

<CHAPTER THREE>  
NEW NATURAL LAW AND SAME-SEX MARRIAGE  
*First Draft* (last updated May 24, 2007)  
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<INTRODUCTION TO CPSA DRAFT:>

In North America, the issue of same-sex marriage has been predominantly framed as a conflict between two different forms of ethical reasoning. On the one hand, the supporters of same-sex marriage invoke principles of equality and the concomitant extension or universalization of rights to members of the gay and lesbian community—members who would otherwise be excluded from full participation in the social good of marriage. On the other hand, opponents of same-sex marriage invoke principles of biological nature, historical tradition, and the divine order to justify drawing the boundaries of marriage so as to continue to exclude same-sex couples.<sup>2</sup>

This public framing introduces an important distortion into the debate. Instead of a debate *about* same-sex marriage itself, the debate more fundamentally becomes one *over* which of the two sorts of ethical principles should be politically dominant: those of equality/rights or those of nature/tradition/divine. This distortion has two consequences for how we think about and act on the issue of same-sex marriage. These two consequences comprise the true problems raised by the same-sex marriage. The first of these problems is philosophic; the second, practical.

The public framing of the issue of same-sex marriage as one of equality/rights versus nature/tradition/divine order has the appearance of trying to treat the problem with an ethical

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2 E.g., see Miriam Smith, “Framing Same-sex Marriage in Canada and the United States: Goodridge, Halpern and The National Boundaries of Political Discourse” in *Social & Legal Studies*, v.16, n.1, 2007: 5–26.

seriousness. That is, the public debate has the appearance of attempting to provide an account of why marriage might be a good—i.e., something worthy of being pursued. However, this public framing tends to obscure rather than clarify what is at stake with same-sex marriage as well as how we might philosophically inquire into that importance.<sup>3</sup> The nature of the public debate unintentionally shifts our attention *from* marriage as an object of ethical investigation *to* those grounds external to marriage which are used to argue for, or against, same-sex marriage. In other words, the debate at its heart is not about the nature of marriage, but rather about, on one side, the nature of rights and, on the other, the nature of nature, tradition, or divine order. Same-sex marriage, and marriage itself, becomes the issue around which the debate between rights and nature/tradition/order is fought, but the debate is not about marriage in any fundamental sense.

The dominant philosophic discourse on same-sex marriage follows the path laid out by the public debate, a path that leads, around marriage rather than to marriage. We see one literature working within the tradition emerging from, and dependent upon, the rights and equality discourse stretching from Immanuel Kant (e.g., the *Groundwork for the Metaphysics of Morals*) in the late eighteenth-century to that of John Rawls (*Theory of Justice*) in the late twentieth-century.<sup>4</sup> We also find a smaller, secular literature

3 Within the Canadian debate, the desire, but inability to find some way to ethically ground marriage and to produce a consent is best captured in two questions asked by Canadian politicians during the height of the debate. Addressing the issue whether it would be better to have same-sex legislation or have the state simply get out of the ‘marriage business’, then Justice Minister Irwin Cotler asked: “How would any of us explain to Canadians—to our own parents and grandparents—that marriage is no longer a part of our law?” (Cotler, “Bill C-38—the Civil Marriage Act, Open Letter from the Minister of Justice Concerning Alternative Approaches” May 12, 2005). On the other side, Manitoba Conservative MP Brian Pallister nicely articulated the whole problem when he said “I think we have got to get beyond [...] one side accusing the other of homophobia and the other side saying the other side is going to burn in hell” (CP, Feb. 15, 2005). In both cases, each senses the need for a solution, but cannot see past the irreconcilability of the *ethical reasonings* being deployed to support either side of the debate.

4 The high-water mark of this literature on the ethics same-sex marriage occurred in a series of debates and articles in the mid- to late-1990s. See, e.g., Richard D. Mohr, “The Case for Gay Marriage” in *Notre Dame Journal of Law, Ethics, and* (continued...)

that returns to the tradition of theorizing from the “natural facts” of human reproduction and the “natural laws” of moral behaviour—a tradition variously located in, and stretching from, classical thinkers such as Plato and Aristotle in the fourth-century BCE to the medieval accounts of natural law in Thomas Aquinas in the thirteenth-century and to the dominant philosophic opponents of same-sex marriage in the work of John Finnis and the so-called “New Natural Law” theorists of the late twentieth-century.<sup>5</sup>

The philosophic problem regarding same-sex marriage is how to inquire into *marriage itself* so to explore in what way, if at all, marriage might be a first-order good (i.e., a good that is desired for itself and not for some other good). In other words, the philosophic problem raised by same-sex marriage, but hidden by the public framing of the debate and the dominant philosophic discourse, is to find a mode of philosophic inquiry that avoids assuming the priority of either rights/equality discourse or that of nature/tradition/divine order.

The purpose of this paper (which is a partial draft of chapter 3 of a book ms on same-sex marriage and political philosophy) is to explore the new natural law approach to same-sex marriage. At present,

4 (...continued)

*Public Policy*, v.9, 1995: 215–239; Stephen Macedo, “Homosexuality and the Conservative Mind” in *Georgia Law Journal*, v.84, 1995–1996: 261–300; Andrew Koppelman, “Is Marriage Inherently Heterosexual?” in *The American Journal of Jurisprudence*, v. 42, 1997: 51–95; Ralph Wedgwood “The Fundamental Argument for Same-sex Marriage” in *The Journal of Political Philosophy*, v.7, n. 3, 1999: 225–242; as well as in books such as Carlos A. Ball, *The Morality of Gay Rights* (New York: Routledge, 2003).

5 The secular version of the so-called ‘new natural law theorists’ take their philosophic bearings from John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 2005 [1980]) and have applied these ideas in a number of articles and book chapters, including: John Finnis, “Law, Morality, and ‘Sexual Orientation’” in *Notre Dame Law Review*, v.69, 1993–1994: 1049–1076; Robert P. George and Gerard V. Bradley, “Marriage and the Liberal Imagination” in *Georgia Law Journal*, v.84, 1995–1996: 301–320; John Finnis, “The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations” in *The American Journal of Jurisprudence*, v.42, 1997: 97–134; Patrick Lee and Robert P. George, “What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union” in *American Journal of Jurisprudence*, v. 42, 1997: 135–157. Recent developments of the new natural law tradition, although not directly speaking to same-sex marriage can be found in Mark Murphy, *Natural Law in Jurisprudence and Politics* (New York: Cambridge University Press, 2006).

however, the chapter explores the philosophic potentialities of the received, early-seventeenth century natural law tradition especially as they are revealed by the social contract tradition that engaged and then supplanted it in the later-seventeenth and eighteenth centuries (section I). It then reconstructs the conceptual ‘mechanics’ of the secular new natural law reconstructed by John Finnis. The argument in this lengthy section is that Finnis’ attempt to overcome the interpenetration of fact and value in the received natural law tradition, causes his new natural law to engage in a complex transposition of meaning first away from natural facts to the ideas of the good, then from the idea of the good to human action, and finally from human action to institutions (section II). Yet it is this very transposition of meaning implicit in the new natural law that the new natural law theorists deny when they confront the issue of the moral possibilities of homosexuality and same-sex marriage (the as-yet unwritten but outlined-in argument section III).

#### I. THE POSSIBILITIES OF NATURAL LAW AND THE SOCIAL CONTRACT CRITICS

Natural law theorizing has not come down to us directly, but instead contained within the historic reaction to its perceived deficiencies. Ironically, the way in which the natural law theorizing has been understood and criticized *recommends* the natural law tradition to us as a possible solution the problem of inquiring into the good of marriage in a way, as we have seen in the previous chapter, that both the issue of same-sex marriage demands (chapter 1) and the liberal tradition fails to achieve (chapter 2).

The ultimate form of the critique of natural law, or at least the critique of natural law as it was understood by that modern tradition of political philosophy which came so thoroughly to supplant it, was that natural law’s regulatory and evaluative power derived from the connection of moral values to

naturally given and immediately known facts. Once the natural fact or the natural order of a situation is known, then one also knows how that situation *ought* to be. Since the “natural fact” is not derived from some averaging of empirical situations, this natural fact is not variable over time (what *is* can tend neither up nor down as historical situations change), but stands as an immutable, a-historical foundation against which all other posited foundations for human action and social organization can be measured. This understanding of the internal logic of the natural law tradition is present in contemporary account of natural law thinking,<sup>6</sup> but exists in a more vital way in that early modern tradition of political philosophic thought present in the preeminent social contract theorists, Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, who laid new foundations for authority, morality, and the nature of the good on top of natural law thinking—foundations that would culminate in the contemporary liberal occlusion or exclusion of questions of the good as a valid politico-philosophic form of inquiry, through an emphasis on a particular conception of justice apparently disconnected from substantive conception of selfhood or human flourishing as the new basis both for the evaluation and the construction of a legitimate social order.

While a full account of the replacement of the received tradition of natural law thinking requires far more space than can be accommodated within the more narrow task of this chapter, it is necessary for us to briefly survey how the natural law tradition was understood by those who sought to engage and correct it. The purpose here is not to *reconstruct* that received natural law tradition, but to reconstruct what was perceived to be wholly inadequate within it for the task of theorizing the nature and good of the political community.

6 <give examples here>

<Brief discussion of the central terms and logic of the debate set by the natural law tradition of the early 17Cth in Gabriel Vasquez's *Commentary* (1605), Francisco Suarez's *De Legibus* (1612), and Hugo Grotius *De Jure Belli ac Pacis* (1625) >.

Against these terms of debate we have the emergence of the social contract theorists who bring to the surface both what is incompatible with modernity within that natural law tradition—and therefore what any return to the natural law tradition must overcome—and, as mentioned, ironically what might be valuable within that tradition for inquiring into contemporary questions like same-sex marriage.

Thomas Hobbes, whose most important and complete account of the nature of man and politics is given in *The Leviathan* (1651), can be seen to structure his new theory of the foundations of political society as an inversion of the natural law tradition discussed above. Like that tradition, Hobbes begins with a natural fact, “the natural condition of mankind” (Hobbes, *Lev*, Bk. I, ch. 13 <[C]>, p. 82), induced by reason and proven by a self-interrogation of our own experience to be that men are equal, and in this equality, the only source of meaning is that which each gives to himself. In his way, the “natural condition” reveals no “*finis ultimus*, (ultimate aim,) nor *summum bonum*, (greatest good,) as is spoken of in the books of the old moral philosophers (Bk. I, ch. 11 [1], p. 65)—i.e., a good which exists external to and independent of our own condition and our own self-understanding, but towards which both of those ought to be directed. Instead, the natural condition is productive of the *possibility* of each creating that now absent meaning in the world. Hobbes phrases this entrenchment, not of natural meaning (the mutual implication of fact and value), but of the *possibility* of the creation of meaning, as the “right of nature” (*jus naturale*):

the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto. (Hobbes, *Lev*, Bk. I, ch. 14 [1]. p. 86)

The “fundamental law of nature” (*lex naturale*) comes into existence only as a consequence of this “right of nature”, for the fundamental law of nature declares that one “ought to endeavour peace, as far as he has hope of obtaining it”, yet the regulative nature of this law depends solely on that radically individual decision that one “has hope of obtaining it”—for it is a hope dependent on “his own judgement, and reason” as well as the means by which he chooses for “the preservation of his own nature” (Hobbes, *Lev*, Bk. I, ch. 14 [1], p. 86). In this way, Hobbes introduces an alternative to, and thereby provides a critique of, the relation of deriving values from facts.

We see in Locke a similar sort of problematization of the co-penetration of natural fact and value. Locke famously begins his *Second Treatise* by questioning the possibility that natural facts can be productive of shared meaning and therefore promote valid rules of collective behaviour and social organization simply by the existence of that fact. So, although Locke returns us to an original fact given by nature—the state of nature—and indicates that the “law of nature” governs there (Locke, *ST*, ch. 2, §§ 4, 6), his account of that natural fact ends up showing how insufficient natural law is in generating social meaning capable of organizing political society. This law of nature is present in the original fact of the state of nature in which each “willeth the peace and preservation of all mankind” and yet

the execution of the law of nature is, in that state, put into every man’s hands, whereby everyone has a right to punish the transgressors of that law to such a degree as may hinder its violation: for the law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody that in the state of nature had a power to execute the law, and thereby preserve the innocent, and restrain offenders. (Locke, *ST*, ch. 2, § 8)

However, in each following the law of nature—which is not known *through* reason or via reason’s *participation* in it, as in Thomas Aquinas’ famous thirteenth century formulation (Aquinas, *Summa*, <I-

II> <q. 90>), but simply “*is that law*” (Locke, *ST*, ch. 2, § 6; emphasis added)—the result is neither the universal harmonization of individual actions nor the enforcement and making concrete those of what we might expect to be the manifestly given meanings of any “law of nature”. Instead, Locke tells us to follow the law of nature produces the destabilization of meaning: for from the individual punishment, which results from our individual reasoning, not *on*, but *as*, the natural, “nothing but confusion and disorder will follow” (Locke, *ST*, ch. 2, § 13, p. 105).<sup>7</sup> The inability to go from the nature of facts of our existence to a stable system of coordinated action and validations—despite the existence of the law of nature and the conceptual distinction between this fact (the state of nature) and this disordered state that results (the state of war) (Locke, *ST*, ch. 3, § 19, p. 108)—Locke has to introduce, as did Hobbes, a new foundation for the imposition or construction of shared meaning. It is a foundation that uses the natural fact not as meaning itself but simply as the condition for the possibility of the introduction of institutions of meaning. These institutions are radically products of our will—expressed by both Hobbes and Locke as the idea of a foundational contract requiring our unanimous consent to construct what we can call realms of meaning, in the form of the political community (first the structure of government, then the legislature, and so on). While the natural fact is not lost, the idea that this fact generates meaning, i.e., that the law of nature can tell us what to do, is. The appearance of embracing a law of nature or the interpenetration of fact and value, in Locke, at minimum serves to show how problematic the direct

7 <Add discussion of the complexity of L’s position on natural law: the problems of natural law are initially given as those of application caused by individual partiality—i.e., not problems with natural law itself. However, L’s own discussion of, e.g., the need to turn to conventionality to determine the age of reason (as opposed to some, say, objective test—compare here the Socrates’ development of a decades’ long series of increasingly long course of study and tests for the guardians in Plato’s *Rep.* to get at the same thing.>



relationship between natural fact and social meaning can be and, at maximum, serves simply as a way for Locke to introduce new ideas of social meaning and legitimacy using the old language of natural law.<sup>8</sup>

Like Hobbes and Locke, Rousseau both adopts the basic framework of that natural law position and inverts the logic of its position: the way meaning is known and grounded. In his *On the Social Contract*, Rousseau removes from natural facts the quality of providing normative guidance: facts of slavery, paternalism, and the biologically derived relations of children to parents, the facts of force, are emptied of their ability to prescribe a normative order. Without value that can be extracted from them, it belongs to the will to provide moral content to the world of things and relations. If there is to be shared meaning its source is to be, not the objective and unassailable natural facts of our own existence—but the shared construction of, and subordination to, a will that is radically shared by, i.e., participated in, by all, Rousseau’s famous general will (*volonté général*).

As we have seen, Hobbes and Locke also had retained the natural law tradition insofar as they begin with natural facts revealed to us by reason (preeminently our natural equality) as a way to then show that a natural dominion of the individual includes the dominion over the very meaning of natural facts such that it is no longer the fact that produces the norm, but rather we who impose the norm onto the fact, an imposition that can and does change according to the conditions (compare the way meaning is imposed in the state of nature and then society) in which the imposition occurs. In this way Hobbes and Locke

8 That Locke himself is aware of the danger of doing away with some objective, external foundation for the evaluation and structuring of human activity can be seen in his initial acknowledgment that without some “fountain of all power” the “world [can be seen as] [. . .] the product only of force and violence, and that men live together by no other rules but that of beasts, where the strongest carries it, and so lay a foundation for perpetual disorder, mischief, tumult, sedition, and rebellion” (Locke, *ST*, ch. 1, § 1, p. 100). It can also be seen in his remarks that “A dependent intelligent being is under the power and direction and dominion of him on whom he depends and must be for the ends appointed him by that superior being. If man were independent he could have no law but his own will no end but himself. He would be a god to himself” (Locke, *Ethica B* [Bodleian Ms. Locke C28]; quoted in John Dunn, *The Political Thought of John Locke* [Cambridge: Cambridge University Press, 1969], p. 141).

radically invert the natural law tradition to which they are responding. In his *On the Origin of Inequality* or so-called Second Discourse Rousseau goes further by radicalizing this idea of natural fact, the last remnant of the natural law tradition present. Of course the Second Discourse begins with the state of nature that includes the natural fact of our equality and the absence of any inherent meaning which flows from those facts in a way that is by now familiar to us from the discussion of Hobbes and Locke above. However, in the course of the Second Discourse, Rousseau does not then proceed to establish the condition by which meaning might be legitimately constructed in the world—the project of Hobbes and Locke and the later Rousseau of the *Social Contract*—, but instead to show that even the natural fact of the state of nature with its atomic individuality is itself a social construction. This constructedness of our atomic individuality is present in two ways.

First, the radical equality of the individual of the state of nature is not a *human* equality. Rather Rousseau shows that our humanity emerges out of a process of interacting with the world. The only natural facts present, then, are those conditions which allow the process to unfold: *amour de soi*, *pitié*, *perfectibilité*, and *agence libre*. The former two provide for the possibility of our existence over time: *amour de soi* by providing an impulse to self-preservation at the expense of the external world (those external material, many of which are living, that we require because of our biological constitution), and *pitié* by providing a counter-impulse to the necessary destruction of this externality. Only changing external conditions (particularly that of scarcity) transforms our nature, activating our capacity to change (*perfectibilité*) to become other than we are—thus making non-nonsensical the idea of a “natural fact”—and providing the opportunity for a self-constituting source of meaning to become the defining feature of our humanity (*agence libre*). At our most atomic and equal (where this equality is a force in the world

such that one cannot even impose herself on another without then individually jeopardizing her own existence in a way that contrasts with Hobbes' account in which equality in the state of nature only shows itself as a confederation of individuals against individually stronger), we are not human—like the animals we exist between the mere modalities of existence given by *pitié* and *amour-de-soi*. Second and following from this, that the positing of a *human* atomistic individuality as the natural fact confuses what are features of the social construction of individuality in modernity for natural facts. In Rousseau's words: Hobbes "had wrongly injected into the savage man's concern for self-preservation the need to satisfy a multitude of passions which are the product of society and which have made laws necessary" (Rousseau, *OL*, Pt. I, p. 153/ 53).

So, for Rousseau, our irreducible humanity and individuality is not present in the world as a natural fact to be discerned by reason and then reasoned from (Hobbes and Locke ) or whose normative status is read out of (the natural law tradition). And yet, Rousseau has not simply overturned the natural law tradition. Although there are no natural facts, we can see its barest remnant in the way that nature still provides a standard or criterion of evaluation in the form of a *relation* between the world and the human (or proto-human) being. Freedom is the form of that this norm takes. For Rousseau, what we ought to learn from nature-as-fact is nothing—nature is meaningless in a way that it is not for Hobbes and Locke for whom the irreducible natural fact of equality and individuality remain—but what we learn from our *relationship* to nature is that it has a quality (freedom) that we can use to evaluate *other* relationships, a quality that ought to guide our thinking about how we ought to be. Because this quality is relational, even this idea of freedom has no unalterable normative content, no trans-historical or immutable dominion over meaning. We see this in Rousseau's insight which animates the whole of the *Social Contract* that the

fact in which freedom first appears (our proto-human condition of the originary state of nature) has no normative hold on us today: in relation to the contemporary possibilities of freedom “the impulsion of mere appetite [of the original state of nature] is slavery and [only] obedience to the law one has prescribed to oneself is freedom” (Rousseau, *SC*, Bk. I, ch. 8 [3], p. 365/54).

How, then, does this critique of the received natural law tradition in the thought of Hobbes, Locke, and Rousseau adumbrated above help us see the advantages of that tradition for an inquiry into the problem of same-sex marriage? First, that tradition asks us to first determine the fact of the matter, i.e., to inquire *what* something is; it forestalls any ethical inquiry until the nature of the subject matter under consideration is determined. With our social contract theorists, this radical plurality of natural facts is replaced with a singular and foundational natural fact and therefore an inquiry directed only to the discovery of that one fact—our atomism, equality, or the relation of freedom—from which the social construction of meaning can occur according to the requirements of that natural fact. So, where the natural law tradition has the potential to address the question of the meaning of nature of marriage, i.e., to proceed to an inquiry into the ethical boundaries of marriage and therefore what makes marriage and the family, marriage and the family and not something else, our social contract theorists do not have at their disposal this plurality of foundational objects worthy of inquiry, but only a singular one: that point from which they begin their inquiry. By the very nature of the critique that Hobbes, Locke, and Rousseau engage in, they show the power of the approach, for their critiques do not dismiss the idea that inquiry must begin with what *is* (a point which, as we saw in the previous chapter, contemporary liberalism has abandoned for questions of justice), but simply that they have reduced the starting point to a singular

natural fact, which structures how the construction of meaning will occur, since the norms that ought to govern our actions and institutions still need to be made present for us.

But the critique of this received natural law tradition also points to the difficulty in simply abandoning current liberal, rights-based approaches, in order to return to the natural law tradition that they only partially abandon. For what these critiques also pick out besides simply whether there is one or a plurality of natural facts or what that natural fact is, is the imperative that the basis on which our foundationally regulative norms be radically open to human comprehension. In these critiques this problem of the knowability of the values that are to regulate and evaluate our lives is captured as the separation of fact from value. If fact and value interpenetrate so that the knowledge of value (of what ought to be) depends on the knowledge of what is (the natural fact) then that value is opaque to us. One can only say of the value that it is, that it is given by nature. That is, nature itself is the ground—a ground that shows itself to be, but not *why* it is.

By conceptually separating the natural fact from the value that it carries, Hobbes, Locke, and Rousseau, each try to solve this problem of the comprehensibility of value. The way in which each tries to solve the problem is to set out the rules by which claims of meaning can be evaluated. For them, this means that meaning must be constructed: it is only by participating in the construction of meaning, or the construction of the rules by which values will be constructed, that we can know the meaning not simply as corresponding to some quality—justice, goodness, equality—but as being comprehensible to us because the value has come into being, and we know the how and why of its coming into being. Anything else has the status of brute force, the mere exercise of power, simple assertion, in other words: that which simply is, and is without any constructed meaning because it affects what also simply is: the

facticity of the body. The elaborate systems of consent and participation which our social contract theorists detail thus are nothing but attempts to do away with this problem of the received natural law tradition that makes facts and values coextensive, without yet doing away with the need for some naturally given starting point, a natural fact that functions as the starting point of our imposition of meaning.<sup>9</sup>

In this way, the social contract engagement helps clarify both the benefits and obstacles of the received natural law tradition in relation to the need to adequately inquire in to same-sex marriage. On the one hand, it stands as beneficial to an inquiry into the issue of same-sex marriage because of its emphasis on the good of the thing itself and thereby its requirement that we inquire into the nature of that thing itself—i.e., to grasp on its own terms the object which morally compels us to act in certain ways and not others. On the other hand, it is antagonistic to the deeper modern impulse which stands behind the drive towards same-sex marriage that we see within a number of democratic states today because of the way the received natural law tradition excludes the idea that we ought to participate in the social construction of meaning, and that possibility of social construction ought to be universally enjoyed by all who are adult members of the polity. (We have focused on the social construction of meaning as definitive of the modern polity— rather than say issues of voting or rights or even justice—because being able to give to relationships that we choose the value that they hold for us, rather than having them exist externally and simply be imposed on us gets at the foundation on which other more concrete ways for subjectivity to

9 Perhaps the clearest modern exponent of this connection between making and knowing can be found in the work of Giambattista Vico, who makes an ontological distinction between that which is made by God and therefore unknowable and what is made by humans and therefore is knowable to us in its truth. This connection between *verum* and *factum* (the made and the true) underpins Vico's influential historicism: the world must be seen as constructed by human, even so far as to posit that we construct our own human nature (see Vico, <*The Third New Science of Giambattista Vico*> <x>; and <"Verum-Factum"> in <x>). But Vico like Hobbes, Locke, and Rousseau, also has his starting point: more proximately a condition of "bestial vagrancy" that corresponds to the idea of a state of nature; and the idea of providence that provides the deep (and unconscious) structure of human activity and history (Vico, *The Third New Science*, ¶¶ <x-y>).

have a place within the modern polity community.) So, if the natural law tradition is to be recoverable in a way that preserves its potential, it must unite the concern for what is with the modern concern for universal participation in a way that contemporary liberalism has not and which the early social contract theorists have not successfully managed.

## II. THE FOUNDATION OF THE NEW NATURAL LAW APPROACH

The natural law position that has come to dominant the debate over the ethical foundation of same-sex marriage is one that self-consciously attempts to return to prior and what it takes to be more originary sources of natural law thinking. These sources are the work of Thomas Aquinas and his own incorporation and transformation of Aristotelianism. By such an attempted return, this natural law position, which has come to be called the “new natural law”, seeks to do two things that avoid the problem of the natural law position as understood by the emerging liberal tradition. First, the new natural law, like the social contract theorists, attempts to disarticulate the relationship between “is” and “ought” or “fact” and “value”. Second, and following from the latter, it attempts to locate the meaning or value or ought in what it calls the moment of “practical reasonableness”, i.e., the moment of (rational) human judgement or decision that is then articulated in (reasonable) action. (Unlike in Rawlsian liberalism, the new natural law uses the words “reasonable” and “rational” interchangeably, where both refer to the presence of reason.)

What we will examine in this section, then, is how this new natural law position works with particular emphasis on the way it: (A) establishes this disarticulation in the form of “basic goods”; (B) provides room for the introduction of the individual construction of meaning through what it calls the “basic

requirements of practical reasonableness”; and finally, (C) utilizes the concept of the community to provide a different basis than the received natural law tradition for inquiry into same-sex marriage—a basis that seemingly corrects both the deficiencies of the liberal and received natural law traditions. The purpose in this section is to bring out the central theoretical feature of the new natural law account, one that is implicit but obscured in its preeminent secular presentation in John Finnis’ work, *Natural Law and Natural Rights*. This feature is the way in which the new natural law account is an attempt to transform natural facts such that they cannot play a role in structuring moments of practical reasonableness by displacing their normative power to institutions. Finnis’ own presentation obscures this displacement by emphasizing instead the individual moment of practical reasonableness and individual relations as *the* site of morality. This displacement of normative power from natural facts to institutions becomes critical when we turn, in section III, to an evaluation of the internal coherence of the application of the new natural law to the issue of same-sex marriage.

#### A. Basic Goods

Finnis is unequivocal that a natural law ethics does not require the interpenetration of fact and norm. Responding to one contemporary formulation of this understanding of natural law, he says “Thus it is simply not true that ‘any form of a natural-law theory of morals entails the belief that propositions about man’s duties and obligations can be inferred from propositions about his nature’” (Finnis, *NL*, p. 33). For Finnis, if this characterization does apply, it is only to the natural law tradition marked by the line, which we have already examined in section I, that runs Vasquez to Suarez to Grotius (Finnis, *NL*, pp. 42–48).



Indeed it is this tradition which Rousseau explicitly criticizes<sup>10</sup> and to which Hobbes and Locke, as we have seen, also respond by placing natural right prior to natural law thereby beginning the disarticulation of fact and norm or nature and meaning. This error, for Finnis, has two related sources: first in the interpreters of Grotius' famous remarks that the whole account of natural law would be true "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God or that the affairs of men are of no concern to him" and, as a consequence, making central Grotius' apparent claim that the requirements of natural law can be derived solely from a principle of man's nature, his sociability <get quote> (Grotius, *De Jure Belli ac Paci*, <x>); second, in misappropriations by the Vasquez and Suarez of Aristotle's and Aquinas' thought (Finnis, *NL*, pp. 45–46). For Finnis, the natural law tradition can be put in its proper form—a form resistant to its traditional criticisms—by returning it to its Thomistic and Aristotelian origins. The question for us here is not whether Finnis has succeeded in producing an account that shows interpretative fidelity to Aquinas' or Aristotle's texts,<sup>11</sup> but simply how it engages in what is the key conceptual move of the new natural law: the attempt to disarticulate fact from norm without, however, abandoning the idea present in the received natural law tradition that there are substantive (i.e., content rich) and objective (i.e., subject free) goods that ought to structure the organization and evaluation of human actions and relationships.

Finnis' first move in this disarticulation is to distinguish between two spheres of inquiry. One uses theoretical reason and therefore has as its object the identification of what something is in an unqualified

10 E.g., "Grotius denies that all human power is established for the sake of the governed: he gives slavery as an example. His most frequent mode of argument is always to establish right by fact" (Rousseau, *SC*, Bk. I, ch. 2 [4], pp. 352–3/42).

11 For Finnis' own less than collegial remarks on what he see as the interpretative failings of a number of his critics, see Finnis <x>.

way, a determination of “what is the case”. The other uses practical reason and has its object the identification of “that [which] is to be pursued and realized” in human action (Finnis, *NL*, pp. 42, 12). Since natural law only concerns practical reasonableness, the first task of natural law is not to inquire into the nature of things to determine what is the case (e.g., are human beings naturally sociable? are they naturally possessors of property? are they naturally gendered or oriented to those of the opposite sex?) and then compare this central case, this “what it is”, with the situation that one wishes to evaluate. Instead, for Finnis, we must move behind the idea of a congruence with, or fittingness of, something to its own given nature to ask what makes possible actions, and the result of actions (situations) reasonable? That is, what makes possible situations and actions *worthy* of choice, such that we *ought* to choose them?

Finnis’ answer is that actions are worthy of choice if they participate in some good. In itself, this identification of the choice-worthy—the ought—with some good is merely formal or definitional in the same way that Aristotle begins his *Nicomachean Ethics* with: “Every art and every inquiry, and similarly, every action and every intention is thought to aim at some good; hence men have expressed themselves well in declaring the good to be that at which all things aim” (Aristotle, *NE*, Bk. A, ch. 1, 1094a1–5). The meaning of Finnis’ declaration of the good, as with Aristotle’s, is not to make metaphysically lofty claims about the existence of the idea of the good,<sup>12</sup> but rather is the much more modest signaling that a study of human decision and action and situation is possible because they are potentially comprehensible—they are not forever opaque to us, but admit of knowing of them. We can study human action and decision—the realm of ethics—because (for Finnis and Aristotle) such actions can be patterned by a source

12 Of course, both Finnis and Aristotle, do go on to make metaphysical claims about the necessity of what Aristotle calls the unmoved-mover and what Finnis, with only the slightest change in nomenclature calls the <“uncaused-causer”>. See Aristotle, *Meta*, <x> and Finnis, *NL*, ch. <x>.

independent of the particularities, the outer shape, of the action and decision-making and situation which results that is at hand. The concept “good” signals the existence of the possibility of such a knowable pattern. To say an action or decision or institution is good is to say that it is patterned in a way that is not a mere matter of consistency of *description*—i.e., *empirically* patterned, conforming to some, say, mean variation—but instead conforms to an a-historical, non-empirical pattern (Finnis, *NL*, pp. 15–16, 24). Only a *rational* pattern, one grasped by reason, can be called “good”.

The idea of the good as an independent standard, knowable by practical reason disarticulates the fact and the norm. In re-constructing the natural law position around the idea of the good as the foundational moment for moral theorizing and moral action, Finnis neither intends to reestablish a Platonic idea of the good as the absolute unchanging unitary ground, as that which *is* most fully and which all other things both *are* incompletely and are, even within this incomplete state, only because there is a participation (*methexis*) in the good (Plato, *Rep*, <x>); nor does he intend to return to the Aristotelian unity of the good with the quiddity of things (their formal cause) or, in the case of what is capable of, or in the product of, intentional action, an end (*telos*; final cause) inseparable from the action, object, or situation itself (e.g., the *polis*) (Aristotle, *On the Soul* <x>; *Physics* Bk. B, <x>; *Politics* <x>). For Finnis, the Platonic solution violates, what he takes to be the central division between theoretical and practical reason, since it would conflate an inquiry into “what is the case” (for Plato: the good) with an inquiry into what-is-to-be-pursued in human action and through human decision.<sup>13</sup> So the good is both distinct from the situation at hand, yet cannot be wholly distinct from it. In this way, even this Aristotelian solution is insufficient

13 Of course the school of modern interpretation of Plato begun by Leo Strauss saw Plato’s *Republic* is nothing but the attempt to show the dangers and impossibility of just such a conflation—i.e., to mistake what humans ought to pursue at least collectively, with what is. See Strauss, *The City and Man*, <x> and Alan Bloom, <“Interpretative essay”> <x>.

because Finnis would then need to invoke two qualities which he indicates his natural law theory does not possess. First, that the principle so which ground ethics “are not [to be] inferred from [ . . . ] ‘the function of a human being’, nor are they [to be] inferred from a teleological conception of nature or any other conception of nature” (Finnis, *NL*, pp. 33–34). Second, that the identification of the *good* as the principles of a natural law ethic must not be conflated with the identification of what is *moral* in the situation at hand for each individual—for the good does not mean that it is obligatory for everyone or that it will be valuable to everyone (Finnis, *NL*, p. 62).

These two qualities of Finnis’ good—that the good is both independent of the world, and only becomes something moral when it is appropriately bound up with human action and decision—frame the complex *methexis* of good and the world, that place which his good occupies between fact and norm within his reconstruction of natural law. On the one hand, the good simply is, which Finnis expresses by saying that we arrive at it without inference from something, without deriving it from some other good or interest or principle and therefore that the good, it is indemonstrable, unverifiable, and, yet, self-evident (Finnis, *NL*, pp. 64–69). On the other hand, because the good is not itself moral and carries, in itself, no moral obligations, the good is not wholly independent, but requires something outside of itself, the determination through human judgement, and articulation through human action, to find completion, to be what it most fully is. We will also see that Finnis’ account carries with it another, but occluded, logic of moral embodiment, another logic of the transformation of good-as-possibility into good-as-morality present and powerful in the world and that is morality can be articulated institutions.

In Finnis’ reconstructed natural law account we have a complex *methexis* of good and world. To understand how this new natural law works, its internal coherence, we must explore this idea of *methexis*

with particular attention to the way in which the relationship between good and the world is not only mutually implicating (the good only becomes fully good—i.e., moral—in the world; the world only becomes complete—i.e., moral—because there is a good to be pursued), but, more importantly, mutually illuminating. In other words, the good and the world serve to make each other rationally comprehensible. It is this implicit movement, first from world to good and then from good to world that we need to explore, first to bring out the existence of this mutual movement within Finnis' account, and, second, to draw out the way in which it does not just sever the connection between fact and norm, but begins to displace the site of the norm from individual action and decision-making to social institutions.

We see this movement of the world to good—a movement which most closely resembles the received tradition of natural law which both the social contract tradition and Finnis are reacting against—in the three sorts of observations that Finnis makes throughout his account about *how* the world can lead us to the indemonstrable, uninferential good. First, inclination and impulse lead us to the good: “One does not judge that ‘I have [or everyone has]<sup>14</sup> [e.g.,] an inclination to find out about things and then infer that therefore ‘knowledge is a good to be pursued’. Rather, by a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one)” (Finnis, *NL*, p. 36; see also pp. 60–61). The first is connected to a second sort of relationship, one that connects not just individual inclinations or experiences, but sets of experiences to the good. Here those that have experienced most, and those who have treated those experiences seriously as an object of reflection (and therefore as a source of how one might act in the world)—the serious man and man of practical judgement or reflection (the *spoudaios* and *phronemos* in

14 Finnis' own editorial assertion.

Aristotle's ethical theory)—have a privileged place in coming to not only an understanding of the good, but how the good might find its completion in the world in the form of moral action. The idea that “many moral questions that can only be rightly answered by someone who is wise, and who considers them searchingly” (Finnis, *NL*, p. 30) and therefore that experience is a condition for moral reflection is comprehensible only if the good is not inseparable from our given impulses and our experience of a wide range of those impulses and inclinations as they are explored, as they produce consequences, and as we reflect upon them.<sup>15</sup> So, for Finnis, just as

principles of theoretical rationality are not demonstrable [ . . . ] [and] they cannot be verified by opening one's eyes and taking a look, they are obvious—obviously valid—to anyone who has experience of inquiring into matters of fact or of theoretical (including historical and philosophical) judgement; [ . . . ] In all those respects, the principles of *theoretical* rationality are self-evident. And it is in these respects that we are asserting that the basic *practical* principle [e.g.,] that knowledge is a good to be pursued is self-evident. (Finnis, *NL*, p. 69)

In spite of Finnis' presentation, these consequences of our experience are not simply matters of *individual* experience. They do not simply reside as expressions of our agency and are contained within that agency—i.e., known only through the *spoudaios* or *phronemos* (e.g., Finnis, *NL*, p. 102)—for the principles “are objective; their validity is not a matter of convention, nor is it relative to anybody's individual purposes” (Finnis, *NL*, p. 69).

From Finnis' remarks that the principles of practical reason are not reducible, we must not understand these principles to be cut off from our social world. The *methexis* of good and the world is not of good to some *given* nature—i.e., it is not of one underived principle (the good) to another (say that natural capacity that grounds the possibility of becoming a *phronemos* and, through experience, a

15 We can compare this idea to Plato's Socrates in whose account of the cave, the philosopher—who does not have the same long experience with convention and the world—returns to the world from his experience of the good and is nonetheless able to see <“ten thousand times better than those with experience”> (Plato, *Rep*, <x>).

*spoudaios*). The very idea of experience as a precondition for the unpacking of moral problems points instead to a participation between the good and the world of human institutions. For the experience of the *phronemos* is, on the one hand, that of the proper ordering, and habit of ordering, human faculties in the proper way—and thus in this respect can be seen as a way to the good from a starting point that is equally natural (the intellectual virtues in Aristotle’s parlance). Yet, on the other, experience is also the discernment of what is required of our actions and comportment by the *political community* in which we live. Aristotle calls these virtues “ethical” and requires some non-customary mode of judgment (*phronêsis*) to determine that famous mean between excess and deficiency as well as that perception of the right place and time and reason which brings action into being as an ethical virtue. This connection between good and social institutions is similarly present in Finnis’ thought but now in a way that goes beyond this Aristotelian reliance on *phronêsis* (and its implication in the other intellectual virtues) to mediate between the principles of the good and experience. We can see this new element when Finnis speaks of both the diversity of human activity catalogued by anthropologists and psychologists as providing for us “an assemblage of reminders of the range of possibly worthwhile activities and orientations open to one” (Finnis, *NL*, p. 81; see also p. 73), the importance of “attend[ing] carefully and honestly to the relevant possibilities”); and, how “even the most elementary and easily recognizable moral implications of those first principles [i.e., the good] are capable of being obscured or distorted for particular people and, indeed, whole cultures, by prejudice, oversight, convention, the sway of desire for particular gratifications, etc.” (Finnis, *NL*, p. 30). These remarks, taken together, capture in this “assemblage of reminders” the range of modalities of the *methexis* of good and nature which we have identified previously from participation of impulse (“the sway of desire”) to the good, from experience to the good (knowledge of “relevant

possibilities”) and now to what is our concern: from human institutions (“whole cultures”, “convention”) to the good.

So, we see how Finnis’ account of the pre-moral principles of practical reason (i.e., the good) neither falls into the problem of the received tradition of natural law and yet neither fully abandons it either. The good does not simply emerge from the fact of the matter. Nor is knowledge of the good inseparable from having the necessary impulses, experiences, or being situated in the necessary institutions broadly conceived. Moreover, it is important to note that the particular *methexis* of good and world does not render the world as a mere instrument. We could, of course, take Finnis’ idea of this world of human impulses, action, and institution as a mere “assemblage of reminders” to mean that once we have been so reminded about the possibilities of the good, we can simply pursue the good, leaving behind this, at best, propaedeutic “assemblage”. Such a reading would misunderstand Finnis’ position in two ways. First, since the good under consideration in natural law is the good of practical reason, the movement to the good is not an ascent to a world beyond. The movement from world to theoretical reason is such a movement (as Plato’s Socrates remarks in the *Republic*, <diagrams and figures can help the geometer, but we ought not confuse these sensual objects with the *truth* of, say, a circle or right angle and once we have that truth in mind, we can abandon our diagrams> [Plato, *Rep*, <510d>]). Second, and related to the first, such an interpretation ignores the way in which Finnis’ *methexis* of good and world is dialectical: the world provides a way to the good and the good provides a way back to the world—not however as we will see the original world that led us there, but rather a world as illuminated by that good.

The nature of a principle of practical reasoning is that it allows one “to make sense of someone’s commitments, projects, and actions over a period [of time]” (Finnis, *NL*, p. 64). Because the good



illuminates what is *worthy* in our complex of “commitments, projects, and actions”, Finnis can say that to reflect upon the goods that make one’s life comprehensible as worthy of pursuit “is, in a way, an attempt to understand one’s own character, or nature” (Finnis, *NL*, p. 81). What does Finnis mean by this “to make sense of”, this “to understand one’s own [ . . . ] nature”?

The first answer is that our own (and other’s) commitments, projects, actions, and nature become comprehensible to us in the sense that they can be grasped in thought in a way that is, in some way, coherent. However, there are many qualities of the system of actions which can be grasped in thought—i.e., many things which make those actions systematic or organized or subject to some order. Finnis is uninterested in that order, as we already know, which emerges from the system of action itself: the empirical consistency, the deviation from the mean characteristic of any such action performed. For example, by looking at the time a runner takes to complete a marathon, we can discern some coherence, some order, that allows the activity to make sense so that a time of two-and-a-half hours and four hours and eight hours tell us about how that activity is ordered based on other empirical observations we have made or heard about marathon running. In this way, a time of one-and-a-half hours or three weeks becomes incomprehensible: we cannot make sense of the system of actions relative to the characterization of these actions as a marathon in an unqualified sense. (If later we were told that in the first case it was a marathon by wheelchair athletes and the second by rather slow moving tortoises then comprehensibility would return). Similarly, a turn to the intentions of the actor involved in the commitment, project, or action does not help. Her intentions certainly provide an order to the actions, by providing an account of why she was doing what she was doing. But activities which are entirely comprehensible *within* the logic of those intentions may nonetheless be senseless when we try to account for the existence of the actions

of the interaction itself. Let us take two examples: the actions of a genocidal regime or someone with a psychological disorder. One may be able to give full accounts as to why the complex series of state policies were implemented, resources gathered, death camps built, trains requisitioned and scheduled, targeted groups rounded up, and so on, but nonetheless have the idea of the wholesale extermination of individuals still be senseless in itself as a self-grounding, self-justifying starting point. It is just the latter which constitutes the order which Finnis aims at illuminating through his principles of practical reason. Similarly, someone with an obsessive-compulsive disorder may wash her hands until raw and this action be comprehensible within the logic of the disease, but the *existence* of the disease itself is not comprehensible as a self-justifying starting point for that action.

The illumination that the good provides of nature is to move from a reliance on some internal coherence or some world-indifferent good to show how the act becomes comprehensible in light of some self-grounding, self-justifying end or purpose. The act still must be internally coherent (as with the times for a marathon) so that one can speak of the action *as a system* (and therefore can have a concept that can be descriptively applied to it such, such as “marathon”, “genocide”, or “obsessive-compulsive”. But this empirical concept also must now “participate” in—i.e., be made comprehensible by—a good that requires, for practical reason, no other justification. In this sense, what the good illuminates when it redounds upon nature is not the internal order of the act under consideration (for that is given by whatever context of human practice which makes the actions systematic) nor by the intention of the actor (for that is simply another form of internality requiring further justification and thus comprehensibility) but whether this system of actions and intentions participate in a good, something that *can be* worthy of pursuit, and therefore can be comprehensible in the fullest sense of the practical rationality. In other words, the

illumination of the good cannot tell us how to make a marathon better in relation to what a marathon is *internally*, or how a state might engage in a more effective genocide, or to make someone who suffers from obsessive-compulsive behaviour a *better* obsessive-compulsive -ness—i.e., a living articulation of the clinical definition of the disorder, even to clarify the intention of actors who think they are engaging in one particular act when they are engaging in another. For the examples just mentioned aim at an illumination through showing how an action is made comprehensible through an end (marathon, genocide, psychological disorder), and yet take as their end something internal to the action themselves or internal to the context of meaning that makes the system of action comprehensible in the first place (there is the concept of foot races of different types, there is a concept of extermination of a people, there is a concept of mental illness).

The good illuminates nature in a way quite different from, but not incompatible with, the other concepts or forms of reflection (academic or not) which illuminate the world. The question, then for Finnis, is what is the substantive context of this illuminative good? What kind of good must there be that can be self-justifying, self-grounding and yet comprehensible to practical reason? What must the good be like to make the internal structure of our system of activity meaningful, not on its own terms (because anyone who accepts genocide or marathon racing will find those activities meaningful and the action of someone who is obsessive-compulsive may be very well meaningful to himself), but rather on terms knowable and acceptable to those who, even if they do not accept those systems of activity, could grasp how those activities are choice-worthy.

Finnis provides a list of seven “basic values” or shapes of the good which are foundational—one cannot go behind them, they rest on nothing else: in Finnis’ language, they are “indemonstrable (because

self-evident)” (Finnis, *NL*, p. 85)—in making systems of action rationally comprehensible as choice-worthy forms of activity. These basic goods are life, knowledge, play, aesthetic experience, sociability, practical reasonableness (which means “to bring an intelligent and reasonable order into one’s own actions and habits and practical attitudes” [Finnis, *NL*, p. 88]), and religion (Finnis, *NL*, pp. 86–90). What is important about this list is not whether it is exhaustive—as Finnis says, “There is no need for the reader to accept the present list, just as it stands, still less its nomenclature” (Finnis, *NL*, p. 92)—but its function within the natural law account he is constructing.

First, they serve to sever the connection between natural fact and value by transposing the initial site of meaning to an independently knowable and comprehensive set of goods. In this sense, the basic values serve as conversation-stoppers: the name the basic value which the commitment, project, action or nature participates is to end the inquiry into the possible meaning, and choice-worthiness, of it. Here the new natural law account which is emerging preserves the conceptual resources required to successfully inquire into the issue of same-sex marriage: although now we ask not about the given nature of marriage and family—its quiddity or innate purpose—but what makes marriage and the family comprehensible as self-justifying, self-grounding systems of choice worthy activity. Second, in this transposition of meaning, the new natural law account opens up space for a new sort of conversation, one about how the good is to be made actual as individual moral action and decision-making. That is: the movement from world to good must be followed by a move from good back to world. It is to that move, this new conversation, that we now turn.

## B. Requirements of Practical Reasonableness

The idea of basic goods does not exhaust the new natural law position. Finnis has asserted that his account avoids the interpenetration of fact and value because, even as it identifies basic goods or principles (or starting points) of practical reasonableness, what these principles illuminate when they redound upon a system of actions is not whether that system is good for me in the particular here and now which constitutes my unique horizons of action, but only whether such a system of action rationally participates in a practical good. The participation in the basic good only signals—is a reminder—that this system of actions is potentially moral. Only when I engage in the action in my here and now do we go, for Finnis, from a consideration of the *good*, to a consideration of *morality*. In other words, I must translate—and only I can translate—from the good as an abstract but objective possibility of choice worthy action to that decision and action that makes one or some of those choice worthy possibilities concrete and therefore the good real for me.

The requirements of this translation—the requirements to choose amongst all the possible actions with the unique horizons I face that can participate in the good, and to avoid those which do not—are what Finnis calls “the basic requirements of practical reasonableness” (Finnis, *NL*, pp. 102–103). What we will be arguing here is that this moment of choosing, of engaging in actions and decisions which are practically reasonable, becomes a way not of acting morally *on top of* our existing nature, but a way of *transforming* our given nature. The disarticulation of fact and norm which Finnis effects in his account of the basic good becomes in the moral moment of practical reasonableness the reunification of good and world—but now in a new form. In the moment of practical reasonableness Finnis provides a way for individuals to give meaning to their lives, literally to construct a new nature in a way that leaves our given

nature no longer fundamentally relevant either to our access to the good or in the moment of moral judgement.

In illuminating our given nature—whether as impulses, experience, or systems of activity—these basic goods also illuminate how we, as individuals or as the member of a group or as a society as a whole, have decided to pursue the good. Indeed, since these goods are foundational, they constitute, for Finnis, the enduring truth of what we are doing and intending. Our given nature, having lead us to the good, now is rationally reconstituted by that good: the given nature which is the internal structure of the system of actions is replaced by the relevant practical principle as what is most natural—i.e., what is most *true*. The conscious pursuit of goods in one’s system of activities becomes the conscious transformation of what is merely given to us with what can be rationally known *in* what we decide and do. In Finnis’ work this conscious pursuit becomes the pursuit of “reasonableness in self-constitution” (Finnis, *NL*, p. 134). Since knowledge and pursuit of the good does not illuminate the internal structure of one’s given nature—the nature is constituted out of impulse, unreflective habituation to the world, and unthinking adoption of convention—this “self-constitution” differs from our given natural or unreflective constitution by being the attempt to make who one *is* (which means here what one *does*) fully comprehensible in terms of principles external to that action. Here, Finnis still can speak of a nature because what explains what one is (the good in which one participates) does have an objective existence. However, this new, transformed *moral* nature corresponds not to that which Hobbes and Locke also try to comprehend as, respectively, matter in motion or principles of rational acquisitiveness, or even which Rousseau minimally entertains in the *Second Discourse* (i.e., *pitié*, *agence libre*, *perfectibilité*, and *amour-de-soi*). Instead it corresponds to the Rousseau of the *Social Contract*, in which through the conscious act of creating a community—the

moment Rousseau calls the “total alienation of each associate with all his rights to the whole community” (Rousseau, CS, Bk. IV, ch. 6 [6], pp. 360–361/50)—each receives a new nature and a new form of freedom that makes the old, natural freedom into slavery (Rousseau, CS, Bk. I, ch. 9 [3], p. 365/54; see also Rousseau’s remark that “Anyone who dares to institute a people must feel capable of, so to speak, changing human nature” (Rousseau, CS, Bk. II, ch. 7 [3], p. 381/69). It also corresponds to what Hegel in his *Philosophy of Right* calls our “second nature” that results not from the conscious act to consent to social membership, but to allow oneself to be cultivated by the community, both in the specific process of education (*Pädagogie*) which, insofar as it is truly education, “considers them [human beings] as natural beings and shows them how they can be reborn, and how their original nature can be transformed into a second, spiritual nature” (Hegel, *PR*, §§ 4, 151Z) but also that more general and thorough-going education (*Bildung*) that occurs through our habituation to the ethical community through our self-chosen engagement with that society’s institutions (for the clearest example of this, see Hegel’s account of the cultivation we receive through the institutions of market; Hegel, *PR*, §§ <x–y>).

What this process of transforming the good into something moral does is reconstruct our own given nature into a moral nature in just the way that Hegel and Rousseau have identified. This moral transformation reconfigures the *methexis* of the good and nature, now adding a third element to their otherwise binary dialectic. This third element which results from the basic goods’ illumination of the assemblage of reminders that are impulses, experiences, and systems of action is that morality stands above both the basic practical good which does the illuminating and above the natural situation—i.e., those simply given impulses experiences, and systems of action (culture, etc). In standing above, morality *completes* both moments: the good as moral possibility is actualized as a presence in the world whose site

is my action in the world; and, my given natural situation is transformed into something which explicitly participates in the good and therefore is something I can make sense of through my action and decision-making.

This two-fold transformation which we have tried to bring out (i.e., the good of our nature, the moral action's unification of the good and that nature) requires elaboration because it has great implications for the coherence of the new natural law position when it is applied to same-sex marriage. Both of these transformations concern the facticity of our situation—the way in which the givenness of our situation, that it appears as simply there to us—is transformed. The first transformation, as we have seen, is of the facticity of our natural situation, our physical endowment, the environmental circumstances which we possess or simply find ourselves in the midst of. Once my actions are illuminated by the good so that they become moral possibilities for me, the facticity of our situation, which may have been the conduit by which we come to the good, no longer comprises the “nature” of the situation—by which I mean that it can no longer be seen as marking out the fundamental meaning of my moral horizons. Those horizons are given by the *way* in which that facticity participates in nature. Through my decisions to pursue projects and commitments that implicate that facticity, the facticity becomes most what it is by taking up those possibilities of becoming actually moral. At most, the fact moves to become a background or material condition but otherwise does not fundamentally bear upon the morality of it, which is, for Finnis, the *true* (because universal and enduring) nature of it.

Let us make this rather abstract but important argument clear with an example. Say that I am lame such that I can run slowly and, because of my condition, must rest with some frequency and at great length after even a short distance. This situation has nothing to do with my level of fitness, but rather is



a structural condition of my physiology; it comprises my physical facticity. At the same time, I have an inclination to run, to compete in a foot race. Now, the disjuncture between this facticity and the requirements to meet even the minimum requirements for such a race may cause me to reflect upon this situation and to ask what good might make comprehensible this inclination—in what way does the *inclination* participate in a good otherwise denied me by my facticity. In asking this question, I ask, ‘Is this inclination a possibility towards which I could *morally* make actual through my actions, projects, or commitments?’ Before my (new natural law) moral reflection, my lameness seemed the defining moment of my situation, the very source of the falsity or non-comprehensibility of my inclination. In other words, before my new natural law reflections, my inclination stood in contradiction with my (given) nature and to act on the inclination would seem straightforwardly to act against my nature.<sup>16</sup>

However, now, according to the *logic* of the position laid down by Finnis, this (false) understanding of my natural possibilities is replaced by a new moral understanding in which the nature of my situation is defined by the good. My inclination to run, to compete in a footrace, does not stand in contradiction with my given nature, but stands as a *possibility* of my nature, something which, if I were to actualize it, *would* be moral and therefore completing of both the good and nature. My lameness, of course, presents one condition which would have to be taken into account, but not a *moral condition*, not one that *fundamentally* bears upon whether that decision would be good or not for me. Of course, the specific details of my lameness may make the decision to run immoral one for me: say, my lameness was causally

16 One is reminded of remarks by Hobbes and Locke, that no one has the liberty to do what their body will not allow—i.e., one’s physical facticity, even for Hobbes and Locke, constitutes an untransformable nature and therefore moral benchmark in a way that is neither the case for Rousseau nor, as we will see, the *logic* of the new natural law position which Finnis is reconstructing.

connected to an irremediable heart condition so that if I do try to actualize the good in which running participates, I may, with some certainty, cause myself a fatal heart attack. That is: the attempt to actualize one good would not just systematically impede access to other goods (in itself, for Finnis, this impediment is part of the unalterable structure or fact of human existence since human life is too short and the multiplicity of possible actions, projects, and commitments too great, to allow all goods to be pursued with anything approaching equality—some actions, projects, and commitments exclude others and thereby the goods associated with them) but would actually harm the other basic values, particularly that of life and therefore violates one of the requirements of practical reasonableness. Only in the latter situation will the fact of my lameness present an insurmountable obstacle and, therefore, except in very unusual circumstances where, say, the likely but still possibility of my death and the nearer certainty of it for myself or others—e.g., I need to flee a burning building; I must run after my toddler who I see toddling towards the busy street—the possible good cannot be a moral for me. But in the example of the lameness which we first gave, the facticity is overcome. And even in the more extreme example in which this facticity cannot be immediately overcome, it is still only a *technical* problem rather than in the nature of the act itself which impedes its translation into a moral good.

The moral transformation of physical facticity also occurs amongst conventional facticity in Finnis' account. When my lameness (of the first variety) is compared to the conventional requirements of a foot racing—i.e., that it occur within such and such a range of time, over certain distance, and so on—the lameness seems to present an insurmountable obstacle to my translation of the inclination to compete into a moral act. The *methexis* of Finnis' new natural law account does not allow us to simply dismiss convention as mere "positive law". As we have seen before, those conventions, culture, system of given

meaning and institutions forms that “assemblage of reminders” of choice-worthy ways of life as well as the material out of which we make our decisions and undertake our actions. Yet, when the good redounds upon nature, it robs this conventional facticity of its only apparent normative power. When the good is made moral this assemblage of reminders is transformed from one that (falsely or now foundationally) determines and evaluates my possibilities to something which must reflect and enable that good present in my decision and actions. If the decision to action is moral for me, and the good which I am actualizing is the good also participated in by the conventional facticity, then the moral nature of the institution, just as with our given nature, is constituted by the good which it secures and the moral action it supports. This interrelationship between institution and good is what Finnis hints at in the opening sentence of his study when he observes “[t]here are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only these institutions can satisfy” (Finnis, *NL*, p. 3).

We must press Finnis’ position further here because this dual transformation of meaning from given and conventional facticity to individual moral action and decision is linked in a way to institutions (in a way we will explore next) becomes the second crucial piece in the puzzle when we try to understand where the new natural law position succeeds and fails to grapple with same-sex marriage. But before we can turn to this application, we must examine the rule that institutions play within Finnis’ new natural law, and we can do so through his account of the community.

### C. Community and Family

We have not lost the connection between institutions and the good that recommended natural law to us in the first place. True, the idea of basic values placed the good outside of the institutions, and nature, and

the idea of the principles of practical reason transformed the way in which our facticity has a bearing upon questions of the intrinsic normative dimension of institutions and nature, so that what is normatively definitive for me is my translation of those goods which I am inclined to participate in a system of action—i.e., the way I bring about what is moral through what I choose to pursue. It is just here, though, that institutions take on the sort of normative significance in which we were looking. Once institutions become articulations of the good by participating in the good and securing not just this (pre-moral) good but *my* moral judgement (i.e., the particular way given the physical situation and inclination I find myself possessing) (thereby even further reducing the importance of my physical facticity), they now can reclaim a normative uniqueness.

And yet, by itself, the two foundational components of his natural law account can lead us, as Finnis says, to wonder “are these and all other requirements really in the service of one’s own self, one’s own self-constitution, self-realization, self-fulfilment?” (Finnis, *NL*, p. 134). This concern is not that of selfishness, but of solipsism—of making the individual her or his inclinations the unassailable norm. We can see this possibility in our account of the lame, would-be runner. Since the basic goods and the principles of practical reasonableness transpose the normative boundaries that we might otherwise take to be present in our physical and conventional facticity, placing that evaluative power in the first instance in the basic good in which my inclination (wherever derived—institution or simply given by the structure of my biological constitution or personality) participates and in the seemingly final, morally determinative instance in my judgement that the pursuit of this good can be actualized in a practically reasonable way by me. Institutions, then, would seem to become moral—to actualize their moral potential—than by corresponding to the morality of my practical reasonableness. There is a plasticity, then, that seems to

be required of the assemblages of reminders in order for to make them good, where their fittingness is determined by that self which does the moral consideration.

What I would now like to do is trace the way that the above account implicates the idea of the community and through it, the idea of institution, in a way that the new natural law account both points towards, but also crucially withdraws from.

The assemblage of reminders are shared in two senses. First, as conventional facticity, they are reminders not just for me, but rather belong as a common stock of material and cultural resources whose universality is secured by the good in which it participates. For while what is moral for me is unique to my situation, what is *potentially moral* (i.e., what is good) is not bound or structured by the particularities of that situation. So, my use of the reminder, both as access to the good and as the condition of morality, automatically implicates me and the morality of my actions with those of all potential and actual individuals. In this sense, the institutions *cannot* be infinitely plastic for just the same reason that they *must be* plastic in the first place. The reminders are good and potentially moral for me only because they are available for that participation and potential actualization. To modify the institution such that it is no longer universally available (say, because it now corresponds so idiosyncratically to my [potentially moral] inclinations) is to cause this reminder, not to cease to participate in the good, but to cease to participate in a way that preserves the presence of the good, or what Finnis calls “the requirement [of practical reasonableness] of favouring and fostering the common good of one’s communities” (Finnis, *NL*, p. 125). I must participate in these institutions such that the good I seek and make constitutive of my moral actions can remain to lead others to the good and to constitute their actions as well. In this sense, the fact of the shared existence of the institution as part of the “assemblage of reminders” does set

normative boundaries. However, these boundaries do not exist as the institution's substantive content (as the received natural law tradition would have it), but as their universal availability.

Second, and more importantly, the empirically shared assemblage of reminders also supply for us the specific aims or purposes which we reflect upon and undertake as part of our moral action. Again, it is not the content of the institution which is normative—for what is normative can only be the good it participates in—but the substantive uniqueness of the institution marks out regarding the *ways* in which we might experience the good: e.g., by pursuing knowledge, being friends, etc. For example, we might pursue the good of knowledge through otolaryngology or through political philosophy, by teaching kindergarten or a graduate seminar, and so on. The institutions that remind us of the range of action and decision that the good can be pursued do so only because of their substantive uniqueness. In this way, for Finnis, our moral actions, right from the beginning, can enter us into a community because we have (even if only implicitly) entered into “an ongoing state of affairs, a sharing of life or of action or of interests, an associating or coming-together” that, for him, “is constitutive of human groups, communities, societies” (Finnis, *NL*, pp. 135, 152). Because the pursuit of a good is something which can be—and insofar as it is drawn from the vast assemblage of reminders, *is*—shared, we have a new (and up to this point, hidden) conventionally given limit on the plasticity of institutions. The institutions cannot be modified to suit my own (moral) decisions to action if doing so would destroy or not allow me to participate in those shared values which first allowed me to entertain the possibility of this self-constituting pursuit of practical reasonableness. To put it even more strongly, this “sharing of life or action or of interests” becomes the very way that I must pursue that good which I have chosen to pursue. To maintain what I want (insofar as it is potentially moral) requires me to maintain that “assemblage of reminders” for all who equally want

to pursue the good it participates in *and* the particular way to that good through their actions and decision-making. Although Finnis refers to this movement in the more specific context of friendship, we can see how this more extensive form of sharing shows that “self-love (the desire to participate fully, oneself, in the basic aspects of human flourishing) requires that one go beyond self-love (self-interest, self-preference, the imperfect rationality of egoism . . .)” (Finnis, *NL*, p. 143).

So, we see that the nature of the shared existence of the “assemblage of reminders” out of which our moral actions are constituted introduce two boundaries to the plasticity of those assemblages—one concerning the preservation of the fact of the universal existence of that particular institution within the assemblage of reminders; the other concerning the particular content of the assemblage. In doing so, we must note that the two transformations of facticity we have identified within Finnis’ account are not undone by these boundaries. What ought to be pursued is bounded *not* by the internal structure of what is, in the sense of its facticity, but simply by the *universal* qualities that adhere to any fact: that its existence is objective and therefore is shared in the two ways just discussed; and, that it is implicated in my carrying out of activities that involve it. These bounds that emerge out of this facticity are all that remains of given nature in Finnis’ new natural law account. Where the received natural law tradition equated facticity with norm, here facticity remains only as formal prescription: preserve the universal possibility of participating in that facticity both in terms of availability and in terms of content—but only insofar as that facticity is *first* shown to be illuminated by the good.

Nonetheless, these boundaries are not insignificant. And their significance is best seen in Finnis’ idea of “four ‘orders’” of human relations—where “[o]rder mean simply a set of unifying relationships” (Finnis, *NL*, p. 136). This idea of orders of unifying relationships reveals to aspects about how facticity, this

remnant of the received natural law tradition, this last bit of the world that the principles and requirements of practical reason cannot transform or do away with. The first is that the affect of facticity is extensive: it runs through all modalities of our existence from that which concerns our animal existence to that which concerns the shared construction of meaning and living within that shared construction. The second is that the facticity of institutions can be transformative of the facticity of the individual who are members of them so that nothing about our individually given existence stands outside of the possibility of becoming moral.

The first of these orders is that of a “physical and biological” unity that permits human beings to interact with each other in a way that does not require the introduction of meaning either *onto* the interaction or as a *context* out of which the interaction occurs. Although Finnis does not elaborate in this direction, an example might be that human beings are capable of *making* actions (e.g., sounds, movement, touch, sexual relations) and of *perceiving* or *receiving* these (e.g., hearing, seeing, feeling, reproducing) all without the need of something other than this bare physical and biological unity. This unity permits all our physical and biological sharing-together. If human beings were such that our biological and physical unity was more precarious—e.g., our capacity to produce sound was not reliably paired with our ability to detect that same sound—then there would be no, or a much more limited, range of human relationship possible. But because there is this wide-ranging physical and biological unity other orders of unifying relationships become possible.

This physical and biological unity then permits what Finnis identifies as the second order of unifying relationships. Here our sharing-together consists in a sharing together of meaning. So, a physical unity allows you to make sounds and me to hear them; a unity of meaning allows me to hear the sounds as



speech—in Finnis’ words, as “*expositions, arguments, and explanations*” (Finnis, *NL*, p. 137). This second order is a sharing-together because “the listener brings his understanding into line with the lecturer’s even if only to the degree needed to disagree with the listener’s views” (Finnis, *NL*, p. 137). Finnis adds: “In order to disagree with each other, we must be thinking of the same proposition” (Finnis, *NL*, p. 137), but of course we also need to have the same given stock of linguistic and cultural meanings, etc. In this way, a third order emerges out of this second, a unity that consists of that “order which we bring into, or impose upon, whatever matter is subject to our power” (Finnis, *NL*, p. 137). This order is a *made* unity rather than, in the second order, what we might call a *harmonization* around already existing systems of meaning. In the second order, unity is possible because we possess the possibility of coming to a shared understanding—if not, we would be hopelessly solipsistic. In the third order, unity exists because we as human beings are capable of creating those underlying foundations of social meaning. In this way, Finnis can say that “[p]art of our unity in human community, then, is the cultural unity of shared language, common technology, common technique (as in an orchestra), a common capital stock, and so on” (Finnis, *NL*, p. 137).

Finally, this third order of unity, which comprises the whole assemblage of reminders of the ways in which we might participate in the good, requires, as we have already seen, that these possibilities of the good be actually taken up—in Finnis’ language, made moral—through our reasonable decision and actions to pursue a good. The fourth order, then, is the unity articulated through “our own actions and dispositions by intelligently deliberating and choosing” (Finnis, *NL*, pp. 137–138).

Although Finnis says that these orders are not meant “to suggest some hierarchy of value or importance” amongst them (Finnis, *NL*, p. 136), each order forms the foundation or precondition to the

one that comes after. As a result, the orders cannot be indifferent to one another in the way that the principles of practical reasoning—i.e., the basic goods that comprise the set of all possible choice-worthy ways of life—are, we can see that this third form of unity is morally more primary than the second, which is in turn more primary than the first, for as we get further away from what is given (biology, context of meaning) we move from world (first order) to good (second order) and back to a constructed world where given facticity has been overlaid with a conventional one (third order), and finally where, through our actions and decision-making, we consciously live in this made world, taking this conventional world to be not goods in themselves, but reminders of the good which we ought to be animated by in and through this made world (fourth order).

To share in this fourth order is, by necessity, to share in the preceding three. Moreover, this necessity connects the two forms of preservation that we mentioned earlier and which we derived from the nature of morality. To preserve the universal availability bound up with the facticity means, now, to preserve not only the physical and biological integrity of others (i.e., that given condition which allows there to be a human sharing-together in the first place), to preserve those intellectual capacities of others (i.e., those things that make a sharing together as an understanding-together possible), to preserve those cultural and technological, linguistic systems of meaning (i.e., those things that make a contentful, meaningful, sharing-together as a doing-together possible), and, finally, to preserve the *purpose* which we have intelligently deliberated upon and chosen (i.e., that which makes a *moral* sharing-together possible).

In each case, we will notice that the facticity sets the bounds of what we must do and not do in order to act and choose in a practically rational way, not only in terms of the mere existence, but now apparently in terms of the *content* of the facticity. For example, to preserve our “shared language, common

technology”, etc. we must do what each of those substantively requires—i.e., not what is required to preserve *a* language, but *this* language. What is required to preserve English as a common stock and what is required to preserve Inuktitut are quite different not only because of the nature of the language themselves, but because of the situation in which each of these languages finds itself. At the same time, the direction of affect does not run one way alone. As we have already seen, systems of meaning only have potential normative validity because they participate in the good, and only moral validity through our practical judgements. These judgements then reflect back upon this existential facticity, illuminating what *ought* to be preserved amongst the various attributes, particularities, and configurations of these “assemblage of reminders”. In this way, these orders of community show only the depth and breadth of our world which are implicated in moral decision-making, and therefore the extent to which our world in its natural and conventional facticity does set boundaries—but only in the form of, to use Finnis’ own language, as *reminders* of boundaries or, more accurately, that any moral action cannot simply be the imposition of our desire unto the world, but rather, because it is a sharing along the four orders that moral action must take into account and be expressed through what is shared and it must preserve what is shared insofar as it can be bound up with moral action.

All relationships that pursue the good will involve a unifying relationship in the minimal sense that my actualization of the good in moral action produces something in the world that can potentially be shared—if only because of the first order of relationship: what I can do physically in the world can be experienced by others, even if it cannot be understood, even if it cannot be used by others to become part of our common stock of cultural, linguistic, technological, etc, resources (assemblage of reminders), and therefore even if there is no shared purpose discernable around which others might share with me in

making decisions and actions together. At maximum, these actions will involve a unifying relationship of the fourth order in which action of a moral community is possible.

Now Finnis, following Aristotle and Aquinas identifies different attitudes that we can take to the unifying relationship. These attitudes are really different ways that we think of what is being shared and therefore what needs preserving. It is important to briefly examine these attitudes because they add another dimension to the account we have been reconstructing regarding the status of the natural and conventional facticity and the normatively transformative power of practical reasonableness. That dimension is of institutionality, the way in which institutions become not just the concrete repository of potentially moral actions and decisions that we might make (institutions as part of the “assemblage of reminders”) but morally constitutive and transformative in a way that amplifies the sort of *individual* transformation that occurs through individual decision making and action. It is this amplification of the transformation of individual action that will be crucial to us when we turn to the application of new natural law to same-sex marriage in section III.

For Finnis, there are three forms of attitudes that individuals can have towards the unifying relationship necessarily bound up with moral action. The first two Finnis treats as a piece because they involve an instrumental relation to others: business relationships and play relationships. Finnis speaks of the instrumentality of these attitudes in terms of our relationship to other individuals—i.e., not as a quality that exists as part of the relationship itself, but only as a relation to that relation. In the business relationship, I care about the other only insofar as their welfare bears upon my own narrowly conceived self-interest that operates through the framework of reciprocal coordination which allows me to use the other instrumentality to further my interests. In the play relationship, I am concerned about the other

for the same reason however the context of the other's welfare is now even more narrowly circumscribed by the boundaries of the game (broadly understood) that allows me to use the other to further my purposes of engaging in play. The attitude towards unifying relationships that Finnis calls friendship transforms this instrumental concern into a genuine concern: collaboration for the sake of the other that aims not at my own exclusion (or incidentally mutual) benefit but aims at the common good of "mutual self-constitution, self-fulfilment, self-realization" (Finnis, *NL*, p. 141).

Now, in each of the first two attitudes we will notice again that to be concerned about my own welfare in a way that implicates another, *simultaneously* I must be concerned with the institutional context that coordinates the action. In the business and play relations the necessity of this concern is straightforward. Take the two pre-eminent examples. First, as a business person, my well being requires that I use others instrumentally and therefore I require a coordinated system of exchange and production—e.g., the market—to sustain that instrumental use if I am to have the opportunity to devote myself to the satisfaction of my interest and not just the application of physical or psychological to keep the other in that instrumental relation. I act in a way contrary to my interests if I destroy this system in order to satisfy some immediate goal (even instrumental relationships require—out of self-interest—that preservation of shared resources we discussed earlier).<sup>17</sup> Second, this simultaneous commitment to, and relation with

17 This idea is not a new one, and finds its articulation in a number of diverse places. For instance, in the argument that Thucydides famously has the Melians make to the massively more powerful Athenian army threatening to destroy them: "As we think, at any rate, it is expedient—we speak as we are obliged, since you enjoin us to let right alone and talk only of interest—that you should not destroy what is our common protection, namely, the privilege of being allowed in danger to invoke what is fair and right, and even to profit by arguments not strictly valid if they can be persuasive. And you [Athenians] are as much interested in this as any, as your fall would be a signal for the heaviest vengeance and an example for the world to meditate upon" (Thucydides, *Peloponnesian War*, Bk. V [5.90], p. 352). We also see it in Marx's insight into the relationship between market and state in which the state preserves the interests of the bourgeoisie *as a class*, rather than the interests of any one particular *member* of that class (Marx <x>). Finnis must have the latter idea in mind, because he defines friendship <as a concern for another individual as a person, not as a member of a class (Finnis, *NL*, p. <x>).

an institution, is even more clear in the second example: as a person who plays a game, my desire to engage with others, whether for pleasure or competition, requires that the game be maintained, whether these structures are formal (the specific and literal rules of the game) or informal (the idea of ‘sporting’ behaviour). (That this attitude towards the unifying relationship is about the institution as the foundation for the relationship with another can be seen also in the idea of a solitary game.) Once the game no longer exists, or I undermine the game, I no longer have a way to engage with another in the way I desire.

In moving beyond instrumentality, Finnis’ concept of friendship also seems to move beyond institutionality.

For if A and B are friends, then the collaboration of each is for the sake (at least in part) *of the other*, and there is community between them not only in that there is a common interest in the conditions, and common pursuit of the means, whereby each will get what he wants for himself, but also in that what A wants for himself he wants (at least in part) under the description ‘that-which-B-wants-for-himself’, and vice versa. Indeed, the good that is common between friends is not simply the good of successful collaboration or co-ordination, not is it simply the good of two successfully achieved coinciding projects or objectives; it is the common good of mutual self-constitution, self-fulfilment, self-realization. (Finnis, *NL*, p. 141)

On the one hand, we see the acknowledgment of the sorts of institutional factors that characterize relationships of business and play (the “conditions and common pursuit of the means”). Yet, in its fullest articulation, when friendship is present as “the common good of mutual self-constitution, self-fulfilment, self-realization”, this “for the sake of each other’, [ . . . ] mean[s] that the concern of each for the other is founded, not in the devotion to some principles according to which the other (as a member of a class picked out by that principle) is entitled to concern, but in regard or affection for that individual person as such” (Finnis, *NL*, pp. 141, 142 respectively). That is, neither this common empirical circumstance nor even the common ideational circumstance (the “principle”) constitutes friendship, but only the commitment of one individual to the other, neither abstracted from all circumstance and context so that

what one is committed to is not “the individual person as such” but their humanity, nor simply the reduction of the individual to those “conditions” and “means” which give that individual the possibilities and concrete ways in which they pursue and indeed construct their individuality.

We see, in the latter observation, how complex this friendship commitment to the “individual person as such” must be since it both implicates institutions and yet is not exhausted by them, and indeed must require that existing institutional commitments be forsaken for the friend when the “individual person as such” requires it—insofar as this forsaking is compatible with the idea of the *mutuality* of friendship. Certainly the idea that Finnis articulates here captures our common experience and popular expressions regarding friendship: that in times of crises—by which we mean when institutions (political system, economy, justice system) has turned against me, then one finds out ‘who one’s friends are’—i.e., whose mutual commitment can endure in the absence of institutional support. However, it is important that we not confuse friendships’ transcendence of existing institutional identities and values with a friendship transcendence of institutions altogether, or the substitution of inter-individual commitment for individual commitment mediated by institutions (such as we saw with business and play relations).

There is, however, something productive of an institution within Finnis’ concept of friendship. We can see the theoretical foundation for this productiveness in two observations that he makes about friendship. The first concerns the mutuality of the relationship between friends: “It follows that A must value his (A’s) own well-being for the sake of B, while B must value his (B’s) own well-being for the sake of A. And so on. The reciprocity of love does not come to rest at either pole” (Finnis, *NL*, p. 143). By this reciprocity, Finnis could mean that friendship has no end point, it is a ceaseless movement of concern, decision, and activity that circulates between the well-being of the friends, without there being anything

other than the well-being of A and B or this practical movement of friendship between these poles. The second, is that “In friendship one is not thinking and choosing ‘from one’s own point of view’, nor from one’s friend’s point of view. Rather, one is acting from a third point of view, the unique perspective from which one’s own good and one’s friend’s good are equally ‘in view’ and ‘in play’” (Finnis, *NL*, p. 143). This third point of view, what Finnis notes others call the “benevolent ‘ideal observer’” constitutes an objective common good, one that emerges out of this friendship and is indeed constitutive of its possibility. In this way, friendship can transcend existing or given institutions with their own ordering of the values and means at play by overlaying a new third point or intermediary between individuals that concretely articulates what the possibilities of friendship *in this particular case are*. This third point of friendship, this objective middle is that form that Finnis calls the “dialectic of friendship” (the apparently restless reciprocity of love which “does not come to rest at either pole”) takes. The decision to pursue the basic good of friendship is the implicit decision to bring into being the actuality of that friendship in the form of this “third point of view”. This third point is the actuality of the moral decision. By contrast, living reference to this third point in my decisions and actions—an activity of practical reasoning which “is simply an extension of what comes naturally to friends” (Finnis, *NL*, p. 143)—the limits and defects of my individual decision making (that I can sometimes be swayed and distorted by desires for gratification, etc.) are thereby transformed and bounded in a way that is at least further resistant to my transgression of that common good which sustains me in a fourth order (moral) unifying relationship.

What form might this “third point of view” take? Here, we can begin to connect the preceding examination of the new natural law position with the issue of same-sex marriage, through the importance which Finnis gives to the family. Finnis immediately follows the discussion of the community of



friendship with the ways that there might be “the widest sharing in friendship” (Finnis, *NL*, p. 144). This form of sharing is not possible, he argues, if we side with Plato’s *Republic* over that of Aristotle’s *Politics* and try to institutionally widen the family so that “[a]ll these women are to belong to all these men in common, and no woman is to live privately with any man. And the children, in their turn, will be in common, and neither will a parent know his offspring, nor a child his parent” thereby achieving “that city in which most say ‘my own’ and ‘not my own’ about the same thing, and in the same way” (Plato, *Rep.*, Bk. V, 457d; 462c–d).

The problem for Finnis is not that the concept of the family is inimicable to the complete form of community of friendship but rather that the power of the family to be the institutional articulation of friendship is diminished: “Plato’s proposal, made in the name of friendship, is tantamount to a drastic dilution, ‘watering-down’, of friendship—a radical emaciation of a basic aspect of well-being” (Finnis, *NL*, p. 145). The family has a special status, for Finnis, because, first, it is an articulation of all orders of unifying relations: the physical unity of genetic interrelationship; the unity of understanding acquired through common experience and learning together (Finnis, *NL*, pp. 136–137); the unity of creation through the family’s “range of especially subtle modes of communication with one another” (Finnis, *NL*, p. 137), and, that moral unity that is a quality of the family “inasmuch as each of its members [ . . . ] is <word?> to finding his or her own fulfilment (at least in part) in helping the other members to fulfil themselves” (Finnis, *NL*, p. 138). Second, and more importantly, it is that form of sharing-with whose purpose is nothing other than to articulate the purpose of friendship. In this way the family not only “constitutes an incomparably fine thing for a friend to give or receive” (Finnis, *NL*, p. 145), but, we might

say, is the very concrete form of that sharing-with, and attitude of sharing-with, that “does not come to rest at either pole” and which allows one to “ac[t] from a third point of view” (Finnis, *NL*, p. 143).

We can see the degree to which Finnis’ understanding of the family implies this institutionalization of the disposition of friendship. Finnis tells us the family is an institution which is justified in “its contractual or quasi-contractual permanence and exclusiveness, for its possessiveness and its possessions [ . . . ] only to the extent that each member of the family is enabled to grow in self-possession (of which self-giving in friendship is one basic aspect)” (Finnis, *NL*, p. 146). Unlike other institutions such as the market or a game, the family has as its goal nothing other than the goal of individual flourishing. Its goal is not only a basic good (friendship), but the persistence of the framework in which individuals, who are valued as “this particular individual as such”, can identify and pursue, and be supported in the identification and pursuit, of the basic aspects of human flourishing. In this way, the family takes the individual, or allows the individual, to be taken away from the family as the locus of well-being and the centre of activity without dissolving. It is a good, thus that does transcend given institutions and their power to influence and shape according to their particular, internal purposes. And, instead, the family overlays, makes concrete the possibility, from which individuals can “enter into a whole network of associations with their [the family members’] neighbours” (Finnis, *NL*, p. 145), where “neighbours” are not to be understood geographically, but as the minimum institutions and resources for a potentially flourishing life external to the family (see Finnis, *NL*, pp. 145–146).

We will notice that Finnis’ account of the family both captures the empirical reality of the modern family, that it is enmeshed within a rich web of non-familial spheres of activity (civil society with its matrix of cultural, linguistic, and economic activity; political with the pursuit of its universal, integrative

purposes) which are necessary for family members to participate in in order to fully flourish, and that it is does so while corresponding to the conceptual requirements of his own account. The family participates in the biological unity and conventions regarding its shape (a shape that has been deeply entrenched in philosophic and popular consciousness as Plato's Socrates was well aware as his own outward reticence in suggesting the communalization of the family suggests—a reticence even greater than his suggestion of the radical (i.e., ontological) equality of the natures of men and women [see Plato, *Rep*, 457b–d] and yet these given, internal structures (one biological and conventional) do not deeply structure the purpose or shape of the family. The family is justified, in its shape, for Finnis and as we have seen, because it not only participates in a basic good—friendship—but moreover it emerges out of moral actions—the continuous actions and decisions that allow us to share-with another as a friend. Where the boundaries are structured by given nature in Finnis' account—i.e., where the transformative power of institution as moral articulation cannot reach—, he only gives us two examples: one is psychological, “a woman can give her maternal affection only to a child that is hers (or that she can treat as hers)”; the other is material, “if a family is thus to contribute to this growth of its members in freedom, friendship, and all-round good, it must be liberated from the requirements of unremitting toil by all its members for material necessities” (Finnis, *NL*, p. 145)

In both cases, the nature of the family is not defined by these given facts: they merely act as conditions that must be taken into account when trying to reflect, then act, upon how the good of friendship might be taken up and secured. The family as a possibility of a good is determined by the nature of friendship. Indeed the concept of friendship illuminates the institution of the family allowing us to see what is simply given by nature in the family—the genetic unity, the sexual relations, the conditions fo natural

dependency of children on parents, and other such given facts—does not tell us what the family *is*. Only the basic value that it participates in reveals its true (potentially-moral) nature. That is, the value of friendship reveals that this given nature has been transformed into a second nature; the principles for this transformation are given by the basic requirements of practical reasonableness which must first take into account the nature of the good, and only secondarily, that given material that will be implicated in the translation from abstract good to moral action.

Now, we need to distinguish two distinct moments in the above discussion of the family. The first is the family as an on-going affair—something that one simply finds oneself in (and for the most part this is the state of affairs that characterizes us all in relation to our existing family). In so far as the family is successful in being that third vantage point, it is successful in *cultivating* action and decision among its members that are moral because they correspond to moral relations already present in and as the family. As children, we will grow up sharing-with the members of the family in a way that is practically reasonable for friendship. The family will not dissolve even as I enter into the greater and richer connections with the world outside the family. The second moment, is that of the moment of practical rationality which creates for me my own family. It is here that our discussion of the new natural law makes the transition from family to marriage, its boundaries, and therefore more directly to the issue of same-sex marriage.

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 III. <OUTLINE> NEW NATURAL LAW AND SAME-SEX MARRIAGE

## A. The Good of Marriage

1. Finnis defines the good of marriage as *fides* or fidelity.
  - a. In order to make sense of this *fides* we need to understand it not, as Finnis, seems to imply, as a fidelity to another (say, the spouse), but as a fidelity to the idea of complete friendship.
  - b. Just as a family becomes the institution of complete friendship, *fides* becomes the name of this attitude the corresponds to the institution.
    - (1) *Fides* becomes a moral commitment, a way of life.
2. How does *fides* transform the given nature? — We know that the logic of Finnis' new natural law requires the boundaries of our actions and decision making be set, not by the internal structure of convention or biology, but by the demands of the good actualized within the horizon of the particular situation I face—i.e., morality.
  - a. Pleasure: seemingly provides immediate (unconstructed) meaning (see Hobbes, Bentham).
    - (1) *Fides* doesn't remove pleasure, but removes the immediate *meaning*: gives pleasure moral meaning: an articulation of friendship. Pleasure is still bound up with sexual relations, but the meaning of pleasure is not given by those relations.
    - (2) Pleasure as part of the "assemblage of reminders": it leads us to consider that something else is at stake. Points to the good, the good redounds upon pleasure.
  - b. Procreation: also seemingly has an immediate meaning: sex = child (as telos of sex). But, this move violates the structure of the new natural law: structure of biology would then determine meaning (whereas only good can determine moral possibilities).
    - (1) *Fides* doesn't remove procreation, but instead allows us to make rationally comprehensible the *moral meaning* of procreation: to be concerned about human flourishing of others (which is the end of friendship) is to be concerned about the existence of others. To have children is one way for the *commitment* to friendship (as a way of life) to be productive out of itself of those over whom one be concerned, not in the abstract, but out of a concern for other (the one one is procreating with) "as such".
      - (a) Perhaps cf. the idea of charity: abstract concern for individuals, not individuals as such.
    - (2) Finnis' account allows him to sustain the connection between children and marriage and the family: not, however, by saying that children (their given fact or the fact of procreation) are the end of marriage (that would violate the logic of his new natural law), but because:
      - (a) the family is the one institution whose sole purpose is to be concerned about the flourishing of another person as such.
      - (b) children implicate marriage and the family because children, if their existence is to be morally meaningful (i.e., we are not to treat them as mere instruments or objects) requires that their facticity be transformed by an institution that articulates the good which children participate in: that is the good of friendship

(not that children become “friends”, but that the friendship of mutual self-constitution is the only relation that “makes sense” of children)

- (3) Since the moral meaning is not given by biology: failure to be procreative—or even to aim at procreation—in one’s actions and decision making cannot have any *fundamental* affect on one’s ability to participate in the good of marriage.
  - (a) We can see this acknowledgment of the transformative power of the institution of marriage in Finnis’ and Lee’s (?) acceptance of the moral possibility of sterile couples.
3. Conclusion of (A): the basic features of Finnis’ account of marriage correspond the transformative power of facticity by institutions that we have developed in section II of the chapter.

#### B. How Can *Fides* Provide an Account of Some of the Conventional Boundaries of Marriage?

1. Sexual Exclusivity: the idea of sexual exclusivity as demanded by the good of marriage (i.e., that sexual relations between other than the marriage partners is against the good of marriage) can be explained by the meaning of *fides* we developed above.
  - a. Finnis’ argument: any form of conditionality with regard to the exclusivity of sexual relation goes against the good of marriage. He calls this conditionality a “consent to extra-marital sex” (a conditionality that he says exists even, if I say that *I* would never engage in non-exclusive sexual act, but allow that others may face different and more difficult circumstances, and in those circumstances other may choose to engage in non-exclusive acts, and that is okay).
  - b. How does this very expansive understanding of consent to extra-marital sex make sense?
    - (1) The idea of conditionality shifts the foundation of marriage from that objective good in which one has chosen to commit oneself to (the good of friendship as *fides*) to *subjectivity*. That is: to say that I won’t engage in non-exclusive sex acts, but that I see how it might be okay if others do is to say that I am not committed (I show no fidelity or *fides*) to the idea that I have committed myself to. This is how *any* conditionality constitutes a violation of the good of marriage.
2. Does the scope of exclusivity stand in tension with the idea of morality as the actualization of the good? Two cases that Finnis mentions:
  - a. Solitary masturbation within marriage: For Finnis’ argument: solitary masturbation (within marriage) harms the good of marriage because it substitutes action in pursuit of a good (friendship) for pleasure. (Lee takes the same argument and extends it to knowingly non-procreative sex within a (heteronormative) marriage.)
  - b. Any sexual activity by those who are not married (and have no intention to do so): Finnis makes the same argument as above: it harms the good of marriage because it does not aim at friendship and therefore falls outside of practical reasonableness.
  - c. In both cases, the good of marriage can have the wide-ranging moral affect because, for Finnis, it is prior to marriage, so it is possible to harm the good of marriage independent of one’s own outward participation (or desire to participate) in that marriage.

- (1) However, both of Finnis' arguments implicitly depend, we will notice, on a particular exclusive linking of sexual activity to the good of marriage, such that the *fides* or the complete friendship articulated in marriage and the family, can transform or bound all sexual activity because Finnis assumes that sexual activity is, by its very internal structure, can participate in only *one* basic good, that of friendship.
3. Conclusion of (B): On the one hand, the morally transformative power of *fides within marriage* is an internally coherent move within the new natural law because having committed oneself to marriage (as a for-all-intents-and-purposes life-long project) one's life is only rationally coherent if all one's actions *that bear upon* that good in some non-incidental way are shaped or bounded by that good.
- a. On the other hand, two potential problems emerge in this account:
- (1) The problem of agency: Finnis' idea of "consent to extra-marital sex" is coherent only when it is understood as the problem of substituting subjectivity as a moral foundation, when participation in the good should be the ground. However, goods are pre-moral in Finnis' account, and only become moral through our actions and decision-making. Therefore, the moral binding of *fides* cannot be complete in the sense that it can bind our actions apart from our consent to pursue it. For that to be the case, this one basic value would stand in tension with the whole theoretical core of the new natural law position, which is the distinction between the good and the moral.
- (a) Finnis provides an implicit acknowledgment of the power of subjectivity (and not just as something corruptive of the good) in his idea that one can "renounce" one's activity and thereby restore one's participation in the good.
- (2) Connected with the above problem, is the implicit understanding that sexual activity can participate in only one good, that of *fides*.
- (a) If sexual activity is not so exclusively bound, then the good of marriage and family can have (moral) dominion only over those who are participating in that good, and not those outside of it or who come to choose not (at this moment) to participate in it (say children who reach adulthood).
- (b) If sexual activity is exclusively bound to this single good, then Finnis' conclusions are internally coherent, but can they be coherently reached through the premises of his new natural law?

### C. Sexual Capacities and the Good of Marriage: What Are the Foundations for Linking Them Within New Natural Law?

1. This question has two repercussions:
- a. for the scope of the moral boundaries of marriage and the family—must policies to foster the family and marriage as a moral good also include (a more extensive) regulation of sexual activity both within outside the family?
- b. for the coherence of new natural law theory—on the face of it, this exclusive linking seems to undo the very theoretical innovation of new natural law over the received natural law tradition: (i) norms do not interpenetrate facts; (ii) goods transform the normative

potentialities of facts; (iii) morality translates that potentiality to actuality; (iv) institutions provide secure those moral possibilities even where the “fact” is not present in the individual (but the morally relevant intent is).

- (1) I.e., the exclusive linking seems to return the new natural law position to the received natural law one.
- c. Explore each of these repercussions separately.
2. Sexual Activity Generally: Discussion of how Finnis (and other new natural law) discuss sexual activity within the context of human flourishing, particularly responses to liberal critics.
3. Procreation:
  - a. Does procreation serve as the “central-case” of marriage for the new natural law theorists?
    - (1) the incorporation of procreation as the one of the lower aspects of the good of marriage
    - (2) the use of procreation to provide the boundary that limits marriage to two partners
    - (3) the use of procreation to provide a fundamental distinction between sterile different-sex couples and same-sex ones.
    - (4) Conclusion: procreation does seem to function as the central case of marriage, even though this inverts the theoretical innovation of the new natural law, allowing the internal structure of what is given to structure what is moral.
  - b. How should the new natural law understand procreation?
    - (1) To reconceptualize procreation so that it is coherent within new natural law theorizing is not to abandon the sort of battle-ground over the biological nature of procreation that has characterized the debate between new natural law and liberal theorists.
      - (a) Rather, if we understand procreation as a “reminder” (part of the “assemblage of reminders”) then such an investigation into the biological structure can be important—not because by revealing that internal structure we reveal the moral contours, but because we can be led by these internal structures to reflect on the good(s) in which they can participate.
        - i) E.g., the mutual feeling of unity and enjoyment that results in an actual unity of a child can cause of to reflect upon those basic goods which are concerned with unity, such as friendship. But it is this basic good that makes *rationaly comprehensible* those brute facts and given feelings.
      - (2) Procreation and family are morally linked by the facticity of children in this one way: for children to engage in human flourishing, they require (by their facticity) particular sorts of support. The family is *one* sort of support that is able, within its structure (because it integrates the four orders of unifying relationships) to translate the conditions for securing that facticity into the conditions for securing human flourishing.
    - c. Conclusion for (C):

#### D. Can the New Natural Law, on its Own Terms, Exclude Same-sex Marriage?



1. New natural law theorists think so because same-sex sexual activity damages the good of marriage, but removes the possibility of *any* sort of activity that might be properly participative in the basic goods that make a life rationally comprehensible and therefore moral. Finnis: “homosexual conduct is ‘never a valid, humanly acceptable choice and form of life’ and is (rightly) ‘repudiated as destructive of human character and relationship.’” (Finnis, “The Good of Marriage . . . .”)
2. How do the elements of this new natural law argument work in relation to the new natural law position?
  - a. Qualitative distinction between non-moral same-sex and different-sex acts are impossible to sustain on the very basis of the new natural law position because the internal, given structure of acts cannot determine their morality.
    - (1) Even granting sexual relations outside of (prior to) marriage are damaging to the good of marriage, the institution of marriage itself is transformative of the meaning of sexual acts.
    - (2) In this way sterile different-sex couples and same-sex couples are normatively equivalent:
      - (a) not because of any *biological analogy* (which is how the liberal critics of new natural law pursue this line of arguments)
      - (b) but because the transformative power of marriage works *equally* on *all* biological facts, whether those facts are potentially procreative, (contingently) sterile different-sex couple or same-sex couples.
3. In this sense, then, the denial of same-sex marriage by new natural law theorists is the denial of the very theoretical innovation the new natural law theorists introduced to overcome the problem of the interpenetration of fact and value in the received natural law tradition.
  - a. It is to deny the transformative power of the good, of moral actions, and institutions over facticity
  - b. In denying the (moral) capacity to marry to same-sex couples, the new natural law denies the very institution that would secure for gay and lesbian relations (or indeed any appropriate adult relations) the possibility of the good of marriage.
4. Conclusion for (D): the new natural law account helps us understand in what way a marriage and the family could be understood as a good worth pursuing. The application of new natural law theorizing to the issue of same-sex marriage is internally incoherent because it denies the ability of goods and actions and institutions to transform facticity on which the new natural law is constructed and by which it distinguishes itself from the previous tradition of natural law theorizing.
  - a. The main failure of the new natural law is its inability to find a place for subjectivity within the broader ethical system that it is constructing. While it goes some ways, through the idea of moral action, to addressing the problem that the social contract tradition points out (that in modernity we must be able to give an account of the values that regulate our lives), its treatment of same-sex marriage reveals that the new natural law cannot successfully negotiate between the fundamental role that subjectivity plays

(through the idea of commitment, action, and decision-making) and the role that objective goods play.

- b. We must turn elsewhere for the theoretical resources to understand how marriage might be a good, and therefore how to address same-sex marriage.