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NATURAL LAW, HOMOSEXUAL CONDUCT, AND THE PUBLIC POLICY EXCEPTION

RAYMOND B. MARCIN†

INTRODUCTION

The central issue of this conference is interjurisdictional marriage recognition. The early case law on this issue was quite clear:

It is universally conceded that generally a marriage valid where celebrated is valid everywhere — *marriages contrary to the laws of nature*, and polygamous marriages, constituting an exception to this fundamental rule.¹

Often the “laws of nature” exception in the early cases was referenced to a Christian understanding of natural law: “the laws of nature as generally recognized in Christian countries. . . .”²

The specific focus of this conference is on the problems posed by the imminent recognition of homosexual marriages in one or more jurisdictions. The question posed by the “laws of nature” exception to the interjurisdictional marriage recognition principle is whether legally endorsed homosexual marriages, involving (as they must) societal approval and endorsement of homosexual conduct, are contrary to natural law. An idea of the older attitude in Anglo-American jurisprudence towards homosexual conduct (or “sodomy” as it was generally known)³ can be gleaned from a listing of a legal maxim in old Law-French in the old *Corpus Juris*: “*Sodomie est crime de majeste vers le Roy Celestre*,” and translated in a footnote as “Sodomy is high treason against the King of Heaven.”⁴ At common law “sodomy” and the phrase “infamous crime against nature” were often used interchangeably.⁵

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1. Annotation, *Recognition of foreign marriage as affected by the conditions or manner of dissolving it under the foreign law, or the toleration of polygamous marriages*, 74 A.L.R. 1533 (1931) (emphasis added). See *Osoinach v. Watkins*, 180 So. 577 (Ala. 1938); *Wheelock v. Wheelock*, 154 A. 665 (Vt. 1931); *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364 (Va. 1939).

2. 55 C.J.S. *Marriage*, § 6 (1998) (emphasis added).

3. “Sodomy is a connection between two human beings of the same sex — the male — named from the prevalence of the sin in Sodom.” *Ausman v. Veal*, 10 Ind. 355, 356 (1858).

4. 58 C.J. 785 n.10 (1932).

5. *Utah v. Johnson*, 137 P. 632, 632-33 (Utah 1913) (citing 4 WILLIAM BLACKSTONE, *BLACKSTONE’S COMMENTARIES* *215).

The statement that homosexual acts are contrary to the natural law does not resound felicitously in contemporary ears. Even pre-scinding from the fact that theories that invoke concepts like the "law of nature" or "natural law" no longer dominate our society's jurisprudential and political philosophies (and in fact are flatly rejected by the currently fashionable postmodernist movements of today), the statement that homosexual acts are contrary to the natural law would still evoke a negative reaction in many. The statement is usually (and superficially) interpreted as a simple expression of majoritarian distaste for activities found pleasurable by an ill-understood, and, therefore, feared minority.

When the early British and American cases dealing with the illegality or criminality of homosexual conduct condemned that conduct as being contrary to the law of nature, however, they were drawing on a body of scholarship and jurisprudential theory that went far beyond majoritarian distaste for homosexual conduct. Those cases were invoking a body of scholarship and a theory that formed the basis of Western civilization for more than a millennium — a theory as old as nature, systematized in the writings of the early Greek and Roman jurists, further developed in the philosophy of Saint Augustine of Hippo, and reaching its zenith in the natural law theory of Saint Thomas Aquinas.

Other conceptions of natural law theory have arisen in recent generations, but it was the fully developed theory of Saint Thomas Aquinas, explicated by his sixteenth and seventeenth century followers,⁶ that held sway in the era in which the early common law was being formulated. It is *that* theory that is rightly regarded as classic natural law jurisprudence and it was *that* theory that informed the early common law decisions declaring homosexual conduct to be contrary to the law of nature.

This paper will explore the classic natural law theory of Saint Thomas Aquinas and the reasons why that theory condemns homosexual conduct as being contrary to the law of nature. One must hasten to add that it is by no means original in doing so. This paper stands beneath and in gratitude to the work of John Finnis, Gerard V. Bradley, and Charles Rice of Notre Dame and Robert George of Princeton, among others.⁷

6. See THOMAS E. DAVITT, *THE NATURE OF LAW* 86-108, 195-218 (1951); Anton-Hermann Chroust, *A Summary of the Main Achievements of the Spanish Jurist-Theologians in the History of Jurisprudence*, 26 AM. J. JURIS. 112 (1981).

7. See John M. Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. (forthcoming 1997); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995); CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 263-71

THE NATURAL LAW THEORY OF SAINT THOMAS AQUINAS

Saint Thomas Aquinas was anything if not blunt in his condemnation of homosexual conduct:

[A] special kind of deformity whereby the venereal act is rendered unbecoming . . . may occur in two ways: First, through being contrary to right reason, and this is common to all lustful vices; secondly, because, in addition, it is contrary to the natural order of the venereal act as becoming to the human race: and this is called *the unnatural vice* . . . [i.e.] copulation with an undue sex, male with male, or female with female . . . and this is called *the vice of sodomy*.⁸

In the passage just quoted, Aquinas has clearly drawn the conclusion that homosexual conduct (“copulation with an undue sex, male with male, or female with female”) is “contrary to the natural order of the venereal act” as well as “contrary to right reason.” He continued by stating that:

since by the unnatural vices [which he earlier identified as masturbation, bestiality, homosexual copulation, and what might be called heterosexual sodomy] man transgresses that which has been determined by nature with regard to the use of venereal actions, it follows that in this matter this sin is *gravest of all*.⁹

But on what premises? What led him to these conclusions? What did Aquinas mean by “the natural order” and “right reason?” The answers to these questions demand at least an outline understanding of the main principles of Aquinas’ natural law theory. It is not the purpose of this article to respond to the contemporary critiques of the Aquinist position (Finnis, Bradley, and George have recently done so with great skill).¹⁰ The purpose of this paper is simply to explain Saint Thomas Aquinas’ position condemning homosexual conduct in the context of his overall natural law theory and to address the major critiques that Aquinas himself foresaw and addressed.

(Ignatius Press 1995). John Finnis’ earlier article dealt largely with the treatment of homosexual conduct in the writings of Socrates, Plato, and Aristotle and concluded that all three “regarded homosexual conduct as intrinsically shameful, immoral, and indeed depraved or depraving.” John M. Finnis, *Law, Morality, and Sexual Orientation*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 17 (1995).

8. SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA*, Secunda Secundae, quest. 154, art. 11, vol. 4 (Fathers of the English Dominican Province, trans., 1948). Most recent scholarship refers to Saint Thomas Aquinas’ magnum opus as the “*Summa Theologiae*.” The quotations in this paper, however, are taken from the work done by the Fathers of the English Dominican Province in an earlier generation, at a time when it was more common to refer to the opus as the “*Summa Theologica*,” and thus, this paper stays with that older appellation.

9. SAINT THOMAS AQUINAS, *supra* note 8, art. 12 (emphasis added).

10. See *supra* note 7 and accompanying text.

Aquinas' natural law theory, indeed his philosophical system in general, is openly, unashamedly, and unapologetically theistic. To some, that will no doubt be seen as a disqualification. But think about it. Is God real? If surveys mean anything, something like ninety-four per cent of the people in the United States of America believe in God, or at least say they do. And it is probably not much of a stretch to surmise that the vast majority of those ninety-four per cent understand the concept of "God" consistently with one or another of our three most prevalent religious traditions, specifically Christianity, Judaism, or Islam. If that is true, then the vast majority of us believe, or say we believe, in a God Who is deeply involved in and deeply concerned with the human condition. Think further. There are probably several ways of understanding the concept of "law," but perhaps the simplest and most descriptively accurate way of understanding "law" is that it represents and describes a fundamental ordering of the human condition. Now, if "law" has profoundly to do with the human condition, and if the vast majority of us believe in a God Who is deeply involved in and deeply concerned with the human condition, why is it that when we sit down to formulate a theory or a philosophy of "law," we seem to accept, almost as a given, the premise that God is *irrelevant* to the enterprise — almost as if we assume that God does not exist at all? How can a theory of "law" be a true, or a complete, or even an acceptable theory of reality if it ignores the Author of reality? Why do we accept so easily the premise that God — the Source of all meaning and of all reality — does not belong in intellectual explorations of meaning and reality? If one thinks about it fairly and openly, a God-centered philosophy is not a disqualification; it is a necessity.

An orientation centered on God is not, however, the starting point or even a focal point in today's postmodern jurisprudential thought. Quite the contrary. The starting premise, and indeed the main focal point of the postmodern thinking that has come to dominate our society's public philosophy is, perhaps, best exemplified by Justice Sandra Day O'Connor's now well known description of the heart of constitutional liberty: "At the heart of liberty is the right to define *one's own* concept of existence, of meaning, of the universe, and of the mystery of human life."¹¹ The important thing is not reality *per se*, but rather "one's own" concept of reality. And, if we accept Justice O'Connor's subjective humanism as valid, one has the constitutional right to *define* that reality for one's self. There we have it — a public philosophy founded on a reality, or more properly a set of individualized realities, divorced from objectivity itself and even from the *idea* of objective

11. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (emphasis added).

truth or objective reality. In a sense, taken to its logical conclusion, Justice O'Connor's dictum bespeaks a philosophical outlook either centering God in the human individual (or rather in each and every one of a chaotic gaggle of human individuals) or in recognizing the human individual as "god" — but a very uncomfortable "god," a "god" who is in potential conflict with innumerable other "gods" whose claims to rights to define reality are just as valid as one's own.

Aquinas' philosophy, on the other hand, although recognizing and defending human liberty, does not divorce that liberty from truth or reality or objectivity.¹² Instead it grounds reality first on logical proofs of the existence of the transcendent God, and then it grounds human liberty in a system that accepts objective truth and reality.¹³ One should not be overly sanguine about the possibility of reconciling these two starting points — the postmodern (exemplified in Justice O'Connor's dictum), and the Aquinist — because they are fundamentally at odds.

And so it is that Aquinas' philosophy and his theory of natural law is God-centered. It is also rationalistic and realistic — based squarely on reason and intellect and on the conformity of intellectually perceived truth with objective reality. To put it simply, Aquinas believed that God is the transcendent Author of reality and that there are correct answers to moral problems, just as there are correct answers to speculative or mathematical problems. The answers, however, are not easy to come by. Aquinas recognized that the ultimate answers to all our problems — speculative as well as moral or practical — reside in the Mind of God. Aquinas referred to these ultimate answers as the "Eternal Law" of God. God exists in eternity. We exist in time. That is the nature of one of our dilemmas. God alone has the "Big Picture." Absent extraordinary divine revelation, we cannot possibly have a perfect understanding of the content of God's Eternal Law. We can, however, have *an* understanding of God's Eternal Law — with our intellect and our reasoning capacity. Moreover, drawing both on divine revelation and on earlier Platonic philosophy, Aquinas recognized another aid. According to Aquinas, the moral requirements of God's Eternal Law are written on our hearts. Saint Paul, in the same Epistle that contains one of the many scriptural condemnations of homosexual conduct,¹⁴ put it this way:

Indeed, when Gentiles, who do not have the law [i.e., the divinely revealed understandings of God's Eternal Law that are

12. See SAINT THOMAS AQUINAS, *supra* note 8, Prima, quest. 83.

13. See SAINT THOMAS AQUINAS, *supra* note 8, Prima, quest. 2, art. 3.

14. See Romans 1:18, 26-27; Leviticus 18:22, 20:1; 1 Corinthians 6:9-10; 1 Timothy 1:8-11.

given in the scriptures], do by nature things required by the law, they are a law for themselves, even though they do not have the law, since they show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts now accusing, now even defending them.¹⁵

The suggestion that God's Eternal Law is somehow written on the human heart is not the exclusive province of sacred scripture. Aquinas and his predecessors in natural law theory recognized that sensibility in the philosophic concept of *synderesis*.¹⁶ Just as the speculative intellect seems to have a natural bent towards the truth, the practical intellect seems to have a natural bent towards the good. In natural law theory, *synderesis* is both the ignition spark that activates the moral conscience and its guide. How *synderesis* works in the area of moral decision making is perhaps best exemplified by drawing an analogy to the way in which the speculative or mathematical intellect works. Consider this math problem:

$$\begin{aligned} a &= b \\ a^2 &= ab \\ a^2 - b^2 &= ab - b^2 \\ (a+b)(a-b) &= b(a-b) \\ a+b &= b \\ b+b &= b \\ 2b &= b \\ 2 &= 1 \end{aligned}$$

The result of this problem leaves our intellect in a state of speculative discomfort. Two cannot equal one, and yet the problem seems to have yielded that result. It is the same, Aquinas said, with the practical intellect. We sometimes work out *moral* problems in such a way that our moral or practical intellect is left in a state of discomfort. Just as the built-in principle of contradiction tells us that something has gone wrong with our speculative or mathematical thinking, the built-in principle of *synderesis* tells us that something has gone wrong with our practical or moral thinking. Whereas, for the purpose of analysis and examples, Aquinas often separated the intellect into the speculative (dealing with mathematical and scientific reasoning) and the practical (dealing with moral reasoning), he is very clear in declaring that the speculative and the practical intellect are one and the same intellect. The speculative and the practical are only distinguished by their ends.¹⁷

15. *Romans* 2:14-15 (New Int'l Version).

16. See SAINT THOMAS AQUINAS, *supra* note 8, Prima, quest. 79, art. 12, at 407.

17. *Id.* Prima, quest. 79, art. 11, at 406.

The philosophical concept of *synderesis* antedates Aquinas and is indeed older than Christian philosophy. Plato used it under a different name; he called it *anamnesis*. Platonic *anamnesis* connoted a built-in “remembrance” of the perfect Platonic Forms or Archetypes, including the Form or Idea or Archetype of the Good. Indeed, Cardinal Ratzinger has said that he finds the term *anamnesis* more useful in Catholic natural law thinking than the term *synderesis*.¹⁸ By whatever term it is known, *synderesis* is our practical intellect’s “principle of contradiction,” the built-in tendency that keeps us oriented toward the good in our quest for correct moral answers and that pricks us with discomfort when we depart from that orientation by doing something like the moral equivalent of dividing by zero (the defect in our mathematical example).

The connection between *synderesis* and “conscience” is obvious. Thomist theologian William E. May has referred to *synderesis* as the general, as opposed to the particularized, moral conscience, “our habitual awareness of the first principles of practical reasoning and of morality.”¹⁹ If *synderesis* is a built-in awareness of the first principles of moral reasoning, what, indeed, *are* those “first principles of moral reasoning” of which we are habitually aware and inclined towards? What is the practical or moral intellect’s equivalent to the principle of contradiction for the speculative or mathematical intellect? Those questions lead us directly to the *content* of the natural law, the version of God’s Eternal Law that is, in Saint Paul’s words, “written on our hearts.”

Aquinas, in assessing the general content of the natural law, began with a self-evident first principle. Just as truth is the first principle in the speculative intellect, so too “good” is the first principle of the practical or moral intellect. Aquinas put it this way:

[T]he first principle in the practical reason is one founded on the notion of good, viz., that *good is that which all things seek after*. Hence this is the first precept of law, that *good is to be done and pursued, and evil is to be avoided*.²⁰

That first principle, it must be admitted, is question-begging in the extreme, especially in the context of today’s moral relativism. What is “good?” What is “evil?”²¹ Is the legal recognition of same-sex unions

18. Joseph Cardinal Ratzinger, *Conscience and Truth* <<http://www.cin.org/avatar/ratzcons.html>> (as presented at the 10th workshop for bishops, Dallas, Texas, February, 1991).

19. WILLIAM E. MAY, *AN INTRODUCTION TO MORAL THEOLOGY* 33 (rev. ed. 1994).

20. SAINT THOMAS AQUINAS, *supra* note 8, Prima Secundae, quest. 94, art. 2, at 1009.

21. The difficulty in the contemporary postmodern world is that a view has come to be dominant that anyone’s concept of what is good is as morally worthy as anyone else’s; such a proposition almost seems to be accepted as a given in today’s moral discourse.

"good?" Some seem to think so.²² How then did Aquinas eventually reach the conclusion that homosexual conduct is contrary to the natural law?

Aquinas proceeded to take some of the question-begging out of the first principle of natural law. He began to answer our questions by putting some content into the notion of "good." Aquinas listed three sets of "precepts" of the law of nature, dividing them into the precepts that (1) human beings have in common with all existing substances, (2) those they have in common with nonrational animals, and (3) those they share in common *because* they are rational beings. All existing substances hold onto existence; so too do human beings. All animals, by nature, do certain things. Aquinas listed two specifically: sexual intercourse and education of offspring. And finally, the complexity of reason has its input into the precepts of the natural law, in the forms of a natural inclination to know the truth about God and to live amicably in society.²³ Thomist theologian William E. May has nicely summarized Aquinas' precepts of the law of nature as follows: "life itself, the handing on and education of life, true knowledge about God, [and] life in fellowship and amity with others. . . ."²⁴

With those precepts as starting points Aquinas called upon the poser of a moral dilemma to reason his or her way to the correct moral answer. In Aquinas' system, however, the task of the poser of the moral dilemma is nothing less than a quest to touch the Mind of God.

Because one of the basic premises of Aquinas' rationalism and realism is that there is an objectively correct answer to each moral dilemma, the postmodern view is definitely not a given in Aquinas' natural law theory.

22. See Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995).

23. See SAINT THOMAS AQUINAS, *supra* note 8, Prima Secundae, quest. 94, art. 2, at 1009. In Aquinas' words:

[A]ccording to the order of natural inclinations, is the order of the precepts of the natural law. Because in man there is first of all an inclination to do good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, which nature has taught to all animals, such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.

Id.

24. MAY, *supra* note 19, at 49.

Recall the role of “synderesis” in Aquinas’ natural law theory.²⁵ Professor May put it this way: “[N]atural law . . . is the way human beings *actively* participate in the divine law, ordering their own actions in accordance with this law insofar as this law is inwardly known by them.”²⁶ The quest for the correct moral answer, in other words, *has* something “inner” about it, but it is *not* an inner quest for one’s *own* deepest feelings or one’s *own* deeply felt values.²⁷ It is instead a quest to discover, with the intellect and reason given us by our Creator and with the aid of the spark of God’s Eternal Law that exists in each of His rational creatures, the true, objective moral reality. This point is very important. It is the point at which classic natural law theory departs from today’s postmodern subjectivism. In Aquinas’ system, personal *sin* may have a subjective element to it, but moral principles have true *objective* reality. Aquinas is no moral relativist or moral subjectivist.

APPLYING AQUINAS’ THEORY OF NATURAL LAW TO HOMOSEXUAL CONDUCT

Aquinas’ negative conclusions regarding homosexual conduct flowed largely from his positive understandings of marriage in the context of the natural law. Quoting the Roman *Digests* approvingly, Aquinas announced that “[t]he union of male and female, which we call matrimony, is of natural law.”²⁸ Recalling that Aquinas had based one of the prime precepts of the natural law, i.e., the procreation and education of offspring, on what it is that human beings have in common with other animals, he posed his own objection:

It would seem that matrimony is not natural. Because *the natural law is what nature has taught all animals* [citing the *Digests*]. But in other animals the sexes are united without matrimony. Therefore matrimony is not of natural law.²⁹

Aquinas’ response to his own posed objection stressed the needs of human children:

[T]here are animals whose offspring are able to seek food immediately after birth, or are sufficiently fed by their mother; . . . in these there is no tie between male and female; whereas in those whose offspring needs the support of both parents, although for a short time, there is a certain tie, as

25. See *supra* note 16 and accompanying text.

26. MAY, *supra* note 19, at 60.

27. Aquinas’ treatment of Original Sin and its aftermath gives an indication why such a quest for one’s own inner moral sensibilities is not likely to succeed. See SAINT THOMAS AQUINAS, *supra* note 8, Prima Secundae, quests. 82, 83, 85, at 956-62, 966-71.

28. SAINT THOMAS AQUINAS, *supra* note 8, Tertia, quest. 41, art. 1, at 2699.

29. *Id.*

may be seen in certain birds. In man, however, since the child needs the parents' care for a long time, there is a very great tie between male and female, to which tie even the generic nature inclines.³⁰

The import of the above quotes is that, in Aquinas' view, the heterosexual union *is* the norm that God has implanted in that portion of His created nature that comprises human beings.

To say, however, that the heterosexual union comports with the natural law is not the same as saying that the homosexual union conflicts with it. If we accept Aquinas' conclusion that heterosexual marriage is of the natural law, we might be led to conclude, as a self-evident negative corollary, that marital infidelity does *not* comport with the natural law, but it does *not* flow *self-evidently* from that premise that sex outside of marriage, whether of the hetero- or homosexual variety, *violates* the natural law. Certainly Aquinas did *not* conclude that heterosexual marriage is *commanded* by the natural law.³¹ So why should sex *outside* of marriage be considered to be contrary to the natural law? Aquinas' answer, in the heterosexual context, tied fornication or sex outside of marriage to his care-of-children theme:

Simple fornication is contrary to the love of our neighbor, because it is opposed to the good of the child to be born . . . since it is an act of generation accomplished in a manner disadvantageous to the future child.³²

If the conclusion that heterosexual fornication is evil is drawn from the premise that it is opposed to the good of a possible projected child born as a result of the act, then the condemnation of *homosexual* fornication cannot be based on the same opposition, since homosexual conduct does not and cannot result in the birth of a child. How is it then that Aquinas condemned homosexual conduct?

Aquinas' treatment of homosexual conduct in his *Summa Theologica* occurred, as did his treatment of fornication, in the larger context of his treatment of the vice of lust. Both fornication and homosexual conduct are, in Aquinas' thought, species of the vice of lust,³³ which Aquinas defined essentially as "exceeding the order and

30. *Id.*

31. *Id.* Tertia, quest. 41, art. 2, at 2700.

32. *Id.* Secunda Secundae, quest. 154, art. 2, at 1811.

33. Drawing on Gratian's Decretals, Aquinas lists six species of lust: fornication, adultery, incest, seduction, rape, and "the unnatural vice" (Aquinas' term for "sodomy," including homosexual conduct). See SAINT THOMAS AQUINAS, *supra* note 8, Secunda Secundae, quest. 154, art. 1, at 1808.

mode of reason in the matter of venereal acts."³⁴ In his discussion of why it is that lustful acts are so clearly violative of the natural law (or the "order of reason"), Aquinas invoked nothing less than the self-preservation of the human race:

The more necessary a thing is, the more it behooves one to observe the order of reason in its regard; wherefore the more sinful it becomes if the order of reason be forsaken. Now the use of venereal acts . . . is most necessary for the common good, namely the preservation of the human race. Wherefore there is the greatest necessity for observing the order of reason in this matter; so that if anything be done in this connection against the dictate of reason's ordering, it will be a sin. Now lust consists essentially in exceeding the order and mode of reason in the matter of venereal acts. Wherefore without any doubt lust is a sin.³⁵

In affording such a degree of extra protection for the heterosexual marital relationship, Saint Thomas Aquinas was doing something that the United States Supreme Court did almost six hundred years later in *Griswold v. Connecticut*³⁶ — and in a strikingly similar context, i.e., respect for the integrity and importance of the heterosexual marital relationship. In Aquinas' view, the procreation and education of children are so important to the survival of the human race that the heterosexual marriage norm, to paraphrase Justice Byron R. White's twentieth century echo of Aquinas,³⁷ comes to the Court of natural law (which is really the Court of God) with a momentum for respect lacking when appeal is made to liberties which derive merely from nonmarital sexual arrangements. Indeed there was a point in the majority opinion of the United States Supreme Court in the *Griswold* case at which the Court literally recognized the *sacredness* of the heterosexual marital relationship:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being *sacred*.³⁸

34. SAINT THOMAS AQUINAS, *supra* note 8, Secunda Secundae, quest. 153, art. 3, at 1806. In Aquinas' terminology, "lust" is confined to venereal (*i.e.*, sexual) activity. *Id.* Secunda Secundae, quest. 153, art. 1, at 1804.

35. SAINT THOMAS AQUINAS, *supra* note 8, Secunda Secundae, quest. 153, art. 3, at 1806.

36. 381 U.S. 479 (1965).

37. *Griswold v. Connecticut*, 381 U.S. 479, 502-03 (1965) (White, J., concurring). The full quote from Justice White's concurring opinion is as follows:

Surely the right invoked in this case, to be free of regulation of the intimacies of the marital relationship "comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Griswold, 381 U.S. at 502-03 (White, J., concurring) (citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

38. *Griswold*, 381 U.S. at 486 (emphasis added).

That the United States Supreme Court later backed down from its recognition of transcendent primacy of the heterosexual marital relationship³⁹ only serves to underscore Aquinas' refusal to back down: the heterosexual marital relationship is not sacred simply because the United States Supreme Court or even Saint Thomas Aquinas once deigned to say that it is. It is sacred because, as Aquinas recognized, it is God-ordained, a facet of God's own Eternal Law for humankind.

FURTHER APPLICATIONS OF AQUINAS' NATURAL LAW THEORY

Aquinas knew of and met some of the usual arguments we hear today concerning the supposed moral legitimacy of homosexual conduct. He posed one of those oft-heard arguments hypothetically (and quite strongly):

It would seem that the unnatural vice [including homosexual conduct] is not the greatest sin among the species of lust. For the more a sin is contrary to charity the graver it is. Now adultery, seduction and rape [also species of the vice of lust] which are injurious to our neighbor, are seemingly more contrary to the love of our neighbor than unnatural sins, by which no other person is injured. Therefore the unnatural sin is not the greatest among the species of lust.⁴⁰

His answer to this argument might not sit well with those who demand or acquiesce in the removal of God from all public philosophy:

Just as the ordering of right reason proceeds from man, so the order of nature is from God Himself: wherefore in sins contrary to nature, whereby the very order of nature is violated, an injury is done to God, the Author of nature.⁴¹

Another oft-heard argument against the thesis that homosexual conduct is contrary to the law of nature is that homosexuality *is* the "law of nature," at least in the context of each individual homosexual person.⁴² Aquinas himself posed that very argument hypothetically, albeit in a more generalized context than homosexuality. Aquinas posited: "It would seem that no pleasure is not natural. For pleasure is to the emotions of the soul what repose is to bodies. But the appetite of a natural body does not repose save in a connatural place. . . .

39. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

40. SAINT THOMAS AQUINAS, *supra* note 8, *Secunda Secundae*, quest 154, art. 12, at 1819-20.

41. *Id.* *Secunda Secundae*, quest 154, art. 12, at 1820. See *supra* note 4 and accompanying text (describing "sodomy" in the old *Corpus Juris* as "high treason against the King of Heaven").

42. In an upcoming article in the *American Journal of Jurisprudence*, John Finnis has responded to a somewhat sophisticated variation of such an argument that had been advanced by John Boswell. Finnis, 42 *AM. J. JURIS.* (forthcoming 1998).

Therefore no pleasure is non-natural."⁴³ After quoting Aristotle's statement that "some things are pleasant *not from nature but from disease*,"⁴⁴ Aquinas went on to respond to the argument:

We speak of that as being natural, which is in accord with nature. . . . Now, in man, nature can be taken in two ways. First, inasmuch as intellect and reason is the principal part of man's nature, since in respect thereof he has his own specific nature. And in this sense, those pleasures may be called natural to man, which are derived from things pertaining to man in respect of his reason. . . . Secondly, nature in man may be taken as contrasted with reason, and as denoting that which is common to man and other animals, especially that part of man which does not obey reason. And in this sense, that which pertains to the preservation of the body, either as regards the individual, as food, drink, sleep, and the like, or as regards the species, as sexual intercourse, are said to afford man natural pleasure. Under each kind of pleasures, we find some that are *not natural* speaking absolutely, and yet *con-natural* in some respect. For it happens in an individual that some one of the natural principles of the species is corrupted, so that something which is contrary to the specific nature, becomes accidentally natural to this individual . . . [citing examples, including "unnatural intercourse"].⁴⁵

Aquinas always insisted on the proper use of words and concepts. Calling a given pleasurable activity "natural" does not make it natural, not even when what is "not natural speaking absolutely" has acquired the appearance of being natural in an individual in whom "some one of the natural principles of the species [has become] corrupted."⁴⁶ If the law of nature were confined to the blind instincts that human beings share with other animals, then the blindly instinctual so-called "law of the jungle" would *be* the natural law. But humans possess rationality, and rationality has its input into the content of the law of nature for all of humankind. It is those pleasures that are in accord with reason that are of the natural law, both insofar as reason and the natural law apply to humankind and insofar as reason and the natural law apply to the individual. To analogize to our mathematical example, if two cannot equal one for the rest of humankind, then two cannot equal one for the individual. The speculative intellect and the practical intellect are one and the same. Truth is objective, not subjective.

43. SAINT THOMAS AQUINAS, *supra* note 8, Prima Secundae, quest, 31, art. 7, at 726.

44. *Id.*

45. *Id.*

46. See Livio Melina, *Homosexual Inclination as an "Objective Disorder": Reflections of Theological Anthropology*, 25 COMMUNIO: INT'L CATH. REV. 57, 60 (1998).

Thus it is that we arrive at Aquinas' clear and unequivocal condemnation of homosexual conduct as being violative of the natural law. In Aquinas' words:

[W]herever there occurs a special kind of deformity whereby the venereal act is rendered unbecoming [i.e., incompatible with the right use of venereal actions⁴⁷], there is a determinate species of lust. This may occur in two ways: First, through being contrary to right reason, and this is common to all lustful vices; secondly, because, in addition, it is contrary to the natural order of the venereal act as becoming to the human race: and this is called the unnatural vice. This may happen in several ways. [Aquinas goes on to list four manifestations of unnatural vice: masturbation, bestiality, homosexual acts, and unnatural heterosexual acts. He describes homosexual conduct as] copulation with an undue sex, male with male, or female with female, as the Apostle [i.e., Saint Paul] states [citing Saint Paul's Epistle to the *Romans* 1:27]: and this is called the vice of sodomy.⁴⁸

Aquinas concluded that, of the listed unnatural vices, homosexual conduct, or sodomy, is second only to bestiality in grievousness.⁴⁹

CONCLUSION

Aquinas' theory of natural law formed the bedrock of jurisprudence and public philosophy for more than half a millennium in a civilization and culture that was so ideologically and theologically united that it could be called "Christendom." It had its influence on the formation of our own civilization and culture. Today, our civilization and culture, founded on the natural law, has been so definitively set loose from its natural-law and its "Christendom" moorings that we are most often referred to these days as a "Post-Christian" society. Aquinas' theory, with its grounding in the Eternal Law of God and its inclusion of God as the Author of nature and nature's laws, for weal or woe, no longer dominates the scene. With our current widespread societal acceptance of the premise that God is irrelevant to public moral thinking, we find ourselves wallowing in a sea of moral relativism. What we are left with is well summarized by Father John F. Harvey, the founder of Courage, a Catholic outreach program serving the spiritual needs of homosexual persons:

47. See SAINT THOMAS AQUINAS, *supra* note 8, *Secunda Secundae*, quest. 154, art. 9, at 1817.

48. *Id.* *Secunda Secundae*, quest. 154, art. 11, at 1819.

49. *Id.* *Secunda Secundae*, quest. 154, art. 12, at 1820-21.

There is something radically wrong with a culture that constantly asserts rights without giving the foundations of such rights in the natural moral law.⁵⁰

Ultimately, homosexual conduct and homosexual marriage are issues of constitutional law. What dominates the constitutional law scene today, however, is the postmodernist subjective relativism encapsulated in Justice O'Connor's epithet glorifying "the right to define *one's own* concept of existence, of meaning, of the universe, and of the mystery of human life,"⁵¹ coupled with what might be called a rudderless brand of "natural law" jurisprudence. It is not much of a secret that, despite the dauntless efforts of the few strict constructionists and positivist originalists that still exist in our society, American constitutional law has ceased to be what it once was — a set of written principles to be changed only through the use of the amendatory process. It may be accurate to suggest that the United States Supreme Court has become, in effect, an on-going constitutional convention, creating something like a case-law constitution alongside the written Constitution. In a sense, it is all very much a natural-law-type enterprise — an effort to discover the fundamental moral principles that ought to govern our society in a source other than the written words of the Constitution or the will of the Constitution-makers — an effort by the justices to tap into a fundamental understanding of human nature and the principles of social organization that flow therefrom. In the process, of course, the justices do nod cursorily toward the text of the written Constitution and its legislative history, but everybody understands that the real source of the new fundamental moral norms is not so much what is *in* the Constitution as the justices' thoughts about what *should be* in there.

Perhaps one of the troubles, from the vantage point of legal philosophy, is that when the justices engage in this process of constitution-making — this quest for the fundamental moral norms that ought to govern our society — they do not look to the natural moral law that has its source in God, the Author of nature. They rummage elsewhere — among their own individual systems of political beliefs, among the residues of our society's deteriorating moral value structure, or among the new dogmas and intimidations of the "political-correctness" movement.

50. JOHN F. HARVEY, *THE TRUTH ABOUT HOMOSEXUALITY: THE CRY OF THE FAITHFUL* 123 (1996).

51. *Casey*, 505 U.S. at 851.

