

Rethinking Same-Sex Sex in Natural Law Theory

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ABSTRACT *Many prominent proponents of Old and New Natural Law morally condemn sexual acts between people of the same sex because those acts are incapable of reproduction; they each offer a distinct set of supporting reasons. While some New Natural Law philosophers have begun to distance themselves from this moral condemnation, there are not many similarly ameliorative efforts within Old Natural Law. I argue for the bold conclusion that Old Natural Law philosophers can accept the basic premises of Old Natural Law without also being committed to morally condemning sexual activity between people of the same sex. I develop an argument from analogy that shows how we can draw metaphysically distinct sub-categories based on someone's capacity to experience the unitive goods of sex. This unitive capacity constitutes the sub-category and provides a distinct principle for evaluating how members of that sub-category (X) act as members of that sub-category, rather than as acting as defective members of another category (Y). Even though my argument is 'internal' to Old Natural Law, I conclude by showing how these conclusions can also address some of the objections to same-sex sex in New Natural Law.*

Many prominent proponents of Natural Law have morally condemned sexual acts between people of the same sex because those acts are incapable of reproduction. Historically, these convergent conclusions were somewhat emblematic of Natural Law as a whole: opponents readily cited them as a *modus tollens* for why Natural Law was homophobic, hidebound, or false. But this 'Natural Law Consensus' about the moral status of sexual acts between people of the same sex obscures philosophically important differences within Natural Law, between 'Old' Natural Law and (ONL) 'New' Natural Law (NNL).¹ Although many ONL and NNL luminaries both agree that same-sex sex is immoral because it is incapable of reproduction, they each provide distinct sets of supporting reasons for that moral condemnation.

Even so, differentiating between an 'ONL Consensus' and a 'NNL Consensus' still obscures recent endeavours to ameliorate or repudiate the moral condemnation within NNL. There has not, however, been many ameliorative alternatives to the 'ONL Consensus'. Mark Jordan, a notable exception, argues that the modern day urge to brandish, rather than read, scholastic thinkers like St. Thomas Aquinas, precludes a more careful, nuanced, and positive stance on same-sex sex.² His kitschier speculations aside, Jordan confronts how this philosophical inclination creates a culture of silence in contemporary Catholicism about same-sex attraction and sex.³ This silence leaves many Catholics in the laity and hierarchy with a

forlorn hope for change. Outside of the Vatican's imperium, philosophers like Alexander Pruss,⁴ J. Budziszewski,⁵ Timothy Hsiao,⁶ and Edward Feser⁷ use core aspects of ONL to conclude that same-sex sex is necessarily immoral. It seems a foregone conclusion then, both by those who support and oppose ONL, that it necessarily condemns same-sex sex. I argue for the bold conclusion that ONL philosophers do not have to be committed to this position because there is a viable interpretation of ONL that permits same-sex sex.

My argument is 'internal' to ONL for a few reasons. First, an internal argument provides an exit ramp for people who feel committed to ONL because of their social, philosophical, or religious background, but who do not want to categorically condemn same-sex sex. Second, an internal argument leaves many other philosophical aspects of ONL intact and so is more likely to be persuasive to proponents of ONL. Third, ONL has survived external objections (e.g. it commits a naturalistic fallacy) and is still taught. Even opponents of ONL should be interested in an internal argument because even a false theory can be more bearable.

My argument is based on the Aristotelian distinction between possession, privation, and deprivation. I show how this distinction establishes a metaphysical point about essential properties. Essences constitutively cause something to have the capacity to possess some property or fulfill a function. Then, in Section 2, I explain how essential properties underpin functional arguments about sexual ethics in ONL: the reproductive function of sex organs essentially orders sexual activity toward a generative end. This procreative potential is what enables couples to experience other emotionally or psychologically unitive goods from sex. If same-sex sex precludes this procreative potential, then it cannot realise any unitive goods. I introduce an argument from analogy in Section 3 to refine how we understand essential properties in terms of sub-categories. I rework how ONL philosophers have evaluated same-sex sex by identifying a constituting principle that explains and evaluates what it means for something to belong to one category, X, rather than being a defective member of a different category, Y. I address what I take to be the strongest ONL objection in Section 4 and present two responses that further develop my conclusions about a separate constituting principle. Then, in Section 5, I show how these responses complement some of the ameliorative NNL efforts and address NNL concerns about unitive reasons for having sex.

I want to make one quick terminological point. Following Michel Foucault's lead, David Halperin insists that there were no homosexuals before the 1800s. Halperin clarifies that he isn't denying that sexual acts between people of the same sex happened before the 1800s; rather he is emphasising that social, cultural, and political sources converged with norms about gender and sex to enable historically embedded subjectivities.⁸ Given that ONL and NNL are supposed to transcend variances in social categories, I've opted for the clunkier, but hopefully less contentious, phrase 'same-sex sex'. Framing the discussion around acts, rather than identities or subjectivities, also helps us focus on the moral reasons people have to participate in those acts. If same-sex sex can actualise a mutual sense of psychological intimacy, care, or closeness for those involved, then people have moral reasons to foster those unitive connections.

2. Possession, Privation, and Deprivation

A key characteristic of ONL is that we can derive moral conclusions from metaphysical premises. This characteristic is rooted in Aristotle's metaphysical distinction between possession, privation, and deprivation.⁹ In this section, I explain how this distinction sets up an evaluative account of essential properties.

Aristotle, in *Categories*, distinguishes between possession, privation, and deprivation. The basic idea is that some entities are the kind of thing that can possess certain properties and others are not.¹⁰ David Oderberg elaborates that we can further distinguish between something possessing a property from the capacity to possess that property.¹¹ Some animals, for example, are the kind of animal that has the capacity to possess teeth. When an animal possesses teeth, it actualises this capacity. If an animal loses its teeth (e.g. in a fight, to rot) then it no longer possesses them and suffers from privation. Privation, then, affects possession, not the capacity to possess a property.

Capacities play an important role in ONL because they provide a metaphysical explanation for why something is the kind of thing that it is. In ONL parlance, this explanation is an essence. Essences enumerate the capacities something has in virtue of being a member of a kind. Oderberg elucidates that 'an essence is more than a list: it is a structural, organisational unity'.¹² Essences integrate capacities to work together by directing them toward a shared end. For example, the lungs' capacity to take in air and diffuse oxygen into the blood works with the heart's capacity to pump blood through the circulatory system. The circulatory system organises veins and arteries to work together in moving oxygenated blood through the body. Capacities, therefore, promote an organism's wellbeing not just by functioning correctly in isolation, but by functioning correctly together.

In order to ensure that these capacities contribute to an organism's flourishing, essences require an objectively real, rather than conventionally imposed, principle to uniquely unify a kind. This principle of unity constitutively causes each member of the kind to have that organised set of essential capacities.¹³ But essences are not static blueprints: they guide an organism's development in terms of the capacities it constitutively has because ONL sees normativity as built into the very fabric of reality'.¹⁴ This metaphysical normativity means that an organism's development, growth, and maturation are teleological because they aim at actualising its essential capacities.

This teleological point indicates that possession and privation do not just describe the mere presence or loss of some property. Rather, as Oderberg accentuates, possession and privation refer to the list of essential capacities that promote an organism's wellbeing. Privation, then, only marks 'when an organism lacks something it is supposed to have for its proper function'.¹⁵ Now, if an animal has the capacity to possess a property, but does not, then it either does not possess it yet, or is at a stage when it should possess it, but does not. A newborn, for example, might not possess teeth, but that is because it has yet to grow them. If an adult animal is supposed to possess teeth, but never developed them, then it suffers from deprivation, not privation. Although deprivation and privation are closely related, they are different in the key sense that privation signifies losing a property we should possess, while deprivation indicates that we never possessed the property that we should possess. The descriptive claim, that an organism lacks some property, implicates an evaluative claim.

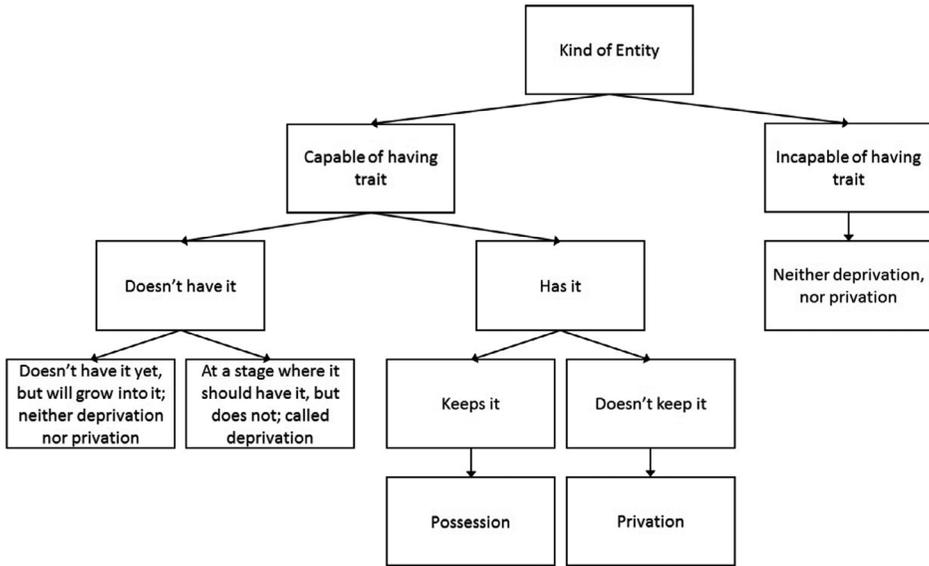


Figure 1. Chart of Possession, Privation, and Deprivation

If, however, an animal is not the kind of animal that has the capacity to possess the property, then we cannot talk about it as either suffering privation or deprivation. Worms don't possess teeth because they are not the kind of animal that has the capacity to possess them, not because they lost them along the way or because something went wrong during maturation. Figure 1 shows a chart of possession, privation, and deprivation.

Possession, privation, and deprivation all indicate a normative component in development. An essential property is not just present or absent; it is an indication of some success or failure of the individual organism with respect to the kind of organism it is.

3. ONL and Sex Organs

Now I want to explain how ONL utilises a functionalist understanding of sex organs to morally condemn same-sex sex and show how this position draws on the distinction between possession, privation, and deprivation.

We use essential capacities to describe and evaluate organs in terms of functions. A heart is not just an organ, but it is an organ that pumps blood. This description is bound up with an evaluation because we are describing what something is by what it does. If a heart fails to pump blood well, then it is a bad heart, rather than just a statistically unusual heart. In failing to pump blood well, a heart does not perform as it should and suffers from privation because it only tenuously possesses the function it should have.

As we saw in Section 1, essences organise and order various capacities toward achieving a particular end. A kidney has the capacity to filter waste from blood to form urine. While we can discern these specific functions, the kidney unifies each individual

function toward an ultimate end of removing waste from the body. If one of my kidneys filters waste well, but never developed the function to form urine, then it possesses the function of filtering waste, but it suffers from deprivation in respect to forming urine. Individuating these subordinate functions clarifies what, exactly, prevents the organ from fully functioning toward the unifying end.

ONL philosophers contend that sex organs also integrate multiple subordinate functions toward a reproductive end. John Haldane summarises that in ONL 'sexual activity is defined by function and its (primary) function is that of reproduction'.¹⁶ If sex organs fail to achieve this procreative function, then they either suffer from deprivation or privation. A fertile adult who loses his genitals in an accident suffers from privation, because he can no longer exercise the procreative function. A sterile adult suffers from deprivation because she never developed the procreative function that she was supposed to during puberty. Haldane acknowledges that, 'sex obviously gives pleasure and serves to express and deepen emotional bonds as well as to effect an uniquely intimate union between distinct but complementary psychophysical natures,' but he qualifies that 'these features are located within the framework of [the] primary reproductive function [of sex]'.¹⁷ The crucial point, then, for ONL sexual ethics, is that this unitive capacity to form intimate bonds with someone draws on the physical capacity to reproduce.

ONL philosophers have articulated this conclusion in different ways. John Lamont focuses on why sexually unitive acts are good, arguing that 'the unitive good depends on the reproductive good because it is the reproductive aspect of sexual intercourse that makes intercourse a unitive act'.¹⁸ The reason that reproductive capacities are morally relevant is because they enable people to engage in generative acts that can bring about a further good: creating new life. Lamont clarifies that people cannot intend the further good of reproduction itself because it's not up to them if sperm fertilises or even reaches an egg. But, if people engage in generative acts that are open to the further good of new life, then they are able to 'to confer a good on one's partner (provided the acts are not evil in some other way)', namely the cooperatively good act of trying to bring new life into the world.¹⁹ Lamont uses this point to explain why other unitive goods, like pleasure or companionship, depend on this generative potential too: pleasure is only good if we take pleasure in something that is itself good, which, for Lamont, is the generative nature of sex.²⁰

Alexander Pruss advances an ontological explanation for why the unitive component of sexual acts depends on the procreative teleology of sex organs. Recall that essences integrate a set of capacities in an organism to work together for some end. Pruss claims that this teleological cooperation enables a man and woman to become one organism during generative sex because 'they are united in a single action oriented in the direction of an end'.²¹ This biophysiological unity grounds the unitive aspect of sex because it enables the two-as-one organism to strive toward the reproductive end of sex. This reproductive end instantiates a morally transcendent good because while a man and woman may experience the unitive goods of intimacy during sex, this cooperative teleology goes 'beyond the man and the woman (since the attainment of the end is procreation of a new person)'.²² Without this transcendent end, unitive goods selfishly turn inward and are only directed at the two-as-one-organism.

Building on the Aristotelian position that human beings are rational animals, Edward Feser adduces that our rational nature inflects our biological desires. If our sexual desires reference sex organs, and those organs have a reproductive teleology,

then our rational capacity to form unitive bonds essentially orders our erotic desires toward someone of the opposite sex because it draws on the reproductive ends of our sex organs. Taken together, our unitive and reproductive capacities ensure that ‘the human soul is directed to *another soul*—and not merely toward certain organs—as its complement, man to woman and woman to man’.²³ Thus, for Feser, human sexual desires have a unified teleology so that ‘a human sexual act is a seamless unity of the procreative and unitive, directed at the same time toward biological generation and emotional communion’.²⁴ Feser frames his conclusion around the point that organisms flourish when they actualise their essentially prescribed ends, or at least do not frustrate them. Feser is not claiming that people need to have sex in order to flourish—vows of chastity forego, but do not frustrate, the use of sex organs and can still contribute to our wellbeing. On Feser’s view, then, if people do have sex, they cannot (morally) act in a way that is inconsistent with the unitive and procreative ends of sex because those ends are what make sex good.

We are now in a position to state why ONL arguments disapprove of same-sex sex in terms of deprivation and recognise some evaluative differences among ONL views. Lamont concluded that the unitive good consisted in each person simultaneously conferring the cooperative good of engaging in generative-type acts, which conferred the good of possibly creating new life on to another. Although Pruss concurred with Lamont that creating new life was itself a good, he held that the unitive good depended on there being a two-as-one organism during sexual acts. This organic unity integrated the teleology of each sex organ to cooperatively strive toward the same generative end, which enabled the pursuit of the transcendent good of creating new life. Since same-sex sex fails, in principle, to be generative, it is *ipso facto* unable to confer the unitive good on either partner or create the two-as-one organism that strives toward the unitive and transcendent end of sex. If the generative good of sex is what grounds the unitive goods of sex, then same-sex sex categorically fails to be unitive.

In his extended defense of what is popularly called ‘the perverted faculty argument’, Feser asserts that if an organism flourishes when it pursues its essentially prescribed end, then decisions to act inconsistently with those ends are dis-ordered and cannot contribute to an organism’s wellbeing. *Contra* Pruss, Feser objects that ‘in no literal sense are a copulating man and woman “one organism”’.²⁵ Instead, sexual acts between people of the same sex fail to actualise their procreative purpose because people are acting in a way that is, in principle, inconsistent with the essentially prescribed procreative ends. Feser charges that people who have sex with people of the same sex ‘frustrate the unitive end insofar as they involve actively taking the psychological process of arousal through to an emotional climax that involves an object other than the one toward which nature has directed it’.²⁶ This position distances his view from Lamont’s conclusion because the fault, for Feser, is based on the dis-ordered unitive capacity, rather than the inability to confer the unitive good of jointly engaging in generative acts.

These theoretical differences aside, we can recognise some common ground. First, same-sex sex is incapable of reproduction. Second, the unitive goods of sex depend on participating in potentially generative acts. If same-sex sex fails, in principle, to be generative, then it cannot actualise any of the unitive goods of sex. These failures are instances of deprivation because those of us involved are unable to realise the procreative, and *ipso facto* unitive, ends of sex even though we are at a stage in our

lives when we should be able to participate in them—or so the ONL Consensus holds.

4. Argument from Analogy

Now that the ONL Consensus is in place, I'll develop my alternative account, where we can still accept the metaphysical claims about possession, privation, and deprivation, without being committed to condemning same-sex sex. Consider the following argument from analogy. The function of bark is to protect the tree and transmit nutrients. Bark that does not protect the tree or transmit nutrients is bad bark; the tree fails to grow, withers, or dies. *Palo verde* trees, however, have green bark, which helps them photosynthesise, in addition to protecting it and transmitting nutrients. Brown bark does not photosynthesise, and so we either have to say that it fails to perform this additional function to photosynthesise or that bark constitutes a genus, where green and brown bark are each a separate species.

Now, nobody thinks that brown bark fails to photosynthesise, but suppose we did. We would have to say that, in failing to photosynthesise, brown bark suffers from either privation or deprivation. If brown bark were to suffer from privation, then, at some point in time, it would have been photosynthesising, but no longer does. But brown bark never stopped photosynthesising because it never started. Since brown bark never matures into the ability to photosynthesise, it does not suffer from deprivation because it never was supposed to photosynthesise in the first place. So, we are left with the other disjunct: bark is a genus with green bark and brown bark as separate species.

As a genus, bark has the function of protecting the tree and transmitting nutrients. We could evaluate each species of bark as different sub-kinds of bark. Since green bark is the kind of bark that has the capacity for this additional photosynthesising function, we can evaluate it on how well it photosynthesises (e.g. in terms of privation, deprivation). If brown bark does not, as a category, have the capacity to photosynthesise, then we cannot say that it fails when it does not perform this function. But, since both brown bark and green bark belong to the bark genus, and that genus was constituted by the function of transmitting nutrients and protecting the tree, then we could still evaluate either kind of bark as good or bad in terms of performing those genus-level functions.

Building up the analogy, we can hold that sex acts between human beings form a genus with different species: different-sex sex and same-sex sex. The bark analogy shows that if we only rely on the genus bark, then we have to say that brown bark is deficient. But brown bark is not deficient because it is just not the kind of thing that has the capacity to photosynthesise. In order to get the right answer about bark, we draw more refined categories. Similarly, if we rely on the 'genus level' to understand human sex acts, then we will get the wrong answer for what is properly a question about 'species'.

Consider each species. Green bark, *qua* species, formed a new sub-category that had the additional capacity to photosynthesise. If green bark did not photosynthesise (e.g. blight, defect during development), then it suffered from privation or deprivation. Opposite-sex sex, *qua* species of the sex act genus, has the capacity to be procreative

while same-sex sex, *qua* species of the sex act genus, does not. But, just as we didn't evaluate the brown bark as failing when it didn't photosynthesise, so too should we not fault same-sex sex for failing to procreate. If human sex acts form a genus, then any human sex act has a unitive capacity. This unitive capacity would still let us evaluate casual or anonymous sex in either species as failing to actualise it.²⁷ Human beings that failed to develop or demonstrate this unitive function would be suffering from either privation or deprivation.

5. Objections and Replies

Some ONL philosophers might object that even if we accept the distinction between green and brown bark, we can't say the same thing about human sex organs. The brown bark physically can't photosynthesise, but adult human sex organs can physically beget or conceive. Their unitive capacity notwithstanding, the deprivation still obtains. I will develop two responses that meet this objection. Call the first 'The Local Function Response' and the second 'The Limited Function Response'. I will go on to show in Section 5 how these responses also provide resources to address NNL concerns about dis-integration and unitive reasons to have sex.

5.1. *The Local Function Response*

As we have seen so far, we understand local functions in terms of how they work in service of the whole. In Section 1, we discussed how essences organise and order an organism's various local functions according to a unifying principle that is unique to that organism with respect to the kind of organism it is. That principle also explains that unity as a constitutive feature of belonging to a specific category or sub-category. In the case of bark, we don't just look at the ability to transmit nutrients or photosynthesise, we have to understand how a function works toward helping the whole tree depending on the kind of tree that it is.

In Section 2, we saw that there were a few different ways that ONL philosophers explained the unitive goods of sex. One commonality, however, was that generative acts enabled people to experience a range of unitive goods (e.g. companionship, closeness, friendship, intimacy). But the unitive goods of sex also have to depend on another psychological capacity to process those experiences as unitive goods. If this unitive capacity enables someone to experience the unitive goods of sex, and people experience those goods only when they have generative-type sex, then the unitive goods depend on people participating in generative-type acts, rather than a particular historically anchored subjectivity. This unitive capacity further helps explain why people participate in generative-type acts in the first place: in order to desire participating in those acts, someone also has to desire the bodies that make those acts possible. If this unitive capacity orders the local reproductive functions of sex organs toward a shared conjugal end, and it also evaluates sexual acts in terms of unitive goods, then it outranks the procreative function of sex organs by directing them toward a unitive end.

Part of what it means to have unitive desires toward people of the same sex is to preclude this reproductive capacity. But, if the unitive capacity is what constitutes the

new sub-categories of human sex acts, and constitutive principles take priority over the local functions of other organs, then we have to look at how the local function of sex organs work toward the end of the constitutive principle. If the capacity to form unitive bonds with people of the same sex both constitutes the new category and, as a unitive capacity, takes precedence over the local function of sex organs, then the issue is not whether sex organs themselves (fail to) function in terms of privation or deprivation,²⁸ but whether the function of those sex organs fulfill the larger unitive capacity.

The ONL objection was that, unitive capacity notwithstanding, sex organs could still beget or conceive. But this objection only looks at the local function of sex organs in isolation, rather than how those organs work toward what unifies the whole organism. In this case, we look at how the functions of sex organs work towards the end of the unitive capacity. I am not claiming that this unitive capacity defines what it means to be a human being. Rather, if we accept the argument from analogy, we can then divide human sexuality up into different (sub)categories, where we can use the genus-level unitive capacity as a way to constitute and consequentially organise those (sub)-categories. The ONL objection fails because it either focuses on the local function of sex organs in isolation, or, because it promotes the local function of those sex organs over the unitive capacity.

If we focus on the local function of sex organs in isolation, instead of how they contribute to the whole, then we have to revise how we understand functions and wholes. Alternatively, if the local functions of sex organs do outrank the unitive capacity, then ONL philosophers have to readjust the moral value of sex that is procreative, but not unitive: it may be less *fulfilling* than sex that was both procreative and unitive, but it would not itself be an undesirable end. If, however, we accept the argument from analogy, we could conclude that while every human sex act has a unitive capacity, there are different categories that reorganise how we understand the functions of sex organs in relation to that unitive capacity.

5.2. *The Limited Function Response*

The ‘limited function response’ starts with a new argument from analogy. The function of a wing is to fly. Baby eagles or crows do not suffer from privation or deprivation because they will grow into an animal that is capable of flight. But if adult eagles or crows have a defective wing or injure it, then they suffer from privation or deprivation. Ostriches and emus, however, are both birds and both have wings, but neither can fly. Neither ostriches nor emus suffer from privation or deprivation from being unable to fly because they are not the kind of bird that is capable of flight, even though they are the kind of animal that can have wings. If we talk about wings without qualifying which kinds of birds we are talking about, then we are looking at the ‘wrong level’ for the function; the genus instead of the species. If we talk about wings as a genus, then we can say that, on the genus level, wings have a stabilising or courtship function. This genus-level trait means that ostrich and emu wings are not homonymous wings because they have a stabilising function. If we divide wings into species, then we can more accurately talk about the respective function of a wing for each kind of bird (e.g. flying birds, non-flying birds).

So far, we have just paraphrased the same argument about green and brown bark in terms of wings. But we can now identify a third species, between birds that can fly

and birds that cannot, that we could not before. Some birds can fly, but not far. Chickens use their wings for stability and for flight, but they can only go about 40 feet—not because their wings are underdeveloped or defective, but because wings, for chickens, are only supposed to sustain the shorter and limited kind of flight. So, chickens, in comparison to other flighted birds, can fly, but to a lesser extent. The ‘chicken’ sub-category reorganises the function of a flighted wing toward a different, though related, end (i.e. short distance flight). Figure 2 diagrams the new classification.

The new analogy is that sex organs in individuals with a same-sex unitive capacity can still physically procreate, but they exercise this function in a circumscribed way. The organising principle of the category (i.e. the same-sex unitive capacity) directs the function of sex organs in a different way than the organising principle of a different category (i.e., the opposite-sex unitive capacity). The physical ability to reproduce is constrained by the organising principle of a category, but it can still be realised (e.g. IVF). So, just as the chicken wing was not hindered by any developmental problems or by any scarring accident, so too is the physical ability to reproduce in people with a same-sex unitive capacity not diminished by any developmental or traumatic issue.

This difference is neither a shortcoming for people who engage in same-sex sex nor some other kind of failure to perform what people who engage in opposite-sex sex can do in the same way that a chicken is not failing to fly the same distances that an eagle or crow is. If chickens do not suffer from privation or deprivation because they cannot fly as far as the other kinds of flighted birds, then we can conclude that people with a same-sex unitive capacity are not suffering from privation or deprivation because they cannot reproduce in the same way that people with an opposite-sex unitive capacity can. Just as each species of wing relied on a different organising principle to explain the local functions of those kinds of wings, so too can we say that the unitive capacity

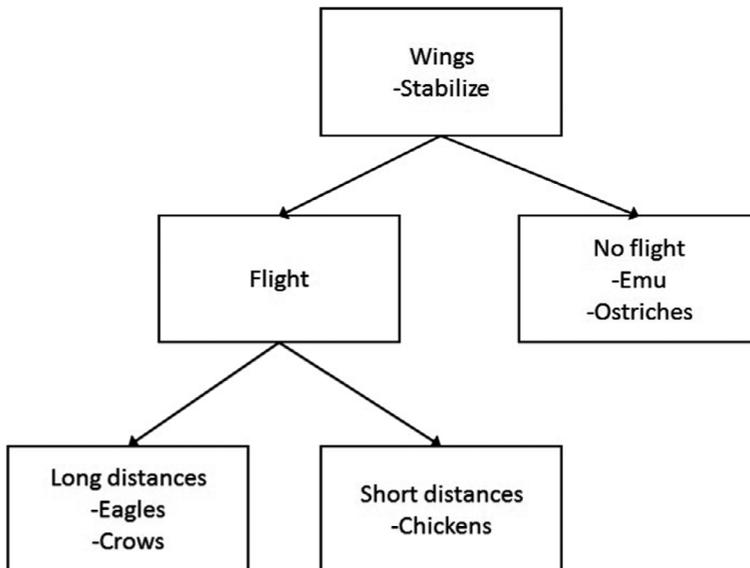


Figure 2. Chart Diagramming the New Classification

for same-sex sex and different-sex sex provides different organising principles for understanding the local functions of sex organs.

As I mentioned in the Introduction, the line of argument I developed in Sections 3 and 4 about a distinct unitive capacity are internal to ONL. I also mentioned that while ONL and NNL philosophers both morally condemned same-sex sex because it was incapable of reproduction, they each provided a distinct set of reasons. I want to spend the next section showing how my conclusions about a unitive capacity in ONL can add to some of the ameliorative endeavours within NNL as well as addressing NNL concerns about unitive reasons to have sex.

6. NNL and Sexual Ethics

I want to start by first describing some prominent NNL theories that argue same-sex sex is immoral before turning to some recent NNL arguments that shift away from this condemnation. I then show how my arguments about a distinct unitive capacity adds to these ameliorative efforts and responds to NNL concerns about same-sex sex failing to actualise marital goods from sex.

NNL philosophers have developed a robust account of wellbeing that is based on practical reason. This emphasis on practical reason undercuts metaphysical explanations of how essentially prescribed functions contribute to our wellbeing.²⁹ John Finnis, for example, denies that we can infer moral conclusions ‘from metaphysical propositions about human nature or about the nature of good and evil, or about “the function of a human being”’.³⁰ Instead, Finnis maintains that there are basic goods that promote human flourishing. All told, Finnis lists life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion as an exhaustive set of basic goods that promote human flourishing.³¹ These goods are basic in the sense that they do not need further justification: they are self-evidently good to ‘anyone of the age of reason’.³² Finnis adds that basic goods are radically plural: we cannot derive one basic good from another, nor is there any hierarchical importance ranking the pursuit of one over the others.³³ Basic goods disclose ‘a horizon of attractive possibilities for us’, and we use practical reasonableness (itself a basic good) to pursue and balance them in our life projects.³⁴ Our wellbeing depends on which basic goods we include in our life and how we incorporate them.

Curiously, Finnis initially omitted marriage as a basic good.³⁵ Acknowledging his oversight later on, Finnis explains that marriage uniquely contributes to our wellbeing by institutionalising a ‘two-sided good’ of deep friendship and openness to procreation.³⁶ Marriage, like the basic good of friendship, enables a wide array of open-ended mutual commitments between people. Unlike friendship, however, marriage expresses a sexual good when both people are open to procreation. People do not have to intend to procreate in order to have sex, but Finnis’ point is that this mutual openness to procreation actualises a common good, namely marital sex, that unifies two people in a shared marital act. Without this mutual openness to procreation, couples are not having marital sex, even if they are married. Spouses who have sex solely for pleasure, health, or ‘solely as a relief from temptations to masturbation or extra-marital sex’ are not acting on marital reasons for sex and so cannot be experiencing the basic good of marriage.³⁷

Finnis uses this line of argument to claim that same-sex sex cannot ever be marital. Since same-sex sex precludes this procreative possibility, those involved will fail to meet a necessary condition for marital sex, regardless of their other mutual commitments to each other. The issue for Finnis is not just that same-sex sex fails to realise the common marital good of procreation. In being unable to be open to procreation, people can only act on reasons for themselves as an individual, rather than a unified couple. Finnis concludes that these individual reasons are morally damaging because people regard their 'sexual capacities, organs, and acts as instruments for gratifying the individual "self" who has them'.³⁸ This moral damage aside, Finnis does not think we should criminalise non-marital sexual acts, but he does warn that recognising same-sex unions as morally or politically equivalent to opposite-sex unions damages society because it institutionalises non-marital sexual norms.

Collaborating with Patrick Lee and Gerard Bradley, Robert George has echoed much of what Finnis says about marriage and the moral harms of non-marital sex. George *et al.* elaborate that we are compound beings with biological, emotional, and rational components. Marital sex is intrinsically good because it instantiates a multi-leveled unity between spouses. This unique unity presupposes that each spouse 'respects the integration of the person as bodily with the person as intentional agent'.³⁹ When spouses have sex as 'potential father and mother', they participate in a procreative act that unifies them as 'one organism' because they have integrated their emotional, rational, and biological components, which 'extends the present unity of the spouses indefinitely into the future'.⁴⁰ But procreation is not the point of marital sex. Treating sex as a means to procreation makes sex an instrumental good, rather than an intrinsic good, of marriage. In this respect, 'spouses rightly hope for and welcome children, not as "products" they "make", but as gifts, which, if all goes well, supervene on their acts of marital union'.⁴¹ Therefore, it does not matter if spouses ever actually produce children because what makes marital sex a basic good is that it actualises the multilevel unity between spouses.

This concern about instrumental integration undergirds other moral conclusions about sex. George *et al.* aver that when couples, even married couples, have sex solely for pleasure, they are dis-integrating themselves because they are instrumentalising their bodily component. People who engage in anal sex, oral sex, or mutual masturbation, 'do not unite biologically; they do not become the subject of a single act' and 'although each person may experience pleasure, they experience pleasure as an individual, not as a unit'.⁴² Dis-integrating our biological component from sexual acts is morally damaging because we treat our body or someone else's body as a mere instrument for pleasure. Since same-sex sex precludes this biological unity, it always treats someone's body as an instrument for pleasure, regardless of what else is going on emotionally or rationally.

It's hard to overstate Finnis' influence on NNL. Jonathan Crowe rightfully complains that while recent work in NNL is diverging from the initial positions Finnis staked out, those outside of NNL presume that it is synonymous with Finnis' arguments, especially about sexual matters.⁴³ While Crowe extensively surveys contemporary developments within NNL, I'll focus on just two emerging ameliorative trends that concern same-sex sex.

First, NNL philosophers, like Sherif Girgis and Ryan Anderson, are shifting the discussion away from morally evaluating sexual acts between individuals to how NNL

structures the public sphere. Coauthoring work with George, Girgis and Anderson focus on the evaluative political conclusion that marriage is a basic good.⁴⁴ This conclusion about marriage being a political good does lead Girgis, Anderson, and George to the moral-political discussion about what kinds of civil institutions societies should (not) have, but they refrain from discussing the moral permissibility of sexual actions between individuals.⁴⁵ Further, Anderson and Girgis' more recent work, debating John Corvino over the role of religious and conscientious objections in law or the market, stresses how NNL should shape the public sphere while saying little about which sexual acts are dis-integrating.⁴⁶ This argumentative pivot, concentrating on NNL in the public sphere instead of both the public sphere *and* the private sphere, still has damaging implications for people who engage in same-sex sex,⁴⁷ but it does suggest a (slight) ameliorative difference in how the next generation, even those closely allied to Finnis and George, interpret NNL.⁴⁸

Second, other NNL philosophers are developing more directly ameliorative alternatives. Gary Chartier emphasises how we phenomenologically form commitments with other people. Romantic commitments require an 'ethic of tenderness' to open ourselves up to someone else while making sure that the other person feels comfortable enough to open themselves up to us too.⁴⁹ This intimacy is interactive and dynamic because we uniquely express mutual care and desire for each other by gradually intermingling our lives over time. Sharing activities, interests, and a life together gradually forms a unified 'we' without erasing either individual. Marriage, as a basic good, makes this unity more durable by creating an affirming context for sexual intimacy. While sex enhances marital unity by opening individuals up to each other in a special way, Chartier clarifies that we do not need to think that 'sex is an inescapable element of marital life' because 'one can love without sex and so one can marry without sex'.⁵⁰ Couples that enact this ethic of tenderness realise the basic good of marital unity because they have developed a special kind of intimacy between them.

Now, even though Finnis denies that we need a robust metaphysical theory of human nature, he acknowledges that basic goods are 'good for human beings with the nature they have'.⁵¹ Crowe expands this point by detailing how our dispositions to identify and pursue basic goods is influenced by our biology and our social environment. Focusing on how structural changes in society track the evolution of basic goods, Crowe contrasts the basic good of friendship in the Stone Age with friendship today. The material conditions in Stone Age cultures restricted friendship to close relationships and familial or tribal loyalties. More plentiful resources today, however, enable more far flung notions of community. Digital resources further extend who we can form friendships, relationships, and families with by connecting us across virtually any geographic divide.⁵²

The metaphysical arguments I developed to address issues in ONL parallel Crowe's point about the relationship between social conditions and basic goods. Just as different social conditions modulate our normative inclinations to pursue basic goods, so too do different unitive capacities attune people to pursue basic goods based on the facts about them. Think about Chartier's ethic of tenderness: sexual acts can provide a special kind of moral value because they open us up to each other in a uniquely unitive way. If a same-sex unitive capacity is what enables people to experience those unitive goods, then they have a moral reason to pursue unitive sex.

Joshua Goldstein reframes the basic good of marriage in terms of the basic good of friendship and a robust conception of committing to self-constituting projects that are ‘foundational to moral selfhood’ because they make use of the basic goods.⁵³ Self-constituting projects can be opened-ended and involve mutual commitments, realising what Finnis calls friendship ‘in the full sense’ by actualising a common good that stands above each individual.⁵⁴ The joint commitment to pursue that common good together means that neither individual is using the other as a mere means for self-gratification because the joint commitment is part of the self-constituting project. Although Goldstein acknowledges that same-sex marital sex imperfectly actualises our biological component, he points out that the marital reasons for sex would still actualise and surpass the biological imperfection.

We can leverage the metaphysical conclusions about our unitive capacity to address>NNL concerns about dis-integration. George *et al.* argue that marital sex is good because it actualises a multi-leveled unity by fully integrating a person’s biological, emotional, and rational components in reproductive-type acts. But, if the arguments from analogy hold, then we can appeal to different principles of unity that enable people to integrate the various components based on their respective unitive capacity. If this unitive capacity organises and orders the subordinate capacities of an organism, then we can bolster Goldstein’s thesis about same-sex sex actualising a common good of marriage without having to concede that same-sex sex is biologically imperfect. If, as The Limited Function Response shows, chickens are not any worse off with short-flighted wings, then neither would there be any biological imperfection in same-sex sex that was aiming at the unitive common good of marriage.

Conclusion

ONL philosophers are not forced to adopt my conclusion. Categories, for Aristotle, are holistic and normalise salient properties. Even if some members of the category do not possess the salient property, we can still use the essential capacity to possess that property to evaluate the members without that property (e.g. privation, deprivation). With respect to the previous analogies, ONL philosophers could say that using *palo verde* bark’s capacity to photosynthesise as an exemplar property to evaluate other bark would result in a skewed account of what bark is. Instead, we focus on the constitutive properties of bark (e.g. protects a tree, transmits nutrients), and note that *palo verde* bark is an exception, not the rule. Similarly, if we wanted to teach someone what a wing was, we wouldn’t start with an ostrich’s wings because they aren’t instructive of what wings normally do. Equally so, while a chicken can demonstrate a wing’s function (e.g. flight), it is not a good example because other kinds of wings perform the function better. If we re-draw the categories to account for the specifics of same-sex and opposite-sex sex, ONL philosophers could say that we are missing out on the broader category of procreative capacities. This response does not refute my internal argument so much as it shows that the ONL Consensus is still an option.

I’d like to respond with three closing points. First, even if the ONL Consensus is still viable, ONL philosophers have to give an additional reason for it, rather than the alternative I’ve developed. If the arguments from analogy hold, then all of the moral arguments about opposite-sex sex still apply because the unitive capacity plays a

constitutive role in evaluating human sex acts. Given that the same unitive principle would apply in a similar way to same-sex sex, it isn't clear what ONL philosophers would lose on my account aside from the moral condemnation of same-sex sex.

Second, ONL philosophers might find my terminology objectionable. Claiming that different unitive capacities correspond to different species suggests that people with one unitive capacity are not just distinct from people with another, but they are an entirely separate species. But 'species' is just a categorising term. We could, *salva veritate*, run the same arguments by replacing 'genus' with 'category' and 'species' with 'sub-category'.

Third, there are several issues about sexuality and gender that I have not addressed. If ONL frames sexual development normatively, then it seems that asexuality would indicate deprivation. Even if my arguments about same-sex sex are correct, I haven't said anything about how we should include bisexuality or gender fluidity. These are limitations. My goal was not to resolve every issue about sexuality within ONL but to rework how we understand and apply the basic principles with respect to same-sex sex. There is additional work to be done, but we can extend the strategy I've developed here to include these cases. In order to claim that ONL has a problematic understanding of a category, we have to identify a constitutive feature of what it means to belong to that category. If we can use this constitutive feature to explain what it means to be in one category, X, then we can use those constitutive features to evaluate possession, privation, and deprivation with respect to being an X, rather than being a defective Y.

Briefly, we might say that a constitutive feature of being bisexual is that someone is capable of forming unitive bonds with people of either sex. If that constitutive principle is what makes someone bisexual, rather than a deficient heterosexual, then we can use it as a standard to evaluate how people actualise that unitive capacity. In cases where someone who is bisexual is attracted to someone of the opposite sex, the procreative norms would apply to that relationship. In cases where someone who is bisexual is attracted to someone of the same sex, the other norms I have been advancing here would apply to that relationship.

I am not claiming that ONL philosophers are necessarily in error by their own lights. My argument does show, however, that distinguishing between possession, privation, and deprivation lets us take on the starting premises of ONL without being committed to condemning same-sex sex.⁵⁵

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NOTES

1 Anthony Lisska traces an additional, genealogical difference. Contemporary ONL and NNL philosophers each claim to be the true intellectual heirs of Natural Law, vying over interpretations and applications of Aristotle, St. Thomas Aquinas, and other historical figures. Anthony Lisska, "Finnis and Veatch on Natural Law in Aristotle and Aquinas." *American Journal of Jurisprudence*. 55 (1991).

2 Mark Jordan. *The Invention of Sodomy in Christian Theology*. (Chicago: The University of Chicago Press, 1997). John Boswell has offered other historically based arguments, but his genealogical project doesn't

- challenge the philosophical explanations within ONL. John Boswell. *Same-Sex Unions in Pre-Modern Europe*. (New York: Vintage Books, 1994).
- 3 Jordan sustains a kitschy chapter-long claim that, from prima donna ‘Liturgy Queens’ to prissy vendettas over chasubles, clerical culture just institutionalises and ritualises clerical camp. Mark Jordan. *The Silence of Sodom: Homosexuality in Modern Catholicism*. (Chicago: The University of Chicago Press, 2002).
 - 4 Alexander Pruss. “Christian Sexual Ethics and Teleological Organicity.” *The Thomist*. 64. (2000).
 - 5 J. Budziszewski. *Written on the Heart: The Case for Natural Law*. (Westmont: InterVarsity Press, 1997). pp. 69–78.
 - 6 Timothy Hsiao. “A Defense of the Perverted Faculty Argument Against Homosexual Sex.” *The Heythrop Journal*. 56.5. (2015).
 - 7 Edward Feser. “In Defense of the Perverted Faculty Argument,” in *Neo-Scholastic Essays* (South Bend: St. Augustine Press, 2015). pp. 378–413.
 - 8 Sometimes, Halperin explains, these subjectivities (e.g. gay, straight, bisexual) result in a sexual interiority, self-understanding, or a durable and life-long configuration of sexual desire or disposition. Other times, these subjectivities were accurately historically situated forms of life rather than self-understandings (e.g. *kinaidos*, *tribades*). Michel Foucault. *The History of Sexuality: Volume I*. (New York: Vintage, 1978). David Halperin. *How to do the History of Homosexuality*. (Chicago: The University of Chicago Press, 2001). For ‘essentialist’ objections to Halperin and Foucault, see, Richard Mohr. *Gay Ideas: Outing and Other Controversies*. (Boston: Beacon Press, 1992). Raja Halwani. “Essentialism, Social Constructionism, and the History of Homosexuality”. *Journal of Homosexuality*. 31.1. (1998).
 - 9 Although Aristotle is often cited as a theoretical touchstone for Natural Law, Michael White points out that Aristotle only briefly discusses Natural Law. White suggests that much of the Natural Law language we attribute to Aristotle is due to Cicero’s translations of Aristotle and Cicero’s own philosophical contributions on the role of reason in nature, ethics, and law. Taking Aquinas as a conceptual anchor point in the history of Natural Law, P.M. Farrell documents how philosophical developments in jurisprudence supplemented and supplanted Aristotle’s legal concepts. This juridical genealogy aside, Farrell is clear (as is White) that Aristotle’s metaphysics structure and permeate Aquinas’ thought. So, whether Aristotle understood himself to be developing a theory of Natural Law, my argument only draws on his metaphysical distinction between possession, privation, and deprivation, and so stands or falls on that distinction showing up in ONL arguments about sexual ethics. P.M. Farrell. “Sources of St. Thomas’ Concept of Natural Law.” *The Thomist*. 20(3). (1957). Michael White. *Political Philosophy: A Historical Introduction*. (Oxford: Oxford University Press, 2012).
 - 10 Aristotle. *Categories*, in J. Barnes (ed.) *The Complete Works of Aristotle: Volume 1*. (Princeton: Princeton University Press, 1984). pp. 3–24. (11b15–13b35).
 - 11 David Oderberg. “Essence and Properties.” *Erkenntnis*. 75(1). (2011).
 - 12 Oderberg, op. cit. 11. p. 99.
 - 13 Oderberg, op. cit. 11. pp. 101–103.
 - 14 David Oderberg, “The Metaphysical Foundations of Natural Law,” in H. Zaborowski (ed.) *Natural Law in Contemporary Society* (Washington, D.C.: Catholic University of America Press, 2010). p. 45.
 - 15 David Oderberg, “The Metaphysics of Privation,” in R. Hüntelmann and J. Hattler (eds.) *New Scholasticism Meets Analytic Philosophy*. (Heusenstamm: Editions Scholasticae, 2014). p. 68.
 - 16 John Haldane, “Families and Why they Matter,” in *Practical Philosophy: Ethics, Society, and Culture*. (Charlottesville: Imprint, 2009). p. 180. Pim Pronk objects that this setup implicitly draws on cultural norms or equivocates between what we can(not) do and what we ought to do and so rejects it as a moral framework. Since I am advancing an ‘internal’ argument, I leave Pronk’s point aside. Pim Pronk. *Against Nature? Types of Arguments Regarding Homosexuality*. (Grand Rapids: William B. Eerdmans Publishing Company, 1993).
 - 17 Haldane, op. cit. 17. p. 180.
 - 18 John Lamont. ‘On the Functions of Sexual Activity.’ *The Thomist*. 62. (1998). p. 563.
 - 19 Lamont, op. cit. 19. p. 568.
 - 20 Lamont, op. cit. 19. pp. 569–573.
 - 21 Pruss, op. cit. 4. p. 82.
 - 22 Pruss, op. cit. 4. pp. 82–83.
 - 23 Feser, op. cit. 7. p. 392.
 - 24 Feser, op. cit. 7. p. 395.

- 25 While this remark is specifically aimed at NNL claims, the ensuing objections seem to equally apply to Pruss' line of argument. Feser, op. cit. 7. p. 411.
- 26 Feser, op. cit. 7. p. 403.
- 27 Thomas Hurka argues that while a perfectionist account of morality does not have to condemn brief or anonymous sexual relationships, Hurka's 'Aristotelian perfectionism' evaluates casual sexual encounters as realising a 'negative value' because they miss out on the greater goods of friendship, companionship, and intimacy. Thomas Hurka. *Perfectionism*. (Oxford: Oxford University Press, 1993).
- 28 Stephen Macedo. "Homosexuality and the Conservative Mind". *Georgetown Law Journal*. 84. (1995): 261–300.
- 29 While sympathetic to NNL, Michael White worries that jettisoning the metaphysical explanations comes at the cost of trying to explain why basic goods are good without resorting to an appeal to intuitions. If many NNL conclusions are at odds with contemporary intuitions about moral, social, or sexual matters, then this approach will only lead to an uphill argument for NNL philosophers. Michael White, *Partisan or Neutral? The Futility of Public Political Theory*. (New York: Rowman & Littlefield Publishers, Inc., 1997). See also Russell Hittinger, *A Critique of the New Natural Law Theory*. (Notre Dame: University of Notre Dame Press, 1988).
- 30 John Finnis, *Natural Law & Natural Rights* (2nd Edition). (Oxford: Oxford University Press, 2011). p. 33.
- 31 Finnis clarifies that while this list is exhaustive, it is not restrictive. Even though life, for example, is one basic good, Finnis conceptualises it rather broadly to include 'every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination.' Relatedly, Finnis qualifies that virtues such as courage, generosity, or moderation are simply ways or modes of pursuing basic goods because they realise one or some combination of them. Finnis, op. cit. 32. p. 86, pp. 86–92.
- 32 Finnis, op. cit. 32. p. 38.
- 33 Finnis, op. cit. 32. pp. 92–97.
- 34 Finnis, op. cit. 32. p. 100.
- 35 Finnis, op. cit. 32. p. 86–87, 446–47.
- 36 John Finnis, "Marriage: A Basic and Exigent Good" in *Human Rights & Common Good*. (Oxford: Oxford University Press, 2011). p. 319.
- 37 John Finnis. "Law, Morality, and 'Sexual Orientation'." *Human Rights & Common Good*. (Oxford: Oxford University Press, 2011). p. 345.
- 38 Finnis, op. cit. 39. p. 344.
- 39 Patrick Lee and Robert George, "What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union." *The American Journal of Jurisprudence*. 42,1 (1997). p. 136.
- 40 Lee and Gorge, op. cit. 41. p. 144–45.
- 41 Gerard Bradley and Robert George, "Marriage and the Liberal Imagination." *Georgetown Law Journal*. 84 (1995). p. 141.
- 42 Lee and George, op. cit. 41. p. 146.
- 43 Jonathan Crowe. "Natural Law Beyond Finnis." *Jurisprudence*. 2(2). (2011).
- 44 Sherif Girgis, Ryan T. Anderson, and Robert P. George. *What Is Marriage? Man and Woman: A Defense*. (New York: Encounter Books, 2012).
- 45 See also Ryan Anderson. *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington, D.C.: Regnery Publishing, 2015).
- 46 John Corvino, Ryan T. Anderson, and Sherif Girgis. *Debating Religious Liberty and Discrimination*. (Oxford: Oxford University Press, 2017).
- 47 Cheshire Calhoun observes that since we associate marriage with starting a family, claims that same-sex couples are categorically unfit for marriage imply they are also unfit to form families. Moreover, 'being fit for marriage is intimately bound up with our cultural conception of what it means to be a citizen. This is because marriage is culturally conceived as playing a uniquely foundational role in sustaining civil society. As a result, only those who are fit to enter marital and family life deserve full civic status'. Cheshire Calhoun. *Feminism, Family, and The Politics of the Closet*. (Oxford: Oxford University Press, 2000). p. 108.
- 48 We have not entered into an 'Era of Good Feelings'. Micha Newman reaffirms the moral condemnation of same-sex sex between individuals while also objecting to same-sex marriage as a political institution. Anderson attacks what he calls 'transgender ideology' in an effort to show trans activists and allies 'that their claims are contrary to basic, self-evident truths'. Micha Newman. "A Realist Sexual Ethics." *Ratio*. 28(2). (2015). Ryan T. Anderson. *When Harry Became Sally*. (New York: Encounter Books, 2018). p. 7.

- 49 Gary Chartier. *Public Practice, Private Law: An Essay on Love, Marriage, and the State*. (Cambridge: Cambridge University Press, 2017). p. 73.
- 50 Chartier, op. cit. 51. p. 68.
- 51 Finnis, op. cit. 32. p. 34.
- 52 Jonathan Crowe. "Natural Law and Normative Inclinations." *Ratio Juris*. 28.1 (2015).
- 53 Joshua Goldstein. "New Natural Law Theory and the Grounds of Marriage: Friendship and Self-Constitution." *Social Theory and Practice*. 37(3). p. 467. (2011).
- 54 Finnis op. cit. 32. p. 141–44.
- 55 There are a number of people that I am extremely grateful to for their support, comments, and encouragement while I was working on this article: Zara Amdur, Carl Blankschaen, Danielle Black, Elizabeth Brake, Cheshire Calhoun, Adam Eakman, Jenni Ernst, James Gillcrist, Sally Haslanger, John Inglis, Susanne Sreedhar, Michael Otteson, and Laura Pearce. I also want to thank the following people for their patience with early drafts and their incredibly helpful comments, criticisms, and suggestions: Marc Gasser-Wingate, Sherif Girgis, Charles Griswold, Raja Halwani, Michaela McSweeney, Mac Misiakiewicz, Steven Nemes, Travis Timmerman, Valerie Williams, and Bobby Withrow. I'd also like to thank the two referees whose trenchant review, detailed feedback, and generous comments made this article stronger. Finally, I want to acknowledge and thank a good number of people who, for important reasons, requested anonymity. You were more helpful than you can ever know.