

MARRIAGE: A BASIC AND EXIGENT GOOD

I

Marrying is an act, the chosen act of the two spouses who thereby commit themselves to living as husband and wife. Marriage as a state or way of life—being married—is the couple's living out of that constitutive act of commitment in countless further acts, and in each spouse's disposition or readiness both to do such acts of carrying out their commitment, and to abstain from choices inconsistent with it, until they are parted by death. Marriage as an institution is the network of legal and other social norms which—in view of the good of that way of life—hold out stable ways of marrying and being married, support such acts and dispositions by benefiting fidelity to marital commitment, and discourage conduct impeding the making and living out of marital commitment.

That stipulates, for this article, the focal meaning of 'marriage'. The paragraph's purpose, however, was neither linguistic stipulation nor lexicography. It was to begin to articulate, summarily, a set of strongly evaluative judgments about a field of human opportunity and practice. Those judgments pick out the central case of an institution, way of life and kind of act which is found also in many more or less non-central cases both in our society and era and in other societies and other times. They display that central case both as a social reality available for description¹ and as a very choice-worthy kind of opportunity. To articulate such judgments is to contribute to discourse by offering a set of propositions for critical consideration and discussion. The discussion can go well only if those who participate in it are aware that, in the last analysis, it is preparatory to the making of judgments and choices which, being more than discursive, change lives.²

What is its point? This is the first question about any act, or kind of act. The answer I give to the question about marriage's point will extend

throughout this whole article. It begins with two summary thoughts: that marriage's point is twofold: procreation and friendship;³ and that marriage is one of those kinds of human good which are so basic and constitutive in human fulfillment that each can be said to be an intrinsic good.

Moral thinking, in its central critical-practical form, begins with an understanding of the desirability and worth of such basic human goods as life and health, knowledge, friendship, marriage, and so forth, and terminates in judgments about what kinds of act it is not unreasonable to choose. The understanding of basic forms of human opportunity parallels the findings of empirical sociology about the basic aspects of human social existence, but does not depend upon or, typically, begin from such findings.⁴ The eventual moral judgments are exercises of the judging person's conscience, framed in the first person singular—about what I ought to be respecting and realizing in what I chose and do—not exercises in praising or blaming the conduct or worthiness of other persons or societies. Yet, since they aspire to be rational and, indeed, reasonable,⁵ they cannot fail to be exercises of public reason in its most fundamental sense. That is, they aspire to be judgments such as anyone else could and should make, and free from the dispositional and other sources of error which render judgment "subjective." They aspire to be correct, objective judgments, judgments in which, under ideal epistemic conditions, everyone would concur.⁶

Moreover, basic human goods are not intelligible in an essentially individualistic way. They are understood as aspects of human well-being that are good not only for me but for anyone "like me"—a qualifier that turns out to include any human person. They are good as realized in the life of a stranger in the same way, in principle, as in my life. Moreover, my own participation in these goods is radically dependent upon the various other persons by whose actions and forbearances I came into being and have begun and continued, more or less, to flourish and be able, for my own part, to contribute to *their* or others' well-being.

Marriage is a distinct fundamental human good⁷ because it enables the parties to it, the wife and husband, to flourish as individuals and as a couple, both by the most far-reaching form of togetherness possible for human beings and by the most radical and creative enabling of another person to flourish, namely, the bringing of that person *into existence* as conceptus, embryo, child, and eventually adult, fully able to participate in human flourishing on his or her own responsibility. The understanding

that this two-sided good is a profoundly desirable and profoundly demanding opportunity entails that marriage is utterly misunderstood when conceived as no more than an official status, imposed by law and accompanied by government entitlements and mandates. Its intelligible and inherent connection with human flourishing (and thus with human nature) makes it far more than a function of legal arrangements and definitions. The intelligibility and worth of its contours are bases for rejecting some legal arrangements and definitions and mandating others.

At the centre of the range of activities that go to make up the marital sharing of life and lives is the kind of sexual act fittingly called marital. The commitment of marriage has at its centre the agreement to engage together, with full mutuality, in such acts.⁸

II

What in the mating of other animals is sheerly instinctual behavior is in marital intercourse a mating which actualizes, expresses and enables the spouses to experience, at all levels of their being, their marriage itself in each of its essential dimensions: friendship and openness to procreation. In *their* marital union of their shared lives as a whole these spouses actualize, to the full extent they can, the intelligible good of marriage, and in the sexual union of their marital acts they epitomize their marriage in the three ways just mentioned: actualizing, expressing and experiencing it. Their commitment is an act of reasonable will (free choice) which illuminates, integrates, extends and deepens all that is instinctual and passionate in their motivation to make the commitment.

That motivation, as with all morally good acts, must not be understood on the Humeian and Kantian models, in which sub-rational motivations set the ends, goals, purposes and reason comes in only to devise means and/or to eliminate the irrationality of contradiction. No, the commitment of marriage has the motivating intelligibilities, the sufficiently attractive and desirable *reasons* already mentioned: as enabling us two to help each other as friends, lovers, who can hand on our life in the procreation of new persons, *our* children whom we can help become self-determining in their own right (*sui iuris*) and who will contribute to the survival of our people. The enterprise to which we commit ourselves can scarcely be other than arduous, and the ardor and joy possible in the marital act reinforce—and

are confirmed by—both the judgment that the commitment does make sense, and the ongoing willingness to be faithful to it.

III

Moral thought or commentary on sex and marriage today often leans heavily on a historicist claim, or assumption, that the moral standards of the central tradition widely rejected today were shaped or influenced by non-moral beliefs and attitudes now obviously unacceptable. Almost all of us grew up believing that medieval people thought the world is flat. More fool us. Medieval people, even school children, knew like us that it's a sphere.⁹ Almost everyone believes that medieval people, or at least the institutions of medieval culture, thought marital sex (i) right only when done for the sake of procreating and (ii) morally tainted if chosen for the sake of pleasure, and (iii) a matter, for the woman, of passivity with no entitlement to and scant expectation of orgasmic pleasure. Wrong again, as unequivocal texts of Aquinas¹⁰ plainly show, and the pre-reformation liturgies of marriage¹¹ (not to mention Boccaccio and Chaucer) confirm.

The first of those three modern myths is the most important here. Aquinas's uncontradicted teaching was that it is entirely acceptable for wife or husband to invite and engage in marital intercourse simply as a matter of pleurably expressing and experiencing *fides*, without thought of procreation. This *fides* is what I have been calling the commitment of each spouse to the other that is their marriage. If we translate it "faithfulness" we must enrich that word, for the *fides* spoken of in the teachings about marriage handed on by Aquinas is not simply abstention from infidelity. It is more a positive motive for all the acts involved in living out a marriage, and most intensely a sufficient motive for proposing intercourse. In making clear that the prospect of the mutual pleasures of marital intercourse, expressive of the spouses' loving or friendly commitment, is an utterly reasonable motive for intercourse, Aquinas affirms that this is true even though both parties know very well that their pleasure may well transport them beyond all reasoning.¹²

So too, when he says that intercourse "for the sake of pleasure" is morally flawed, Aquinas repeatedly makes his meaning clear. Here "for the sake of pleasure" is just shorthand for the real thesis: intercourse "for the sake of pleasure *alone*" is flawed. And an act of marital intercourse is

not for the sake of "pleasure alone" if it expresses and embodies personal commitment to one's spouse and the marital relationship with him or her. It is for "pleasure alone" (*intendens solam delectationem*) in the flawed sense only if either (i) one or both would be willing to have sex with some other attractive person then and there, or (ii) one spouse (or both), though resolved to have sex only "within marriage," is so indifferent to the identity or personality of the other that the spirit of his or her engagement in their sexual activities is just as if he were doing it with a call-girl or she with a gigolo. Aquinas, like Augustine and the central tradition, is not concerned to downplay pleasure, the wife's any more than the husband's, but only to teach against depersonalized sex which in its interior motivation is already half-way non-marital and, in the worse of the two kinds of case, case (i), is inwardly devoid of, and opposed to, one of marriage's foundations: devotion to the unique person of one's spouse.¹³

The two relatively subtle sorts of sexual immorality just mentioned are discussed by Aquinas more than any other sort. This fact points us to a sound account of specifically sexual immoralities, one continuous with, perhaps implicit in, the central tradition he exemplifies.¹⁴ In each of the two cases discussed by Aquinas, the de-maritalising and de-personalising of sexual choice and activity is identified as a kind of conditional willingness—in the one case, present conditional willingness to have sex with such an other *if* such an other were available; in the other, present willingness to act with the same attitudes as one *would* have with a prostitute or other adulterous "lover." Behaviour which is marital, because with one's spouse, is in such cases not truly marital *action* because it is not the carrying out of a choice shaped by marital commitment, and so does not *really* actualize, express or enable the couple to experience their marriage. Moreover, still more significantly, a willingness to approve (and where possible to engage in) such sexual activity entails denying that doing this together *is* actualizing, expressing and experiencing marriage. Doing this together becomes, instead, just an instance of the kind of thing done by people in countless non-marital ways; trying to *clothe* it with additional significance is at best an imposing, and at worst an illusory imagining, rather than a finding or a participating in true significance. Marital intercourse, so important to the full intelligibility of marital commitment (and thus to marriage as an institution, and to the children who could be benefited by marital devotion), only actualizes, expresses and enables the spouses to experience in it their marriage on condition that they reject—

and where need be repent of—any willingness, however attitudinal or conditional, to engage in any non-marital sex act.¹⁵ That thesis is the core of the traditional language of “purity” and “chaste marital intercourse”, and of the commonsense thought that one should “keep oneself” for marriage and trust or hope that one’s spouse has done likewise—or has really repented of not having done so.

The account, or argument, is completed by its universalizing. If the married couple cannot reasonably hope to participate, really, in authentically marital intercourse without resolving upon an exceptionless reservation of their sex acts to the marital before and during marriage, so too none of us can coherently judge marriage a form of life that enables such participation, unless we too judge that sex acts are to be reserved to the marital kind. That judgment implies the wrongness of the subtly (“psychologically”) non-marital kinds of sex act enumerated above; and also of the many less subtly, more manifestly non-marital kinds. Sex acts cannot be marital in kind unless they actualize, express and enable the spouses to experience not only their commitment to their marriage but also their marriage’s dual point. Whatever the person or persons engaging in it imagine or suppose, a sex act cannot do that unless it actualizes, expresses and enables the experiencing of a marriage’s freely chosen commitment to equality between the spouses, exclusivity, permanence, and openness to procreation.

So all morally bad kinds of sex act are bad because their choosing sets the wills of the choosers, willy nilly, against¹⁶ the good of marriage. Because we are directed to that good by a first principle of practical reason, such choosing against the marital good is unreasonable. In any understanding of morality that is not childish or merely conventional, it is in such unreasonableness that the immorality of bad kinds of sex act consists.

IV

The moral, that is rational, norms just given a summary articulation—reservation of all sex acts to the truly marital—are widely rejected, scorned and reviled as arbitrarily oppressive, rooted in denigration of sexuality, gender stereotyping, refusal to admit polymorphic “sexual identity”, and so forth.¹⁷ The extent to which essentially these norms were judged true by the most profound and critical philosophers of many ages is widely unrecognized or even, by a kind of forgery, denied.¹⁸

The moral requirement that sex acts be marital is no denigration of sexuality, but instead a pointing out of the conditions under which its intense pleasures are human, that is, attentive to the relevant intelligible goods as they can be actualized in the lives of others (as oneself).¹⁹ The conflict between adultery's "Dionysian" pleasures and respect for one's spouse and children is only an example, exemplary and easily grasped, of the kinds of inhumanity to which the "pleasure principle" gives a meretricious glamour. The conflict between taking contracepted sex acts to be truly marital and the maintenance of marriage as a coherent social institution and individual opportunity is less easily grasped, no doubt. But the conflict has been becoming steadily more palpable, not only in the unraveling of ecclesial communities which explicitly proposed that they could admit contraception while retaining the rest of their sexual ethic, but also in the secular realities of western societies. In these societies, marriage is in process of being replaced by scarcely committed cohabitation or by decades of sexually active living alone. Taxes and other social mechanisms of redistribution of wealth have been altered to minimize or remove the benefits of marital status. Arrangements for housing and employment likewise. The concept of a family wage, around which a major progressive industrial politics was constructed in the early twentieth century, has been banished with hostility and contempt. Large minorities or even majorities of its children are being raised by their mothers without their fathers or any committed step-father. And above all: these are societies confronted by the inexorable, ever more evident reality that any people whose women give birth, on average, to only two or fewer children will become extinct, and on the way down and out will forfeit to other peoples much of what it has and is. Yet they remain unwilling, both officially and in the preponderant decisions of private citizens, to begin making any of the revisions of judgment and preference, or taking any of the measures, needed to avert their fate. At the core of such measures would have to be a re-maritalising of their understanding of sexual capacities and relationships.

The foregoing neither attempts nor insinuates a rule-utilitarian or any other kind of consequentialist weighing of overall consequences. Rather it explores further the conditions on which marriage is a genuine opportunity rather than a snare or a delusion. Why undertake the burdens and unquantifiable risks involved in its defining commitments if not, in part, out

of care for the future of one's people (and one's forebears' families) and, in part and more immediately, out of an uncomplacent wonder at the reality of a new person's coming to be, utter dependence, intrinsic worth but relative fragility in health, character and attainments. There can be no reasonable ethics of sex and marriage, and no reasonable politics of education, employment and family support, without this clear-eyed, unsentimental wonder.

Marriage, with the exclusiveness and moral permanence that define its central case, makes sense because the children to whose procreation, nurture and education its structure is thoroughly adapted are each an icon of the non-fungibility of persons. The contracting of the spouses, and their fulfillment of their promises, is itself an icon not only of their families' and their people's past and future hopes and achievements, but of free and self-directing citizenship. And their commitment and fidelity weave the cradle of new, eventually independent and responsible citizens. (*Liberi* [children] on the way to being *liberi* [fully self-determining free persons].) These are goods sufficiently important, exigent and unsubstitutable to falsify the thought that the moral restraints which guard them are cruel or arbitrarily oppressive, difficult though the living out of those restraints certainly is for many (in some respects for almost everyone willing to follow a well-formed conscience in making choices about sex).

V

We all live our lives in four distinct and irreducible kinds of order: the natural (including physical, chemical, biochemical, biological, and psychosomatic systems/orders), the logical (involving all aspects of our reasoning), the technical domain of systems (including language) for mastering matter to achieve specific goals, and the domain of self-determining, morally significant choices.²⁰ Marriage, too, involves all four kinds of order. But since it is at bottom an act, and the carrying out of that constitutive act in countless other acts, its primary reality is moral, presupposing and engaging the natural, and supported by the cultural. To say that polygamy is not truly marriage, but only a version so watered down and defective as to be rather an imitation, is not to make a linguistic or other culture-relative claim. Rather it is to make a moral assertion, which must be validated by moral arguments. (These arguments will

point, for example, to the inequality of—in polygamy's standard form, polygyny—the multiple "wives" both with each other and with the "husband"; and to the fractured relations of siblings and half-siblings.)

Similarly with "gay marriage." What the phrase means is clear enough. To judge such marriages no marriage is like judging invalid arguments no argument, quack medicines no medicine; the point is not linguistic but, in the second two cases, is logical and technical respectively, and in the case in issue, is both cultural and moral. In our culture, the normative definition, both cultural and legal (until only the other day), has been the same as the moral judgment unfolded in previous sections of this article: lifelong and exclusive sexual commitment to a single spouse, in an institution oriented towards, and socially supported precisely for the sake of, the children whom this sexual union may well generate, is truly choice-worthy, and exigently important to—irreplaceably beneficial for—the whole community. Since the sexual acts of same-sex partners (couples, threesomes, foursomes . . .) have no tendency at all to generate children, there is no reason why whatever commitment such partners wish to make to one another (as couples, threesomes, foursomes . . . for life or for five years . . .) should be thought of as marriage. Their relationship is physically, biologically, psychosomatically different from the spectrum of really marital relations.

For in marital relations the marital act culminates in the very kind of activity—ecstatic genital giving and genital accepting of semen—that sometimes results in generation. Thus, even when it does not have that result, it is an act of the kind²¹ that links the spouses triply to the dual good of marriage, by enabling²² them to actualize, experience and express the marital commitment. That commitment is to be open to procreation, even though marital acts are incapable of resulting in procreation on the great majority of days, and throughout any pregnancy, and then throughout the period that begins, usually quite gradually, with the coming of menopause. In short, marital acts retain that triple link to both elements of the dual good of marriage even when those who choose and engage in the acts believe themselves sterile because of the time of the month, pregnancy or aging, or because of a medical condition which yet leaves them potent to engage in such acts.²³ Whatever imaginings or longings accompany them, neither solitary sex acts nor the sex acts of same-sex partners can be more than fictionally marital.²⁴

Notoriously, moreover, ethical positions which present themselves as "gay" include no norm requiring or making sense of exclusiveness of sexual partnership, and much evidence suggests that the great majority of same-sex male couples or wider groupings have "open" relationships.²⁵ In all such cases the imitation of authentic marriage is even more threadbare, more parodic. Indeed, the drive for same-sex marriage seems in large measure an element in a strategy of parrying and finally de-legitimizing cultural-moral critiques of same-sex sex acts, critiques which in their proper form are critiques of *all* non-marital sex acts, heterosexual and homosexual alike. This de-legitimizing strategy finds a willing aide in the ideologists of equality of entitlement to esteem. The ideology, which of course subjects its equality axiom to arbitrary exceptions, draws support from all whose scepticism about all human value prevents them from assessing reasonably whether the ways of life esteemed are all equally or even sufficiently compatible with common good. Such scepticism is kept from plunging into utter nihilism only by this devotion to equality, which functions for the devotees like a rotting bough over the stream just above the misted lip of the falls.

The successes of the gay movement's strategy are further signs of our culture's—not least its educated elites's—faltering grasp of the human goods at stake and the conditions under which these goods can be actualized well. If most modern marriages involve no commitment to exclude either consensual divorce (with a view to remarriage or extra-marital sex) or contraception, and so are watered-down instances of marriage—though authentic enough as instances of the cultural form now held out as marriage to those contemplating it—the question arises whether there remains rational ground for resisting the extension of the present legal-cultural form of marriage to same-sex couples.

Should not that question be answered in much the same way as another current question? Should one help defend one's country (*patria*) against colonization and takeover, demographic if not violent, if many of its native people and institutions have themselves, with cultural approval, become coarsely decadent, selectively homicidal and legally intolerant of certain true beliefs held, until recently, by virtually everyone, while the colonizers do not share these vices? Much depends, surely, on the character of the colonizers. Suppose that their culture, while embodying a range of virtues and condemning a number of our own culture's vicious

traits, has its own traits which, albeit in different ways, are lascivious, dishonest, homicidal, inequitable and oppressive, and that it further lacks those institutions of freedom which keep open the way to legal, political, moral and cultural *conversion*—and that, worse still, it forbids, with even capital penalties, all conversion *from* its errors. Then the rational love we all should have for that country which, for all its faults and falsehoods, helped enable us to participate in all the true goods we do, and is, at least presumptively, for us the non-fungible embodiment of many lasting forms of common good,²⁶ should be sufficient ground for willingly defending it by cultural, political and other morally acceptable means of repelling the takeover and the preparatory colonization.

So too, then, the great flaws in the modern cultural form of marriage do indeed impair, but do not eliminate, its fundamental intelligibility and worth as oriented towards exclusivity and permanence for the sake both of children and of a corresponding and unique kind of friendship—of man with woman, in a complementarity which makes up for what each sex or gender lacks as a type-instantiation of human flourishing and nature. To try to graft into this root legal-cultural form a kind of sexual relationship which has no structural orientation or inherent intelligible ground for either exclusivity and permanence, no deep complementarity, no connection between its sexual interactions and any children the partners may acquire, and no inherent commitment to the arduous parenting of children, is to do what one can to make the root institution and practice unintelligible, and to demote it, culturally, from a worthy ideal to one more or less arbitrary fancy amongst others. It is also to install sexual immorality officially at the heart of this primary social institution. In even the short term, this subjecting of the legal-cultural definition of marriage to the revolutionary and shattering transformation of excising “of one *man* with one *woman*” strips the law, the culture and its institution of marriage of any coherent response to claims that equality of esteem demands excision of the exclusive “one with one” and extension of marriage first to polygamy/polygyny and then in short order to a polyamory which excises also all even aspirational commitment to permanence. An elementary respect for children, one of justice’s demands, and concern for one’s own people as a lasting community linking past, present and future, justify and indeed mandate the defence even of modern marriage against such evacuations of

its meaning and intelligibility as an ideal and a summons to thoroughgoing commitment for a non-illusory common good.

VI

And then there are the travails, failures, miseries of many who have made the commitment of true marriage in its central form, but whose hopes of it have been betrayed by the fault of one or both of them, or by some other kind of rupture or dissolution of their friendship which makes it reasonable for one or both of them to separate from the other and end their living together as spouses (*divortium a mensa et thoro*)—and wholly understandable if they (and their friends) wish also that each could start afresh in a new marital commitment to a new spouse.

But to start afresh by “remarriage” during the life of one to whom one had freely made the commitment of marriage would entail that, in that commitment, the undertaking to be married to this person “for better for worse, for richer for poorer, ’til death us do part” was illusory. For, on the hypothesis that marriage can be terminated by the radical divorce (*divortium a vinculo*) which would leave the parties free to remarry (just as if one of them had died), the undertaking of *permanent* exclusivity would be subject to an unspoken but foreknown and therefore implied negation (“though not if. . .”). On this hypothesis, the parties entering on this uniquely far-reaching friendship would have to regard themselves as incapable of making a commitment unqualified by any negation of its permanent exclusivity. But there is no good reason to treat everyone as lacking the capacity to make so far-reaching a commitment.

The issue here is philosophically interesting, and important for understanding why any political theory offering a “social contract” as the foundation of political obligation must fail. The bond (*vinculum*) of marriage is in each case unquestionably dependent upon the choice, the will of the parties to it to enter upon the commitment, by their exchange of promises, that is, their contract or covenant of marriage here and now (*de praesenti*). But such acts of will could not have the moral effect of making it true that the parties are morally obligated, that is, bound to each other in the way and to the extent they undertake, unless it is morally true, prior to and independently of their promising, that such promises can

rightly be made and have the enduring morally binding effect they profess and intend (at the time of their making) to have. And that moral proposition—which has acts of will as its subject-matter but not as the ground for its truth—is indeed true, for two kinds of reason. (1) Persons do not have the moral incapacity presupposed by the theory of necessarily dissoluble marriage. And, more fundamentally, (2) the idea of an inter-personal relationship created by choice precisely *as*—under the description of—a relationship not dissoluble by choice or circumstance is an idea that can and should be affirmed, in view of the great dual good it makes realizable, the good of (i) bringing offspring into existence as the embodiment of (ii) the friendship of two friends committed to accepting each child as a (i) gift supervening on and extending that (ii) friendship and to responding to that gift by (i) shouldering the lifelong responsibility of carrying out, through countless choices to act *maternally* and *paternally*, their originating choice to enact (ii) their friendship by uniting biologically, joyfully, lovingly—maritally—at all levels of their being, in marital acts. Thus the rationality of willing a permanent and exclusive marital union emerges by unfolding the implications of the dual-good outline in previous sections of this essay: children's needs and interests entitle them, doubtless not absolutely but really and exigently, to very firm parental intention and commitment to maintaining a framework of common life in mutual cooperation, father with mother, and each with children who are and are entitled to be treated as *theirs*, in a relationship thoroughly dissimilar in kind to the relation of producers to their products or owners to their property, and ever more similar in kind to that of friend to friend.

It is much the same with political obligation, and indeed with the authority of posited law. No contract of the members of a society with each other and/or with a putative leader could have the effect of making performance of the contract obligatory, unless there were sound reasons, independent of any agreement, for grouping into political communities and acknowledging as authoritative certain prescriptions of persons acknowledged to be rulers. No such law-making prescriptions could have a moral obligation-imposing effect tracking, presumptively, the obligatory force they purport to have, unless it were a standing requirement of practical reason (of integral human fulfillment) that government and law be acknowledged as authoritative for the sake of fundamental aspects of

common good (especially justice and its maintenance against injustice) not otherwise securable. Positive law, in short, adds much content to the principles and standards of practical reasonableness traditionally called "natural law." Yet, for its relevance in practical reason and the judgments of conscience, it depends upon natural law with its master principle of "love of neighbor as oneself" and its more specific principles identifying kinds of act compatible with intelligent love of human persons and their fulfillment, and kinds incompatible with it.

Natural law's invitation to, and underwriting of, the commitment to truly marital union points to and provides a moral reality, our marriage. That reality not only has the intelligible dual point articulated above, but also answers to and is an objective correlate of those central elements in erotic attraction, love and affection which make lovers—especially, but not only, in the act of love—yearn for and profess an undying union, exclusive and permanent. The natural law principles leave a good many questions about the boundaries (e.g., as to consanguinity) and implications of unions of this type, all to be settled by *determinatio* by the relevant authorities, ecclesiastical or political, along with many other questions about the spouses' status, property, rights *inter se* and in relation to their children, in marital breakdown, and so forth. There can even, I think, be ground for the law of the state to diverge from the morally true contours of marriage, just as the Mosaic law of marriage and divorce diverged (it has been said with some authority²⁷) because of the people's "hardness of heart." The wider the divergence, the greater the risk that real marriage's intelligibility, and thus its desirability, will be obscured. Since marriages, not unlike positive legal systems, are *factual* realities whose coming to be and lasting depends upon people's grasp of marriage's truth ("reality", "worth") as an *ideal*, that risk is one to be accepted only with reluctance, caution, and willingness to go "back" as well as "forward."

There are other relevant matters within the law's proper jurisdiction, which is to protect and promote *public* good, that is, justice and the public morality that protects justice (especially justice to children and other vulnerable people). The effective, not merely nominal, prohibition of distributing pornography has always been regarded, and rightly so, as a necessary public witness to the truth about marriage's worth and importance, and as an empirically (though of course incompletely) efficacious restraint on the impurities

which, if unresisted, darken natural reason's understanding of the link between purity and the proper significance and value of marital acts.

VII

An institution so lived-in as marriage is attracts in full measure the resentment, satirical denunciation, ribaldry, scorn and sophisticated *ennui* of those many whom—or whose associates—it has disappointed or wounded in their idealism, their self-interest, or both. As was said already, in more particular contexts, in Section V above, marriage's moral claims cannot be justly assessed if its defective instantiations are compared with alternative ideals considered as ideals. Much the same goes for long lived-in institutions such as political society, government and the rule of law, each constantly the occasion and even cause of dreadful abuses and failures, yet each plainly a worthwhile ideal to be reconstructed, again and again, in preference to the anarchic or tyrannical alternatives.

So one makes no progress by imagining alternative worlds in which everything is the same as our world save that law and government give no endorsement to marriage and, subject to a few prohibitions, leave couples, threesomes . . . fivesomes . . . to make their own arrangements for sex acts and for the generation and upbringing of children—and then to simply postulate that in such a world children will generally be loved and cared for. Nor does one make progress—clarify issues and get closer to sound judgment—by overlooking the fundamental disparities between mothers and fathers, the former bound to their children by physical and psychological ties vastly closer and more durable than the latter's, which need last no longer than a single act of insemination. The well-nigh complete unraveling of marriage and family, and destruction of fatherhood, experienced in some ethnic groups during the past thirty years, and its broad and intricate consequences, summon everyone to reflection on the real nature of alternatives to marriage. On the real inhumanity, for example, of a mother's bonding, not so much with transient and irresponsible sexual partners as with the offices, officials, and funds of a government bureaucracy.

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NOTES

1. On the evaluative conditions for such description advanced in a general descriptive theory of human affairs, see Finnis, "On Hart's Ways: Law as Reason and as Fact," *American Journal of Jurisprudence*, 53 (2007) 25–53.

2. See Finnis, *Fundamentals of Ethics* (Oxford: Oxford University Press; Georgetown: Georgetown University Press, 1993), 1–6.

3. Some find "friendship" too cool a term in this context, and some think it fails to refer to the biological union involved in a marriage. But alternatives such as "love" and "communion" have distracting connotations for many, friendships can be passionate, and it is marriage's orientation to procreation that makes it possible for biologically unitive marital intercourse, even when engaged in with no prospect, intent or hope of procreation, to have the multiple significance which it has. (See Sections II and III below.)

4. See Finnis, "Law and What I Truly Should Decide," *American Journal of Jurisprudence*, 48 (2003) 107–29 at 109–12.

5. On this distinction between "rational" and "reasonable" see *Fundamentals of Ethics*, 29–30, 52–53.

6. On such consensus under ideal conditions as a mark, *not* a criterion, of truth, and on objectivity in general, see *ibid.*, 62–66.

7. The discussion of basic human goods in Finnis, *Natural Law and Natural Rights* [hereafter *NLNR*] (Oxford: Oxford University Press, 1980), 86–87, failed to reach any clear or stable position on the place of transmission of life, procreation and marital friendship. Aquinas (when correctly translated) had it right (in this respect): see Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 83, for the kinds of reasons outlined, in relation to the identification of basic human goods in general, in *NLNR*, 81–86.

8. More precisely, the consent and commitment is to be open to the other's wish (whether expressed or unexpressed) for such intercourse, provided there is not, in the circumstances of the relevant time and place, some sufficient reason not to engage in intercourse. Such reasons may legitimately vary widely; at the far end of the spectrum is an example found in Christian tradition, as accepted and articulated by Aquinas: on the one hand, Mary and Joseph, the parents of Jesus of Nazareth, had each, earlier and independently, resolved upon virginity, believing that God had for her/him a special vocation, but on the other hand, this resolve was not inconsistent with them marrying, because each of them had qualified it with a further, conditional act of will of the form: "but if God ever so wills it, I consent to sexual intercourse with my spouse": Aquinas, *Scriptum super Libros Sententiarum Petri Lombardiensis* IV d. 30 q. 2 a. 1 qa 1c; qa 2 ad 3; d. 28 q. 1 a. 4c.

9. See (referring also to the Enlightenment fabrication of this myth about medieval times) Finnis, *Aquinas*, 4, 16.

10. On this, and on the massive, fundamental misreadings and misrepresentation of Aquinas in John T. Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Cambridge, MA: Harvard University Press, 1965 and 1986, see Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," *American Journal of Jurisprudence*, 42 (1997) 97–134 at 102–14; also Finnis, *Aquinas* 143–54. Noonan's misrepresentations have their baleful influence everywhere; they wreck, for instance, the treatment of sex in marriage in the early modern era in Margaret R. Sommerville, *Sex and Subjection: Attitudes to Women in Early-Modern Society* (London: Arnold; New York: St Martin's Press, 1995) 118–40,

though she rightly rejects outright (2, 130, 139, etc.) the myth that companionate marriage emerged from Protestantism (or Puritanism).

11. The liturgy known as the Sarum Rite, widely used in England and predating the Protestant Reformation by 450 years or more, begins its marriage rituals with the declaration that they are to join two bodies (*ad conjugendum duo corpora*), so that these in a way become one flesh, two souls (*ut amodo sint una caro et duae animae*); the central identical statement which each makes in order to give his or her commitment (*det fidem*) to the other, exclusively and permanently, is supplemented by the wife's undertaking to "be bonere and buxom [affable and willing] in bed and at board" and the husband's declaration "with my body I thee worship." See William Palmer, *Origines Liturgicae* (Oxford: Clarendon Press, 1832), vol. II, 209–13; Dennis Freeborn, *From Old English to Standard English* (Toronto: University of Ottawa Press, 2nd ed'n. 1998), 6.

12. On this and the other aspects of Aquinas's theses on sex and marriage, see *Aquinas*, 143–54; on pleasure in intercourse, see also *ibid.*, 76 notes 64–65; also, in some respects fuller, "The Good of Marriage . . ." at 97–120.

13. For all matters in this paragraph, see Finnis, "The Good of Marriage . . ." at 102–11 (not least notes. 2, 51, 115, 127 on female pleasure in marital intercourse).

14. For this account, see Finnis, *Aquinas*, 152; much more fully, "The Good of Marriage . . ." at 118–26.

15. I use 'sex act' to signify an act or sequence of performances engaged in with the intention or willingness that it secure orgasmic sexual satisfaction for one or more persons doing or participating in the act. The term is morally entirely neutral. See further "The Good of Marriage . . ." at 98 n. 2.

16. One who reasonably chooses a worthwhile form of life which entails responsibilities incompatible with the commitment and responsibilities of marriage does not thereby choose *against* the good of marriage, unless he or she engages in sex acts (in which case the choice to engage in them is against that good for the reason already stated: briefly, judging it reasonable to engage in sex acts non-maritally entails judging that the sex acts of a married couple do not *really* actualize, express and enable them to experience their marriage).

17. Thus Charles Taylor, "Sex and Christianity: How Has the Moral Landscape Changed?," *Commonweal* 134, 16 (September 28, 2007) lists the main features of the "sexual revolution":

- (1) the rehabilitation, continued from the 1920s, of sensuality as a good in itself; (2) the continued affirmation of the equality of the sexes, and in particular the expression of a new ideal in which men and women come together as partners freed of their gender roles; (3) a widespread sense of Dionysian, even "transgressive" sex as liberating; and (4) a new conception of one's sexuality as an essential part of one's identity, which not only gave an additional meaning to sexual liberation, but also became the basis for gay liberation and the emancipation of a whole host of previously condemned forms of sexual life.

He ends:

. . . we have to recognize that the moral landscape has changed. People who have been through the upheaval have to find forms that allow for long-term loving relations between equal partners who will in many cases also want to become parents and bring up their children in love and security. But these can't be simply identical to the codes of the past, insofar as they were connected with the denigration of sexuality, horror at the Dionysian, fixed gender roles, or a refusal to discuss identity issues. It is a tragedy that the codes that churches want to urge on people still (at least seem to) suffer from one or more—and sometimes all—of these defects.

18. Showing how far the sex ethics of Socrates, Plato, and Aristotle, not to mention philosophically minded transmitters of their tradition, such as Musonius Rufus and Plutarch, correspond to that expounded in this essay, and how far Martha Nussbaum was willing to go in misrepresenting Plato: Finnis, "Law, Morality and 'Sexual Orientation'," *Notre Dame Law Review*, 69 (1994) 1049; slightly supplemented in *Notre Dame Journal of Law, Ethics and Public Policy*, 9 (1995) 11 at 18–20; see also Finnis, "'Shameless Acts' in Colorado: Abuse of Scholarship in Constitutional Cases," *Academic Questions*, 7, 4 (1994) 1 at 19–41; on her reply, see Finnis, "The Good of Marriage" at 124 n. 109; Robert P. George, "'Shameless Acts' Revisited: Some Questions for Martha Nussbaum," *Academic Questions*, 9, 1 (1995) 24–42.

19. In the sense recalled by Hermia to her beloved Lysander in the woods in *A Midsummer Night's Dream* 2.2:

But, gentle friend, for love and courtesy
Lie further off; in human modesty,
Such separation as may well be said
Becomes a virtuous bachelor and a maid,
So far be distant; and, good night, sweet friend:
Thy love ne'er alter till thy sweet life end!

See likewise *The Tempest* 4.1.14–31, 51–56, 84–97, 106–17. For all his bawdy, there is nothing in Shakespeare to set against these repeated expressions of the rightness—the necessity, if great goods are to be preserved and attained—of reserving sex for marriage.

20. See, e.g., Finnis, "'The Thing I Am': Personal Identity in Aquinas and Shakespeare," *Social Philosophy & Policy*, 22 (2005) 250–82; also in Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul (eds.), *Personal Identity* (New York: Cambridge University Press, 2005), 250–82.

21. Namely, what the tradition—as expressed in, for example, Aquinas—calls acts of the generative kind. These are acts which, as Aquinas carefully notes, can be engaged in even by couples who know that they are sterile: see Finnis, *Aquinas*, 150, n. 84; for much fuller citation and quotation, see "The Good of Marriage . . ." 128–29 at n. 127.

22. Necessary, not sufficient: the triple link to marital commitment fails if the parties to the act are engaging in it "solely for pleasure" in the precise, depersonalizing sense explained above.

23. See further Finnis, "The Good of Marriage . . ." at 128 n. 127; 132. On the arguments of Stephen Macedo and Andrew Koppelman attempting to assimilate same-sex sex acts to the marital intercourse of spouses who believe themselves sterile (and have done nothing to render themselves or their act sterile), see Finnis, "Law, Morality, and 'Sexual Orientation,'" in John Corvino (ed.), *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Rowman and Littlefield, 1997) 31–43 at 37–43 (pages written for that volume).

24. Stephen Macedo, "Homosexuality and the Conservative Mind," *Georgetown Law Journal*, 84 (1995) 261 at 280, says: "The focus on procreation [in the sex ethics represented by the present article] appears opportunistic: selected so as to allow sterile heterosexuals into the tent while keeping homosexuals out." But (1) there has been no selection of focus, however motivated; marriage is the form of life that corresponds to the need for a new generation of human persons to sustain all human goods, and to the need for children for the nurture of committed friends who take seriously their responsibility for bringing new persons in to the world; and the marital act does embody this commitment to the marital form of life by its uniting of the reproductive organs and all other levels of

the spouses' being. And (2) in this ethics, the non-marital sex acts of heterosexuals, solitary or with another or others, are "outside the tent," too.

25. For evidence and argument, see "Good of Marriage" at 130–31; that evidence warrants the conclusion there formulated: "Only a small proportion of homosexual men who live as 'gays' seriously attempt anything even resembling marriage as a permanent commitment. Only a tiny proportion seriously attempt marital fidelity, the commitment to exclusiveness; the proportion who find that the attempt seems to make sense, in view of the other aspects of their 'gay identity', is even tinier. Thus, even at the level of behavior—i.e., even leaving aside its inherent sterility—gay 'marriage', precisely because it excludes or makes no sense of a *commitment* utterly central to *marriage*, is a sham."

26. Finnis, "Universality, Personal and Social Identity, and Law" (2007), SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1094277.

27. Mark 10: 5.

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