

## Homosexuality and the PIB Argument\*

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Some bad arguments never die. Consider, for example, the allegation that approval of homosexuality somehow entails approval for polygamy, bestiality, and incest. This argument has resurfaced recently amid debates about sodomy laws and gay marriage. As U.S. Senator Rick Santorum put it, “if the Supreme Court says that you have the right to consensual sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.” Later in the same interview he compared gay marriage to “man on child, man on dog, or whatever the case may be.”<sup>1</sup>

This argument would not be so worrisome if its use were limited to occasional hyperbolic remarks by politicians. But the “polygamy, incest, bestiality” (PIB for short) argument has been employed by philosophers, Supreme Court justices, and influential political theorists and pundits.<sup>2</sup> Begin tinkering with the institution of marriage, they claim,

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1. Interview of U.S. Senator Rick Santorum by the Associated Press, taped April 7, 2003, published April 22, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?File=news/archive/2003/04/22/national17-37EDT0668.dtl>.

2. Justice Byron White used the analogy in the 1986 U.S. Supreme Court Decision *Bowers v. Hardwick* (478 U.S. 186 [1986]), and Justice Scalia used it in his dissent in the 2003 *Lawrence v. Texas* (539 U.S. 02-102 [2003]). See also Charles Krauthammer, “When John and Jim Say ‘I Do,’” *Time*, July 22, 1996; William Bennett, “Leave Marriage Alone,” *Newsweek*, June 3, 1996; Hadley Arkes, “The Role of Nature,” from the hearing of the House Judiciary Committee, May 15, 1996; all three are reprinted in *Same-Sex Marriage*:

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and you start down a dangerous path with no reasonable stopping point. Their argument is nothing new, having been used before against interracial marriage. But whatever it lacks in originality it more than makes up for in rhetorical force: given the choice between rejecting homosexuality or accepting a sexual free-for-all, mainstream Americans tend to opt for the former.

Unfortunately, sound-bite arguments don't always lend themselves to sound-bite refutations—which is one reason for their appeal. Part of the problem is that the PIB argument is not typically put forth as an argument. Instead, it takes the form of a challenge: “Okay, you sexual liberals: explain to us why polygamy, incest, and bestiality are wrong.” Most people are not prepared to do that on short order. And many answers that leap to mind (e.g., that PIB relationships violate well-established social norms) won't work for the defender of same-sex relationships (since same-sex relationships, too, violate well-established social norms). Accordingly, gay-rights opponents often treat the PIB argument as a kind of trump card in the debate.

In this article I attempt both to clarify and to refute the PIB argument. In the first section, I analyze the argument and consider three familiar but inadequate responses to it. In the second section, I develop my own response while further clarifying the original argument. In brief, my central thesis is that PIB and homosexuality are no more essentially connected than PIB and heterosexuality. In the third section, I explore a different version of the argument associated with “new natural lawyers” such as John Finnis. Although Finnis's version is in some ways superior to the original formulation, ultimately I find his approach untenable. In the fourth section, I return to some lingering questions about the individual practices of polygamy, incest, and bestiality, and I sketch some tentative lines of response.

Before proceeding, I want to make two points clear. First, I want to acknowledge that the PIB argument is stronger than many people think. One might try to dismiss it on Millian grounds: after all, incest often harms children, and polygamy is correlated with the oppression of women, whereas homosexual acts per se produce no such adverse effects. But this dismissal is too quick. For one thing, it covers only a limited subset of PIB relationships (more on this later). Furthermore, most opponents of PIB would retain their opposition even if PIB did not involve obvious harm to participants: there is something in the very form of PIB relationships that opponents find objectionable.

A second important preliminary point regards the different possible

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*Pro and Con: A Reader*, ed. Andrew Sullivan, 282–84, 274–75, and 276–77, respectively (New York: Vintage, 1997). All further citations to the latter three articles will be to the reprinted versions. See also the new natural lawyers information cited in n. 27 below.

objectives of the PIB argument. The PIB argument can be understood as an argument against gay sex (e.g., “If homosexuality, why not bestiality?”—and so on) or as an argument against gay civil marriage. Furthermore, it can be understood variously as an argument about whether the respective practices are morally permissible, whether they should be legally permissible, or whether they are constitutionally protected (cf. Santorum interview, above). So there are actually a variety of different PIB arguments, depending on which combination of the above one has in mind.

In this article, I will be concerned with the argument as a moral argument against sexual relationships between persons of the same sex. I have chosen “sexual relationships” rather than “sexual acts” deliberately to eschew the kind of reductivist thinking about sex that separates its physical from its emotional (or more broadly, personal) aspects—a point that I will make clearer in subsequent sections. Moreover, the focus on relationships fits better with the polygamy analogy (though less well with the bestiality analogy): there are no such things as polygamous “acts,” strictly speaking. Whether this version of the argument has implications for the legal and constitutional debates, or for the gay-marriage debate, depends upon large theoretical issues beyond the scope of this article—for example, the proper function of government, particularly with respect to civil marriage.<sup>3</sup> Insofar as opposition to gay civil marriage stems from the conviction that homosexual relationships are morally wrong, my discussion is likely to have implications for the gay-marriage debate. Nevertheless, in discussing the moral status of homosexual relationships vis-à-vis PIB relationships, I will be addressing legal and constitutional issues only indirectly.

## I. IDENTIFYING THE ARGUMENT

Before developing my own response to the PIB argument, I wish to examine three popular responses: the “slippery-slope” charge, Andrew Sullivan’s “we really exist” argument, and Jonathan Rauch’s “equal options” argument. The first of these dismisses the PIB argument as an instance of the “slippery-slope fallacy.” But slippery-slope arguments are not necessarily fallacious. Whether they are depends, among other things, upon the strength of the connections between various points on the slope.<sup>4</sup>

Slippery-slope arguments take the following general form: If P, then Q, and if Q, then R; R is unacceptable; therefore, P is unacceptable.

3. For a helpful discussion of this issue, see William N. Eskridge Jr., *The Case for Same-Sex Marriage* (New York: Free Press, 1996), esp. chap. 5.

4. For a detailed development of this claim, see Eugene Volokh, “The Mechanisms of the Slippery Slope,” *Harvard Law Review* 116 (2003): 1077–1114.

But what is the connection between P, Q, and R? Consider one example: If we allow Johnny to stay out past his curfew this Friday, he'll want to do it next Friday, and then on other nights of the week, and so on, until he ultimately loses all respect for curfews. Here the connection between P, Q, and R appears to be causal: Johnny's being permitted to stay out this Friday causes him to want to stay out next Friday and ultimately to ignore curfews altogether. The weaker the evidence for such causal connections, the weaker the argument.

But the connection between P, Q, and R might also be understood to be logical, where P entails Q and Q entails R. One could argue (perhaps unconvincingly) that, if it is permissible for Johnny to stay out late this Friday, then it must be permissible for him to stay out late whenever he wants. After all, the reason for forbidding his staying out late this Friday is the same reason for forbidding it on any other night. Here the connections are stronger: it would be unreasonable to accept P but reject R; thus, if R is unacceptable, P must be unacceptable as well.

Which type of connection—causal or logical—does the PIB challenger have in mind when comparing homosexuality to polygamy, incest, and bestiality? I suggest that the causal form of the argument is not terribly plausible. There is little evidence that moral acceptance of gay relationships will incite a wave of support for incestuous relationships, for instance. More important, this rejection of the causal interpretation of the argument is supported by its more sophisticated proponents. As Hadley Arkes puts it, "I want to make it clear that I am not offering a prediction. I am not saying that if we accept gay marriage we will be engulfed by polygamy and incest and other exotic arrangements."<sup>5</sup> So the principle of charity requires us to interpret the connections as logical, not causal. According to the PIB challenger, there is no principled reason to accept homosexuality yet forbid PIB.

We can now offer a preliminary statement of the PIB argument as follows:

1. If homosexual relationships are morally permissible, then PIB relationships are morally permissible as well.
2. But PIB relationships are not morally permissible.
3. Therefore, homosexual relationships are not morally permissible.

In subsequent sections, I will elaborate the argument somewhat: in particular, I will say more about the intended scope of its terms (e.g., *all* homosexual and PIB relationships, or only some, and which ones?). For now, note that the PIB challenger holds that PIB relationships are

5. Arkes, "The Role of Nature," 277; Krauthammer ("When John and Jim Say 'I Do,'" 284) makes a similar point.

not morally permissible and that the strength of the argument depends on the truth of this conviction. Since the conclusion follows from the premises by the valid argument form *modus tollens*, the only way to attack the argument is to show that one or both of its premises is false.

Perhaps unsurprisingly, most responses to the PIB argument grant the second premise—that PIB relationships are immoral—and attack the first. I turn now to two of the more influential responses, those of Andrew Sullivan and Jonathan Rauch. Understanding their responses will help elucidate the PIB argument.

Andrew Sullivan attacks the first premise by arguing that PIB and homosexuality are importantly different, because there are “constitutional” homosexuals, but not constitutional polygamists, “incestualists,” or “bestialists.” In other words, homosexuality is a constitutive feature of human personalities in a way that the other tendencies are not. Call this the “gays really exist” argument. As Sullivan writes,

Almost everyone seems to accept, even if they find homosexuality morally troublesome, that it occupies a deeper level of human consciousness than a polygamous impulse. Even the Catholic Church, which believes that homosexuality is an “objective disorder,” concedes that it is a profound element of human identity. It speaks of “homosexual persons,” for example, in a way that it would never speak of “polygamous persons.” And almost all of us tacitly assume this, even in the very use of the term “homosexuals.” We accept also that multiple partners can be desired by gays and straights alike: polygamy is an activity, whereas both homosexuality and heterosexuality are states.<sup>6</sup>

There are several ways to interpret Sullivan’s claim that homosexuality is “a profound element of human identity.” I shall explore three possible readings: first, that homosexuality is immutable; second, that it’s important to the homosexual person’s self-concept; and third, that it’s intimately tied up with the homosexual person’s capacity to love. Assuming that we can pin down which of these Sullivan intends, there are two questions to ask: (1) is homosexuality really different from PIB in the way suggested? and (2) is that difference relevant to the PIB argument? To foreshadow: my answers to these questions will be “maybe” and “probably not.”

Suppose that, by calling homosexuality “a profound element of human identity,” Sullivan means that it’s immutable. Sullivan is probably right about this (in most cases), despite the insistence of some traditionalists that homosexuals can be “cured” through a combination of

6. Andrew Sullivan, “Three’s a Crowd,” *New Republic*, June 17, 1996, reprinted in Sullivan, *Same-Sex Marriage*, 278–81, 279.

“reparative therapy” and prayer.<sup>7</sup> And he’s also probably right that immutability distinguishes most cases of homosexuality from most cases of PIB. But traditionalists, even if they grant these points, are likely to respond, “So what?” Unless the relevant similarity between homosexuality and PIB is their relative susceptibility to change, the “immutability” point seems irrelevant. To undermine premise 1 of the PIB argument, it is not enough to show that homosexuality has a feature that PIB lacks (or vice versa). One must also show that the disanalogous feature is relevant to the proposed analogy between the two.

Here’s where analogies are sometimes tricky. Any two things that are analogous are going to have some differences—otherwise, they would not be two things but one. So the question becomes, do the indicated differences undermine the proposed analogy? To illustrate: suppose that Jack claims that homosexuality and polygamy are similar in that both involve a relaxing of traditional marriage standards in this country. Jill replies, “But polygamy is more expensive!” (Think of the anniversary gifts.) In response, Jack can grant that polygamy is more expensive but nevertheless hold on to his analogy, which had nothing to do with the expense of the two practices but rather with their alleged relaxing of marital standards.

The PIB challenger can make a similar move. She can grant that homosexuality is unlike PIB in that the former involves an immutable trait and yet claim that immutability has nothing to do with the alleged connection between the two. The “immutability” version of Sullivan’s argument is thus unconvincing.

Suppose, instead, that we take Sullivan to mean that homosexuality is important to the homosexual person’s self-concept in a way that PIB is not to the PIB participant’s. Now Sullivan’s argument faces the same problem as before, plus a new one. As with immutability, the PIB challenger can say that she doesn’t care about this alleged disanalogy: “importance to self-concept” is not why she linked homosexuality and PIB together in the first place. But now she can also deny that the alleged disanalogy exists, at least for some instances of PIB: after all, polygamy is part of the deep religious commitments of many polygamists and thus quite possibly important to their self-concepts. Alternatively, a traditionalist could deny that homosexuality has genuine importance, despite its subjective importance to many homosexual persons.<sup>8</sup> (Indeed, doing so is often a key step in so-called reparative therapy.)

7. Sullivan himself has written against the alleged success of reparative therapy. See Andrew Sullivan, “They’ve Changed, So They Say,” *New York Times*, July 26, 1998.

8. For example, at a June 1997 conference at Georgetown University, “Homosexuality and American Public Life,” conservative columnist Maggie Gallagher urged her audience to stop thinking of homosexuality as an inevitable, key feature of an indi-

In response to the latter claim, Sullivan would need a way of demonstrating the significance of homosexuality that goes beyond mere subjective importance (i.e., “It’s important because I think so”). And this need can be met by a third reading of “profound element of human identity.” Such a reading can be gleaned by considering Sullivan’s work more broadly. Sullivan has long emphasized the importance of love in a flourishing life and has frequently reminded readers that the fight for gay equality is fundamentally about love. To prohibit homosexuality is essentially to deny, to a large class of people, the opportunity for human fulfillment that comes from such love.

The prohibition of PIB is by no means similar, in that it doesn’t deny love to anyone in the way that the prohibition of homosexuality does for (most) homosexuals.<sup>9</sup> A man who can love two wives can presumably love one; a man who loves his daughter can presumably love women to whom he is unrelated.<sup>10</sup> (Bestiality doesn’t even seem relevant here, since bestiality typically seems to be more about sexual release than love.) Thus, the salient point is not that “polygamy is an activity, whereas both homosexuality and heterosexuality are states,” as Sullivan put it. The point is that there is a significant group of people who can only have fulfilling romantic relationships with members of their own sex. By contrast, no one seriously asserts that there is a significant group of people who can only have fulfilling romantic relationships with multiple spouses, relatives, or nonhuman animals.

This third reading of Sullivan’s argument is different enough from the other two that it deserves treatment as a separate argument. Fortunately, a very similar argument has been formulated independently—and somewhat more explicitly—by Jonathan Rauch. Although Rauch’s main concern is with gay marriage as a political institution (rather than with the moral status of homosexuality), much of what he says can be applied, *mutatis mutandis*, to the version of the PIB argument I have been considering. Rauch writes: “The hidden assumption of the argument which

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vidual’s personality. Drawing, ironically, on the work of queer theorists, Gallagher proposed instead that homosexuality is a cultural construction—one that ought to be challenged. One might respond to Gallagher that the fact that something is culturally constructed does not make it unimportant: religion is culturally constructed, yet most traditionalists would consider it a “profound element of human identity.” But it is certainly legitimate to question whether we ought to regard a trait as important just because most people with the trait consider it so. (Some papers from the Georgetown conference [although not Gallagher’s] were collected in Christopher Wolfe, ed., *Homosexuality and American Public Life* [Dallas: Spence, 1999]).

9. I grant that a small percentage of homosexual people may be able to have fulfilling relationships with members of the “opposite” sex, but perhaps such persons are better categorized as “bisexuals.”

10. This point has been suggested by Jonathan Rauch, whose position I shall take up shortly.

brackets gay marriage with polygamous or incestuous marriage is that homosexuals want the right to marry anyone they fall for. But, of course, heterosexuals are currently denied that right. They cannot marry their immediate family or all their sex partners. What homosexuals are asking for is the right to marry, not anybody they love, but *somebody* they love, which is not at all the same thing.<sup>11</sup>

Rauch's position has sometimes been called the "equal options" argument. Put simply, homosexuality differs from PIB in that, compared to heterosexuals, homosexuals are asking for "equal options" (namely, a relationship with "somebody they love") whereas PIB people would be asking for "extra options" (multiple spouses, etc.). As Rauch writes, "People who insist on marrying their mother or several lovers want an additional (and weird) marital option. Homosexuals currently have no marital option at all. A demand for polygamous or incestuous marriage is thus frivolous in a way that the demand for gay marriage is not."<sup>12</sup>

Labeling Rauch's position the "equal options" argument is a bit dangerous, because it encourages an easy misreading.<sup>13</sup> On its face, "equal options" sounds like a formal, rather than a substantive, notion, and one might be tempted to think that a formally similar argument could be applied to any one of the items of PIB. For example, advocates of heterosexual polygamy could argue that they are not asking for relationships with "anyone" they love—they are not asking for relationships with blood relatives or with same-sex partners. They are simply asking for relationships with *all* the persons they love, just as monogamists (i.e., those who love only one partner) enjoy. True, heterosexuals are currently denied the right to marry multiple partners. But they are also currently denied the right to marry same-sex partners, and a "formalist" reading of the equal-options argument provides no immediate reason to assume that restrictions on the basis of sex are worse than restrictions on the basis of number.

A simpler way to make the same point is to note that, formally speaking, homosexuals do have "equal options": they have the right to relationships with persons of the opposite sex. Thus (the traditionalist might argue) whether one seeks homosexual relationships or PIB relationships, one is asking for "an additional (and weird) marital option," to use Rauch's words.

The problem with this formalist response is that Rauch clearly understands "equal options" to be taken substantively, rather than formally.

11. Jonathan Rauch, "Marrying Somebody," reprinted in Sullivan, *Same-Sex Marriage*, 285–88, 286.

12. *Ibid.*

13. The labels "we really exist" and "equal options" are both taken from personal correspondence I've had with Sullivan and Rauch.



A relationship with a member of the opposite sex is not an “equal option” for the homosexual person, because it is bound to be unsatisfying. “Constitutional” homosexuals are thus left with a choice between unsatisfying relationships or none at all—which puts them in a very different position from those who want PIB. The latter still have some avenues open for successful loving relationships, even though PIB is prohibited. Thus the formalist response to Rauch misses the point.

The formalist response to Rauch is strikingly similar to a now-discredited argument in defense of antiscegenation laws: whites can marry only within their race; nonwhites can marry only within their race; therefore, antiscegenation laws do not deny “equal options.” Putting aside the problematic assumption of two and only two racial groups—whites and nonwhites—the argument does have a kind of formal parity to it. The reason that we regard its conclusion as objectionable nevertheless is that we recognize that the very point of antiscegenation laws is to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites (that is, unequal).

Are prohibitions of same-sex relationships similar? Perhaps. Part of their point is indeed to signify and maintain the belief that homosexuals are morally inferior to heterosexuals (or more precisely, that homosexuality is morally inferior to heterosexuality). But whether this belief is “false and pernicious” is an open question in the PIB debate. And herein lies the weakness in Rauch’s argument: traditionalists are quite comfortable with denying “equal options” (in some sense) to those whose behavior they judge to be morally unequal. They might concede to Rauch that prohibitions of homosexuality place a greater burden on homosexuals than prohibitions of PIB place on those who desire PIB. And they might recognize that this burden constitutes a difference between homosexuality and PIB (albeit an extrinsic one). But they can nevertheless conclude, “Tough luck. Like PIB (and unlike miscegenation), homosexuality is wrong, and you ought not to engage in it.”

Applying this discussion to the PIB argument: Rauch has attempted to undermine the first premise of the PIB argument by arguing that prohibitions of homosexuality place a greater burden on the relevant parties than prohibitions of PIB. Traditionalists can grant this difference but claim that it’s irrelevant. What caused them to group homosexuality and PIB together was not similarity of burden, or any other extrinsic reason, but some moral defect involved in the practices themselves. Pointing out various disanalogies between homosexuality and PIB will not disprove the first premise unless those disanalogies are relevant to the alleged moral defect. At best, it will shift the burden back to traditionalists to justify that premise. I shall now argue that such burden shifting is in fact a better response to the PIB argument.

## II. A BETTER RESPONSE

Thus far I have rejected three responses to the PIB argument: the slippery-slope-fallacy charge, the “gays really exist” argument, and the “equal options” argument. The first of these falsely assumes that all slippery-slope arguments are fallacious. The second and third, by Sullivan and Rauch, are more promising. Both of these attack the premise that, if homosexuality is morally permissible, then PIB is morally permissible. And this premise is indeed suspect, since there is no reason to suppose that homosexuality has anything to do with PIB. After all, polygamous, incestuous, and bestial relationships can be either homosexual or heterosexual. To group PIB with homosexuality rather than heterosexuality raises the question, what’s the principle of analogy? This question, of course, is crucial, since it is impossible to attack an analogy without first correctly identifying the relevant similarity between the analogues.

The difficulties faced by Sullivan’s and Rauch’s responses stem from their attempting to guess at the answer to that question. Sullivan suggests that traditionalists lump homosexuality with PIB because they assume that none of the dispositions are “deep,” while Rauch suggests that they do so because they assume that all four groups want to marry “anyone they love.” Each then goes on to differentiate homosexuality from PIB with respect to the alleged similarity. Traditionalists can (and in some cases, do) accept the differences but then argue that they are irrelevant: what makes homosexuality relevantly similar to PIB is not lack of depth or the desire to “marry anyone” but something else.

But what is this “something else”? I propose that it’s time to stop guessing and instead to ask the traditionalists, thereby shifting to them the burden of proof. Call this, for lack of a neater name, the “What-does-one-thing-have-to-do-with-another?” response. The difference between the “What-does-one-thing-have-to-do-with-another?” response and the previous two is that, instead of arguing that the first premise of the PIB argument is false, it simply asks for the premise to be justified. Indeed, perhaps the most charitable way to read Sullivan and Rauch is to view their arguments as attempts at such burden-shifting.<sup>14</sup>

The issue of burden of proof is a tricky one. Some would argue that the burden of proof is on those (like Sullivan, Rauch, and myself) who challenge traditional sexual mores and advocate homosexual relationships. Others would argue that the burden of proof is on those who would restrict people’s relationship options. In a sense, they’re both wrong: the burden of proof is on whoever wants to prove something. If the traditionalists want to prove that there’s some connection between

14. Let me here acknowledge my debt to both of them for their work on the PIB argument.

homosexuality and PIB, they need to argue for that conclusion. Otherwise, what we have is “not an argument, it’s a panic”—to borrow an apt phrase from Sullivan.<sup>15</sup>

The traditionalist might respond that homosexual relationships and PIB relationships have been historically lumped together and then argue that it is a bad idea to tamper with longstanding tradition in the area of human relationships. This response is not as question-begging as it initially appears. James Donovan, a proponent of gay marriage, has argued that any sufficient answer to the PIB argument must explain why the question of appropriate relationship boundaries should be considered “open” rather than “closed.”<sup>16</sup> Rauch makes a similar point: “The customs generated by societies may often seem irrational or arbitrary. But the very fact that they are the customs that have evolved implies that there is a kind of practical logic embedded in them that may not be apparent from even a sophisticated analysis. And the web of custom cannot be torn apart and reordered at will, because once its internal logic is violated, it falls apart.”<sup>17</sup>

Although Donovan and Rauch do not ultimately accept the traditionalist position, they consider the argument from tradition plausible. In order to overcome it, one must have a strong reason for the proposed challenge to social custom. In this case, that reason must come in the form of a *prima facie* argument in favor of homosexual relationships. Such arguments are surprisingly rare in the literature (although they are certainly implicit in the arguments of Sullivan and Rauch). Instead, gay-rights advocates typically begin with arguments against homosexuality and then knock those down: the case in favor is taken for granted.

The starkest version of the case in favor of homosexual relationships is the simple assertion that homosexual relationships make people happy. But this assertion merits elaboration. For the point is not merely that the relationships give pleasure (which they do) or that pleasure is a good thing (which it is—which is not to say that it is the only or most important good thing).<sup>18</sup> The point is rather that the myriad and im-

15. Sullivan, “Three’s a Crowd,” 280.

16. See James Donovan, “Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not a Commitment to Polygamous Marriage,” *Northern Kentucky Law Review* 29 (2002): 521–90, esp. 548–49.

17. Jonathan Rauch, “Who Needs Marriage?” in *Beyond Queer: Challenging Gay Left Orthodoxy*, ed. Bruce Bawer (New York: Free Press, 1996), as revised and reprinted in *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality*, ed. John Corvino, 304–16 (Lanham, MD: Rowman & Littlefield, 1997), 306.

18. For an illuminating debate about whether pleasure constitutes a reason for action, see Stephen Macedo, “Homosexuality and the Conservative Mind,” *Georgetown Law Journal* 84 (1995): 261–300, and, more specifically, Macedo’s “Reply to Critics” in the same issue, 329–37.

portant goods that are realized in (nonprocreative) heterosexual relationships can be realized in homosexual relationships as well.<sup>19</sup>

Thus, the *prima facie* case in favor of homosexual relationships may be best expressed as an argument from analogy. Consider the various goods that one can realize in a heterosexual relationship, even if the partners are not capable of procreation: pleasure, communication, emotional growth, personal stability, long-term fulfillment. We need not settle on a precise list: indeed, one advantage of the argument from analogy is that it is compatible with a number of different theories of value. Thus, the hedonist can point to the pleasure associated with such relationships, while the value pluralist can point as well to health, communication, knowledge, and so on. The principle of analogy is thus variable, but it is nevertheless explicit: whatever makes these nonprocreative heterosexual relationships good appears *prima facie* to make homosexual relationships good as well. The burden of proof is on those who would evaluate them differently.

One might object that the above argument equivocates on the term “relationships.” For it is unclear that the goods mentioned are indeed derivable from the sexual aspect of these relationships. It is not the fact that the homosexual partners offer emotional support to each other, or share a household, or go shopping together that bothers traditionalists—it is the fact that they have genital sexual contact. These other things are morally neutral or even morally good, my opponents might concede, but they are entirely separable from the relationship’s sexual aspect.

I respond that this crucial last contention is false. There is no reason to assume—and indeed, there are good reasons to doubt—that one can remove the sexual aspect of relationships and have all others remain the same. Sex can be a powerful and unique way of building, celebrating, and replenishing love in a relationship. This is one important reason why heterosexual people have sex even if they don’t want children, don’t want children yet, or don’t want any more children. It is a reason why sexless marriages are often cause for concern. To assume that one can subtract sex without affecting the rest of the equation is to take a naive and reductionistic view of sexual relationships. This is not to say that physical intimacy is always connected with other forms of intimacy: sex is sometimes impersonal, mechanical, or fleeting. But sex is often much

19. It is true that some theorists reject the notion that heterosexual marriage is normative for everyone, but my argument does not depend on this claim. It merely depends upon the recognition that some important goods are realized by (nondeliberately) nonprocreative heterosexual relationships. And this point is conceded by every known proponent of the PIB argument (although, I explain in the next section, those proponents often disagree with gay-rights advocates about what the relevant goods are).

more than that, for heterosexuals and homosexuals alike. The physical union of the partners manifests and contributes to a larger union.

“But wait,” my opponents might interject. “Can’t you make the same *prima facie* argument for PIB relationships?” Not quite. It is true that you can use the same *form* of argument for PIB relationships: PIB relationships have benefits X, Y, and Z. But whether PIB relationships do in fact have such benefits will not be settled by looking to homosexual relationships. Put simply, to observe that many people flourish in homosexual relationships is not to prove that others might flourish in incestuous, bestial, or polygamous relationships. Whether they would or not is a separate question—one that requires a whole new set of data. As James Donovan helpfully explains, elaborating on an earlier statement of my position in his discussion of gay marriage: “Proving that oranges are good for your health does not help on the question of whether lawn grass is also good for your health. The two problems at best share some similarity in the methodological procedures one would use to resolve the issue, but knowing the answer to one provides no insight as to the other. So too the relationship (or lack thereof) between same-sex marriage and polygamy.”<sup>20</sup>

Thus far I have challenged the first premise of the PIB argument by contending that there appears to be no essential connection between the moral status of homosexuality and the moral status of PIB. Another way to challenge the PIB argument is to point out the serious ambiguity in the scope of its terms.<sup>21</sup> For the first premise can be taken in at least four ways:

- 1a. If *all* homosexual relationships are morally permissible, then *all* PIB relationships are morally permissible.
- 1b. If *all* homosexual relationships are morally permissible, then *some* PIB relationships are morally permissible.
- 1c. If *some* homosexual relationships are morally permissible, then *all* PIB relationships are morally permissible.
- 1d. If *some* homosexual relationships are morally permissible, then *some* PIB relationships are morally permissible.

Claims 1a and 1b are nonstarters, in that their antecedents are obviously false: no gay-rights proponent holds that all homosexual relationships are morally permissible (e.g., abusive ones are not).<sup>22</sup> And 1c is implausible: why would the permissibility of some homosexual relationships (say, the ones between consenting adults) entail the permissibility

20. Donovan, “Rock-Salting the Slippery Slope,” 548.

21. I am indebted to Bruce Russell for pointing this out to me.

22. To say that they are nonstarters is not to say that they are false; indeed, both conditionals are probably true.

of all PIB relationships (including, say, abusive ones)? So we are left with the limited claim 1d: if *some* homosexual relationships are morally permissible, then *some* PIB relationships are.

Now, even putting aside the concern about burden of proof, notice that the PIB challenge has lost much of its bite. For suppose that we were to grant 1d. Is it really so horrible to imagine that some PIB relationships are morally permissible? What about, for example, the polygamous relationships apparently sanctioned by the God of the Hebrew Bible? The force of the PIB challenge seems to depend rather upon the audience's connecting all homosexual relationships with the worst of PIB relationships.

This point also underscores the arbitrariness of the first premise (suitably modified as 1d) and the burden of its proponents: which homosexual relationships are connected to which PIB relationships, and why? Presumably, the PIB challenger is concerned that the *prima facie* case I've offered for homosexual relationships would apply to any PIB relationships that realize pleasure, communication, emotional fulfillment, and so on. But this still leaves open the question, what does one thing have to do with the other? For one could raise the same concern via nonprocreative heterosexual relationships, including those that are nonprocreative for reasons acceptable to traditionalists. Thus:

- 1e. If *some* heterosexual relationships between sterile partners are morally permissible (insofar as they realize pleasure, etc.), then *some* PIB relationships are (insofar as they realize pleasure, etc.).

Of course, the appropriate response to this claim is, "So what?" Our confidence in the permissibility of nonprocreative heterosexual relationships remains unshaken, and many distinctions remain to be drawn. While it seems quite likely that some PIB relationships will share good-making features with some heterosexual relationships (after all, many PIB relationships are heterosexual relationships), this likelihood hardly renders heterosexual relationships suspect as a class.

### III. A BETTER PIB ARGUMENT?

Now at this point many traditionalists will still be unsatisfied. It's not that they necessarily disagree with the distinctions drawn in the last section. Rather, they will find much of the section irrelevant. For there I argued that a proper evaluation of PIB relationships—or for that matter, any relationships—requires considering their relative benefits and drawbacks. But this approach smacks of consequentialism, a view that many traditionalists reject. As they see it, the point is not whether homosexual and PIB relationships make people happy. The point is rather that such relationships are wrong in themselves, apart from their apparently positive or negative consequences. According to these tradi-

tionalists, to take pleasure in such activities does not mitigate their wrongness; if anything, it heightens it.

It is important to note that this response betrays a misunderstanding of my position, for the defense I have given is not necessarily consequentialist. Rather, I proposed an argument from analogy in favor of homosexuality. My fundamental premise is that whatever goods are realized in nonprocreative heterosexual relationships appear *prima facie* to be realized in homosexual relationships as well, and there is no reason to presuppose that those goods are strictly consequentialist in character.

Yet many traditionalists would deny this fundamental premise, for they hold that there are essential moral goods realized in heterosexual relationships—even many nonprocreative ones—that are not realized in homosexual relationships. David Bradshaw explains this extra element in terms of respect for “the body’s moral space” and participation in the “larger human drama.”<sup>23</sup> Hadley Arkes emphasizes conformity with our “engendered” state.<sup>24</sup> John Finnis and other “new natural lawyers” refer to the basic “marital good” achievable only when sexual acts are of the “reproductive kind.” Since the new-natural-law defense is the most developed and influential of the traditionalist group and since Finnis is its best known proponent, I will treat his view as representative. (The views of the new natural lawyers—Finnis, Germain Grisez, Robert George, Gerard Bradley, Patrick Lee, and others—are substantially interchangeable; I will quote from the others where they helpfully elaborate on Finnis’s view.)

In brief, Finnis holds that there is a morally essential feature of sexual acts that is lacking in both homosexuality and PIB. It has nothing to do with consequences: it is intrinsic to the acts themselves. This feature’s absence provides the only principled reason for ruling out PIB. Thus Finnis presents gay-rights advocates with a dilemma: either accept this essential feature, and thus reject homosexuality; or else reject the feature, and thus lose any principled reason for ruling out PIB. In his words: “The plain fact is that those who propound a homosexual ideology have no principled moral case to offer against (prudent and moderate) promiscuity, indeed *the getting of orgasmic sexual pleasure in whatever friendly touch or welcoming orifice (human or otherwise) one may opportunely find it* [emphasis added].”<sup>25</sup>

But what is this essential feature that both homosexuality and PIB lack? And why should we accept Finnis’s dilemma? Unfortunately, an-

23. David Bradshaw, “A Reply to Corvino,” in Corvino, *Same Sex*, 17–30.

24. See Hadley Arkes, “Questions of Principle, Not Predictions: A Reply to Macedo,” *Georgetown Law Journal* 84 (1995): 321–27.

25. John M. Finnis, “Law, Morality, and ‘Sexual Orientation,’” in Corvino, *Same Sex*, 34.

swering these questions will require a bit of a detour into the natural law theory on which Finnis's PIB argument is based.

As one of the "new natural lawyers," Finnis holds that there are certain basic goods that are intrinsically worthy of pursuit. The goods are "basic" insofar as they are irreducible to other goods. One of these goods is "the marital good," the two-in-one-flesh union of a husband and wife. This union realizes two important values (although it is not reducible to either): procreation and friendship. Finnis claims that it would be wrong to engage in sexual activity as a means to either of these goods—including procreation—for to do so would be to treat one's body as an instrument for the satisfaction of desire. Rather, the good realized in (uncontracepted married heterosexual) intercourse is the intrinsic good of the marital union itself—where "marital union" is understood in a prepolitical, prelegal sense. Finnis would therefore object to my *prima facie* case by claiming that it is simply impossible for homosexual partners to realize "whatever goods are realized in non-procreative heterosexual acts," as I put it. Homosexual acts, by definition, cannot achieve the biological and personal union constitutive of the marital good.

With admirable consistency, Finnis criticizes all sexual acts that fall short of pursuing this marital good—including homosexual acts, PIB acts, premarital sex, extramarital sex, masturbation, contraception, and oral or anal sex by heterosexual partners.<sup>26</sup> Such acts not only fail to realize the marital good; they damage it, by erroneously treating it as a merely optional feature of sexual activity. Further, they damage the good of integrity, by treating the body as a mere instrument for the satisfaction of desire. (Following Finnis, I shall hereafter refer to sexual acts in which the partners intentionally pursue the marital good as "marital" and all other sexual acts as "nonmarital.")

The new natural law position has been developed at considerable length, and I have only sketched its main contours here.<sup>27</sup> But it is

26. Finnis might allow oral or anal sex by heterosexual partners as foreplay to marital intercourse.

27. For fuller statements of the position, see John M. Finnis, "Law, Morality, and 'Sexual Orientation,'" *Notre Dame Journal of Law, Ethics, and Public Policy* 9 (1995): 11–39, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," *American Journal of Jurisprudence* 42 (1997): 97–134; Robert P. George and Gerard V. Bradley, "Marriage and the Liberal Imagination," *Georgetown Law Journal* 84 (1995): 301–20; Patrick Lee and Robert P. George, "What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union," *American Journal of Jurisprudence* 42 (1997): 135–57. For criticism of the position, see Macedo, "Homosexuality and the Conservative Mind," and "Reply to Critics"; Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* (Chicago: University of Chicago Press, 2002), 79–93; Gareth Moore, "Natural Sex: Germain Grisez, Sex, and Natural Law," in *The Revival of Natural Law: Philosophical, Theological, and Ethical Responses to the Finnis-Grisez School*, ed. Nigel Biggar and Rufus Black, 223–41 (Burlington, VT: Ashgate, 2001); Paul J.



important to recognize its significance. As Andrew Koppelman has noted, the position appears to capture the widespread intuition that “gay marriage” (in its prepolitical sense) is an oxymoron, because homosexual partners lack the required complementarity.<sup>28</sup> Notice, too, that the position does not depend on any suspect empirical claims about the relative happiness (health, stability, success) of gay and lesbian partners. Finally, and most relevant to our purposes, Finnis’s position provides a reason for grouping homosexuality and PIB: all lack the essential feature of the marital good. (I shall return to this claim below.)

Is Finnis’s view tenable? There are a number of reasons to think not:

1. *Sterile couples and the marital good.* The most familiar objection to Finnis doubts whether, given his definition of the marital good, he can consistently permit sex for sterile heterosexual partners. Finnis responds that the biological union constitutive of the marital good is still possible in their case. A sexual act between such partners can still be of the “reproductive kind”—that is, of the sort normally suitable for reproduction. But this response is unconvincing, and attempts to elaborate on it tend merely to underscore its inadequacy. For example, Finnis’s fellow natural lawyers Patrick Lee and Robert George consider the case of Smith, who has a digestive disorder that causes him to vomit frequently, thus preventing many of his meals from being digested.<sup>29</sup> According to Lee and George, Smith is “engaging in nourishing activity” and “performing a nourishing-type act” and would continue to do so even if “his disorder got worse, his stomach was closed, and he obtained his nourishment intravenously.”<sup>30</sup> Yet it seems a terrible stretch to describe Smith’s subsequent acts of eating in this case as “nourishing-type acts” in any morally significant sense. Such acts can provide no nourishment, and Smith knows it. That same stretch is involved in describing the sexual acts of couples known to be infertile as acts of the “reproductive kind.”<sup>31</sup>

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Weithman, “Natural Law, Morality, and Sexual Complementarity,” in *Sex, Preference, and Family: Essays on Law and Nature*, ed. David M. Estlund and Martha C. Nussbaum, 227–46 (New York: Oxford University Press, 1997); and Michael J. Perry, “The Morality of Homosexual Conduct: A Response to John Finnis,” *Notre Dame Journal of Law, Ethics, and Public Policy* 9 (1995): 41–74.

28. Koppelman, *The Gay Rights Question in Contemporary American Law*, 80.

29. Lee and George, “What Sex Can Be,” 151.

30. *Ibid.*

31. Koppelman (*The Gay Rights Question in Contemporary American Law*, 87–88) makes this point forcefully: “A sterile person’s genitals are no more suitable for generation than an unloaded gun is suitable for shooting. . . . Contingencies of deception and fright aside, all objects that are *not* loaded guns are morally equivalent in this context: it is not more wrong, and certainly not closer to homicide, to point a gun known to be unloaded at someone and pull the trigger than it is to point one’s finger and say ‘bang!’ And if the two acts have

There is also a reason to doubt whether Finnis's notion of the "marital good" is even coherent. Gareth Moore has argued that, although the idea of a "two-in-one-flesh" union might be appealing metaphorically, it cannot do the necessary work in the argument unless the new natural lawyers understand it literally. (Otherwise, why couldn't gay couples become two-in-one-flesh, metaphorically speaking?) Unfortunately for Finnis, there is no coherent literal sense in which two people become one. Moore writes, "We might at a pinch speak of male and female reproductive organs as incomplete, if by that is meant that one cannot achieve reproduction without the other, but the male and female animals are in no sense incomplete. So neither is a mating pair a single complete organism: it is simply two organisms cooperating in a joint activity of mating."<sup>32</sup> If Moore is right, then no one achieves two-in-one-flesh union, and Finnis's argument is finished.

2. *Damage to the marital good?* Suppose, however, that we grant Finnis's problematic notion of the marital good—a two-in-one flesh biological union that is somehow possible even for heterosexual partners known to be permanently sterile but not for homosexual partners. Why should we worry about sex that fails to pursue this good? Part of Finnis's answer is that nonmarital sex damages the marital good.<sup>33</sup> Finnis views this damage as intrinsic, claiming that any willingness to engage in nonmarital sex renders one unable to achieve the marital good. This is true even if the willingness is merely conditional (e.g., if one would be willing to have extramarital sex in the case of a long separation that never in fact happens). The problem is that such willingness indicates that one treats the marital good as a merely optional feature of sexual acts. Finnis explains that

one's conscience's complete exclusion of nonmarital sex acts from the range of acceptable and valuable human options is existentially, if not logically, a precondition for the truly marital character of one's intercourse as and with a spouse. Deliberate approval of nonmarital sex acts is among the states of mind (understanding and willingness) which damage one's capacity to choose and carry out as marital even those actual sex acts which in all other respects

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the same moral character in this context, why is the same not equally true of, on the one hand, vaginal intercourse between a heterosexual couple who know they cannot reproduce, and on the other, oral or anal sex between any couple? Just as, in the case of the gun, neither act is more homicidal than the other, so in the sexual cases, neither act is more reproductive than the other."

32. Moore, "Natural Sex," 224–26.

33. One might be tempted to compare this damage to that of counterfeiting: think, e.g., of how ersatz master's degrees or doctorates which can be readily purchased on the Internet undermine the value of real degrees. But while attacks on the marital good may have bad consequences (e.g., rising divorce rates), Finnis's main concern is not consequentialist.

are marital in kind. It is a state of mind which, even in those people who are not interested in marrying, is contrary to, and violative of, the good of marriage.<sup>34</sup>

Finnis follows this explanation with an analogy that initially appears helpful: “Just as a cowardly weakling who would never try to kill anyone, yet deliberately approves of the killings of innocent people in a terrorist massacre, has a will which violates the good of life, so [someone] violates the good of marriage by consenting to (deliberately approving) non-marital sex acts such as solitary masturbation.”<sup>35</sup>

This analogy is misleading, however. A proper analogue for the cowardly weakling would be someone who is too timid to try to break up someone’s marriage herself but who deliberately approves of such meddling—that is, someone who approves of what are clearly active threats to marriage. By contrast, whether nonmarital acts constitute active threats to marriage is very much an open question at this point in the debate, and we get no closer to answering that question by considering the case of the cowardly terrorist sympathizer. Finnis has yet to explain why sexual acts that fail to pursue the marital good must thereby threaten that good. Certainly, they threaten the idea that the marital good is not optional in sexual acts, but this point is simply question-begging.

3. *Damage to integrity?* Perhaps Finnis can do a better job of explaining how nonmarital acts damage the good of integrity. In a key passage, he writes that

the common good of friends who are not and cannot be married (for example, man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit. So their sexual acts together cannot do what they may hope and imagine. Because their activation of one or even each of their reproductive organs cannot be an actualizing and experiencing of the *marital* good—as marital intercourse (intercourse between spouses in a marital way) can, even between spouses who *happen* to be sterile—it can do no more than provide each partner with individual gratification. For want of a *common good* that could be actualized and experienced *by and in this bodily union*, that conduct involves the partners in treating their bodies as instruments to be used in the service of their consciously ex-

34. Finnis, “The Good of Marriage,” 123.

35. *Ibid.*, 123–24. I have substituted “someone” for “even a person of exclusively and irreversibly homosexual inclination,” since the sexual orientation of the person is irrelevant to Finnis’s point and the longer construction serves only to distract from that point.

periencing selves; their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.<sup>36</sup>

Finnis makes several important claims here. First, he claims that there is no common good to be realized in nonmarital acts; relatedly, he contends that such acts “*can do no more* than provide . . . individual gratification” (emphasis mine). Second, he claims that insofar as this common good is lacking, the conduct damages integrity by instrumentalizing the body.

One could approach this argument in a variety of ways. One could argue that it is impossible to instrumentalize the body in the manner Finnis suggests. Gareth Moore, for example, has argued that the alleged separation of the conscious self and the bodily self rests on an untenable dualism.<sup>37</sup> Alternatively, one could argue that instrumentalizing the body is not necessarily wrong by pointing to various unproblematic activities that seem to do so.<sup>38</sup> Finally, one could argue that nonmarital acts need not instrumentalize the body (at least not in any morally problematic way), for they in fact realize a common good. While all three lines of argument are promising, for reasons of efficiency, I will confine my comments to the third.

What common good might be realized in nonmarital acts? Recall some of the goods mentioned earlier in connection with the *prima facie* case for homosexuality: pleasure, communication, emotional growth, long-term fulfillment. Certainly, some of these may be solitary (e.g., pleasure), but not all are. For sexual conduct can realize a shared experience of intimacy, one that is unachievable alone. Its goodness rests not (or not merely) in subjective states but also in mutual acts of genuine affection. Such interpersonal intimacy is sought, and achieved, even by partners who intend not to procreate.<sup>39</sup>

This last fact seems obvious. Yet the new natural lawyers insist that, whatever such partners’ intentions may be, they act only for their own self-gratification, not for any interpersonal (that is, common) good. Finnis claims that they achieve no more than they would in sex with a

36. Finnis, “Law, Morality,” 28–29.

37. Moore, “Natural Sex,” 231–32.

38. See, e.g., Perry, “The Morality of Homosexual Conduct,” 56.

39. As Perry writes, “Interpersonal sexual conduct, whether heterosexual or homosexual, can be a way of affirming and serving both the sexual and the emotional wellbeing of one’s lover; as such, sexual conduct can both express, in a bodily (embodied) way, one’s love for one’s lover; indeed, at its best such conduct can be a generative matrix of the emotional strength one needs to live well—to live a truly, fully human life—and therefore to attend to one’s most challenging responsibilities, such as those that attend being a parent. Sexual conduct can be all this (and more) even if it is not meant to be—indeed, *even if it is meant not to be*—procreative” (Perry, “The Morality of Homosexual Conduct,” 51–52).

prostitute or in solitary masturbation.<sup>40</sup> Similarly, Lee and George claim that in nonmarital sex, “the physical activities (stroking, rubbing) are chosen merely as extrinsic means of producing an effect (gratification) in consciousness, the only thing chosen for its own sake.”<sup>41</sup>

Such claims reveal what I think is the most fundamental problem with the new natural lawyers’ theory: a bad phenomenology of sexual desire.<sup>42</sup> (By “phenomenology,” I mean an account of the participants’ intentions and experience.) This problem leads directly to a false dichotomy about what people may seek in sex: either the marital good or mere self-gratification.

Without a doubt, some people who choose sex are interested only in a subjective experience (i.e., “getting off”) and are relatively indifferent to how this goal is achieved. But, as Koppelman points out, “this seems to be the exception rather than the rule.”<sup>43</sup> If it were not, it would be hard to explain why so many people who are clearly not pursuing Finnis’s marital good—homosexuals, heterosexuals using contraception, heterosexuals choosing oral sex, and so on—go through the trouble of seeking out particular sexual partners when they could more easily masturbate or settle for “Mr. Right-Now.”<sup>44</sup> The reason seems obvious: they want intimacy with a particular individual rather than a purely

40. Perry, “The Morality of Homosexual Conduct,” n. 32.

41. Lee and George, “What Sex Can Be,” 155. The new natural lawyers’ use of the term “gratification” may leave them vulnerable to an argument similar to Bishop Butler’s famous a priori argument against psychological egoism. Butler observed that the achievement of “desire-satisfaction” presupposes the existence of a desire for something other than “desire-satisfaction”; thus, we must at least sometimes desire things other than desire-satisfaction—otherwise, we would face an infinite regress of desires to be satisfied (Joseph Butler, *Fifteen Sermons Preached at the Rolls Chapel*, sermon 11 [esp. par. 6], reprinted in *Joseph Butler: Five Sermons*, ed. Stephen L. Darwall [Indianapolis: Hackett, 1983], 46–57). In a similar way, “gratification” presupposes some appetite to be “gratified,” and that appetite must have some object beyond “gratification.” This point fits well with our common-sense understanding of most sexual desire: Jack desires Jill, and perhaps desires to perform certain actions with Jill, and his “gratification” comes from satisfying those desires. If so, then Jack does not—indeed, cannot—desire gratification for its own sake. Perhaps when Lee and George wrote “gratification” they should have written “orgasm, or genital arousal, or the subjective experience thereof.” But then the claim would be even more obviously false: Jack doesn’t (merely) desire orgasms; Jack desires Jill. (On this point, see Roger Scruton, *Sexual Desire: A Moral Philosophy of the Erotic* [New York: Free Press, 1986], 21–22.)

42. On this point, see Macedo, “Reply to Critics,” 330 ff.

43. Koppelman, *The Gay Rights Question in Contemporary American Law*, 85.

44. Moore (“Natural Sex,” 236) makes this point. Finnis could respond by noting that some subjective experiences are more desirable than others: most people would rather imagine sex with an attractive partner than with an unattractive one. But this response still fails to justify the radical revision of common sense involved in his assertion that any partners who do not seek the marital good (e.g., homosexual partners, partners who use contraception) are merely seeking subjective experiences rather than genuine interpersonal intimacy.

subjective experience. To claim that all such people want is “self-gratification” is implausible, and in any case, is not knowable a priori.<sup>45</sup> Where is the evidence for this radical revision of common sense?<sup>46</sup> Finnis’s view, and a fortiori, his PIB argument, must be rejected.

Recall that Finnis’s PIB argument presented gay-rights advocates with a dilemma: either accept the marital good as an essential rationale for sexual acts, and thus give up homosexuality and PIB. Or else reject the marital good, and thus lose any reason for ruling out PIB, or for that matter “the getting of orgasmic pleasure in whatever friendly touch or welcoming orifice (human or otherwise) one may opportunely find it.” This dilemma can be generalized for use by other traditionalists: if *T* is false, then anything goes (where *T* represents the preferred form of traditionalism).<sup>47</sup> Traditionalists then employ this dilemma as the fourth premise of the following *reductio ad absurdum*:

- R1. Suppose that homosexual relationships are morally permissible.
- R2. If homosexual relationships are morally permissible, then *T* is false.
- R3. *T* is false. (From R1 and R2)
- R4. If *T* is false, then PIB relationships are morally permissible (i.e., “anything goes”).
- R5. PIB relationships are morally permissible. (From R3 and R4)
- R6. But PIB relationships are not morally permissible (common sense), and thus the supposition R1 must be false.

This *reductio* is an expanded and more rigorous version of the original PIB argument. Instead of simply asserting the conditional premise (If homosexual relationships are morally permissible, then PIB relationships are morally permissible), it argues from the antecedent (R1) to the consequent (R5). It thus attempts to answer the question posed earlier, what does one thing have to do with the other? But the new

45. Ironically, Finnis seems to forget his own advice about the importance of empirical observation in moral analysis: “The disciplined acquisition of accurate knowledge about human affairs . . . is an important help to the reflective and critical theorist in his effort to convert his own (and his culture’s) practical ‘prejudices’ into truly reasonable judgments about what is good and practically reasonable.” See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), 17. I am indebted to James Donovan for pointing out this inconsistency in Finnis. See Donovan, “Rock-Salting the Slippery Slope,” n. 143.

46. That it is so divorced from the self-understanding of reasonable sexually active people does not necessarily render it false; people could be systematically self-deceived. For a plausible development of this point, see Paul Weithman, “A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics,” *Notre Dame Journal of Law, Ethics, and Public Policy* 9 (1995): 75–92. However, the problem does increase Finnis’s burden of proof, which he already seems far from meeting. And see Perry’s response to Weithman on this point in Perry, “The Morality of Homosexual Conduct,” n. 46.

47. This is reminiscent of Dostoevsky’s claim, “If God is dead, everything is permitted.”

argument falters on the crucial premise R4. One can reject the traditionalist position without embracing a sexual free-for-all.<sup>48</sup>

In the next section, I will discuss how those who reject the traditionalist position might argue against PIB. Before doing so, however, I wish briefly to consider whether Finnis's own account is sufficient to rule out PIB, even if we grant its many problematic premises. Ruling out bestiality on his view is easy, since it clearly lacks biological complementarity. But it is by no means clear that Finnis's "marital good" can explain why polygamy or incest is wrong. I shall take each up in turn.

Finnis might try to argue against polygamy on the grounds that the two-in-one-flesh union does not admit of third parties: if sex with Wife 1 is undertaken with a conditional willingness to have sex with Wife 2, then it is nonmarital. For recall his claim that "one's conscience's complete exclusion of nonmarital acts from the range of acceptable and valuable human options is existentially, if not logically, a precondition for the truly marital character of one's intercourse as and with a spouse."<sup>49</sup> But this argument would be patently question-begging, since it has not yet been established that intercourse with additional spouses would be nonmarital. After all, as long as such intercourse is loving, committed, and intentionally open to procreation, it would seem capable of realizing the marital good.

Alternatively, Finnis might try to exploit the issue of biological complementarity and employ an argument similar to that of Hadley Arkes. Arkes argues that the principle that prohibits both homosexual relationships and polygamous relationships stems from the teleology of the body.<sup>50</sup> Only one man and one woman can produce a new life: homosexual relationships are inadequate to this goal, and polygamous relationships are superfluous. That premise is undeniable (barring the issue of cloning), but it is unclear what follows. One can acknowledge that polygamous relationships are in some sense superfluous to procreation without inferring that they are bad. (After all, additional sexual acts by parents are similarly superfluous to procreation.) Absent further argument, we must conclude that if polygamy is wrong, it is wrong for reasons available to gay-rights advocates.

But what about incest? In a section entitled "Nonmarital Sexual Acts, Multiple Partners, Incest, Bestiality," Lee and George suggest that

48. Indeed, perhaps this is the point of Rauch's equal-options argument: gays can seek marriage without seeking sexual anarchy. The question still remains, however, whether (regardless of what they in fact seek), gay-rights advocates can maintain a principled objection to PIB after embracing homosexuality. I address this question in the fourth and final sections.

49. Finnis, "The Good of Marriage," 123.

50. See Arkes, "Questions of Principle."

the new natural law theory provides an especially good reason for condemning it (recall that their view is identical to Finnis's):

There must be some feature of sex which distinguishes it from activities which are appropriately shared with one's children, one's parents, in groups, and so on. But what is that feature? Being an intense and pleasurable sign of affection—the only trait distinctive of sex according to many who oppose our view—provides not the slightest reason to refrain from sexual acts in those contexts. Our view, on the contrary, provides an intelligible answer: sexual acts are such that either they embody a marital communion—a communion that is possible only in reproductive-type acts between a man and a woman, in a marital relationship—or they involve instrumentalizing the body for the sake of an illusory experience or a fantasy of a marital union, an illusion or fantasy that is especially inappropriate with children, one's parents, and so on.<sup>51</sup>

There are several problems here (beyond the false dilemma already discussed). First, Lee and George seem to be contrasting their view with a straw man. This is partly because the phrase “intense and pleasurable sign of affection” oversimplifies the good(s) their opponents attribute to sex. But it is also because sex has morally relevant traits that are not “distinctive” to it (e.g., potential for physical and emotional harms): thus, their opponents may (and often do) criticize sexual acts for traits not “distinctive of sex.” Second, Lee and George falsely assume that what makes sex inappropriate with “one's children, one's parents, in groups, and so on” must be “some feature”—that is, a single feature—rather than different features in different cases.

Put those two problems aside, however, and notice that Lee and George seem to equate incest with “adult-child incest.” Nontraditionalists have a perfectly intelligible objection to adult-child incest: it harms children. Lee and George respond, “But if sex is . . . simply an intense sign of affection, it is hard to see why extending it to children would in any way exploit their vulnerability, or why it would be ‘horrible and revolting’” (quoting Stephen Macedo).

Again, I note that few of their opponents hold that sex is simply an intense sign of affection. (Is sex *simply* anything?) But even ignoring that problem, their response is fatuous. There are plenty of activities that realize significant goods for some people under some circumstances but not for others differently situated.<sup>52</sup> Children are different from

51. Lee and George, “What Sex Can Be,” 156.

52. See Martha C. Nussbaum and Kenneth J. Dover, app. 4 to Martha C. Nussbaum, “Platonic Love and Colorado Law,” *Virginia Law Review* 80 (1994): 1515–1651, 1651, “It is, however, an extraordinary error to suppose that someone who regards *x* as sometimes or often a good must, if consistent, regard it as good in all circumstances.”



adults in a variety of morally relevant ways. That is why, for instance, there are child labor laws.

The hard case, then, is consensual adult incest. Most commentators respond to this case by pointing out the potential for deformed offspring. But what about instances where the partners are permanently sterile or where they lack the problematic recessive genes? Do Finnis and the new natural lawyers have a unique argument against such instances? I do not see how they do. Such acts seem *prima facie* capable of achieving the biological complementarity and friendship constitutive of the marital good. If there is an objection to such acts, it must be for some other reason (such as the actual or potential harm to family bonds). Such reasons are entirely available to gay-rights advocates.<sup>53</sup>

#### IV. POLYGAMY, INCEST, AND BESTIALITY

I have argued that Finnis and his natural law colleagues have failed to sustain a compelling version of the PIB argument. And if their version fails—despite its rigor and detail—others are unlikely to succeed.

Insofar as prohibitions of PIB are cogent, they will not stem from a bright-line category that includes properly motivated uncontracepted heterosexual intercourse and excludes everything else. Rather, they will stem from a careful consideration of the relative goods and harms that each practice may realize.

It is worth repeating that this approach need not be consequentialist, in that such goods and harms need not be subsequent to, and thus readily separable from, sexual acts themselves. Traditionalists have an unfortunate habit of assuming that all of their opponents are consequentialists, and in particular, hedonistic act-utilitarians. They need not be (and, indeed, many of us are not). The rejection of traditionalism does not entail that the only good realizable in sex is pleasure or some other extrinsic experience. Rather, the goods realized in sex—such as intimacy, communication, and so on—may be in some important sense intrinsic, regardless of whether the sex is heterosexual or homosexual. (By ‘traditionalism’, I mean the view that the only appropriate avenue for sexual expression is monogamous heterosexual uncontracepted intercourse. Traditionalists sometimes refer to their opponents as ‘liberationists’; I prefer the broader and less loaded term ‘nontraditionalists’.)

The question remains whether nontraditionalists have some argument to offer against PIB relationships, which are widely considered morally abhorrent. I turn now to a brief consideration of that question.

53. In correspondence, Robert George has informed me that he and Patrick Lee will be addressing this issue in a forthcoming book on dualism and morality. Having not seen that book, I remain unconvinced that mere attention to the “marital good” will rule out all forms of PIB—unless the concept is stretched into an even more problematic form.

A complete answer will require far more data than I can marshal in this article. It will also require careful attention to various distinctions: distinctions between morality and public policy, between the morally permissible and the morally ideal, and—perhaps most important—between various sorts of polygamy, incest, and bestiality, which are as different from one another as each is from homosexuality. However, in what remains I will offer some very brief and inconclusive observations about each of these practices, in the hope of suggesting avenues for future discussion.

My aim here is to show that there are plausible nontraditionalist arguments against many—though probably not all—PIB practices. Taken together, these arguments disprove the claim (R4) that, if one rejects the traditionalist position, one gives up hope of drawing moral distinctions in the area of human sexuality. At the same time, I want to make it very clear that the following observations are independent of my central thesis—that PIB and homosexuality are no more essentially connected than PIB and heterosexuality. That thesis is compatible with a wide variety of positions on polygamy, incest, and bestiality, including positions quite different from those I sketch below.<sup>54</sup>

#### A. *Polygamy*

Do nontraditionalists have a plausible argument against polygamy? Notice that this question is somewhat off topic, since the PIB argument I have been considering is an argument against gay relationships, not gay civil marriage. Insofar as polygamy is a legal and political issue, it takes us somewhat afield of that argument. Perhaps it would be better to discuss polyamory—that is, relationships with multiple partners, regardless of legal recognition. But since polygamy is the more familiar concern, and since many of the arguments for and against polyamory are roughly equivalent to those for and against polygamy, let us ignore that point for a moment and focus on polygamy.

The most familiar argument against polygamy is that it's bad for women, or more broadly, that it is associated with authoritarian societies.<sup>55</sup> But here we must make a distinction. 'Polygamy' refers to multiple spouses, not merely multiple wives. The more precise term for multiple wives is 'polygyny'; for multiple husbands, it is 'polyandry'. It is by no means clear that a society that permitted both polygyny and

54. Notice, e.g., that my comments on polygamy contradict those of fellow gay-rights advocate Jonathan Rauch.

55. James Donovan has argued that polygamy is not as inherently sexist as widely believed. See Donovan, "Rock-Salting the Slippery Slope," sec. IV.B.

polyandry would be bad for women. Thus, the most familiar argument is insufficient.<sup>56</sup>

Unfortunately, even commentators who acknowledge the distinction between polygyny and polyandry tend to assume that polygamous societies will be polygynous societies. Consider Rauch:

As a mathematical necessity (given that polyandry is extremely rare), for one man to have two wives means that some other man has none. Moreover, the higher a man's status, the more wives he gets. . . . With elite men taking more than their share, low-status men have trouble finding mates, and some can't marry at all. This problem is not just theoretical. In developing countries where girls are disproportionately aborted, shortages of brides for young men lead to an array of intractable social problems. By taking more women than men off the marriage market, polygamy has much the same result.

Whether in the Third World or in inner-city America, a good way to create an angry and restless underclass is to create a population of unmarriageable, low-status men.<sup>57</sup>

Rauch seems to be saying that even though in theory we could have a roughly equal number of polygynous and polyandrous marriages—thus avoiding the problem of restless low-status males—in practice it doesn't work that way. And public policy needs to be based on real experience rather than imagined ideals. If we legalize polygamy, we should expect to see a lot more polygyny than polyandry, with the usual social problems resulting.

Rauch then anticipates and responds to an objection:

It's tempting to retort, "All of that might be true in a society where polygamy was widely practiced. But in modern America, what harm does it do if a few people here and there take multiple spouses?" The answer goes back to Immanuel Kant, one of the touchstone theorists of modern liberalism. A liberal society, he said, needs to insist that rules work at least as well when applied to everybody as when applied to only a few. Otherwise, the government ends up picking and choosing favored citizens. When a first-grade teacher says, "The reason you can't take two jars of paint, Tommy, is that if everyone took two jars we wouldn't have enough to go around," she is inculcating the basic principle of legislating for equality.<sup>58</sup>

56. For a discussion of egalitarian polyamorous relationships, see Elizabeth F. Emens, "Monogamy's Law: Compulsory Monogamy and Polyamorous Existence," *New York University Review of Law Social Change* 29 (2004): 277–376.

57. Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* (New York: Holt, 2004), 129.

58. *Ibid.*, 130.

Put aside for a moment the fact that Rauch's argument is more consequentialist than Kantian. The problem is that Rauch is now contradicting his earlier point about laws being based on real experience rather than imagined ideals. In reality, it seems unlikely that many people would choose polygamous marriage in our society. After all, very few people currently choose polyamorous relationships, despite the fact that those are legal.

Worse yet, Rauch's "Kantian" argument against polygamy seems to work equally against gay marriage. For if we cannot assume that most men wouldn't take multiple wives, we also cannot assume that most men wouldn't take husbands, thus creating a shortage of males for women to marry (and perhaps a "restless underclass of old maids"). If Adam marries Steve, that's one less man for Eve to marry. And on Rauch's "Kantian" logic, we cannot assume that other men won't act like Adam. Similarly, if every woman takes a wife, the "restless males" problem looms again.

The difficulties in applying Kant's universalizability principle are familiar and do not need to be rehearsed here.<sup>59</sup> Besides, as already noted, Rauch's real concern is consequentialist, not Kantian: legalizing polygamy will result primarily in polygyny, and polygyny causes social problems. Whether these causal connections will actually ensue is an empirical question requiring additional data. Those data must include the fact that historically, polyandry is vanishingly rare and that polygyny is highly correlated with sexism. And they must include the fact that most polygamous relationships historically have involved inequality, with one "head" making unilateral decisions. But they must also include the fact that very few people in contemporary Western societies seem interested in polyamorous relationships (a relationship with one partner is challenging enough) and that egalitarian polygamous relationships, though rare, do occur.

The thing to remember is that even traditionalists will need to base their argument against polygamy on such data, unless their argument is to amount to nothing more than a blind appeal to (recent Western) tradition. For, as I argued in the last section, neither Finnis's "marital good" nor Arkes's "teleology of the body" can explain why polygamy or polyamory is wrong. If there are good arguments against these practices, they are as available to nontraditionalists as traditionalists.

59. Rauch's example of Tommy and the paint cans suggests an illustration of the problem. Suppose that, instead of painting, Tommy decides to borrow a book from the library. Obviously, not every student could borrow that same book (assuming that there is only one copy but multiple students). Does it follow that it is unjust for Tommy to borrow the book? I am grateful to Christine Korsgaard for her helpful comments on this section.

*B. Incest*

Incest and bestiality are more difficult to discuss, since the prohibitions against them reach the level of taboos—that is, prohibitions beyond question.<sup>60</sup> Then again, homosexuality was once widely regarded as “the love that dare not speak its name,” and it is the job of philosophers to question deeply held assumptions—even if, after doing so, they ultimately embrace them.

The term “incest” encompasses a wide variety of practices, and we should be clear on which we are discussing. In the previous section, I argued that nontraditionalists have a strong argument against adult-child incest. But perhaps this argument was too quick. According to anthropologists, some societies approve incestuous practices as a feature of rites of initiation. One example is the Etoro of New Guinea, where young males fellate older males (often relatives) in the belief that ingesting the latter’s semen is necessary for maturation. Suppose that the Etoro were to realize that the semen did not have any physiological benefits but were to continue the practice for its symbolic value. Would this practice be incest? And are there good arguments against it? These are two separate questions, and I will address each in turn.

First, on the issue of whether the behavior constitutes incest, Laurie Shrage writes: “From the perspective of our society, the Etoro’s practice involves behaviors which are highly stigmatized—incest, sex with children, and homosexuality. Yet, for an anthropologist who is attempting to interpret and translate these behaviors, to assume that the Etoro practice is best subsumed under the category of ‘sex,’ rather than, for example, child rearing, would reflect ethnocentrism. Clearly, our choice of one translation scheme or the other will influence our attitude toward the Etoro practice. The point is that there is no practice, such as ‘sex,’ that can be morally evaluated apart from a cultural framework.”<sup>61</sup> Shrage appears to hold that whether a behavior counts as “sex” depends (at least in part) on the intentions of those engaging in it. If the Etoro’s intention is to make boys into men—rather than, say, to experience a particular kind of pleasure or to realize the marital good or (to borrow Thomas Nagel’s phrase) to achieve “multi-level interpersonal awareness”—then it is not sex, regardless of its physical form. And if it is not sex, then a fortiori it is not incest.

Shrage’s argument provides one way of distancing the Etoro’s practice (and others like it) from more troubling examples of incest in our

60. The classic philosophical article on the incest taboo remains Jerome Neu’s “What Is Wrong with Incest?” *Inquiry* 19 (1976): 27–39.

61. Laurie Shrage, “Should Feminists Oppose Prostitution?” *Ethics* 99 (1989), as reprinted in *The Philosophy of Sex*, 3rd ed., ed. Alan Soble, 323–38 (Lanham, MD: Rowman & Littlefield, 1997), 326–27.

own society. But as interesting as Shrage's argument is, I doubt it will satisfy most traditionalists. So let me put aside the question of whether the Etoro's behavior is incest and instead consider how nontraditionalists might argue against it. In developing a *prima facie* case for homosexuality, I suggested a framework in which a sexual practice's moral status hinges on its contribution to human flourishing. Here, there is no immediate, obvious tension between the practice and flourishing (particularly if we restrict our consideration to the modified case in which the practice does not depend upon any false beliefs). Must nontraditionalists accept this practice and thus abandon the blanket prohibition of adult-child incest?

Cultural context matters here, but to acknowledge this is not necessarily to endorse moral relativism. For I would not suggest that the mere fact that the Etoro approve the practice makes it right (or "right for them"). To allow that would be to imply that cultural condemnation of homosexuality makes it wrong—a conclusion that neither Shrage nor I (nor most other sensible people) would accept. There are, however, less direct ways in which cultural beliefs and attitudes can bear on the moral status of actions. Beliefs and attitudes can generate moral obligations indirectly by giving our actions effects they might lack in the absence of such beliefs and attitudes.

Consider the following illustration. There is nothing particularly morally significant *per se* about which side of the road one drives on. Nevertheless, once a society (through its customs and laws) decides to favor one side, it could well be morally significant to defy that preference. Driving on the left side of the road in our society is morally significant because it puts people in danger—which danger partially results from cultural preference. It's not wrong merely "because we say so"—that is, because of the rule. It's wrong because, given that we have established the rule and that people generally observe it, violations can be dangerous to people's health and safety.

How might incest be similar? Our society has certain attitudes toward both intergenerational and intrafamilial sex. Those attitudes partially result from the harms that such sex can cause, but they also partially (and indirectly) cause some of those harms. Because sex has a particular meaning in our culture, participants in incest here are subject to certain psychological and social difficulties that their analogues in Etoro society are not. That fact gives incest a moral significance here that it might well lack for the Etoro. Since the persons in question in this example are children, we should be especially careful about protecting them from these difficulties. (In this detail, adult homosexuality is relevantly different from adult-child sex: even if social disapproval creates risk for homosexual adults, adults are in a position to choose whether the benefits outweigh the risks.) There is a complex social web at work here, comprising beliefs and attitudes not only about sex but also about parenting, education,

autonomy, family, and society (the list is by no means complete). One cannot simply “opt out” of this web by saying so. Thus, it would be illegitimate for someone in our society to point to the Etoro practice in order to absolve himself of adult-child incest.

The upshot is that nontraditionalists can maintain a strong prohibition of adult-child incest in our society that does not necessarily apply to the Etoro practice. (It might still apply, depending on what else anthropologists uncover.) But what about the more difficult case of consensual adult incest? The easy and familiar response is that it can produce deformed children. But this response is too easy, since it says nothing about homosexual incest, postmenopausal incest, incest by sterile partners, and so on. Most people who think that incest is wrong would continue to think so even if contraception were foolproof or if the partners lacked the problematic recessive genes.

One might instead argue that the prohibition of consensual adult incest is justified indirectly as follows: the reasons for prohibiting adult-child incest in our society are so strong that, for the sake of the general good, we need a taboo against all incest. Otherwise, there is too much danger for “slippage.” To put the point vividly, imagine a world in which Mom and Dad believed it would be okay to have sex with Junior once he turned eighteen. Bad idea. More generally, permitting incest in any form in this society seems to have tremendous potential for wreaking havoc on family life as we know it.<sup>62</sup>

As is often the case in moral philosophy, one can imagine exceptional “desert-island” cases that circumvent many of the above concerns: suppose that participants are fully aware of the risks mentioned, willing to undertake them, and able to do so secretly, so as not to encourage reckless behavior in others. (It is important to emphasize that these cases are indeed exceptional and thus largely irrelevant to the real-world prohibitions that we seek.) Still, my opponent might ask, could I explain why those cases of incest are wrong? Not in a paragraph or two. But neither, I expect, could traditionalists. Insofar as traditionalists base their sexual ethics on acts being of the “procreative kind,” they do not have a unique argument against incest. If there are good responses to the “desert-island” cases—which again, are more philosophically interesting

62. This “playing it safe” argument is a consequentialist one, and there are at least two different ways of understanding it. On one reading, the argument claims that consensual adult incest is wrong because it is likely to lead to nonconsensual (especially adult-child) incest, or more broadly, to harm to the family. On another reading, the argument claims not that consensual adult incest is wrong but that the failure to prohibit it is wrong. The idea behind this second reading is that, while some cases of consensual adult incest may not have bad consequences, any policy that fails to prohibit incest across the board would have bad consequences. In the remarks that follow, I am assuming the former reading.

than practically useful—they should be as available to gay-rights advocates as gay-rights opponents.

### *C. Bestiality*

The bestiality analogy is the most far-fetched of the three. To compare a homosexual encounter—even a so-called casual one—with bestiality is to ignore the distinctively human capacities that sexual relationships can (and usually do) engage. As such, the analogy embodies the sort of reductionist thinking about sex that traditionalists typically attribute to gay-rights advocates. For that reason, however, the analogy is the easiest of the three to rebut. I have argued that, *prima facie*, homosexuality appears capable of realizing the same goods as nonprocreative heterosexual relationships. Bestiality is not comparable on this score, since (virtually by definition) it does not provide the same opportunity for interpersonal communication, intimacy, and so on.

One might also argue that bestiality lacks meaningful consent on the part of the animal, although this point is less decisive than it seems. For one thing, most people do not think consent is morally required in our dealings with animals. Suppose, however, that most people are just wrong about this. The next question to ask is, are animals ever capable of meaningful consent? If we answer “no,” then what should we say of the apparently morally uncontroversial interactions we have with many animals? The elderly person who hand-feeds squirrels on a park bench does not seem to be doing anything wrong, despite the supposed absence of meaningful consent. If, however, we suppose that animals are capable of (perhaps limited) consent, what could we say about the (probably rare, if even existent) cases of bestiality that involve such consent?

Assume for the moment that such cases exist. To argue against them, a nontraditionalist would likely argue for one or more of the following: (1) harm to the animal via the sexual act, despite the animal’s consent; (2) harm to the animal as a necessary precondition for the act (e.g., involuntary domestication); (3) harm to the person via the act, perhaps by damaging his or her capacity for fulfilling human relationships; or (4) harm to the person as a necessary precondition for the act (e.g., a warped psyche).

There is also a frequently overlooked fifth option: (5) failure to achieve the much greater goods available in human relationships. For those of us who see morality not purely in negative terms but instead in terms of aspiring to be our best selves, the fifth option should be rather compelling. As I see it, the point of morality is not (or not merely) to produce pleasure and avoid harm but to realize important human goods. Given that point, the difference between homosexuality and bestiality should be quite obvious.

In this section, I have briefly reviewed various arguments against



polygamy, incest, and bestiality, and I have found some more compelling than others. Such mixed results do suggest one apparent advantage to the traditionalist position: an appealing simplicity. Unfortunately, such simplicity comes at considerable cost. Traditionalists employ ad hoc constructions like “the marital good” and then fail to see their implications and their limits; they also commonly suffer from historical myopia about the moral horrors committed in the name of tradition. If the traditionalist position is to be at all plausible, those who wish to maintain it cannot simply lump together all the practices they wish to forbid under the “anti-tradition” rubric. Instead, just like the rest of us, they will need to grapple with the unique moral dimensions of each practice.

## V. CONCLUSION

We have examined the charge that gay-rights advocates “have no principled moral case to offer against . . . the getting of orgasmic sexual pleasure in whatever friendly touch or welcoming orifice (human or otherwise) one may opportunely find it.” The charge doesn’t stick: one can approve of homosexuality without endorsing sexual anarchy.

In a footnote to his critique of Finnis, Andrew Koppelman “plead[s] guilty” to the above charge, on the grounds that his own rejection of certain sexual practices “will be too dependent on consequentialist judgments to be ‘principled’ in the sense that Finnis intends.”<sup>63</sup> If by this concession Koppelman means that he has no objection to such practices in principle—that is, in themselves, apart from any connection to more general moral principles, then his point is reasonable and I share his position. Sexual practices ought to be evaluated in terms of their relative contribution to human flourishing. In this article, I have argued that there is no reason to presuppose that homosexuality is more like PIB in this contribution than heterosexuality.

Yet I also think that Koppelman gives away the word ‘principled’ too readily. Consequentialist principles are principles, and moral prohibitions can be serious without being absolute. Moreover, as we have seen, even traditionalists will need to appeal to some consequentialist considerations to reject most instances of PIB, and their rejection is no less “principled” for that fact.<sup>64</sup> Finally, as I have argued above, gay-rights

63. Koppelman, *The Gay Rights Question in Contemporary American Law*, 184 n. 93.

64. To my ear, the move from “no objection in principle to PIB” to “no principled objection to PIB” is a non sequitur. The former suggests that there are no true general principles entailing that PIB is wrong in itself, while the latter suggests something stronger, namely, that there are no true general principles that we could use to show that (most or all) instances of PIB are wrong. That is, the latter rules out the possibility of a principled *extrinsic* objection to PIB (e.g., an objection to PIB on the grounds of its being generally harmful). Most gay-rights advocates (including Koppelman) have precisely that sort of objection to PIB.

advocates need not be consequentialists. The goods realized in homosexual acts, like those in heterosexual acts, need not be subsequent and separable in the way that consequentialism usually suggests.

Proponents of the PIB argument present a false dilemma, claiming that we must either accept a very narrow understanding of appropriate sexual expression or else abandon all hope for drawing serious moral distinctions. They then arbitrarily connect all forms of homosexuality with the worst forms of PIB and count on their audience's horror. This is not so much an argument as it is a scare tactic.

Sadly, we can expect to see this tactic frequently in the ongoing debate over same-sex marriage. And, as I noted at the beginning of the article, this rhetorical stratagem is nothing new. As E. J. Graff explains, quoting rhetoric from a variety of earlier debates about marriage,

conservatives are dragging out the rhetoric that has been hurled against every marriage change. . . . Allowing same-sex marriage would be like allowing married women to own property, "virtually destroying the moral and social efficacy of the marriage institution." Or it would be like legalizing contraception, which "is not what the God of nature and grace, in His Divine wisdom, ordained marriage to be; but the lustful indulgence of man and woman. . . . Religion shudders at the wild orgy of atheism and immorality the situation forebodes." Or it would be like recognizing marriage between the races, a concept so "revolting, disgraceful, and almost bestial" that it would lead directly to "the father living with his daughter, the son with the mother, the brother with his sister, in lawful wedlock"—and bring forth children who would be "sickly, effeminate, and . . . inferior." Or it would be like making wives the legal equals of their husbands, a proposal that "criticizes the Bible . . . degrading the holy bonds of matrimony into a mere civil contract . . . striking at the root of those divinely ordained principles upon which is built the superstructure of society." Or it would be like allowing divorce, "tantamount to polygamy," thereby throwing "the whole community . . . into a general prostitution," making us all "loathsome, abandoned wretches, and the offspring of Sodom and Gomorrhah."<sup>65</sup>

In this article, I have tried to respond to this sort of irrational panic while making some broader points about sexual ethics, but I have left many questions unanswered. It is easy to draw lines around what one likes and to condemn others for falling outside the lines; it is much harder to articulate a coherent, complete, and plausible sexual ethics. It is especially hard to do so when one's opponents keep changing the subject.

65. E. J. Graff, *What Is Marriage For? The Strange Social History of Our Most Intimate Institution* (Boston: Beacon, 1999), 251–52.