, if so, whether the challenged law is narrowly tailored to serve those interests, is a question of law and not of fact, the experts' "factual" testimony about various historical and contemporary practices, and about arguments within ethics and political philosophy, could in principle assist the court to decide whether the standard of review is met. Just as Justice Harlan, dissenting in *Lochner v. New York*, 198 U.S. 45, 70-71 (1905), relied on Professor Hirt's treatise on the diseases of the bakery workers to support his conclusion that the state had a rational basis for restricting the hours of such workers, so a court might rely on expert opinion about the alleged moral harms of homosexuality.

On the other hand, it is at least plausible to suppose that under strict scrutiny, as opposed to the more deferential rational basis test, the state interests under review must be the interests that actually motivated the state to enact the challenged law (assuming both that the concept of "actual motive" is coherent in this context, and that the motivating interests are recoverable in principle). If that supposition is correct, then even if the court satisfied itself that choices to engage in homosexual conduct are immoral, or that there exist very strong arguments to that effect, it would not necessarily follow that the state's interests were compelling in this case. The court would need to decide whether these strong moral reasons were in fact the reasons that motivated the challenged law. But I will not pursue here either the question of whether the postulated state interests need be the motivating ones, or the problem of just what it means for interests to be motivating (and, correspondingly, of how the motivating interests are to be identified).

11. Finnis's main contribution to the trial was a lengthy deposition dated October 8, 1993. *See* Finnis Deposition, *supra* note 5. Testifying at trial on October 15, 1993, plaintiff's expert witness Martha Nussbaum attacked Finnis's main claims along with arguments made by Robert George. Testimony of Martha Nussbaum at 788 (October 15, 1993) [hereinafter Nussbaum testimony]. Finnis responded to Nussbaum's testimony in a rebuttal affidavit, October 21, 1993. Rebuttal Affidavit of John Mitchell Finnis (October 21, 1993) [hereinafter Rebuttal Affidavit]. Nussbaum expanded her testimony in an affidavit also dated October 21, 1993. Affidavit of Martha Craven Nussbaum (October 21, 1993), Evans v. Romer, 854 P.2d 1270 (Colo. 1993) (No. 92-7223) [hereinafter Nussbaum Affidavit]. On October 27, 1993, Finnis submitted an addendum to his rebuttal affidavit, correcting and clarifying certain statements made therein. Addendum to Rebuttal Affidavit of John Mitchell Finnis (October 27, 1993). Both Finnis and Nussbaum later published revised and somewhat expanded versions of their affidavits. John Finnis, *Law, Morality, and 'Sexual Orientation'*, 69 NOTRE DAME L. REV. 1049 (1994) [hereinafter *Sexual Orientation*]. Martha Nussbaum, *Platonic Love and Colorado Law: The Relevance of*

meeting rigorous standards of reasonableness, holds that choices to engage in same-sex sexual conduct are unworthy and immoral.[12] Second, a very substantial position in political philosophy, more or less corresponding to certain ancient and modern political frameworks for government, withholds from government the power to punish adults for consensual private homosexual conduct, but accords government the authority to discourage people from deliberately choosing homosexual conduct or manifesting homosexual orientation in certain public ways.

The trial court evaluated each of the state's six asserted interests, and found them either not compelling or not a close fit to the actual provisions of the challenged amendment.[13] (The court did not address itself to the substance of Finnis's arguments.)

Ancient Greek Norms to Modern Sexual Controversies, 80 VA. L. REV. 1515 (1994) [hereinafter *Platonic Love*].

12. None of the six state interests put forward by the state as compelling closely matched the moral arguments that Finnis advanced, or to whose existence and merits he witnessed. The state did not argue that choices to engage in homosexual conduct are immoral, and that governmental neutrality between homosexual and heterosexual conduct or orientation would undermine the efforts of people of good will to conform their behavior to the dictates or insights of practical reasonableness. The closest the state came to this claim, perhaps, was in its sixth asserted interest, "the promotion of the physical and psychological well-being of children." Evans v. Romer, No. 92-7223, 1993 WL 518586, at *9 (Colo. Dist. Ct. Dec. 14, 1993). It certainly is not uncommon for the state to rely on claims about the damaging social consequences of behavior rather than on the claim that the behavior is morally harmful (not only to third parties but also to those who engage in the behavior). Here, defendants contended that "The state has a compelling interest in supporting the traditional family because without it, our children are condemned to a higher incidence of social maladies such as substance abuse, poverty, violence, criminality, greater burdens upon government, and perpetuation of the underclass." 1993 WL 518586, at *8 (Colo. Dist. Ct. Dec. 14, 1993). The state did not want alternative arrangements to be publicly accepted because, in its view, such arrangements provide less stable environments for children. Telephone conversations with the Colorado Attorney General's office.

13. *Evans v. Romer*, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993). At this point in the trial, the plaintiffs advanced two new and independent grounds for invalidation. First, the plaintiffs contended that the amendment triggers strict scrutiny not only because it invades a fundamental political participation right, as the Supreme Court had found, but also because it makes a suspect classification. (In the alternative, plaintiffs contended that the amendment makes a semi-suspect classification triggering the intermediate standard of review.) Second, the plaintiffs asked the court to find that even under the rational basis test, the amendment would not survive scrutiny. The trial court found that the statute did not make a suspect classification, and it declined to apply the rational basis test. Having made these determinations, the trial court declared the amendment unconstitutional and permanently enjoined its enforcement.

Plaintiffs' belated introduction of the two alternative equal protection theories suggests some different ways of understanding or estimating the relevance of the expert testimony. Finnis's deposition offers arguments which, to the extent that they are persuasive, tend to rebut the plaintiffs' claim that laws burdening people (or permitting people to be burdened) on the basis of sexual orientation or conduct necessarily reflect prejudice against a discrete and insular minority. If there exist good reasons of morality for people to eschew homosexual conduct and

In *Evans II*, the Colorado Supreme Court agreed that the amendment was not narrowly tailored to serve a compelling state interest.[14] Before the supreme court, the state advanced as a compelling state interest, *inter alia*, a claim that comes much closer to the arguments of Finnis.[15] The defendants argued that the amendment "promotes the compelling governmental interest of allowing the people themselves to establish social and moral norms," "preserves heterosexual families and heterosexual marriage," and "sends the societal message condemning gay men, lesbians, and bisexuals as immoral."[16] The court decided as a threshold matter that this asserted state interest, though not formally equivalent to any pleaded at trial, was sufficiently implicated in the state's arguments at trial to merit review on appeal.[17] But the court went on to deny that "the protection of morality constitutes a compelling governmental interest."[18] "At the most, this interest is substantial. However, a substantial governmental interest is not sufficient to render constitutional a law which infringes on a fundamental right—the interest must be compelling."[19]

The precedents on which the Colorado Supreme Court relied in *Evans I*,[20] in support of its conclusion that the amendment must be

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to discourage the idea that one form of sexual conduct or practice is as good as another, then it would be a mistake to adopt the background assumption that laws burdening people who adopt homosexual conduct are animated by prejudice.

The Colorado Attorney General's office, in telephone conversations, has explained that it conceptualized the expert testimony of Finnis and George as arguments in support of the state's claim to a compelling state interest rather than as arguments rebutting the plaintiff's claim that laws burdening homosexuals presumptively reflect prejudice against a group warranting strong constitutional protection.

14. *Evans v. Romer* ("*Evans II*"), 882 P.2d 1335 (Colo. 1994), *cert. granted*, Romer v. Evans, 115 S.Ct. 1092 (1995) (No. 94-1039) (deciding whether an initiative state constitutional amendment precluding state or local legal protections for homosexuals and bisexuals violates a fundamental right of classes which are "independently identifiable" but "non-suspect").

15. The argument comes closest, perhaps, to the views that Robert George advanced at trial on behalf of the state. Testimony of Robert George, pp. 1282-1341; Deposition of Robert George, Oct. 8, 1993. For a more complete argument on behalf of the thesis that laws cultivating morality may (in principle) be within the state's authority, see generally ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993).

16. *Evans II*, 882 P.2d at 1346.

17. *Id.*

18. *Id.* at 1347.

19. *Id.*

20. Reitman v. Mulkey, 387 U.S. 369 (1967); Hunter v. Erickson, 393 U.S. 385 (1969); James v. Valtierra, 402 U.S. 137 (1971); Gordon v. Lance, 403 U.S. 1 (1971); Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Board of Educ., 458 U.S. 527 (1982).

subjected to strict scrutiny, are extremely difficult to understand: individually, in relation to one another, and in the context of contemporary equal protection doctrine as a whole. The dissent in *Evans I* interpreted these precedents as establishing only that laws imposing political burdens on the basis of suspect classifications such as race trigger strict scrutiny.[21] Thus, disagreement arises over the proper interpretation of the case law.

Among the theories of precedent that address this standard kind of legal disagreement are natural law theories. In Michael Moore's natural law theory of precedent, the bearing of existing case law on the issue presented by the instant case must be determined by reference to the normative ideals that ground the institution of precedent: equality, liberty, and efficiency.[22] Properly understood, these norms supply the two necessary elements of an account of precedent. They identify what (among competing conceptions) is to count as the holding of a case, and they define the weight that is to be given a holding. What is more, they guide the integration of diverse, perhaps competing holdings into a common set of concepts.

The natural law theory of precedent offers to define and organize the questions that need to be answered if the straggling line of cases on which the Colorado Supreme Court relied is to be integrated conscientiously into legal reasoning that supplies an answer to the question of whether strict scrutiny should be applied to the challenged amendment and, if so, why. The theory would take into account the normative basis for the hierarchical structure of appellate courts, which may supply the United States Supreme Court a wider latitude than the Colorado Supreme Court to overrule the precedents or to offer a new theory resolving the problem that they can be seen to state in common with one another.

Not surprisingly, Finnis does not attempt in his deposition to provide such a natural law reconstruction of the relevant equal protection precedents. His deposition is that of an expert witness; it is not his role to brief the questions of law. (Further, by the time that Finnis entered his deposition in the trial court, the state supreme court had

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21. *Evans I*, 854 P.2d 1270 (Colo. 1993) (Erickson, J., dissenting).

22. Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 371 (1985). *See also* Michael Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW 183-216 (Laurence Goldstein ed., 1987). Ronald Dworkin's account of precedent might also be regarded as a natural law theory, *see* Ronald Dworkin, A MATTER OF PRINCIPLE 146-66 (1985); *see* Dworkin, *'Natural' Law Revisited*, 34 U. FLA. L. REV. 165 (1982); *but compare* Michael Moore, *Metaphysics, Epistemology, and Legal Theory*, 60 S. CAL. L. REV. 453 (1987).

already settled on an interpretation of the precedents under which strict scrutiny was to be applied.) Therefore, Finnis's deposition does not afford an opportunity to look closely at reasoning about precedent, and to understand in detail how natural law theory structures that reasoning in a constitutional law context.

But even if Finnis had written for the state supreme court (rather than as an expert witness for the state), he would not have followed Moore's natural law theory of precedent. Finnis's account of precedent, unlike Moore's, shares certain features with positivism. The question of what rule the case lays down is essentially factual or descriptive in nature. The authority of such rules is not a function of their moral soundness.[23] It is the fact of having been decided, or posited, that makes a rule-like holding right.[24] The precedents that are to be interpreted in the Colorado case are, then, just cultural objects that adopt but one among many possible rationally appealing choices. At bottom, it is the inability of reason to commensurate distinct goods that accounts for these conclusions. Finnis contends that there is no way to maximize over a set of norms that includes both the moral reasons governing the interpretation of the case law and the moral reasons that justify deciding a case one way or another on the merits.[25] In genuinely hard cases, the law does not supply a unique right answer. Finnis's judge, deciding such a case, has the kind of discretion that positivism ascribes to the judge deciding problems of the penumbra.

To a lawyer who must argue for a standard of review in the Colorado case, a natural law theory of precedent such as Moore's may prove more helpful than Finnis's approach. A natural law theory of precedent conforms to the lawyer's commonsense idea that rationalizing the precedents means bringing forward their common point in such a way as to exhibit that point's soundness and its conformity to the principles or policies animating the overall structure of the doctrine. Yet there are plausible alternative views. When the relevant case law reflects transitions in judicial personnel and political norms, and sends signals at cross-purposes, as the cases on which the Colorado Supreme Court relied arguably do, it may be better to frame the

23. John Finnis, *Natural Law and Legal Reasoning*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 134, 141-45 (Robert George ed., 1992).

24. *Id.* at 145.

25. *Id.* at 143-48. While Finnis is concerned in these pages to demonstrate that Dworkin's theory of precedent founders on the rock of incommensurability, it would seem that he would make the same argument against Moore.

appellate advocate's task as urging adoption on wholly normative grounds of one of a range of choices left open by the positive law. Finnis's views of precedent are consistent with this approach.

In constitutional law, one may distinguish between arguments *to* a standard of review and arguments *within* a standard of review. Finnis's arguments in the Colorado case were of the latter sort. He argued that the state had good reason in adopting its amendment to discourage homosexual conduct and orientation. The trial court held that these reasons were not good enough to satisfy strict scrutiny, and the state supreme court agreed. This Article will be concerned to present Finnis's reasons and to explain why the Colorado courts were right to reject them.

The questions that will occupy us here are: What are the reasons that Finnis advances? In what sense are his arguments natural law arguments? In what respects are these arguments sound, and in what respects deficient? And do the deficiencies cast doubt upon the natural law tradition itself, or upon the specific interpretation of that tradition that Finnis has developed?

B. *NUSSBAUM V. FINNIS*

There are a great many ways to engage the deposition, but not all of these ways equally and centrally engage Finnis's main ideas. One section of the deposition, comprising perhaps half its length, offers an exposition and interpretation of philosophical and political stances toward homosexuality in classical Athens.[26] The expository argument is by no means incidental to Finnis's aims. He undertakes to show that there is a central tradition in western ethical thought that adopts, as a part of its larger concern to lead people toward a good life, a position that assesses homosexual conduct as unworthy and that justifies limited forms of legal discouragement of that conduct. But the deposition's effort to place this position within the tradition invites dismissive replies. It is easy enough to protest that serious modern controversies should not be settled by the beliefs of the ancients. Yet this sally is easily repelled. Finnis is concerned not with beliefs (ancient or modern) but with reasons; he quite clearly says that his case rests on a reconstruction of reasoning evidenced by many authors both ancient and modern.[27] He invokes the ancients not as authorities

26. Part IV of the Finnis Deposition, *supra* note 5, at 15-35. For a revised version, *see Sexual Orientation*, *supra* note 11, at 1055-70.

27. *Sexual Orientation*, *supra* note 11, at 1063.

whose proposals give us conclusive reasons to adopt a certain position, but as experts whose insights have proved their worth in the course of our experience and reflection.

A second response to the deposition is to subject it to the antiquarian version of "the death by a thousand cuts." Classicists and philologists dispute Finnis's translations of certain key passages in the ancient texts and challenge his credentials as an expert in Greek language or culture. Those of us who lack the necessary training are unable to take sides in the bitter dispute between Martha Nussbaum and John Finnis that began in their affidavits and testimony at trial and continues in recent publications.[28] But the exchange between Nussbaum and Finnis raises deeper issues of method and theory which deserve to be considered carefully.

As I understand Nussbaum, her real quarrel with Finnis has to do not directly with his credentials as an expert but instead with his intellectual method (which ultimately implicates his technical credentials). For Nussbaum, who champions what I will call the methods of the *Geisteswissenschaften* or cultural studies, "what is central is the full sense of the author and the author's particular tradition."[29] An education that steeps the scholar in language and text stimulates the growth of that "full sense." Finnis, as Nussbaum understands and criticizes him, is by temperament uninterested in that "full sense" and by training unable to achieve it. Instead, he models arguments, constructing lines of reasoning and associating these arguments with certain authors. But this approach to the classics is empty, Nussbaum suggests, because in the end it can only offer us confirmation of views we already hold (or at least are already comprehensible to us). We read the classics well when we prepare ourselves to be surprised into new thought by the texts' nonconformity to our simplifying models. A truly wide and deep culture, removed from us in time and yet linked so closely to us, admittedly imperfect yet forever associated with

28. Perhaps two-thirds of the testimony and affidavit of Nussbaum was concerned, in one form or another, to demonstrate that Finnis and Robert George (especially Finnis) relied on dated or otherwise distorted translations that reflect a modern Christian bias against homosexuality. Four-fifths of Finnis's rebuttal affidavit was occupied in challenging Nussbaum's criticisms of his translations, expositions, and interpretations of the classical texts. Finnis's addendum to his rebuttal affidavit offered yet more clarifications and responses concerning the correct rendition of words and phrases. *See* Finnis Deposition, *supra* note 5; Rebuttal Affidavit, *supra* note 11; and Addendum to Rebuttal Affidavit, *supra* note 11.

29. *See Platonic Love*, *supra* note 11, at 1617.

greatness, can open new possibilities in our understanding of our sexuality.[30]

Framing the dispute between Nussbaum and Finnis in this way helps us, I believe, to see in it something more instructive and more challenging than mere professional boundary maintenance, or political war carried out in remote academic battlefields. For I think it clear that Finnis would say that the hermeneutic methodology of the *Geisteswissenschaften*, whatever its merits in historical or cultural studies, is not moral reasoning; that is to say, for Finnis, that it is not practical reasoning. Moral reasoning commences only when one asks what is worth doing or pursuing in one's action, and matures only when one grasps the strict negative precepts that limit one's action. An agent who seeks to be perfectly reasonable in all his or her choices, as morality essentially commands, may be well served by studying the tradition that both discovered and named practical reasonableness. But such study ceases to be practical when its goal becomes the understanding of a culture, an author, or a text in its complex fullness, as an illuminating end in itself. One is to read Plato and Aristotle not to discover a possible lifestyle, but to improve the radical practicality of one's reasoning.

In analyzing the issues raised by the expert testimony, I will steer a middle course between the views of Nussbaum and Finnis. With Finnis, I take practical reasoning to commence with descriptions of possible actions that render these possibilities intelligible as opportunities to realize human goods. With Nussbaum, I believe that the interpretation of canonical texts, guided by the hope for full understanding of a text, *oeuvre*, author, or tradition, may enable new descriptions that open new horizons of worthy action. What may appear in the first light of reason as mere sensations, satisfactions, or pleasures, are revealed by further study to be worthy opportunities.

The generosity of the hermeneutic impulse ought, ideally, to be reciprocal.[31] It will not do to turn the tables on Christian thought, which sometimes celebrates a simplifying distinction between Hebraism and Hellenism,[32] embracing the former and denouncing the latter

30. *See id.* at 1592-1606, app. at 1614-22. These portions of Nussbaum's article are additions to her testimony in the Colorado case.

31. Nussbaum's criticisms of Finnis would be more valuable if seasoned by greater attention to the framework of his ideas, worked out in his scholarly writings.

32. *E.g.*, 1 REINHOLD NIEBUHR, THE NATURE AND DESTINY OF MAN 5-18 (1941).

as pagan error, by staging a rescue of Hellenism form its Christianizing interpreters. In her effort to present a rounded and nuanced view of Greek sexual norms, Nussbaum sometimes misses comparable complexities in Finnis's thought, and compresses his ideas to fit them within the outlines of Christian moralism as she understands it.

Nussbaum argues that even when the Greek texts offer a less than flattering portrait of same-sex lovemaking, they do not brand it as "wicked," and hence they do not treat it with the same attitude of moral condemnation as Finnis.[33] On the other side of the coin, Nussbaum says against Finnis that in Plato, procreative sex is not celebrated as "excellent," but merely enforced as "necessary."[34] Both criticisms may be aptly made, perhaps, of many a tract or Sunday sermon, but they mistake the nature of Finnis's moral claims.

First, Finnis does not intend, so far as I can see, to establish that homosexual conduct, or the choice to pursue it, is "wicked," if by that one means motivated by an evil heart. He claims instead that it is bad, immoral, and "unworthy," meaning that it fails reasonably to realize intelligible goods that are rightfully the objects of human action. One of Nussbaum's main attacks on Finnis is the contention that he approaches classical thought anachronistically through a Christian framework.[35] Interpreting Finnis as condemning homosexual conduct as "wicked" furthers that attack, by making it appear that Finnis is imputing to the classics a view of evil or of sinfulness whose origin is Biblical. But if Finnis's claim is not that the conduct in question is sinful, but only that it is unreasonable, then it comes closer perhaps to fitting some of the ideas that Nussbaum herself finds in the texts under review.

Second, while there is weight to Nussbaum's argument that Finnis takes a higher view of marriage and conjugal sex than did Plato, it does not strengthen the argument to cast it in the mold of an asserted contrast between the "excellent" and the "necessary." I understand Finnis to be making the claim not that marriage is "excellent," but only that marital community is an intelligible human good. Indeed, in insisting as he does upon the incommensurability of such goods, Finnis distances himself from the kind of relative judgments implied by the

33. *Platonic Love*, *supra* note 11, at 1645.

34. *Id.* at 1580.

35. Nussbaum Testimony, *supra* note 11, at 799-800; Nussbaum Affidavit, *supra* note 11, at 6. Nussbaum also argues that Finnis relies on translations that are colored by Christian moralism. Nussbaum Affidavit, *supra* note 11, at 18.

term "excellent." (I do not take Finnis to be saying that a life plan that is centrally devoted to worship or knowledge, for example, is better or worse than one in which marital community figures prominently.) What is more, the kind of sharp distinction between the good and the necessary that Nussbaum has in mind is foreign to Finnis's thought. There are an infinite number of ways to share in the human goods, and a great many ways in which societies can order themselves through law to foster such sharings. While marital communion is understood by Finnis to be a basic good, societies are free to choose among a wide range of legal policies that protect and create access to that good. Societies, if they are sensible, choose policies likely to be workable. No doubt some of the specific institutional rules of marriage are of this latter sort. In the deposition, Finnis argues, as I understand him, only that if the people of Colorado choose to protect their pursuit of the marital good by offering homosexuals less than the fullest possible protection from private acts of injustice, that choice is sensible enough; that is, it is a workable common decision. It will not do to treat Finnis as deriving the institutional framework rules of marriage and the family directly from a moral premise about the special moral worth of marriage.

Many of those who agree with the ultimate conclusion of the Colorado Supreme Court, that the state law is unconstitutional, may reject the whole architecture of Finnis's political and moral theory out of hand, finding it alien or repugnant, or disqualified because religiously motivated, or irrelevant to the specific concerns of American constitutional law. My own assessment is different. By accepting the framework of Finnis's theory, at least for the purposes of the inquiry, we can enter more deeply into the ideas motivating the deposition and address them with the kind of critical respect suggested in my opening remarks.

Karl Barth, the great Protestant theologian and opponent of natural law, once referred to a sympathetic Catholic critic as "a friend from another shore."[36] Finnis is surely a great exponent of the natural law in our time. I hope, in assuming the outlines of Finnis's theory and challenging (at virtually every turn) the interpretations and views that fill it in, that my opposition satisfies the standard of true friendship.

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36. Barth was referring to Hans Urs von Balthasar.

For my opposition, though it is (I believe) internal to the Christian natural law tradition, runs deep. However wisely we construe the orders of creation, I believe that equal regard for all creatures made in God's image and likeness will not rise to the mutual concern and respect at once demanded and enabled by the gracious regime of neighbor love. That regime, I will suggest, presses American constitutional law to shake and challenge any legal order that withholds from loving and committed partners the opportunity to share in the outward, visible forms of marriage.

III. A FRAMEWORK OF NATURAL LAW PROPOSALS

A. INTRODUCTION

Finnis's background proposals, as they relate to the questions of personal and political morality raised in *Evans v. Romer*, may be grouped under several headings. First, basic goods as the objects of practical reason. Second, moral reasonableness and personal integration. Third, the state's legitimate but limited authority to discourage vice. I will briefly state the proposals and sketch their implications for the issues in *Evans v. Romer*.

Many who find the arguments to which Finnis testified in *Evans v. Romer* unconvincing may do so because they reject one or more of these propositions. For the purpose of the present analysis, I will generally accept the background proposals grouped under the first and second headings. I will raise some questions about the proposals under the third heading, but anything like a complete assessment of them is beyond the scope of the essay.

B. BASIC GOODS AS THE OBJECTS OF PRACTICAL REASON

(a) The objects of practical reason are not contingent pre-rational desires but goods intelligibly worth participating in.[37] (b) Participating in these goods involves action undertaken with a will to affirm or realize them.

Finnis recognizes that people want to experience various pleasures and satisfactions, and to avoid various pains and discomforts. Within the frame of wanting, it is perfectly intelligible to want the sexual pleasures and satisfactions afforded by the whole range of

37. JOHN FINNIS, FUNDAMENTALS OF ETHICS 29, 33 (1983) [hereinafter FUNDAMENTALS OF ETHICS].

sexual activity, homosexual, heterosexual, bisexual, and solitary. But within the frame of practical reasoning, what counts is the object of an action that makes it worthwhile, the good that is to be actualized. "[M]any people today think that the satisfaction of sexual desire is in itself an important human good, and that one irreducible aspect of marital love simply is the decent satisfaction of this desire within the bounds of marriage."[38] But "in itself the satisfaction of natural desires is not a good of human persons. Desire satisfaction contributes to human goods only insofar as it is integrated within a wider framework determined by reason and morally upright commitments."[39]

I believe that these proposals, properly understood and applied in the context of *Evans v. Romer*, operate primarily to exclude a first-round knockout for either side. Finnis recognizes that the condemnation of homosexual conduct does not flow from claims about perverted or sick desires. It is natural to want stimulation and release, just as it is natural to want the pleasures of the palate and a full stomach. A natural law argument that is meant to establish both that the adoption of homosexual conduct is immoral and that the state is entitled to discourage it does not rest on claims about certain kinds of desires being more natural, in the sense of commonplace or rooted in human biology or psychology, than others. By the same token, it is not enough for the other side to establish that desires for homosexual sex acts are natural in these same senses.

We will concern ourselves later with the question of selecting a level of generality at which to describe the basic goods, and selecting a description of an action such that the action can be related (either intrinsically or instrumentally) to those goods. Taken at face value, however, Finnis's account of practical reasoning as oriented to the actualization of basic rather than assertedly natural (that is, commonplace or organic) goods[40] is more plausible than other interpretations of natural law that commence with some asserted deduction of an "ought" (what ought to be done or pursued) from an "is" (what is ordinarily or organically desired). It will appear that in the later

38. *See* Germain Grisez et al., *"Every Marital Act Ought to Be Open to New Life": Toward a Clearer Understanding*, 52 THE THOMIST 365, 394 (1988) [hereinafter *Every Marital Act*].

39. *Id.*

40. "In making moral judgments we are concerned, not with such distinctions as between the natural and the artificial, nor with respecting patterns inherent in nature (just as patterns inherent in nature). Rather we are concerned with the relations between acts of choice and the real human goods which can be favoured, respected, contemned or rejected in human choices." John Finnis, *Personal Integrity, Sexual Morality and Responsible Parenthood*, 1 ANTHROPOS: RIVISTA DI STUDI SULLA PERSONA E LA FAMIGLIA 43, 52 (1985) [hereinafter *Personal Integrity*].

rounds, however, hoping to deal a blow that will deck the opposition, Finnis adopts a more naturalistic version of natural law. For example, Finnis affirms (in an essay reconstructing and defending Catholic teachings against contraception) that "[s]exual behavior does have something to do with the coming to be of new people."[41] The status of that "something," not surprisingly, is a matter of some importance.

In his deposition, as in his writings on sexual ethics and contraception, Finnis generally presents sexual conduct in terms of sharply distinct alternatives. Either it is a mindless pursuit of gratification, in which the distinctively human lapses into a kind of animalistic condition, or it is a project entertained with high moral seriousness, an expression and enactment of committed friendship and of responsibility for new life. But these stark alternatives do not flow from the underlying commitments of Finnis's theory. In *Natural Law and Natural Rights*, Finnis says that "as a human action, pursuit and realization of value, sexual intercourse may be play, and/or expression of love or friendship, and/or an effort to procreate."[42] I believe that it also may be, indeed long has been, a pursuit and realization of beauty, both for its own sake and for the sake (broadly speaking) of art. While Finnis may be correct as a social critic in denouncing a culture of gratification, his discussion of matters sexual is strangely silent about the romantic and aesthetic culture that historically stands in equal opposition to the understanding of sexuality as mere gratification and to the domestication of sexuality in the morally serious institution of the family. There is no room, in Finnis, for the troubadours' songs of courtly love, or for Shakespeare's sonnets; or whatever sexual projects are bound up with them are assimilated to scratching where it itches. So we will need to inquire into just which intelligible goods may be internal to sexual conduct.

C. Moral Reasonableness and Personal Integration

(a) While one is free to take initiatives on behalf of certain goods, knowing that one is not thereby pursuing other worthwhile objects, one may never repudiate a basic good as such, or have as one's object the blocking of such a good. (b) Integral human fulfillment requires an integration of the self, such that the choosing self is not subordinated to the feeling or experiencing self.[43] (c) Integral human

41. *Every Marital Act*, *supra* note 38, at 398.
42. Finnis, Natural Law and Natural Rights, *supra* note 2, at 86.
43. *See* Moral Absolutes, *supra* note 1, at 55.

fulfillment requires an integration of the person, such that the living body is the person (as persons we don't *have* bodies in the sense that we have possessions or tools; we *are* our living bodies).[44] (d) Moral reasonableness constrains not only interpersonal but also self-regarding conduct.[45] (e) Conduct may be morally wrong, e.g. unchaste, even if it is not unjust.[46]

Together, these proposals comprise an interpretation of the idea of moral harm to self. Even if one does no wrong to another person, one may act in ways that are destructive of one's own integrity. In general, acts of personal dis-integration involve a saying-no to basic goods and/or a saying-yes to pre-rational desires that claim satisfaction for their own sake.

In his deposition, Finnis defines homosexual conduct as "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."[47] This description prepares the way for a claim about dis-integration, via an analogy between homosexual conduct and masturbation.

> In masturbating, as in being masturbated or sodomized, one's body is treated as instrumental for the securing of the experiential satisfaction of the conscious self. Thus one dis-integrates oneself in two ways, (i) by treating one's body as a mere instrument of the consciously experiencing self, and (ii) by making one's choosing self the quasi-slave of the experiencing self which is demanding gratification.[48]

Many who disagree with Finnis may not go to the trouble of investigating these specific claims about homosexual conduct, because they get off the boat much earlier. They deny that there can be moral harms to self, or that moral strictures restrain the self-infliction of such harms. Or, if they accept the general idea of a moral stricture restraining harms to self, they may not work out this idea in terms of a requirement of integration. But I believe that we can stay on the boat a very long way, so long as we get off before we join Finnis in his claim

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44. John Finnis, *The "Value of Human Life" and "The Right to Death": Some Reflections on* Cruzan *and Ronald Dworkin*, 17 SO. ILL. U. L. REV. 559, 568-569 (1993) [hereinafter *Reflections*].

45. John Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 446 n.62 (1987) [hereinafter *Duties*].

46. *Id.* at 451; *Every Marital Act*, *supra* note 38, at 376, 385.

47. Finnis Deposition, *supra* note 5, at 15-16; *Sexual Orientation*, *supra* note 11, at 1055.

48. Finnis Deposition, *supra* note 5, at 27; *Sexual Orientation*, *supra* note 11, at 1066-67.

that homosexual conduct is morally unreasonable, a spurning of intelligible goods in favor of mere organic satisfactions.

D. The State's Legitimate but Limited Authority to Discourage Vice

(a) The state should not be neutral among competing conceptions of what is good or right for individuals.[49] (b) The state may exercise coercive power and persuasive socialization to deter people from vice and to encourage them in efforts at right conduct.[50] (c) But its role in exercising this power is subsidiary; that is, its function is to help individuals and groups.[51]

In his deposition, Finnis endorses what he calls the "standard modern European position" (SMEP) in which "the state is not authorized to, and does not, make it a punishable offense for adult consenting persons to perform homosexual acts in private. But states do have the authority to discourage homosexual conduct and 'orientation' (i.e. overtly manifested active willingness to engage in homosexual conduct)."[52] The difference between that which the state is authorized and not authorized to do turns, then, on two distinctions: private v. public, and prohibition v. discouragement. The state may discourage certain public acts, but may not prohibit certain private ones.

The SMEP is further defined by a distinction between 'inclination' and "certain *decisions* to *express* or *manifest* deliberate promotion of, or interest in engaging 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."[53] The state is not entitled, within the SMEP, to burden or disadvantage an individual just on the basis of his or her inclinations. The state's concern is with what is willed or chosen, not with what is merely desired or wanted. On the other hand, the state is free, within the SMEP, to permit some degree of private

49. *Duties*, *supra* note 45, at 433-434; *Reflections*, *supra* note 44, at 560-62.

50. *Duties*, *supra* note 45, at 454.

51. John Finnis, Natural Law and Limited Government, lecture delivered at Boston College (Nov. 12, 1993), part of which is published in *Sexual Orientation*, *supra* note 11, at 1070-76 (1994).

52. Finnis Deposition, *supra* note 5, at 6; *Sexual Orientation*, *supra* note 11, at 1049.

53. Finnis Deposition, *supra* note 5, at 9; *Sexual Orientation*, *supra* note 11, at 1052 (emphasis in original).

injustice toward homosexuals: that is, private decisions to disadvantage a person on the basis of that person's inclinations. The state also may permit people, in the exercise of their privacy or disposing of their property, to disadvantage a person on the basis of that person's private homosexual conduct. For example, within the SMEP, the state may permit landlords to decline to rent to persons who would engage in same-sex sexual activity on the premises.

Finnis's exposition of the SMEP, which is necessarily abbreviated in the deposition, is less than clear about several of these distinctions. In particular, it would be helpful to know more about just which kinds of conduct are thought to involve not mere inclinations but decisions; which kinds of decisions promote or encourage a form of life as opposed to simply reflecting it; and which forms of deliberate conduct (of the requisite type) are public and which are private. I do not mean to suggest that a political proposal is disqualified if it rests on vague concepts. I am not terribly concerned that it is easy to posit hard cases for the conceptual distinctions that define the SMEP. But it seems wise to recognize from the outset how difficult it may be to tie observed behavior to the categories in which the SMEP is framed. Whether a look in someone's eyes, or a gesture or a way of touching, or even a certain idiom of verbal expression, indicates inclination or choice, a mere life-way or a deliberate promotion of a life-way (and in any event *what* life-way)—these are, or at least often may be, difficult questions in the interpretation of everyday life.[54]

Even if its structural concepts were clearer and the acts in question easier to interpret and classify, the SMEP could not easily be conformed to basic principles of American constitutional law. A social choice to adopt the SMEP can be considered a decision to change the fabric of constitutional principle and doctrine, if not by constitutional amendment, then by the kind of structural reform that is achieved by

54. It seems clear, for example, that men who play football embrace one another in certain ways and at certain times in the course of a game. But it seems very unclear, to the outsider like myself (and perhaps also to the insider), just what all of this touching is about. Indeed, the very notion that it is about something in particular should arouse misgivings. Touchings are at once very densely coded and free or open in their meaning (or in their resistance to meaning). If I put my hand on your shoulder, am I expressing support for you, or am I curious about what your shoulder feels like, or am I seeking some form of intimacy? Is a hand on the shoulder friendship or harassment, or both? Which of these possibilities properly state the "point" of the action in the idiom of practical reasoning? *See* FUNDAMENTALS OF ETHICS, *supra* note 37, at 33-36.

sustained shifts in the Supreme Court's political aims. There are several respects in which the defining features of the SMEP are inconsistent with our constitutional framework as it is commonly and currently understood.

A deliberate governmental choice to discourage a way of life, implemented by a law imposing disadvantages on people who publicly promote behavior or conduct that is not itself criminal, is on American constitutional principles a content regulation that invades or violates First Amendment freedom of expression. So the line that the SMEP draws between prohibiting private conduct, which is withdrawn from the state's power, and discouraging the public endorsement of that conduct or the way of life associated with it, which is within the state's power, is constitutionally questionable. For example, Finnis cites a decision by the House of Lords holding that "a jury may lawfully convict on a charge of conspiring to corrupt public morals by publishing advertisements of private individuals' availability for (non-commercial) homosexual acts."[55] Within an American framework, this technique for discouraging public manifestations of homosexual choices would raise serious First Amendment concerns.

Similar concerns are raised by Finnis's application of the SMEP framework to legal policies toward the distribution and use of contraceptives. Finnis supports the decision in *Griswold v. Connecticut*[56] to strike down a state law prohibiting the use of devices for contraceptive purposes. Such a law reaches private conduct: specifically, on the facts of the case, private marital conduct. Finnis points out that "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."[57] Of course, the disinclination of American constitutional law to regard a law prohibiting the public promotion of contraceptive information and supplies as constitutionally superior to Connecticut's flat ban and accessory statute can be seen as evincing not a want of principle but a principled preference for openness and public debate. It should be noted, also,

55. Finnis Deposition, *supra* note 5, at 6, citing *Knuller v. Director of Public Prosecutions* A.C. 435 (1973).

56. 381 U.S. 479 (1965).

57. *Sexual Orientation*, *supra* note 11, at 1076 n.68.

that Finnis definitely allows for the possibility that American law may be wanting in principle, and to that extent in need of reform.

Clearly, government has many ways, even within the American system, to discourage behavior without criminalizing it, or to discourage the public validation of the behavior while permitting the behavior in private settings. But the reasonableness of classifications meant to discourage homosexuality in contrast with heterosexuality must be assessed in much the same way, under our law, as the reasonableness of classifications meant to prohibit homosexual but permit heterosexual conduct. A generic assumption that the former kind of law is more reasonable than the latter would translate, within our framework, into a lower standard of review for laws of that type. But that is not how standards of review work. A law prohibiting miscegenation and a law (facially) discouraging it are subjected to the same standard of review because, beneath the differences in form, they are equally likely to be unreasonable, stigmatizing, and motivated by prejudice. Of course, legislatures may adopt policies, creating disincentives to some choices or behavior, that are treated quite deferentially by reviewing courts because those policies do not make the kinds of classifications, invade the kinds of rights, or reflect the kinds of motives thought to call for searching scrutiny. But these are not the kinds of policies authorized by the standard modern European position. In that position, the authorized policies share the same classifications and purposes as the unauthorized.

For example, Finnis states (as another illustration of the standard position) that Parliament has set the age of consent for lawful heterosexual intercourse at sixteen and for lawful homosexual intercourse at twenty-one.[58] Analyzed under the equal protection clause, this law creates two classifications, one in terms of age and another in terms of sexual orientation. The standard of review to be applied is determined by asking whether age classifications or sexual orientation classifications are suspect (or semi-suspect). Once the standard is adopted, the law is analyzed in just the same way that it would be if it set the age for lawful heterosexual intercourse at 16 and barred all homosexual intercourse. We do not set a lower threshold of validity for laws that discourage as opposed to prohibit, although in applying the constitutional standard, we may well favor the laws that discourage over the laws that prohibit if the former are determined to be less restrictive.

58. *Id.* at 1050 (referring to 1967 Sexual Offenses Act).

From time to time in our history, natural law ideas have prompted us to reconsider elements of our constitutional design. Some strands of antislavery jurisprudence, and certain interpretations of the Fourteenth Amendment, illustrate the influence of natural law in constitutional law. I am unconvinced, however, that natural law arguments surrounding sexual ethics and the common good supply persuasive grounds for changing our background assumptions about freedom of moral and political expression and about the conditions for applying the graded standards of review. The natural law argument against slavery was truly an argument against injustice, with all of its associated and highly visible injuries. But in the main, Finnis's natural law critique of unworthy sexual practices is about the wrongful infliction of moral harms to self, not about the wrong of injustice. While it would be a mistake to rule out the possibility of legislation meant to forestall such harms, the problems of description and justification inherent in such legislation are grave enough to caution against any revision of our constitutional fabric that would afford wider latitude for laws of that class.

E. Summary

In summary, it is possible to distinguish three levels of constitutional argument: all related to issues raised by the Colorado case, and all (in principle) open to natural law proposals. First, it can be argued on the strength of a natural law theory of ethics and government that the positive constitutional law should be reformed to harmonize it more closely with the distinction that the SMEP draws between prohibiting private acts and discouraging public promotion of those acts. Finnis makes just this argument in connection with laws bearing on sexual morality. The argument is best understood as a natural law law-reform proposal, and the invitation should be declined (for the reasons briefly indicated above).

Second, the task of arguing for a standard of review (to apply to the Colorado law), or of choosing that standard judicially, can be given a natural law interpretation, one that offers to rationalize the precedents by making them, and the larger doctrine of which they form a part, the best that they can be. As we have seen, Finnis does not adopt this natural law view of precedent. His position in this respect is essentially positivist. To paraphrase Finnis's assessment of *Griswold*: if American law doesn't draw the SMEP's framework distinction, it is simply wrong (unprincipled) to that extent, and in need

of change. I have suggested that the natural law account of precedent is in some respects superior to the positivist account, but the question cannot satisfactorily be addressed here. Further, the distinction between offering to reform the law by approximating it more closely to an independently justified moral and political ideal, and interpreting it so as to realize more fully the law's own principles and policies, is at best a hazy one. Should the United States Supreme Court decide that the state supreme court erred in adopting strict scrutiny, its reasons for choosing a more deferential standard of review could not be sorted neatly into those internal and external to the constitutional design. Yet if the Court settles on the rational basis test as the appropriate standard of review, it should rest that conclusion on its best effort to relate the cases on which the Colorado court relied to the larger commitments of equal protection and not upon the wholesale reformation of the design of American constitutional law entailed in Finnis's advocacy of the SMEP.

Third, once the applicable standard of review has been determined, natural law theory offers reasons within that standard. In the Colorado case, the state supreme court settled, as we have seen, on strict scrutiny. I assume that Finnis thinks that strict scrutiny is the wrong standard to apply to the Colorado law: wrong in the sense that it fails to match the SMEP. But once strict scrutiny is held to be the applicable standard, the need for reasons in support of the state law arises, and natural law theory offers to supply these reasons. The next two sections test the adequacy of those reasons.

IV. DIS-INTEGRATIVE ACTIONS

A. INTRODUCTION

The heart of Finnis's discussion of the moral unworthiness of homosexual conduct is his claim that "genital activity between same-sex partners cannot actualize or allow them to really experience any common good to which they are jointly committed."[59] This is a very strong claim. It is difficult to prove a negative, and indeed Finnis does not in fact consider every candidate for such a common good to see if it is actualized by homosexual conduct. If it can be shown, as I think it can, that there is some common good which is actualized and experienced in lovemaking by homosexual partners who are committed to one another and to their common project, then Finnis's argument

59. Rebuttal Affidavit, *supra* note 11, at 21.

fails. Finnis does not see the common good that homosexual lovemaking by committed partners realizes and expresses because his eye is on a specific binary good, comprehending friendship and the secure transmission of new life, that he associates with genital intercourse as an instantiation of marital community.

I will work through the argument in three stages. First, in the course of introducing the concepts central to Finnis's sexual ethics, I will sort out various senses in which homosexual conduct might be claimed to be unworthy because dismissive of the value of engendering (and securely providing for) new life. While Finnis seems to make such claims, they may only be artifacts of the design of much of his published writing on sexual ethics, with its focus on the moral status of contraceptive practices. Second, I will take up a recurrent theme in Finnis's discussion of homosexual conduct: a treatment of it as (in essential respects) a form of masturbation, or at least morally equivalent to masturbation. I will accept the equivalence for the purpose of the analysis, and show that masturbation may have as its essential object an intelligible good. In the third part of this section, I will challenge Finnis's thesis that "homosexual sex is bad because it is inevitably and radically non-marital in character."[60] I will contend that lovemaking by committed same-sex partners shares in the "two-in-one-flesh" communion that defines marriage.

Finnis appraises homosexual lovemaking within both committed and casual relationships as essentially non-marital and believes that advocacy on behalf of homosexuals' rights conversely must defend "casual same-sex sex acts with various partners."[61] I offer no such defense. My background assumption is that there is something morally wrong with casual sex acts with various partners. I further assume, without testing that assumption here, that however that wrong is worked out, it is equally wrong for same-sex and different-sex encounters. My specific concern is to reject the thesis that lovemaking by committed same-sex partners is essentially non-marital.[62]

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60. *Id.*

61. *Id.* at 22.

62. Finnis makes the sweeping claim that "it is of the essence of 'gay pride' that 'gay' sex is radically non-marital in character—as indeed the very word 'gay' is calculated to convey." *Id.* at 21-22. Those who share Finnis's views are estopped, in my view, from generalizing that same-sex love is inherently casual or uncommitted. The traditional barrier to same-sex marriage, which Finnis approves, must make it marginally harder for same-sex couples to receive effective social support for permanent commitments.

B. The Contralife Will

We begin with the need for an action under a description. Moral reflection, like explanation in the social sciences, proceeds "by referring to the action under a description that makes it intelligible as an opportunity, i.e. as having a point, i.e. as a good (not necessarily 'moral'!), i.e. as a good thing to be doing."[63] As we have seen, the description of homosexual conduct that Finnis provides in his deposition is "bodily acts, on the body of a person of the other sex, which are engaged in with a view to securing orgasmic sexual satisfaction for one or more of the parties."[64] But the phrase "with a view to" is ambiguous. It may mean feeling, wishing, or emotional motivation; or it may mean willing, in the sense of choosing or intending, taking an end as one's object in action. Finnis relies on this distinction between kinds of volition in his argument condemning contraception but vindicating natural family planning (NFP). Contraception, says Finnis, is an act, distinct from the sex act, defined by its object, which is to block the coming into being of new human life. In the proper (non-contraceptive) exercise of NFP, by contrast, "the choice is to-not-cause-the-side-effects-of-the-baby's-coming-to-be by abstaining from causing the baby to come to be."[65] Finnis grants that the emotional wanting of couples in the two cases is "very similar," in that "They do not (emotionally) want that baby. But feelings and wishes are not morally determinative. The wanting which counts morally is willing. . . ."[66]

Finnis's evaluation of sexual activity and of contraceptive practices and NFP requires descriptions of two forms or instances of willing. First, the evaluation rests on a description of the intelligible human good, if any, that is willed by one who undertakes the action in question. Second, the evaluation rests on a description of a will to repudiate an intelligible human good, if any, that is essential to the action in question. A third possibility is intermediate. Those undertaking the action may adopt as their object something that substitutes, in appearance but not in reason, for the intelligible good.

Marital or conjugal sexual intercourse adopts as its object the intelligible goods of friendship and the transmission of human life. Commitment is central to both of these objects. The marital partners, in their love-making, are expressing their commitment to stand by one

63. Fundamentals of Ethics, *supra* note 37, at 34.
64. Finnis Deposition, *supra* note 5, at 15-16; *Sexual Orientation*, *supra* note 9, at 1055.
65. *Every Marital Act*, *supra* note 38, at 405.
66. *Id.* at 405.

another and to provide their children with a secure basis for participation in life's goods. But the choice to contracept is a choice against new life, which is (in and of itself) a repudiation of a human good. A married couple that contracepts and makes love is engaging in two acts. The sexual act is, to an extent, impoverished, because while it can be expressive of feelings of love and friendship, it cannot express and enact the horizontal (between the partners) or vertical (among partners and children) commitments of marital love-making. To that extent, contracepted intercourse "is in one important respect non-marital."[67] The contraceptive act is morally wrong, for it is a rejection of life.

The situation is somewhat different in individual masturbation. In that case, there is but one act, not two. The act takes no intelligible good as its object. It is defined, morally, by a will to substitute certain personal experiences for actions that realize or participate in intelligible goods, such as friendship and the secure transmission of new human life.

Individuation of acts is central to this moral analysis. If one act has two effects, one of which realizes a basic good and the other does not, and if the actor adopts one of those effects as his or her willed object but as to the other merely accepts it as an unintended side effect, then (if the good effect that is intended is proportionate in relation to the bad effect) the act is morally acceptable. This is the principle of double effect.[68] This principle condemns not only adoption of the bad effect as one's ultimate object or end, but also intending the bad effect as a means to an ultimate end. Thus, consistently with the principle of double effect, a very sick person may choose to reject medical treatments because those treatments are too painful or invasive, even though the patient knows that the effect of this choice will be to cause or hasten death. There is but one act in this choice, and in that act the death of the patient is willed neither as the end nor as the means. By contrast, it is unacceptable to target intercontinental ballistic missiles on civilian population centers.[69] While the ultimate goal of this one act, namely deterring nuclear war and thereby saving lives, is an affirmation of the basic good of human life, the chosen means necessarily include intending the deaths of innocents, or at least intending

67. Rebuttal Affidavit, *supra* note 11, at 23.

68. John Finnis, *The Rights and Wrongs of Abortion*, *in* THE RIGHTS AND WRONGS OF ABORTION 85, 102-03 (Marshall Cohen, Thomas Nagel & Thomas Scanlon eds., 1974).

69. JOHN FINNIS, JOSEPH M. BOYLE, JR. & GERMAIN GRISEZ, NUCLEAR DETERRENCE, MORALITY, AND REALISM (1987).

threats against innocent life. Thus the act of targeting the missiles against civilians rejects a basic good, and is *per se* morally unacceptable.

With these ideas in mind, let us consider homosexual conduct, attending to the role (if any) of the dismissal of life (variously conceived) in structuring possible sexual projects. Begin with two people of the same sex, whose friendship has deepened into mutual love, who wish to express their affection to one another, and who wish to do so within a framework of mutual commitment. They have talked with one another seriously about the implications of their choice. They wish to marry one another, but the state will not formally recognize such a marriage. Marriage, in their eyes, means (at least) undertaking obligations of mutual support and fidelity. But let us suppose that they have solemnized their vows in a way that is meaningful to them, in the presence of friends and family, whose support for the partnership they make every effort to enlist. And on their wedding night, for surely they can be said to be wedded even if they are not married in the eyes of the law, they make love to one another.

On this account, the couple's sexual project is fully mutual and fully framed by a will toward commitment. The project is not defined in any way by a will in relation to the transmission of life. On one hand, the couple does not (can not) adopt as its end, in lovemaking, the secure transmission of human life.[70] On the other hand, it is no part of the couple's aim, in lovemaking or in choosing to make love with one another, to avert the creation of human life or to denigrate the importance of such creation. Nor is it any part of the couple's aim to render stable and nurturing home life any less available to children. In no sense, then, is the couple's sexual project oriented or defined by a contralife will.

This same-sex couple is in the same position, with respect to the contralife will, as an infertile different-sex married couple that expresses love and commitment mutually through lovemaking. Finnis says that "The choice to engage in intercourse by those who think they are naturally sterile, permanently or temporarily, cannot involve a contralife will; thinking they are sterile, they cannot choose to do anything whatsoever to impede what they believe to be impossible—the coming to be of a possible person—and so they cannot choose to

70. While this is not the end of the lovemaking, it might be a defining good of the marital partnership, as when a same-sex couple includes children from prior marriages, or (under a hospitable legal regime) children adopted by the couple.

engage in intercourse with that intent."[71] "Moreover, the Church has never taught that marital intercourse is good only if the couple desires to procreate; indeed, couples known to be sterile have never been forbidden to marry."[72]

But now imagine a second scenario. A man and a woman, in love with one another and deliberating marriage, decide to marry in part *because* they know themselves to be infertile. They do not want children. They do want to be able to make love without risking creating a baby. This consideration is part of the reasoning that leads them ultimately to make the marriage commitment that brings them into bed with one another. Here there is a contralife will, and it is ingredient in the couple's marital and sexual project. This project, accordingly, is morally distinguishable from that of the infertile marital couple whom Finnis describes. It is relatively unworthy because it is oriented to the repudiation of life. Indeed, its moral worth is more at risk than that of the fertile heterosexual couple that contracepts, for in the latter case the contraception is an independent act.

The second scenario seems somewhat unlikely. Romantic attachment, mutual commitment and the implications of lovemaking are too significant to hazard on the fortuity of finding a partner with whom one can have sex without fear of engendering a baby.[73] For these same reasons, and more, it is very unlikely that individuals would choose same-sex intercourse over different-sex intercourse due to the fact that the former is proof against conception. It is equally unlikely that two individuals of the same sex, who have no definitive view of themselves as heterosexual or homosexual, but who are in love with one another and wish to express that love physically, would regard as a decisive consideration (or even as any consideration) in their deliberations, that if they did indeed make love to one another as wedded partners, they would be proof against conception. But when Finnis claims, in his deposition, that laws forbidding discrimination on the basis of sexual orientation would teach that homosexual conduct "is a type of sexual activity as good as any other (and per se much less

71. *Every Marital Act*, *supra* note 38, at 404.

72. *Id.* at 365.

73. Persons with children from prior marriages, however, sometimes want partners who have undergone medical procedures such as vasectomy or tubal ligation.

involved with onerous responsibilities than is the sexual union of husband and wife),"[74] he implies that people do adopt homosexual conduct in part because they want to avoid the risks of conception and the duties of parents.

This implication cannot be a conceptual claim. Even as a descriptive claim, it seems entirely unlikely. But even if it infrequently happens that persons choose same-sex partners because they want to avert pregnancy, there is no reason to believe that this happens more frequently than persons choosing sterile different-sex partners to achieve the same end. If the general moral rule, that is the institution-framing rule, is as Finnis describes and accepts it—namely, that the Church does not bar infertile couples from marrying and having sex together—then in just this one respect (at least), the general rule would have to be the same for same-sex couples.

Other, even less likely scenarios may be imagined. Suppose that among those many people who choose celibacy, there are a few who do so not because they love their privacy or because they wish to perfect their relation with God, but because they are morally scrupulous and wish to avoid placing themselves in a position where they might form a contralife will. Such persons fear that if they made themselves available for sexual partnership, even in marriage, they might be led by the power of their sexual desire to engage in contraception, which would be wrong (they believe) because contralife. So they choose celibacy to eliminate the risk of forming a contralife will and acting on that will.

Now suppose that some persons, for just the same reasons, choose to pursue same-sex love exclusively. Their will is not (any more than that of the similarly situated heterosexuals) contralife. Indeed, it is a will against a contralife will. However one appraises this curious will and the projects defined by it, the appraisal would necessarily be the same for both the heterosexual celibates and the scrupulous homosexuals.[75]

Apart from Finnis's unguarded remark quoted above, and from the fact that Finnis characterizes homosexual conduct as masturbatory

74. Finnis Deposition, *supra* note 5, at 15; *Sexual Orientation*, *supra* note 11, at 1055.

75. The scrupulous homosexuals would be situated similarly to the right-thinking practitioners of NFP, who choose to have sex during infertile times in the woman's cycle. They are choosing to omit to do actions which might have, as an unintended effect, the engendering of babies. *Every Marital Act*, *supra* note 38, at 405.

(which may imply some form of rejection of the good of life in transmission),[76] Finnis is not centrally concerned to tie such conduct to a contralife will. For the reasons I have suggested in the preceding scenarios, I believe that it would be best simply to rule out that line of attack.

Two possibilities remain. First, Finnis is (in part) contending that the adoption of homosexual projects (even within the factual setting of my first scenario, that of the committed and wedded same-sex couple) is oriented to no intelligible good at all. The couple in question is actually (appearances to the contrary notwithstanding) unable, in making love, to express or actualize any common good. Notice that this critique is only metonymically a claim that homosexual projects are contralife. That is, the conduct is against life because it is not for any of the basic human goods that make life reasonably worthwhile (and not because it entails a will against conceiving, bearing and begetting, or raising children).

Second, Finnis is (in part) describing homosexual conduct as a simulation of real goods. The simulation is in essence the same as plugging into Nozick's "experience machine." Feelings of mutual good will are substituted for the expression and realization of actual common goods. Appearances of consummated marital friendship are substituted for the reality. And, like all decisions to plug into the experience machine, the homosexual decision is a kind of suicide. The life against which one is choosing is not the averted baby's, but one's own (and perhaps one's partner's).

I will address the two possibilities together because they both fail if it can be shown that homosexual conduct takes as its object, under the circumstances I have laid out, a real common good. My line of thought is as follows. In the next part, I argue that even masturbation, which is Finnis's *reductio* of homosexual conduct, is not necessarily alien to the expression and realization of an intelligible human good. In the concluding part, I restore the circumstances of mutuality of affection and commitment and argue that it is wrong to deny to the wedded same-sex couple the social opportunity to marry.

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76. Whether masturbation essentially involves a contralife will tracks the analysis of relational sexual conduct. For example, a person could choose masturbation exclusively in order to avoid unwanted pregnancies and parental responsibilities, or (like the "scrupulous" homosexual) to avoid the risks of forming a contralife will, and so on. The question of whether a person who chooses to masturbate is necessarily choosing to plug into the experience machine is considered in the next part.

C. A Natural Law Theory of Masturbation

Despite the fact that much of Finnis's published discussion of homosexuality is incidental to his treatments of contraception, his critique of the former is not in fact closely allied to his assault on the latter. This is evident in his definition of homosexual conduct in the deposition. That definition is framed in terms of specified behaviors ("bodily acts, on the body of a person of the same sex"), done in pursuit of certain satisfactions ("with a view to securing orgasmic sexual satisfaction").[77] Finnis explains elsewhere that sexual acts (or at least illicit ones) can be specified in terms of regular behavioral patterns (like shaking hands), while contraception as an act must be specified by its point rather than by any common behavioral pattern (like apologizing, which has a common point but which can be done in many different ways).[78]

This explanation fails to clarify the many difficulties that surround the typification of acts for purposes of moral choice and judgment. If kinds of sexual acts can be typified behaviorally, why does the definition of homosexual conduct include, as a criterion, its "point"? (Notice that even shaking hands, as a kind of act, must be specified not only by a visible behavior but also by beliefs and desires of the actors, rendered meaningful by certain social conventions.) If the specification of homosexual conduct must include a reference to the point of that conduct, why is that point identified as "securing orgasmic sexual satisfaction"?[79] Apparently heterosexual conduct cannot be individuated in the same way because the act-kind thus generated, "bodily acts, on the body of a person of the other sex, which are engaged in with a view to securing orgasmic sexual satisfaction," would fail to differentiate marital conjugal intercourse, a morally distinct kind in Finnis's view.

Finnis confidently states that acts are of this or of that kind. For example, he affirms that marital sex acts are, "as human conduct, acts of the reproductive kind."[80] In an article on family planning, he denies that *in vitro* fertilization and other such procedures are acts of

77. *Sexual Orientation*, *supra* note 11, at 1055.

78. *Every Marital Act*, *supra* note 38, at 369.

79. I am uncertain whether Finnis believes that there are acts such that, conceptually, they cannot take intelligible goods as their objects; and, if so, whether Finnis regards homosexual conduct (on his specification) as such an act.

80. *Sexual Orientation*, *supra* note 11, at 1067.

the reproductive kind.[81] In Finnis's hands, acts sort themselves readily into distinct kinds which are related either internally, or instrumentally, or negatively, to equally distinct kinds of human goods. But both the act kinds and the good kinds may be specified in potentially infinite ways, varying in level of generality and in the features highlighted or backgrounded by the description. Homosexual love-making, as a kind, would not be specified in just the same way that Finnis typifies homosexual conduct because the behavioral criterion would shift to include embraces other than those involving intercourse and because the "point" of the conduct would not be orgasmic satisfaction but (to be redundant) making love.

If the purpose served by specifying act kinds is to classify them for ready identification and sorting, as in a tax code perhaps, it may be desirable to fasten where possible upon observable patterns of behavioral difference and to neglect the underlying variety of purposes and intentions. If we wanted to discourage people from kissing in public places, or to raise some revenue in a novel and amusing if somewhat puritanical way, we could levy a tax on such kisses. To do so effectively, we would need to define what is to count as a kiss. Presumably we would rely on certain overt behavioral cues, necessarily framed in terms of certain intentions but hardly marking the complete phenomenology of the kiss. But if we wanted not to tax kisses but to assess them morally, so that we can know when, in what way, and whom it is good to kiss, the outward behaviors would prove an insufficient basis for differentiation. A pure phenomenology such as Sartre's might also be adjudged inadequate.[82] We would have to make do with some necessarily tentative and imperfect generalizations relating, *inter alia*, the outward conduct one proposes to engage in, the personal meaning and intention behind the conduct, and the possible meaning and value of the contact to one's partner. Such generalizations would be hazardous, lest they fail to distinguish, as possible communal realizations of possible intelligible goods, between the kiss of peace exchanged between two co-religionists in a church and the french kiss exchanged between two teenagers in a parked car.

What we most need, then, is an ethics of seriousness, fidelity, and sensitivity in a world in which neither acts nor goods can be sorted into kinds as confidently as Finnis imagines. Because Finnis treats

81. *Every Marital Act*, *supra* note 38, at 410-11.

82. *See* Jean-Paul Sartre's phenomenology of the caress, BEING AND NOTHINGNESS 484-515 (1966) (lover experiences the subjectivity of the other by closing eyes during caress).

homosexual conduct as the moral equivalent of masturbation, I will take masturbation as my central illustration of the need for care in specifying act-kinds and relating such act-kinds to kinds of goods.

Finnis has in mind an act-kind, masturbation, that has three features. First, the act-kind is defined in terms of some behavioral pattern. (Finnis, does not, I think, state the defining pattern. He would find it somewhat difficult to frame masturbation behaviorally in terms of standard instances of observable conduct, not only because of differences between ways that men and women masturbate but also because of the significance in masturbation of fantasies.) Second, so defined, the act may be instrumentally related to an intelligible good, but the act itself cannot realize (participate in) such a good. A married person might masturbate, for example, in order to release sexual tension that might otherwise lead to infidelity.[83] Third, the act essentially repudiates the twin intelligible goods of marital communion (friendship and the secure transmission of human life), substituting pleasurable sensations for action that realizes true goods. In sum, a person might masturbate to stay awake, much as one might drink coffee; or a person might reach orgasm in order to go to sleep, much as one might drink warm milk; but masturbation itself instantiates nothing other than the pursuit of experienced satisfactions.

But suppose that the solitary masturbator is a poet. I will take Arthur Rimbaud as my test case.[84] Suppose that the adolescent Rimbaud is capable of visions of almost unspeakable intensity and power. But what is more extraordinary is that the young Rimbaud can speak the unspeakable, in language that presses language more than it had yet been pressed. Rimbaud masturbates, shall we say, because this is part of a life that necessarily involves (in his famous phrase) "un long, immense et raisonné dérèglement de tous les sens."[85] The project is committed to unruliness, but it is not a spurning of reasonableness; the dissociation of the senses from their ordinary objects and contexts is precisely "raisonné," reasoned.

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83. Compare Finnis, "a husband's resort to a good-time girl may be intended to . . . contribute[s] in some way to the stability and peace of the marriage." *Personal Integrity*, *supra* note 40, at 53.

84. I do not rest the following argument on the premise that Rimbaud, or indeed anyone else, ever acted in just the way I describe.

85. ARTHUR RIMBAUD, OEUVRES POETIQUES 17 (1964). Rimbaud describes his poetic project in this way:

> Universal Mind has always thrown out its ideas naturally; men would pick up part of these fruits of the brain; they acted through, wrote books with them: and so things went along, since man did not work on himself, not being yet awake, or not yet in the

Rimbaud's specific concern is precisely with the *intelligible* good, with opportunity and worth. But the realization of that good—and it is just here that we test the place of the natural in a natural law theory—requires Rimbaud, or so he believes, to challenge the regime of the senses, which conceals as much as it discloses.[86]

Rimbaud's aesthetic achievement, let us stipulate, is of the first magnitude. What is in doubt is not the realization of the good in action, for his poetry is surely such a good. If there is any doubt, it is, first, about the nexus between the masturbation and the poetry, and, second, about the maturity or stability of this kind of aesthetic undertaking.

The nexus between the masturbation and the poetry could be only an external or instrumental connection. Coleridge, of course, took opium and laudanum, and was also a poet some of whose works are equal (at least technically) to anything in the English language. If we may indulge, for the purpose of the inquiry, Coleridge's own account of the genesis of "Kubla Khan," then the poet owed his vision of the pleasure-dome to two grains of opium (and the fragmentary nature of the poem is owing to the unfortunate knock on the door by the person from Porlock that prematurely roused Coleridge from his reverie).[87] I mean, through (excessive) simplification, to set up a kind of polar or extreme case: Coleridge's use of drugs (on this account) was related to his creation of poetry only as a means to an end, and not as an act to its own inherently intelligible object. More specifically, the poet's use of the drugs can be described as a mode of production.

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fullness of his dream. Writers were functionaries. Author, creator, poet,—that man has never existed!

The first study for a man who wants to be a poet is the knowledge of himself, entire. He searches his soul, he inspects it, he tests it, he learns it. As soon as he knows it, he cultivates it: it seems simple: in every brain a natural development is accomplished: so many egoists proclaim themselves authors; others attribute their intellectual progress to themselves! But the soul has to be made monstrous, that's the point. . . . Imagine a man planting and cultivating warts on his face.

One must, I say, be a *visionary*, make oneself a *visionary*.

The poet makes himself a *visionary* through a long, a prodigious and rational disordering of *all* the senses.

Arthur Rimbaud, *Letter to Paul Demeny*, *in* ILLUMINATIONS AND OTHER PROSE POEMS xxx (Louise Varèse trans., 1957) [hereinafter ILLUMINATIONS].

86. I pursue these themes at greater length in *Gnostic Due Process*, 7 YALE J.L. & HUMAN. 97 (1995), in which I discuss gnostic anti-naturalism in William Blake and in certain traditions within American constitutional law.

87. Samuel Taylor Coleridge, *Kubla Khan*, *in* 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 353 (M. H. Abrams et al. eds., 5th ed. 1986).

Finnis, following Aristotle, distinguishes action from production. Action is governed by practical reasoning, while production is subject to norms of craft.[88] But activity that actualizes beauty in writing surely participates in and expresses a deeply intelligible human good,[89] just as the pursuit of study participates in the basic good of knowledge. Coleridge's conduct in writing "Kubla Khan" certainly realizes, indeed uniquely so, an opportunity to share in one of life's sensible and intelligible goods. His poetic conduct is in this respect morally equivalent to his deeds of friendship, including for example his friendship with Wordsworth. Indeed (recalling the *Lyrical Ballads*, the long walks in the Lake District, and so on), the good of his friendship with Wordsworth may not be severed from the good of his partaking in the poetic life, except at the price of artificiality. But Coleridge's use of opium does seem so severable. It helped produce the poems (let us assume), but nothing more. In itself, taking the opium was plugging into the experience machine (with this twist: that when the knock at the door disconnected Coleridge from the machine, he was able to write his visions in immortal poetry).

Cannot Rimbaud claim a more essential connection between his masturbation and his vision? What he proposed, after all, was a sustained and reasoned unruliness of the senses. His masturbation enacts that proposal, let us say. Masturbation, in his case, bore the same integral relation to his project that Wordsworth's country walks bore to his creative imagination and to his writing of poetry, or that the friendship of Wordsworth and Coleridge bore to the realization of

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88. MORAL ABSOLUTES, *supra* note 1, at 101-02 (difference between ethics and *techne*); *Sexual Orientation*, *supra* note 11, at 1075 (difference between *praxis* and *poiesis*).

89. In *Natural Law and Natural Rights*, Finnis includes "aesthetic experience" among the basic human goods. He recognizes that appreciation of the beautiful may be good in itself (as is appreciation of the true), or good in connection with a creative project. "Aesthetic experience, unlike play, need not involve an action of one's own; what is sought after and valued for its own sake may simply be the beautiful form 'outside' one, and the 'inner' experience of appreciation of its beauty. But often enough the valued experience is found in the creation and/or active appreciation of some *work* of significant and satisfying form." NATURAL LAW AND NATURAL RIGHTS, *supra* note 2, at 87-88. Given his use of the thought-experiment of the experience machine to show the uniquely valuable nature of activity, Finnis may want to refine these brief remarks further to bring out differences between the kind of aesthetic experience one may have while plugged into the experience machine, and the kind of aesthetic project that necessarily involves action whose object is realization of the beautiful. Creation, perhaps, supplies the active element in aesthetic appreciation, just as analysis, memorization, proof, critique, etc. supply the active element in projects whose object is knowledge. But it would be a mistake to differentiate these active elements too completely, associating them solely with specialized or professionalized routines. The artist's realization of the beautiful in and through making love may offer an extreme case of an ordinary life project, much as the scholar's or scientist's pursuits vividly represent the more pervasive opportunity to participate in the good of knowledge.

their opportunities for participation in the creation and appreciation of beauty. Masturbation was to Rimbaud what exercise is to the physically fit. What he wanted was a real deregulation of the senses, not an imitation, just as the fitness enthusiast wants real exercise, not a drug that induces an indiscernible "high." As Finnis says, "appearances are not to be substituted for reality."[90]

On this account, Rimbaud's masturbation is, in form, a deeply integrative act. Rimbaud is neither experientially simulating or counterfeiting a basic good, nor treating his body as a mere means of producing experiences. Indeed, in the act of visionary masturbation, Rimbaud is more thoroughly integrated than the scholar who sits in his armchair, reading a book which he hopes will bring him a better understanding of the subject matter of his own writing. For the scholar is only using his arms and hands because he happens to have them; a simple page-turning machine would do as well. Even the eyes are being used, perhaps overused, for the purpose of feeding the mind's interest in knowledge and critical reflection. But everything that Rimbaud senses while masturbating is qualified for meaning by the underlying project of systematic sensory unruliness.

Finnis says that:

> One can choose to engage in a form of sexual activity which lacks all the constitutive elements of personal integrity. This form of activity, when chosen, goes under the name 'masturbation.' This act, while it lasts, isolates the individual within his or her own self-consciousness, in order to achieve an effect within that self-consciousness or 'experience'. . . . [In masturbation,] the body is being used as an object, in particular as an instrument of self-consciousness. For one's bodily activity, in masturbation, bears no more relationship to the real-ising of any chosen good outside self-consciousness than the choice to plug into a lifetime of experiencing the writing of great novels bears to the writing of great novels. In masturbation, one's bodily activity is not serving the transmission of human life; nor is it expressing a choice to communicate with another person; those choices and their carrying out are only simulated.[91]

The central mistake that Finnis makes here, and it is characteristic of his writing on sexual ethics, is the assumption that because the activity in question does not "serve" (a curiously instrumental formulation) the basic goods that Finnis has in mind (friendship and transmission of

90. *Personal Integrity*, *supra* note 40, at 45. Rimbaud requires *real* masturbation, not a substitute.

91. *Id.* at 46-47.

life), it serves no basic goods at all. But this is not correct in the case of Rimbaud. His act not only "serves" the basic good of beauty (or, if one likes, knowledge of the beautiful), it truly participates in that good. His act bears a very close relationship indeed to the real-ising of the chosen good outside self-consciousness; the same relation, one supposes, that obtained between Wordsworth's country walks and his poetry, or Eliot's scholarship (or church-going) and *his* poetry.

Finnis treats masturbation as if it were the organic incarnation of the experience machine. This is wrong for the reasons shown, but the idea is intuitive enough to be turned against Finnis's own claims in the following way. Surely, Finnis implies, masturbating while fantasizing that one is writing a great novel is a sham, a choice for hollow experience over worthy activity. If so, it would be equally wrong for Rimbaud to masturbate while fantasizing that he was writing great poetry. But what Rimbaud actually did (on my reconstruction, at any rate) was to masturbate poetically, integrating body and mind in a fully engaged way, the better to rid the senses of the naturalistic integuments that bind them, falsely, to specified acts defined in terms of specified goods. His peculiar muse enabled him to speak of "la fille à lèvre d'orange, les genoux croisés dans le clair déluge qui sourd des prés, nudité qu'ombrent, traversent et habillent les arcs-in-ciel, la flore, la mer."[92]

Now, if one doesn't like the idea of a girl with orange lips, knees crossed in the clear flood gushing from the fields, nakedness traversed by rainbow, flora, sea, then one isn't going to find much to like in Rimbaud, and therefore perhaps one will find even less to like in the thought of him masturbating in quest of haunting verbal beauty. One reason not to like the image of the girl with orange lips is that, in nature, girls don't have orange lips. Moreover, nature does not supply "nakedness shaded, traversed, dressed by rainbow, flora, sea." But this set of aesthetic values has nothing whatsoever to do with intelligible goods. It has to do with things following their nature, as they are meant to do according to an older interpretation of natural law, an interpretation that Finnis (to my mind rightly) rejects. It will not do to say that lips ought not be orange, any more than it will do to say that sexual activity ought to be about friendship or reproduction, any more

92. Rimbaud, *Enfance*, *in* ILLUMINATIONS, *supra* note 85, at 6. "The girl with orange lips, knees crossed in the clear flood that gushes from the fields, nakedness shaded, traversed, dressed by rainbow, flora, sea." *Id.* at 7.

than it will do to say that masturbation is, inherently, in its nature, sexual.

In the deposition, Finnis states his central claims in the following way.

> In masturbating, as in being masturbated or sodomized, one's body is treated as instrumental for the securing of the experiential satisfaction of the conscious self. Thus one dis-integrates oneself in two ways, (i) by treating one's body as a mere instrument of the consciously experiencing self, and (ii) by making one's choosing self the quasi-slave of the experiencing self which is demanding gratification. The worthlessness of the gratification, and the dis-integration of oneself, are both the result of the fact that, in these sorts of behavior, one's conduct is not the actualizing and experiencing of a real common good. Marriage, with its double blessing—procreation and friendship—is a real common good. Moreover, it is a common good which can be both actualized and experienced in the reproductive organs of a man and a woman united in commitment to that good. Conjugal sexual activity, and—as Plato and Aristotle and Plutarch and Kant all argue—*only* conjugal activity is free from the shamefulness of instrumentalisation which is found in masturbating and in being masturbated or sodomized.[93]

But there is no necessary dis-integration of the self involved in masturbation, because masturbation is no more (necessarily, essentially) about gratification than marital love-making is. There is no necessary instrumentalization of body in relation to experiencing self, or necessary subordination of the choosing self to the experiencing self, because masturbation may be an act adopted to enact and express an aesthetic worth, intelligible to reason, that may loom as large in one's practical reasoning as knowledge in the reasoning of the scholar. Hence there is no regressive substitution of gratifications for goods. Because the act is undertaken in relation to its own good, there is no contralife will; that is, while the act is not procreative, choosing the act is not choosing against life. And because the act is generative and expressive of something inherently shareable, in this case the language of poetry which is meant to be communicated, there is a truly common good to be expressed and actualized, albeit not the conjugal good.

But I expressed, above, a second reservation about Rimbaud's project. Even if it is oriented to an intelligible good, and that in a way that unites the act (under a description) to a basic good as its object, it

93. Finnis Deposition, *supra* note 5, at 27-28; *cf. Sexual Orientation*, *supra* note 11, at 1063-69.

is not the sort of project (perhaps) that expresses the worth of life activity from the most serious and stable vantage-point. In an early and (I think) very valuable formulation of the requirements of natural law, Finnis said that "A philosophical exploration of the implications of natural law is not a decree from Sinai, nor an ecclesiastical unfolding of divine revelation. Rather, it is an exposition of the loves that a man finds in his heart when he sees himself steadily and whole, and a measuring of the demands made on him by these loves."[94] Finnis, echoing Augustine, went on to say that "every mis-measurement of the demands of the natural principles of practical reason results from some slackness in love, in caring for an intelligible good."[95] Doesn't Rimbaud's unique value as a poetic life lie precisely in the unrelenting, utterly committed way in which he expressed the courage and vision of adolescence? Isn't Rimbaud's personal and authorial integrity confirmed precisely by the fact that he stopped writing poetry at the age of nineteen?

In filling out a natural law theory, one wants not only to accommodate challenging redescriptions of acts, discovering in those acts affirmations as well as negations, but also to maintain a perspective that sees the possible maturation of these affirmations into lifelong commitments. This is the perspective that Finnis describes when he speaks of "the loves that a man finds in his heart when he sees himself steadily and whole." It is within this perspective that marriage takes on its special meaning and value (and also, recalling Kierkegaard, its unique challenge to the vocation of the "single one.")

D. Essentially Marital

Let us return, then, to homosexual conduct. Finnis's treatment of homosexual conduct is framed by comparisons with contraception and masturbation, and by contrast with marital heterosexual intercourse open to procreation. The comparison with contraception is flawed from the start, both because (as Finnis says) the contraceptive act is distinct from the sex act, and because (as I have argued) adoption of homosexual conduct does not necessarily involve a contralife will. The argument that homosexual conduct is unworthy because it is centrally like masturbation which is clearly unworthy—the argument on which Finnis leans throughout the deposition and elsewhere—is

94. John Finnis, *Natural Law in Humanae Vitae*, 84 Law Q. Rev. 467, 469 (1968) [hereinafter *Humanae Vitae*].

95. *Id.* at 469.

flawed as well. For even if the comparison holds, masturbation is not necessarily dis-integrative in any of the ways that Finnis claims it is. So if homosexual conduct is centrally like masturbation, it is not necessarily dis-integrative.

But the claim that homosexuality is centrally like masturbation and essentially non-marital must itself be rejected. Finnis's argument rests on the concept of a biological union, and on a claim about the place of that union in the lovers' common good. Here is Finnis's account of the ancients' critique of homosexual conduct.

> [H]omosexual conduct (and indeed all extra-marital sexual gratification) is radically incapable of participating in, actualizing, the common good of friendship. Friends who engage in such conduct are following a natural impulse and doubtless often wish their genital conduct to be an intimate expression of their mutual affection. But they are deceiving themselves. The attempt to express affection by orgasmic non-marital sex is the pursuit of an illusion. The orgasmic 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); that orgasmic union therefore can actualize and allow them to experience their real common good—their marriage with the two goods, children and friendship, which are the parts of its wholeness as an intelligible common good. But the common good of friends who are not and cannot be married (man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit. So their genital acts together cannot do what they may hope and imagine.[96]

This passage reflects not only Finnis's good will but also his insight and rigor as a philosopher. Far from denying that homosexual partners may entertain, from their subjective points of view, hopes and wishes of love and loyalty that animate and color their lovemaking—a denial that would open his argument to resounding descriptive objections—Finnis makes it clear that he assumes that this may be so. But he goes on to say, "In reality, whatever the generous hopes and dreams with which the loving partners surround their use of their genitals *that use* cannot express more than is expressed if two strangers engage in genital activity to give each other orgasm, or a prostitute

96. Finnis Deposition, *supra* note 5, at 28-29.

pleasures a client, or a man pleasures himself."[97] In other words, subjective generosity does not stop homosexual conduct from being radically non-marital and, in essence, masturbatory.

I must confess that I do not begin to understand how Finnis squares these claims with his endorsement of the traditional Christian view that a man and a women, though sterile, may marry and make love in marriage.

> A husband and wife who unite their reproductive organs in sexual intercourse do function as a biological (and thus personal) unit and thus do actualize and experience the two-in-one-flesh good and reality of marriage, even when some biological condition happens to prevent that unity resulting in reproduction of a child. The same cannot be said of a husband and wife whose intercourse is masturbatory, for example sodomitic or by coitus interruptus or fellatio. Such acts do not consummate their marriage in law, because (whatever the couple's illusions of intimacy in such acts) they do not actualize the marital good (which is not *merely* procreative) in reality.[98]

Finnis finds all of this "clear enough," but I worry that the premises needed to make it clear reduce the new formulation of the principles of natural law to the sort of naturalism that Finnis rejects in his ethical writings. Why do a man and a woman "function as a biological unit" when a certain sort of coupling takes place, even when conception cannot occur, yet do not so function when they couple in a different way, in which conception is no less (if no more) likely to occur? If the answer is only that the one form of coupling is more adaptive for the whole species than the other, insofar as it enables the species to survive through reproduction, then Finnis's whole argument against the sex acts that he believes to be essentially non-marital is that they are unnatural in the old-fashioned, ought-from-is sense. I will not consider the merits of such arguments here, but must confess to sore disappointment that the trail leads back to them.

More basically: just what is meant by "function as a biological unit," and why ought a practical reasoner, alive to intelligible goods and their motivating power, aspire to such function? Finnis has argued that dualisms ought to be resisted: that the person is the living body (persons don't *have* bodies).[99] The basic good of human life,

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97. *Id.* at 30. *Compare Sexual Orientation*, *supra* note 11, at 1067.

98. *Id.* at 31. *Compare Sexual Orientation*, *supra* note 11, at 1068.

99. *Reflections*, *supra* note 44, at 568-69.

then, is the good of the living, embodied person. It is wrong to repudiate that good, argues Finnis: wrong in euthanasia, wrong in abortion, wrong in suicide. While many would quarrel with these claims, let us assume them here. They establish, let us say, that the functioning of the human person as a biological unit is a basic human good. But if a couple engaged in intercourse is a biological unit, it is so metaphorically or in some other sense. The meaning of the biological unit in the dyadic sense is elusive. Finnis argues, for example, that *in vitro* fertilization and artificial insemination are unacceptable,[100] even though there is a sense in which the parties are "functioning as a biological unit" (as are, say, blood or organ donors and donees).

Finnis says that "Marital love primarily is the bond which is constituted by the mutual commitment which the couple make when they marry and which they nurture by mutual faithfulness."[101] I accept this description. Its stress on mutual commitment and faithfulness aptly distinguishes marriage— by whatever name it is called in societies— from transient relations, by whatever name they are known (and they are often known as marriages). Elsewhere in the same essay, Finnis says that "Marital love begins with the mutual commitment which constitutes marriage and is fulfilled by the marital intercourse which consummates it. That act of sexual intercourse realizes the husband and wife as two in one flesh and provides them with the experience of being married."[102] This, too, seems right to me. The concept of "two in one flesh" differs, I think, from that of the functioning biological unit. Nature allows us so to function, or in its indifference prevents us. But grace enables us to be "two in one flesh," despite nature's cruelty or caprice. And grace enables us to be "husband and wife," in sacramental memory of God's redemptive action in history.[103] The power of grace to join us in one flesh is not restricted by our chromosomes.

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100. *See Personal Integrity*, *supra* note 40, at 54-55; *Every Marital Act*, *supra* note 38, at 410-11.

101. *Every Marital Act*, *supra* note 38, at 413.

102. *Id.* at 392.

103. In the edited and expanded version of his argument, in a passage which I have been unable to trace to his affidavits, Finnis qualifies his account of the goods realized in and by marriage, referring to "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" (emphasis omitted). *Sexual Orientation*, *supra* note 11, at 1066. But the order of grace is not to be brushed aside. Without grace, what is to sustain the goodness of friendship and parenthood against the inevitable failures of our commitment and mutual understanding? With grace, what obstacle can prevent the realization of these goods?

V. MORAL REASONING AND STANDARDS OF REVIEW

The holding that "the protection of morality" is not a compelling state interest, but is at most substantial, provides a useful lens with which to examine the specifically constitutional significance of natural law arguments. The natural lawyer supplies a reasoned evaluation of various courses of conduct, appraising some as practically reasonable and others as practically unreasonable. For the special purposes of constitutional law, one must decide not only whether these reasoned evaluations and appraisals are persuasive, but how persuasive, and in what way persuasive. The whole point of strict scrutiny, one might say, is that a governmental decision to act on behalf of certain beliefs and goals may be reasonable but not reasonable enough, or not reasonable in just the right way. So it is necessary not only to address Finnis's position as an argument in ethics (section IV, *supra*), but also to hold it up to a constitutional standard of reasonableness.

Finnis contends that the framework of his argument rests on "reflective, critical, publicly intelligible arguments which meet the highest standards and demands of rationality."[104] What are these standards and demands of rationality, and does an argument that satisfies them also (and for that reason) satisfy strict scrutiny? This is a way of asking what it might mean for "the protection of morality" to be a compelling state interest, and whether the Colorado Supreme Court is correct in deciding that such protection is at most a substantial and not a compelling interest.

Moral harms to self, of the sort that Finnis (following the main line of argument in western ethics) defines and denounces, may be very substantial. Certain forms of drug addiction dethrone the subject by making him or her the slave of gratifications. Loss of interest in or capacity for action oriented to the realization of goods is a grievous harm, as is the addictive undermining of effective choice. There is assuredly nothing inherent in the concept of a compelling state interest, or in the policies and principles underlying that concept, which precludes a legal judgment that the state's interest in averting these moral harms is compelling. The validity of that judgment depends on the reliability and accuracy with which types of overt, regulable conduct (here, the taking of certain drugs) can be associated with moral harms ("slave of gratifications").

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104. Finnis Deposition, *supra* note 5, at 15. *Compare Sexual Orientation*, *supra* note 11, at 1055.

True enough, the harms to self will almost always be accompanied by harms to others, and the social interest in preventing the latter kinds of harms may contribute to the judgment that the overall state interest is of very high magnitude. Finnis's own arguments take on this mixed form when they stress the community's responsible freedom to organize the marital family in ways that the community reasonably believes will accord to all, including potential parents and potential children, opportunity to share in the intelligible goods that make human life worthwhile. But even if the harms to self disclosed by moral reflection were more purely self-regarding, those harms could be so monstrous as to make the interest in averting them compelling (or at least to bring the judgment that it is compelling well within the bounds of legitimacy).

The difficulty arises in determining whether life projects and choices, especially when defined in superficial legal action-classifications,[105] necessarily entrain monstrous harms to self. This determination, in the interesting cases, rests on choices among act-descriptions, good-descriptions, and alternative connections between the acts and goods. Just here, the claim that high standards of theoretical or critical reasonableness can be met seems relatively implausible. As the discussion in section IV, above, makes clear, the complexity of the human condition may make it extraordinarily difficult to settle reasonably on an act-type description and a good-type description that relates the one to the other with sufficient certainty to warrant evaluative conclusions. Finnis's confidence in detecting and denouncing "mutilations" of worthwhile life activity[106] is not warranted by the nature and methods of practical reasonableness.

Finnis's overall estimate of the powers of reason is complex. First, reason is capable of discerning intelligible goods, which serve as the first principles of practical reasoning. In practical reflection on what is to be done, we see that certain activities are worthy, intelligibly good. Second, reason is unable to dictate a uniquely right project, life plan, or social policy, because (Finnis argues) maximizing the good

105. Suppose that the law permitted a landlord to refuse to rent an apartment to a potential tenant on the ground that that person masturbates. (Robert George says that such a permission would be proper. Deposition of Robert George at 95 (October 8, 1993). It seems inappropriate to carve out from this rule a "Rimbaud exception" for (say) tenants engaged in masturbation thoroughly integrated with an aesthetic project oriented to the realization of beauties otherwise restricted by naturalistic limitations on the range and application of the senses. Legal action classifications are necessarily more superficial.

106. Finnis speaks of "intercourse mutilated by contraception." *Every Marital Act*, *supra* note 38, at 420.

or identifying the greatest proportion of good to bad is incoherent. Thus, we are free in a strong sense to choose different paths, all of which have worthy "points" or purposes. Third, our choices of these paths are subject to certain strict negative precepts, which are themselves the fruit of reason. For example, one is not to take as one's object the repudiation of any intelligible good. Actions undertaken with a contralife will, Finnis says, are per se immoral, regardless of their further purposes or effects, because they are defined morally by that which is nothing other than bad, that is, the rejection of life.

I would not say about the first and third operations of reason what Finnis says about the second, namely, that the operation does not get off the ground because it is "incoherent." Mine is the weaker claim that the rational discernment involved in relating acts (under descriptions), positively or negatively, to goods (stated at various levels of generality), is necessarily a matter of great subtlety, calling for extraordinary self-restraint and sensitivity to complexity and nuance. Two people decline a proffered portion of pork, but just what they are embracing and what they are spurning may well be quite different. How and when one puts what foods in one's mouth, how and when one touches oneself or someone else: God only knows—literally—just how the intelligible goods embraced and rejected in these everyday patterns are to be made out. As Finnis believes that the "proportionalist" makes knowledge claims that are immodest and usurp God's providence,[107] so I believe that the natural law theorist always runs the risk of absolutizing act-classifications that are at best tentative interpretations.

The principles and policies underlying strict scrutiny motivate salutary caution on review of such act-classifications. The court's business is not to reject out of hand, as did the Colorado court, the idea that the state may have a compelling interest in discouraging a certain class of conduct for moral reasons, but instead to probe the interpretations that are offered in support of the classification. The correct result of such an inquiry in a case like *Evans v. Romer* is to hold that the challenged law fails strict scrutiny because the forms of conduct sought to be discouraged (and encouraged) by that law are too heterogeneous to be helpfully and carefully classified according either to the goods that they take as their objects or to the goods that they reject or displace.

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107. MORAL ABSOLUTES, *supra* note 1, at 15-20.

The state's position is hardly rendered untenable by this conclusion. In defense of the challenged law, the state may retreat to an argument that rests on empirical generalization. It may claim that conduct of a certain type is very likely to be bad or unworthy, though it need not be so in every case.

Of the state's population of adolescent masturbating boys, for example, it may safely be estimated that thousands content themselves with the conventions of pornography for every one who, like my hypothetical Rimbaud, rigorously challenges convention itself in the name of a purer perception, a higher beauty, and a more humanized art. The generalization is sound enough, it may be argued, to warrant treating masturbation in just the way prescribed by the Standard Modern European Position (see section III.D., *supra*). While the state does not prohibit masturbation (the limiting case, one may imagine, of unenforceable law), the people (through their elected representatives) are authorized to discourage publicly the view that masturbation is a fully adequate or valid form of sexual conduct.[108]

More generally, the state could adopt Finnis's views about unworthy sexual conduct—that it involves a subordination of the choosing self to the experiencing self—but depart from Finnis's natural law theory by satisfying itself that specified sexual activities generally tend to be unworthy in that way. But this departure represents a serious weakening of Finnis's position, for surely arguments of the sort he musters in his deposition are not persuasive when treated as empirical generalizations. I believe that Finnis would agree that in order for such generalizations to satisfy the highest standards of rationality, they must be grounded in empirical social studies so far as this is possible. Finnis relies on no such studies precisely because his argument is put forward not as an empirical generalization but as a moral assessment of the goodness or badness of kinds of acts as such.

VI. CONCLUSION

In his exposition and defense of moral absolutes, Finnis says that "the tradition, rightly understood, proposes that every exceptionless moral norm is subordinated to the supreme principles of morality:

108. President Clinton's firing of Surgeon General Joycelyn Elders for publicly commenting that masturbation "is something that is a part of human sexuality and it's a part of something that perhaps should be taught" suggests that if the SMEP's double standard does not closely match our constitutional law, it conforms quite well to our political culture. (Ruth Marcus, *President Clinton Fires Elders*, WASH. POST, Dec. 10, 1994, at A12).

love and reverence for God and conformity to reason (which discloses to us something of the mind of God). The specific moral norms are proposed precisely as specifications of, implications of, love of God and of every human person made in his image."[109]

The association of practical reasonableness with our nature as made in God's image and likeness is ancient and deep. It surfaces in our constitutional tradition in Jefferson's appeal to the self-evident truth that all persons are created equal in certain fundamental rights. It is, so far as it goes, a precious insight into human nature, conceived morally. But it does not go far enough.

So long as we relate our moral nature fundamentally to our status as created, we invite a dangerous exaggeration of the powers of reasonableness to disclose the final truth about that which is worthy and unworthy in sexuality as in all of life. An exaggeration of the depravity of reason has proved equally, if not more dangerous. Yet Reinhold Niebuhr was surely right to restate, on expressly Christian grounds, the insight that (within the constitutional tradition) we associate with Madison: "All statements and definitions of justice are corrupted by even the most rational men through the fact that the definition is colored by interest."[110] Niebuhr understood that the conception of love of which we stand in greatest need, as a salutary corrective to our falsely absolutized conceptions of justice, is the utterly gracious and self-giving love which transcends the limits of worthiness, indeed which loves the neighbor precisely in the face of every condition of worthlessness: his, hers, and mine.

> Human nature is, in short, a realm of infinite possibilities of good and evil because of the character of human freedom. The love that is the law of its nature is a boundless self-giving. The sin that corrupts its life is a boundless assertion of the self. Between these two forces all kinds of *ad hoc* restraints may be elaborated and defined. We may call this natural law. But we had better realize how very tentative it is. Otherwise we shall merely sanction some traditional relation between myself and my fellow man as a "just" relation, and quiet the voice of conscience which speaks to me of higher possibilities.[111]

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109. MORAL ABSOLUTES, *supra* note 1, at 99.

110. REINHOLD NIEBUHR, *Christian Faith and Natural Law*, *in* LOVE AND JUSTICE: SELECTIONS FROM THE SHORTER WRITINGS OF REINHOLD NIEBUHR 46, 48 (D.B. Robertson ed., 1967).

111. *Id.* at 54.