Georgia State University
ScholarWorks @ Georgia State University

Philosophy Theses | Department of Philosophy

4-30-2010

Dworkinian Liberalism & Gay Rights: A Defense of Same-Sex Relations

Ngoc Quang H. Bui
Georgia State University

Follow this and additional works at: http://scholarworks.gsu.edu/philosophy_theses

Recommended Citation
Bui, Ngoc Quang H., "Dworkinian Liberalism & Gay Rights: A Defense of Same-Sex Relations" (2010). *Philosophy Theses.* Paper 71.

This Thesis is brought to you for free and open access by the Department of Philosophy at ScholarWorks @ Georgia State University. It has been accepted for inclusion in Philosophy Theses by an authorized administrator of ScholarWorks @ Georgia State University. For more information, please contact scholarworks@gsu.edu.

DWORKINIAN LIBERALISM & GAY RIGHTS: A DEFENSE OF SAME-SEX RELATIONS

by

NGOC QUANG H. BUI

Under the Direction of Andrew Altman

ABSTRACT

Recent changes in the politics of gay rights have led to a gay rights demand for liberal governments: i) decriminalization of sodomy and ii) full governmental recognition of civil, same-sex marriages. Challengers to liberalism argue that a neutral liberalism cannot satisfy the gay rights demand. I argue that the liberal political framework put forth by Ronald Dworkin can adequately fulfill the gay rights demand. Dworkinian liberalism, which is neutral with respect to the ethical life, need not be neutral with respect to moral and non-ethical values. I argue for the more modest claim that Dworkinian liberalism has the conceptual tools and principles for satisfying the gay rights demand. In arguing for my claim, I discuss the internal criticisms of Carlos Ball and Michael Sandel and the external criticism of John Finnis. I argue that these concerns are surmountable. Dworkinian liberalism is capable of offering a robust defense of same-sex relations.

INDEX WORDS: Ronald Dworkin, Michael Sandel, Carlos Ball, John Finnis, Same-sex marriages, Gay rights, Neutral liberalism, Gay rights demand, Political philosophy, Principles of human dignity, Abstract egalitarian principle, Equal concern and respect, Sexuality and the law

DWORKINIAN LIBERALISM & GAY RIGHTS: A DEFENSE OF SAME-SEX RELATIONS

by

NGOC QUANG H. BUI

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

2010

Copyright by
Ngoc Quang H. Bui
2010

DWORKINIAN LIBERALISM & GAY RIGHTS: A DEFENSE OF SAME-SEX RELATIONS

by

NGOC QUANG H. BUI

Committee Chair: Andrew Altman

Committee: Christie Hartley

Andrew I. Cohen

Electronic Version Approved:

Office of Graduate Studies

College of Arts and Sciences

Georgia State University

August 2010

DEDICATION

To my mother, my constant supporter,

& to Richy, my motivator.

ACKNOWLEDGEMENTS

My sincerest acknowledge goes to my very first mentor in philosophy, Nico Silins. As a professor, Nico was able to spark my deepest interest in philosophy. He was first to make me realize the pleasures of philosophy. Professor Sandra Dwyer has also been a constant mentor during my graduate studies at Georgia State University. She has always been there, listening attentively about the ideas and concepts stemming from my burgeoning philosophical mind. Her advice and insights has always been a guiding force throughout my graduate years. I would also like to give acknowledgement to Professor Andrew Altman, who has the incredible talent of making lucid the oftentimes tangled up ideas and arguments in my mind. Constantly throughout my thesis research, drafting and defense, he was always ready and available to give advice. Finally, I would like to thank Professors Christie Hartley and Andrew I. Cohen. Their comments and concerns have been invaluable.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS v

INTRODUCTION 1

CHAPTER 1: THE POLITICS OF GAY RIGHTS 4

(A) SOME PRELIMINARY COMMENTS & CONCEPTUAL DISTINCTIONS 7

CHAPTER 2: DWORKINIAN LIBERALISM 11

(A) TWO PRINCIPLES OF HUMAN DIGNITY 12

(B) THE ROLE OF A LIBERAL GOVERNMENT 17

i. Principle of Equal Concern and Respect. 17

ii. Ethical, Moral & Non-Ethical Values 23

iii. Liberty, Neutrality and Equality. 30

CHAPTER 3: CHALLENGES TO A LIBERAL THEORY OF GAY RIGHTS 34

(A) INTERNAL CRITICISMS 34

i. Liberal Neutrality & the Principle of Toleration 35

ii. Perfectionist Liberalism 40

(B) EXTERNAL CRITICISMS 45

i. New Natural Law Theory 46

CHAPTER 4: RESPONDING TO THE CRITICS 54

(A) REPLIES TO THE INTERNAL CRITICISMS 55

i. Toleration Revisited 56

ii. Perfectionist Liberalism Revisited 60

(B) REPLIES TO THE EXTERNAL CRITICISM 68

i. The Good of Marriage 69

ii. Dworkinian Interpretation of the Marital Good 79

CONCLUSORY REMARKS 88

INTRODUCTION

Justice Sandra Day O'Connor is credited with having said that the Lesbian, Gay, Bisexual, and Transgender (LGBT) community's struggle for equal citizenship is the civil rights movement of the 21st century.[1] I am in agreement with Justice O'Connor. The current political climate in the United States is ripe for social reform. The topic of gay marriage was front and center in the 2004 presidential elections.[2] Deep divides in religious, political and ethical ideals drove many people to the polls, which resulted in 13 states amending their constitution to ban same-sex marriages.[3] Since the 2008 elections, however, the gay community, which was once deemed a pariah of society, is making great strides in gaining governmental protection for its members. In his first State of the Union address to the American people, President Obama expressed his desire to repeal Don't Ask, Don't Tell (DADT). Recently both Admiral Mike Mullen and Secretary of Defense Robert Gates testified before a congressional hearing to repeal DADT. Clearly, the times are changing. Given the recent developments in our political culture, the question emerges whether the rights normally demanded by the LGBT community can be defended from the traditional, neutral liberal standpoint. How long can certain liberal ideas like the right to privacy and tolerance sustain a rigorous defense of same-sex relations, especially when persons involved in these relations are beginning to ask for public recognition?

The issue made explicit in the above question is the focus of this paper. How can a society that avows by liberal principles guarantee full, equal rights to members of the LGBT community? Many detractors of both the gay rights movement and liberalism have criticized the liberal as being

---

[1] H.N. Hirsch, *The Future of Gay Rights in America* (New York: Routledge, 2005).
[2] Gregory B. Lewis, "Same-Sex Marriage and the 2004 Presidential Election," *Political Science & Politics* 38, no. 02 (2005): 195-199.
[3] Ibid., 195.

too neutral on the gay rights issue.[4] If their criticisms are true, then liberalism as a political doctrine becomes a quagmire for gay rights supporters. It is my belief, however, that liberalism can offer a robust defense of same-sex relations. I will attempt to show how a liberal can endorse gay rights fully – without internal inconsistencies. In particular, I focus on the liberal framework developed by Ronald Dworkin.[5] His liberal doctrine revolves around the central claim that the primary role of a democratic government is to accord equal concern and respect to all of its citizens. I argue that a Dworkinian liberal democracy is *capable* of offering the members of the LGBT community the equal citizenship status they deserve.

Since my primary concern is how a liberal can justify gay rights, my discussion takes as its starting point a democratic government compatible with commonly conceived liberal principles: e.g., right to privacy, principle of toleration, separation of church and state and so on. In Chapter 1, I give a brief overview of the political climate with respect to gay and lesbians. I highlight the growing desire of gays and lesbians for greater public recognition of their relationships. I call this the gay rights demand. In Chapter 2, I give an account of Dworkinian Liberalism. Here, I will focus on Dworkin's two principles of human dignity and the role of government that follows from them. My aim is to set up the conceptual distinctions and background principles to rebuff later criticisms. In Chapter 3, I address some concerns about a liberal defense of same-sex relations. These criticisms tend to come in two flavors: i) internal criticisms that claim that Dworkinian liberalism is too weak and cannot fulfill the gay rights requirement completely, and ii) external criticisms that claim that li-

---

[4] In this paper, my use of the term 'gay' as a qualification or characterization of a person, group, organization, community, etc., is inclusive of lesbians, bisexual, transgendered persons. Though I believe that my usage will not result in any misunderstanding, I apologize in advance for any unforeseeable problems this stylistic convention might create.

[5] Ronald Dworkin, "Three Questions for America," *The New York Review of Books* 53, no. 14 (September 21, 2006), http://www.nybooks.com/articles/19271; *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton: Princeton University Press, 2006); "Do Values Conflict? A Hedgehog's Approach," *Arizona Law Review* 43, no. 2, Isaac Marks Memorial Lecture (2001): 251-260; *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000); "Objectivity and Truth: You'd Better Believe It," *Philosophy and Public Affairs* 25, no. 2 (March 1, 1996): 87-139; *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996); *A Matter of Principle* (Cambridge: Harvard University Press, 1985); *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978).

beralism is inadequate because it fails to account for the true value of marriage. After a government recognizes the good of marriage, the external critics claim that it will be politically obligated to discriminate against same-sex relations. I contend that both these two classes of criticisms are unwarranted. First, I demonstrate that the conceptual distinctions and principles contained in Dworkinian liberalism makes it much stronger than the internal critics claim. Second, I argue against the external criticisms. Against these external critics, I raise some internal and external concerns. For my internal critique, I argue that the distinctions drawn by the external critics are either untenable or undesirable. For my external critique, I attempt to show that Dworkinian liberalism accounts for the good of marriage better than the external critics' own political framework. Dworkinian liberalism has this advantage because it permits heterogeneity in our personal, individualistic valuation of goods. Additionally, I argue that Dworkinian liberalism's conception of equality is more well-founded than the external critic's. These considerations of the Dworkinian liberalism highlight the framework's advantages for gay rights advocates.

CHAPTER 1: THE POLITICS OF GAY RIGHTS

Before I begin my paper, I want to address the question, 'What is the point?' In politics, there exists a common (overly-used) distinction between liberals and conservatives. Gay rights tend to be supported by the first class, but not the second. So then it may seem pointless for me to address the gay rights issue within a liberal framework of government. However, this is too simplistic a picture of the liberal, political standpoint. There exist numerous different liberal frameworks which the gay rights advocate may adopt, and there has been growing concern with traditional, neutral liberal frameworks. As Katherine M. Franke points out in her discussion of the politics of same-sex marriages:

> We should note, however, that the shift from decriminalization to recognition of same-sex partnerships requires more, or indeed something else than, an argument based on tolerance. Those who advocate for same-sex marriage are not asking that the majority bracket the disgust they hold for us so long as our sex is privatize and individualized. Rather, this is a public argument of a collective nature – we want to be included in "We the People."… What we are witnessing in the gay community, I would argue, is a radical substitution or transformation of the nature of homosexual desire. Into the psychic space created by decriminalization has rushed a desire for governance, a desire for recognition – recognition by legal and state authority.[6]

Many proponents of gay rights contend that a neutral liberalism, like Dworkinian liberalism, is not capable of meeting the *gay rights demand*: that i) the government decriminalize sexual acts between homosexuals *and* ii) the government accords full civil recognition of same-sex marriages. Issue (i) concerns the realm of criminal law; issue (ii), the realm of civil law.[7] Many critics argue that the neutral liberal state can fulfill the gay rights demand only halfway. The traditional liberal principle of

---

[6] Katherine M. Franke, "The Politics of Same-Sex Marriage Politics," *Columbia Journal of Gender and Law* 15, no. 1 (2006): 239-240.

[7] As pointed out by Professor Christie Hartley, a further distinction may be made with respect to the civil prong of the gay rights demands: a) civil valuation of same-sex marriages and b) civil recognition of the rights of same-sex couples to get married. These two considerations need not entail one another. Issue (a) requires that the government values the marital relation of same-sex couples to be on par (to be as valuable) as those of heterosexual couples. Issue (b) only requires that the government recognize and extend the right to marry to gays and lesbians. The government need not consider the value of same-sex marriages. I think that given recent developments in the politics of gay rights, it is clear that gays and lesbians desire (and deserve) equal valuation.

tolerance and non-interference may only guarantee that the government and others not invasively intrude in the private intimate acts between gay and lesbian couples. That is, neutrality cannot guarantee complete civil recognition of intimate same-sex relations.

Perhaps the change represented by part (ii) of the gay rights demand results from the LGBT community's reaction to the growingly vocal social conservative right.[8] Political scientists have documented cyclical patterns of rebuffs by gays and lesbians; there tends to be an upsurge in political mobilization after some rights have been compromised.[9] Renewed interest in gay rights shortly after California's passing of 'Prop. 8' and Maine's referendum, which resulted in a repeal of the state's recently passed gay marriage laws, make the above claim plausible. Yet, I believe that the push for a government to fulfill the second, civil prong of the gay rights demand is the result of political and legal victories gained by the LGBT community and its supporters nationwide. William N. Eskridge, Jr. in his survey of sodomy laws in America makes explicit that it was not until the early 20th century that laws against sodomites (in general) were beginning to be directed more forcibly against homosexuals.[10] Even the nationwide decriminalization of sodomy is a recent phenomenon. In *Bowers v. Hardwick*[11] the Supreme Court upheld Georgia's sodomy laws. The Court held that "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home."[12] In the court's view, a statute may pass rational basis review on the grounds of furthering public sexual morality. It was not until *Lawrence v. Texas*[13] that the court reversed it position. In deli-

---

[8] John Green, "Antigay: Varieties of Opposition to Gay Rights," in *The Politics of Gay Rights*, ed. Craig Rimmerman, Kenneth Wald, and Clyde Wilcox, The Chicago Series on Sexuality, History, and Society (Chicago and London: University of Chicago Press, 2000), 121-138; Didi Herman, "The Gay Agenda Is the Devil's Agenda: The Christian Right's Vision and the Role of the State," in *The Politics of Gay Rights*, ed. Craig Rimmerman, Kenneth Wald, and Clyde Wilcox, The Chicago Series on Sexuality, History, and Society (Chicago and London: University of Chicago Press, 2000), 139-160.
[9] John D'Emilio, "Cycles of Change, Questions of Strategy: The Gay and Lesbian Movement after Fifty Years," in *The Politics of Gay Rights*, 31-53.
[10] William N. Eskridge, *Dishonorable Passions: Sodomy Laws in America, 1861-2003* (New York: Viking, 2008).
[11] *Bowers v. Hardwick*, 478 U.S. 186 (1986).
[12] Ibid. at 194.
[13] *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

vering the majority opinion, Justice Anthony Kennedy wrote, "When homosexual conduct is made criminal by the law of the state, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres. The central holding of *Bowers* has been brought in question by this case, and … [i]ts continuance as precedent demeans the lives of homosexual persons."[14] So, the criminal prong of the gay rights demand has been satisfied.

Yet, many commentators have questioned the force of equality-based arguments for governmental recognition of civil, same-sex marriages.[15] This point is highlighted by the Court's narrow ruling in *Romer v. Evans*[16] where a Colorado law (i.e., 'Amendment 2') that barred municipalities from enacting ordinances entitling homosexuals protected minority status was ruled unconstitutional. The Court ruled that the Colorado law violated the Equal Protection Clause since did not pass rational basis review. Since the amendment was "born of animosity toward the class of persons affected [i.e., gays and lesbians]," it lacked legitimate state purpose.[17] However, as Richard H. Fallon, Jr. points out, "In so ruling, the Court pointedly assumed that discriminations against homosexual are subject only to rational basis review, not strict judicial scrutiny."[18] I contend, however, that equality-based arguments have more force than these commentators let on. We see this point highlighted in two recent court cases. In *Goodridge v. Massachusetts Department of Public Health*,[19] the Massachusetts Court held that "the Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens."[20] The Massachusetts Court held that the state may not deny same-sex couples the same kind of civil marriages available to opposite-sex couples. Even

---

[14] Ibid. at 2482.
[15] See Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996); *The Gay Rights Question in Contemporary American Law* (Chicago: University of Chicago Press, 2002).
[16] *Romer v. Evans*, 517 U.S. 620 (1996).
[17] Ibid. at 634. (See *United States v. Carolene Products*, 304 U.S. 144 [1938] at footnote 4, wherein statutes reflecting prejudice against a minority class do not pass rational basis review.)
[18] Richard H. Fallon, Jr, *The Dynamic Constitution: An Introduction to American Constitutional Law* (New York: Cambridge University Press, 2004), 135. (to qualify for strict judicial scrutiny or *quasi*-strict scrutiny a statute must either create a suspect classification of citizens [e.g., Blacks, women, etc.] or pertain to some fundamental right)
[19] *Goodridge v. Massachusetts Department of Public Health*, 440 Mass. 309 (2003).
[20] Ibid.

more pointedly stated is the opinion of the South African Constitutional Court in *Minister of Home Affairs and Others v. Fourie and Bonthuys and Others*[21]:

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalize people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. *Equality means equal concern and respect across difference*…. What is at stake in this case, then, is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals…. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all*…. What justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples.[22]

This thesis will defend the view advanced by the South African Constitutional Court that a liberal government, which abides by the principle of equal respect and concern for the human dignity of its citizens, will be positively obligated to recognize civil, same-sex marriages. A liberal government *can* satisfy the gay rights demand completely, and it can do so while holding on to a neutral liberal standpoint.

(a) Some Preliminary Comments & Conceptual Distinctions

Before I begin my discussion of Dworkinian liberalism and the criticisms directed at it, I want to set up some conceptual distinctions: the reasonable versus the rational, the right versus the good and the moral versus the ethical. These distinctions are interrelated and inter-defined. It is hard to explain one distinction in complete abstraction from the others. In addition, they constitute essential concepts in my philosophical toolkit.

---

[21] *Minister of Home Affairs and Others v. Fourie and Bonthuys and Others*, CCT 10/05.
[22] Ibid. at 60, 61, 95 and 158. (emphasis added)

The first conceptual distinction concerns the reasonable and the rational. Liberals like John Rawls rely on this distinction heavily. In his theory of a just society, Rawls applies this distinction to the central idea of social cooperation. A person acts *reasonably* when she acts in accordance with certain political principles affirmed by herself and others, even when these principles turn out to be detrimental to her own plans and goals.[23] A reasonable person interacts with other members of their society on the same, fair terms. I believe that central to reasonableness is the idea of *reciprocity*: viz., in acting reasonably, a person assumes not only her ability to recognize and act according to the political principles of her society; she must also presuppose that others within her society have the similar ability to act reasonably. A person acts *rationally*, however, when she acts according to her self-interest, her life-plan and goals, and so on. She acts out of her own good.

From a political standpoint, the reasonable has priority over the rational.[24] A and B may possess two completely opposing life-plans. A loves meat and wants her society to make every Monday night "Steak night." B is a vegetarian and wants his society to make every Monday night "Tofu Night" instead. In acting rationally, A's actions may harm B, and vice versus. Yet, if A and B were to act reasonably (i.e., under political principles both can affirm and expect the other to follow), then both persons need not necessarily be harmed. Perhaps after negotiating, both A and B decide not to make Monday nights anything at all. In this case, by cooperating (i.e., by acting reasonably) both A and B are able to further their own life goals.

The reasonable and the rational lead us to the second conceptual distinction: viz., the right versus the good. This distinction applies to the political realm. A theory of the *right* concerns how persons are to interact with one another. For instance, T.M. Scanlon has argued that moral agents

---

[23] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), 6-7. (A reasonable person, Rawls tells us, is someone who is "ready to propose, or to acknowledge when proposed by others, the principle needed to specify what can be seen by all as fair terms of cooperation. Reasonable persons also understand that they are to honor these principles, even at the expense of their own interests.")

[24] Ibid., 82. (As Rawls states, "In each case the reasonable has priority over the rational and subordinates it absolutely.")

act in the right way when they act according to moral principles that cannot be reasonably rejected.[25] Rawls uses the original position to argue for certain principles of justice, principles that govern how citizens of a well ordered society will structure its basic institutions. The theory of the *good* concerns what persons value for themselves without implying that others are obligated to hold the same values. For this paper, I assume the priority of the right over the good – at least from a political standpoint. My position follows from the above discussion wherein I noted the priority of the reasonable over the rational. The reasonable concerns our interactions with others in our society; the theory of the right concerns what we owe these other citizens. The rational concerns our own proper life-plans; the theory of the good concerns what we should value. In the same way, a liberal government must presuppose a theory of the right over a theory of the good.[26]

Dworkin, himself, relies heavily on these two prior distinctions. Nowhere is this reliance more explicit, I believe, than in his distinction between ethics and morality. Admittedly, not all philosophers adopt this distinction between the ethical and the moral.[27] Oftentimes philosophers talk about ethics and morality as though they are synonymous. I rely heavily on this distinction when discussing the individual philosophical doctrines citizens within a liberal polity may hold. In fact, only much recently in his own writings has Dworkin made his reliance on this distinction explicit. In a singular footnote in *Sovereign Virtue*, he notes that ethics "includes convictions about which kinds of lives are good or bad," while morality "includes principles about how a person should treat other people."[28] In other words, *ethics* concerns principles for living well, for setting and fulfilling our life-plans and flourishing. *Morality*, on the other hand, concerns principles for treating others. Morality,

---

[25] Thomas Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998).
[26] Rawls, *Justice as Fairness: A Restatement*, see section III. (Rawls argues for this point in a slight different manner. He uses the original position to argue that the right is prior to the good. I believe that the intuitions that undergird both our arguments are similar.)
[27] See Scanlon, *What We Owe to Each Other*. (Scanlon takes what we owe to each other to be morality narrowly construed [i.e., morality] , and the good life to be morality broadly construed [i.e., ethics].)
[28] Dworkin, *Sovereign Virtue*, 485 footnote 5. (Dworkin emphasizes this distinction much more forcefully in *Is Democracy Possible Here?*)

strictly speaking, concerns what we owe each other. Its purview is our interpersonal interactions with each other. A person may adopt the ethical principle that living a good life requires that she acquire as much knowledge as possible. Yet, she may also accept the moral principle that she should treat others with respect and dignity, even if they do not share her own ethical views. Note that this distinction is different from – though not unrelated to – the distinction between the right versus the good. This third distinction concerns the individual, micro-level more than the second distinction, which is concerned with the political structure of society. This is not to say that this distinction between morality and ethics has no implications on the macro-level of political discourse. Nonetheless, the ethical and moral distinction does indirectly implicate the proper role of a liberal government. This distinction when transposed to the macro-level tracks the right versus the good, and vice versa. So, the distinction between morality and ethics may be used on either the micro- or macro-level. The distinction between the right and the good, however, is used primarily at the collective, macro-level. In the remainder of my thesis, I will follow Dworkin and avoid using the right versus the good terminology. Rather, I will focus on the distinction between morality and ethics at both levels of discourse.

CHAPTER 2: DWORKINIAN LIBERALISM

My exposition on Dworkinian liberalism takes place on two levels of discourse: a micro- and a macro-level. At the *micro-level*, I focus on individual citizens and their interactions with each other. At the *macro-level*, I focus on the interactions between a Dworkinian liberal government and its citizens.[29] I first address the former level because understanding the principles by which citizens interact will help us to understand better the role of a liberal government. That is, the micro-level makes salient the groundings for the macro-level of political discourse. First, I address Dworkin's two principles of human dignity – viz., principles to which Dworkin argues most, if not all, citizens of a democratic society are committed. Then I discuss the proper role of government that emerges from these two micro-level principles. The proper role of government is to ensure that equal concern and respect is accorded to all citizens, and a just liberal government is one that abides by this abstract egalitarian principle. As will be demonstrated, a government that follows this principle will not be able to legislate ethical values – though moral and non-ethical values will be within its domain. Afterwards, I address how this role of the government aides us in finding compatible interpretations of liberal values (e.g., liberty, neutrality and equality) that have traditionally been taken to be in conflict with each other. My aim in this chapter is not to directly argue for gay rights. Rather, I strive to setup the basics of Dworkinian liberalism so that I may use the conceptual tools developed here to later rebuff criticisms against a liberal approach to the gay rights issue.

[29] I will often talk about the government or some state performing or 'doing' some action as though it were an autonomous entity. In other words, I am guilty of personification. I take a government or society to be an autonomous collective body consisting of a large number of persons.

(a) Two Principles of Human Dignity

On the micro-level of discourse, the level of individual citizens and their interpersonal communications, Dworkin holds that there exist two fundamental, abstract principles – *the principles of human dignity* – that all citizens share.[30] He contends that these two principles constitute the common starting ground where by genuine political arguments and debates can emerge. The first principle is called the *principle of intrinsic value*, and it has two parts.[31] The first part concerns the intrinsic, personal worth of the citizen's life, and consequently, of her goals and life-plans. The second part concerns the citizen's mutual recognition of the value and equal importance of leading a successful life for everyone. That is, it concerns the objective value of others' lives. The second principle of human dignity is the *principle of personal responsibility*.[32] This principle "holds that each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him. He must not accept that anyone else has the right to dictate those personal values to him… without his endorsement."[33] In other words, a person holds a special responsibility for deciding and ensuring the instantiation of *her* goals and life-plan. As will be noted later, I contend that these two principles, though mostly formal in nature, are weakly substantive. There exists a corresponding thin theory of the good emerging from these principles of human dignity.

The principle of intrinsic value concerns the objective value of human life: "[It] holds that once a human life has begun, it is of great and objective importance that it be successful rather than

---

[30] Dworkin, *Is Democracy Possible Here?*, 4. (This name for the two principles is reminiscent of certain aspects of the morality of Immanuel Kant, whose moral philosophy relies heavily on the notion of respect for human dignity [see Kant, *Groundwork for the Metaphysics of Moral*, ed. Thomas E. Hill, trans. Arnulf Zweig [New York: Oxford University Press, 2003]. In fact, in his later writings, Dworkin seems to accept a Kantian-like understanding of human dignity.)

[31] Dworkin does not split this first principle into two parts, but I think doing so will helps us better understand the nuances entrenched in the principle.

[32] Ibid, 17. (Earlier in *Sovereign Virtue*, Dworkin calls this principle the principle of 'special' responsibility. Despite the change in terminology, however, the content of the principle, however, has remained the same.)

[33] Ibid, 10.

wasted, and that this is of equal importance in the case of each human life."[34] This intrinsic value of human life is a formal consideration. A person's life is taken to have worth, even if he fails to lead a good life. He may consider his life good insofar as he instantiates his life-plan. Yet, despite whether he actually instantiates his personal life-plan or not, his life is still valuable. Dworkin admits that there exist objective standards of a good life beyond the formal consideration that one succeeds in one's goals and life-plan.[35] The correct objective standard of goodness is a matter to be determined by substantive ethical arguments at the micro-level of discourse among individual citizens. This consideration, however, does not diminish the formal consideration noted above.

Each person sees her own life as valuable. Once we recognize that our own personal life is valuable, we must also recognize that all human life is objectively, mutually valuable. Consider the following quote from Dworkin.

> If, like almost all Americans, you do not believe that there is anything about you that makes the success of your life particularly important objectively [compared to how anyone else's life goes], then on reflection you must admit to embracing the first principle of human dignity…. You must accept that this is equally important for each person because you have no ground for distinctions of degree any more than for flat exclusions. This step that I ask you to take, from first-person [i.e., personal] concern with the success of your own life to a recognition of the equal objective importance of all human lives, has of course very important moral and political consequences.[36]

---

[34] *Sovereign Virtue*, 240. (As Dworkin notes elsewhere, "This is a matter of objective, not merely subjective value; I mean that a human life's success or failure is not only important to the person whose life it is or only important if and because that is what he wants. The success or failure of any human life is important in itself, something we all have *reason* to want or to deplore" [*Is Democracy Possible Here?*, 9]. Dworkin is suggesting here that it is desirable that a life succeeds since every life is valuable. But a person, who fails to instantiate her life-plan may not deem her life to be particularly good, possess a life that is valuable nonetheless.)

[35] Dworkin himself affirms a much more robust account of the goodness of a life: "Most of us also think that the standard of a good life is objective, not subjective in the following sense. We do not think that someone is doing a good job of living whenever he thinks he is; we believe that people can be mistaken about this transcendently important matter" (*Is Democracy Possible Here?*, 12-13). What makes a life a good one will be dependent on how one responds to particular challenges. This *challenge model* of the good life is Aristotelian in nature: "The model of challenge holds that living a life is itself a performance that demands skill, that is the most comprehensive and important challenge we face, and that our critical interests consist in the achievements, events, and experiences that mean that we have met the challenge well" (*Sovereign Virtue*, 253). Dworkin takes this view of living the good life to be still purely formal. I believe, however, that the level of specificity and the terms spelled out by this account makes it much more substantive, and less formal, than the principle of intrinsic value. As noted by Matthew Clayton, however, one need not accept this challenge model in order to accept the principle of intrinsic value. Dworkin seems to hold that while the principle of intrinsic value is common to everyone, this challenge model is not (see Clayton, "Liberal Equality and Ethics," *Ethics* 113, (October, 2002): 8-22). In this paper, I bracket further discussion of this challenge model of a good life. It is an interesting account of living, but it is much more contentious than the first principle of human dignity.

[36] Dworkin, *Is Democracy Possible Here?*, 16.

I believe reciprocity is important here to Dworkin's argument. If I recognize that my life has intrinsic value and that this value is mutually shared by others, then I must also reciprocally recognize that others' lives have equal intrinsic value. In other words, by presupposing my own human dignity, I must reciprocally presume the dignity of others: "[I]t is impossible to separate self-respect from respect for the importance of the lives of others. You cannot act in a way that denies the intrinsic importance of any human life without an insult to your own dignity."[37] The first principle is not individualistic all the way down. Because of the reciprocal recognition of objective value, we all have reasons to concern ourselves with the lives of others within our society.

Regarding the principle of personal responsibility, Dworkin claims that "each of us has a personal responsibility for the governance of his own life that includes the responsibility to make and execute ultimate decisions about what life would be a good one to lead."[38] A person is responsible for the decisions she makes in creating and pursuing her goals; moreover she is responsible for the instantiation of those goals. The person cannot allow others to subordinate her will to decision of which goals and life-plan to pursue: "We may not subordinate ourselves to the will of other human beings in making those decisions; we must not accept the right of anyone else to force us to conform to a view of success that but for that coercion we would not choose."[39] Like the first principle of human dignity, this second principle is more or less formal. I believe this is a principle shared by the majority of persons regardless of his or her ethical framework. We do hold ourselves accountable for our actions and decisions. We sometimes do make appeals to cultural and environmental factors to excuse some of our actions. Yet, ultimately, the citizens of a liberal society share

[37] Ibid. (This claim is also very Kantian in nature.)
[38] Ibid., 17.
[39] Ibid.

the common belief that they are responsible for their own persons.[40] The principle of personal responsibility is also objective and not individualistic all the way down. Here again, I believe that reciprocity plays an important role. When I recognize my special responsibility for my decisions and life-plan, I must reciprocally recognize others' responsibility to do the same.[41] My decisions and actions affect others, and their decisions and actions affect me. Therefore, by reciprocally recognizing the personal responsibility that others have, I recognize our mutual objective responsibility to one another.

Two last exegetical notes are needed. First, according to Dworkin, the principle of intrinsic value tracks what we normally take to be the concept of equality, and the principle of personal responsibility tracks the concept of liberty. Moreover, note that these two principles are not in conflict with each other. Rather, they complement one another. The second exegetical point concerns the formalistic nature of the two principles. Dworkin, himself, takes these principles of human dignity to be purely formal. I agree that the principles are mostly formal, but it is clear that they are at least thinly substantive. The principle of intrinsic value leaves much to the discretion of the citizen herself as to what and how she is to succeed in life. In addition, success here can be either performative (i.e., what counts is that one strives to succeed) or impact driven (i.e., what counts are the successful outcomes one is able to instantiate). The first principle must entail at least one particular substantive, objective standard of what constitutes an ethically good life: viz., that a good life will be one in which you care and respect other persons' lives. That is, one objective standard of goodness is that

---

[40] Here I stress again that I am concerned primarily with a liberal society. One could imagine an oppressive, Orwellian society in which most of its citizens are not strictly speaking responsible for their own decisions and life-plans. But then it seems that in such a society, the second principle of human dignity would be violated.

[41] As Dworkin puts it, "The values and actions of other people may influence us in a more diffuse and *reciprocal* way: through their impact on the culture in which we all live" (*Is Democracy Possible Here?,* 17; emphasis added). Later on he states, "Once again none of us has any reason to think that he alone has that responsibility and that other human beings do not. There is nothing about any of us that could account for that difference…. We do think that some people are not capable of deciding important issues themselves. But this is a matter of capacity, not status, and the capacity in question is basic rationality, not even normal skill" (ibid., 20).

whatever your life plans, the life-plan must include the objective and respectful valuation of all human life.

Like the first principle I contend that the second principle, though generally formal, is thinly substantive. For instance, if we take the first principle in conjunction with this second one, we see that a person is additionally (reciprocally) responsible for the objective and respectful valuation of the lives of others. Insofar as she fails to accord equal respect and concern for the lives of others', she is behaving irresponsibly. Moreover, in a similar fashion, a person who fails to construct or instantiate her own life-plan fails to recognize rationally the value of her own life. If a person accepts goals imposed on her by others without her own genuine endorsement – thereby failing to construct and instantiate her own life-plan – she fails to recognize the potential value of her own life. She is accountable for this failure. The formalistic complementary nature of the two principles entails that they are substantively complementary.[42]

[42] Given our earlier distinction between ethics and morality, Dworkin is unclear as to which of the two realms of discourse he takes the two principles of human dignity to span. The fact that the principles were originally called principles of 'ethical individualism' would suggest that the principles concern only the ethical (c.f., *Sovereign Virtue*). Dworkin changed his terminology in his later writings by calling these two principles, the principles of human dignity (c.f., *Is Democracy Possible Here?*). No doubt this change was done to mitigate any confusion that may result from discussing these two micro-level principles and the distinction between the ethical and the moral. That these principles are purely ethical in nature is not completely correct, given what I mentioned earlier concerning the principles' robustly formal and thinly substantive natures. The two principles taken together imply that individual citizens should respect human dignity (i.e., value human life) as an ethical good – as part of their life plans. This consideration seemed more pertinent to ethics. Yet, I also noted that the two principles imply that we are responsible not only for our own decisions but also for valuing the lives of others. In other words, we are to be held accountable if we fail to treat others respectfully. This responsibility to the respectful and objective valuation of life is at least one thing we owe morally to each other. I take the slightly vague extension of the two principles to be a virtue and not a vice. It is no happenstance that the two principles are complementary just like ethics and morality. I cannot see any disadvantages spawning from this vagueness. As will be seen shortly, what matters ultimately is that a legitimate liberal government designs its institutions and structures around the fact that its citizenry affirms these principles of human dignity. What really matters in fulfilling the gay rights demand is how these principles play out on the macro-level of political discourse.

(b) The Role of a Liberal Government

The *abstract egalitarian principle* is the macro-level manifestation of the two micro-level principles of human dignity. This fundamental macro-level principle holds that the central role of a liberal government will be to show equal respect and concern for each citizen. Below, I will discuss how the two micro-level principles of human dignity lead us to this macro-level principle. I also address some anticipated objections to the principle. Addressing these objections early on will make salient some key features of this foundational macro-level principle. In the subsequent section, I discuss the distinction between ethical, moral and non-ethical values that emerges from our discussion of the micro- and macro-level principles and the distinction between the ethical and the moral. A government that abides by the abstract egalitarian principle is politically obligated to never endorse ethical values. The rest of this section will focus on what Dworkin calls the 'unity of value.' Contrary to Isaiah Berlin[43], and other advocates of value pluralism, Dworkinian liberalism takes values like equality, liberty and neutrality to be completely compatible with (indeed, complementary to) each other. A liberal government need not sacrifice one or more to preserve the other.

i. Principle of Equal Concern and Respect.

As Dworkin puts it, "Any [liberal] society faithful to these two principles [of human dignity] must adopt legal and institutional structures that reflect equal concern for everyone in the community, but it must also insist, out of respect for the second principle, that the fate of each [citizen] must be sensitive to his own choices."[44] First, the government must respect the value of human life; i.e., the principle of intrinsic value requires the state to recognize the humanity and dignity of its citizens.

---

[43] Isaiah Berlin, "Two Concepts of Liberty," in *Liberty: Incorporating Four Essays on Liberty* (Oxford: Oxford University Press, 2002).
[44] Dworkin, *Sovereign Virtue*, 324.

Second, the government must acknowledge the proper responsibility of its citizens to determine for themselves the good life; i.e., "the principle of personal responsibility allows the state to force us to live in accordance with collective decisions of moral [values], but it forbids the state to dictate [substantive] ethical convictions in that way."[45] These micro-level principles affect the macro-level. At the macro-level of governance, the *abstract egalitarian principle* emerges from the two principles of human dignity. The principle requires that the "government must act to make the lives of those it governs better lives, and it must show equal concern for the life of each [citizen]."[46] On the macro-level, the abstract egalitarian principle holds lexical priority to all other macro-level principles. Any other principles on which a government can justify its actions must be harmonious with this macro-level principle of equal respect and concern. That is, the latter subsumes the former.[47]

Additionally, there exists an intimate nexus between the abstract egalitarian principle and the *legitimacy principle* (i.e., a principle that stipulates when a government or its actions and policies are politically legitimate):

> No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance. *Equal concern is the sovereign virtue of political community* – without it government is only tyranny – and when a nation's wealth is very unequally distributed, as the wealth of even very prosperous nations now is, then its equal concern is suspect.[48]

A legitimate liberal government will structure its institutions in ways that will express equal respect and concern for each citizen, in ways that respect the human dignity of its citizens. A government may in good faith pursue a course of action that actually turns out to be an inappropriate interpretation of the abstract egalitarian principle. Dworkin holds this to be true for Germany and its

---

[45] Dworkin, *Is Democracy Possible Here?*, 21. (I qualify Dworkin's statement because, as noted earlier, I believe that the two principles of ethical individualism are at least weakly substantive. The citizens must include in their life-plans the respectful and objective valuation of human life and they are each responsible for treating others with equal dignity and respect.)

[46] Dworkin, *Sovereign Virtue*, 128.

[47] In other words, the abstract egalitarian principle offers a justification for various governmental sanctions and public policies. All else being equal, governmental actions are sanctioned when they are grounded in considerations of equal respect and concern.

[48] Dworkin, *Sovereign Virtue,* 1. (emphasis added)

restriction on any free speech that purports the Holocaust to be a Jewish fiction.[49] Such a government is not abiding by an appropriate interpretation of the fundamental macro-level principle, but it may be nonetheless legitimate. Legitimacy is a matter of degrees: "A legitimate government must treat all those over whom it claims dominion not just with a measure of concern but with *equal* concern. I mean that it must act as if the impact of its policies on the life of any citizen is equally important. On this account political legitimacy is not an all-or-nothing matter but a matter of degree."[50] It follows that a government, which continues to knowingly or naively violate the abstract egalitarian principle, will weaken the legitimacy of its political regime.

Naturally, there emerge some concerns with the abstract egalitarian principle. I will address them here because I believe that responding to them will make more salient some significant, yet nuanced, features of the abstract egalitarian principle. The first concern is that the principle is very abstract. How is a society to know when it is following the egalitarian principle? In other words, how can a government be sure that one of its acts or policies follow the principle? Dworkin acknowledges that there may exist different interpretations of this principle. That is, there can be different instantiations of the abstract egalitarian principle. In addition, how this principle is implemented and interpreted by a particular society will depend on social, cultural and historical circumstances. For instance, consider two interpretations of political democracy: a social democracy versus a liberal democracy. A social democracy may provide single-payer universal health insurance to its citizenry, while a liberal democracy, valuing the free market to a greater extent than the social democracy, may instead choose to provide subsidies to enable its citizens to purchase private health insurance. Both political regimes respect the intrinsic value and personal responsibilities of citizens. Both are acceptable instantiations of the abstract egalitarian principle.

---

[49] See Dworkin, *Is Democracy Possible Here?*, 33-36; *Freedom's Law*, 223-224.

[50] Ibid., 97. (To the question of "What test must a government meet to be legitimate?" Dworkin replies that "[w]e cannot say that it is not legitimate unless it is perfectly just: that would be too strong a requirement because no existing government is perfectly just" [95].)

This contrast between social democracy and liberal democracy highlights one of the benefits of the abstract egalitarian principle. It is *abstract*; it allows for multiple interpretations of what it means for a government to express equal respect and concern. The principle allows for flexibility given a state's culture and other historical peculiarities. Yet, the principle's level of abstraction does set formal parameters for interpretation: not everything goes. The content of the principle itself set the boundaries of the possible spectrum of interpretations. What ultimately matters is that both countries attempts in good faith to realize the abstract egalitarian principle. Very much like how citizens at the micro-level are living the good life when they instantiate their goals and life-plan so too will a liberal government show equal respect and concern for its citizens when it instantiates the abstract egalitarian principle.[51]

The second concern revolves around the difference between a government expressing equal concern and respect and treating equally its citizens. The question is whether there is a substantial difference between the two. Many political philosophers are wholeheartedly opposed to equalizing treatment, arguing that such treatment normalizes the citizenry.[52] If equal concern and respect is the same as equal treatment, and equal treatment is undesirable as a political principle, then so too will equal concern and respect be undesirable. The two, however, are not the same: "In some circumstances the right to treatment as an equal [i.e., equal respect and concern] will entail a right to equal treatment, but not, by any means, in all circumstances."[53] According to Dworkin, the right to equal treatment is "the right to an equal distribution of some opportunity or resource or burden." On the

[51] Again, here I am using instantiation to be inclusive of attempting to bring about some *X*. Whether *X* is actually realized is not important here. What matters is that the government strives to realize the abstract egalitarian principle. Perhaps given social, cultural and historical circumstances (e.g., pandemics, natural disasters, economic instabilities, etc.), a government is not able to fully realize the principle. Even so, I believe such a government may be acting in a way that expresses equal concern and respect for its citizens – given that it has attempted to do so in earnest.
[52] For a detailed historical survey of anti-egalitarian political theories, see Sanford A. Lakoff, *Equality in Political Philosophy*, Harvard Political Studies (Cambridge: Harvard University Press, 1964).
[53] Dworkin, *Taking Rights Seriously*, 227.

other hand, the right to treatment as an equal is "the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else."[54]

In fact, a government will oftentimes come to realize the abstract egalitarian principle more fully when it treats its citizens unequally. Consider the weighing of 'hard factors' in law school admissions. Consider Winston and Larry. Both went to Cornell University for undergraduate, and both applied to the University of Michigan Law School. During their times at Cornell, Winston was an all too frequent patron of the North Campus fraternity scene, while Larry frequented Libe Café at Olin Library instead. As a result, Winston graduated with a 3.0 GPA, and Larry with a 3.8 GPA. Come springtime, Larry gains admission to Michigan while Winston is rejected. Should Winston feel that an injustice has been committed? A definitive no. The admissions board did take the time to review his application, thereby showing that it values him. Yet, the admissions board ended up treating the two differently. Winston's fundamental right to equal respect and concern has not been harmed.[55] A corollary of this example is that a liberal government may choose to pursue some public policy even if by doing so the government does not treat all its citizens the same. No one has a right to equal treatment irrespective of the right to equal respect and concern. Equal treatment, insofar as it can be a right or privilege, must be subsumed under equal respect and concern.[56]

---

[54] Ibid.

[55] As Dworkin states, "An individual's right to be treated as an equal means that his potential loss must be treated as a matter of concern, but that loss may nevertheless be outweighed by the gain to the community as a whole. If it is, then the less intelligent applicant cannot claim that he is cheated of his right to be treated as an equal just because he suffers a disadvantage others do not" (ibid., 227-228).

[56] This analysis can be extended to the case of affirmative action in higher education. As Dworkin notes in his commentary (*Taking Rights Seriously*, 227) on *Defunis v. Odegaard* [94 S. Ct. 1704 (1974)], wherein the plaintiff petitioned the Supreme Court to rule unconstitutional the affirmative action based practice of the University of Washington Law School:

> Defunis does not have a right to equal treatment in the assignment of law school places; he does not have a right to a place just because others are given places. Individuals may have a right to equal treatment in elementary education, because someone who is denied elementary education is unlikely to lead a useful life. But legal education is not so vital that everyone has an equal right to it.
>
> Defunis does have the second sort of right – a right to treatment as an equal in the decision as to which admissions standards should be used. That is, he has a right that his interests be treated as fully and sympathetically as the interests of any others when the law school decides whether to count race as a pertinent criterion for admissions. But we must be careful not to overstate what that means.

The third concern takes both the first and second concerns and looks at them from a more cynical standpoint.[57] Consider a society, S, which not only claims to abide by the abstract egalitarian principle, it also claims to treats all its citizens the same. It has the best of both worlds. This society holds everyone's life to have the same objective value. Furthermore, it treats everyone equally – equally bad. Can we classify such a society as a Dworkinian liberal state? I believe that this concern does not fully appreciate the nuances of the abstract egalitarian principle. Recall earlier that the principle is abstract for a reason. Its abstractness allows for different interpretations that factor in cultural, social and historical contexts. Yet, the fact that the principle is derived from the two principles of human dignity, which are foundational at the micro-level, means that there are parameters to what counts as an appropriate interpretation. Clearly, S's interpretation of the principle, P_S, is not an acceptable one that falls within the formal parameters. A government that treats its citizens very poorly, but equally, does not respectfully and objectively value the humanity of its citizens: "We might say that [S's] individual [citizens do not] have a right to equal concern and respect in the design and administration of the political institutions that govern them."[58] The ruling body of S might object and say that it does value the lives of its citizens – it just values them equally little. Something is odd about this response. When you respectfully and objectively value another person's dignity, it is inconsistent to claim that you are continuing to value very little of it. Deeming someone's life as worthless is not by any stretch of the imagination deeming her life to have worth. Clearly, valuing someone's dignity cannot be measure on a continuous scale as such. Either you recognize the objective value of someone's life (i.e., you recognize her dignity) or you do not. To recognize someone's life as having little value is not to objectively and respectfully value the person. In addition, taking a person's life to be of little value also violates the principle of personal responsibility. By viewing someone's life as having little value, you also must think the person incapable of taking responsibility

[57] I would like to thank Professor Altman for bringing this important objection to my attention.
[58] Dworkin, *Taking Rights Seriously*, 180.

for his or her decisions. This entailment is so because, as mentioned earlier, the two principles of human dignity are complementary. A person whose life has little value would find it difficult to live a good life, since a life's having objective value is a bare minimum requirement for a life turning out good. And so, since the person is precluded from living a good life (i.e., she cannot strive for some goal or life-plan that she endorses), she cannot be held responsible for making her own decisions as to what the good life is and how to pursue it. I cannot be responsible for choosing to become a philosophy graduate student if, indeed, I had not genuinely decided to do so. This last concern makes explicit the advantage of choosing equality to mean equal respect and concern (i.e., the abstract egalitarian principle) over equal treatment:

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern…. I propose that the right to treatment as an equal must be taken to be fundamental under the liberal conception of equality, and that the more restrictive right to equal treatment holds only in those special circumstances in which, for some special reason, it follows from the more fundamental right.[59]

Clearly, a government that treats its citizenry equally poorly violates the abstract egalitarian principle. Treating all citizens equally poorly cannot be justified by the fundamental macro-level principle of equal respect and concern.

ii. Ethical, Moral & Non-Ethical Values.

Given our discussion of the distinction between the ethical and the moral and the micro- and macro-level principles, there emerge three distinct kinds of goods: ethical, moral and non-ethical values. Recall that the ethical concerns the goals and life-plans individual citizens wish to pursue; it

[59] Dworkin, *Taking Rights Seriously*, 272-273.

concerns the good life. Included in these goals and life-plans are ethical values. An academic presumably will value knowledge and discovery; an athlete presumably will value physical strength and performance. Assuming that both the academic and athlete pursue in good-faith these goods, both persons will instantiate different ethical values. The moral realm concerns what we owe to each other. As such, there emerge certain moral values: e.g., personal autonomy, property, moral standing, accountability, etc. The academic and the athlete may both value the same moral good. Both might deem important the moral obligation arising from the moral standing we occupy. Non-ethical values constitute the third class of values. Some clear candidates for non-ethical values include goods like education, health, political involvement, personal and political stability, and so on. However, a problem arises. Surely someone may interpret these non-ethical goods to be ethical values, to be values by which they construct their life-plans. Imagine the academic who considers a life filled with education to be good, and one without to be bad. How are we to draw a definite distinguishing line between ethical and non-ethical values? Dworkin's answer requires us to look at the kind of justificatory considerations involved in valuing these goods. At the macro-level, the government cannot justifiably endorse ethical values. Yet, there are certain goods that a liberal state justifiably pursues that do not fit properly within the purview of moral values. Appeals to non-ethical value considerations may provide adequate justification for governmental endorsement of these goods, which are not nicely contained within the realms of ethics and morality.

While ethical values are justified by considerations appealing to the good life, non-ethical values are not. For the former class of values, personally judgmental justificatory considerations are made. For the latter class of values, impersonally judgmental justificatory considerations are made. [60] A *personally* judgmental justificatory consideration refers to some robust theory of the good life: "[This justification] appeals to or presupposes a [substantive] theory about what kinds of lives are in-

[60] This distinction between justificatory standpoints is reminiscent of Thomas Nagel's personal and impersonal standpoint. See Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991).

trinsically good or bad for the people who lead those lives. Any justification for making sodomy illegal that cites the immorality [i.e., unethical nature] or baseness of that sexual practice is personally judgmental."[61] An *impersonal* judgmental justificatory consideration, however, does not make appeal to a theory about the good life. Instead, it concerns the "value of some impersonal object or state of affairs rather than to the intrinsic value of certain kinds of [good] lives."[62] There are no specific substantive constraints with respect to these state of affairs; there is, however, the formal constraint that whatever the content of these state of affairs, they must not concern what it means to lead the good life.[63] If the academic appeals to an impersonal judgmental justification in valuing education, he will be valuing it as a non-ethical good. He takes on a detached, impersonal standpoint. For instance, perhaps he values education because it helps makes his fellow citizens smarter. And by having a more educated citizenry, his society may turn out to be more technologically advanced than other less educated societies. Technological advancement of one's society may be taken as an impersonal state of affairs insofar as no appeal to the good life is made. The non-ethical good may be valued instrumentally or intrinsically. My example involves the instrumental, non-ethical valuation of education. On the other hand, education may be valued because it is an intrinsically valuable societal good. The academic or the government may value education in and of itself.

Additionally, we see the intrinsic valuation of non-ethical goods often in cases involving culture, tradition, art, and so on. For instance Dworkin, in his argument concerning how a liberal state

---

[61] *Is Democracy Possible Here?*, 70-71.

[62] Dworkin, *Is Democracy Possible Here?*, 71. (Dworkin herein states that "the principle of personal responsibility distinguishes between these two kinds of judgmental justifications because it insists only that people have responsibility for their own ethical values, that is, their own convictions about what their life has intrinsic importance and what kind of life would best realize that value for them. It does not give them immunity from laws that protect impersonal values like natural or artistic treasures. So government does not offend that principle when it adopts zoning schemes to protect architectural or historical integrity of some part of a city, for example, or when it uses public funds collected in taxes to support museums.")

[63] Though Dworkin does not always make it explicit, non-ethical values do not include moral values. The object of non-ethical values is some impersonal state-of-affairs. The object of moral values is our interpersonal interaction with each other. We may value being able to make moral claims on each other, but we need not value this ability non-ethically. A person can morally value the ability to originate moral claims, but she need not deem it as valuable because it helps to bring about some objective state-of-affairs.

can justifiably endorse and promote the arts, points out the impersonal standpoint the liberal state occupies. Dworkin gives a 'structural' argument for art. There are two distinction consequences of the state's endorsement of art: i) the actual artworks themselves (e.g., paintings, novels, etc.) that individuals citizens may derive pleasure from and ii) a richer, more diverse and innovative structural framework. This latter consequence is the kind of appropriate impersonal justification for governmental endorsement of art: "[Art] provides the structural frame that makes aesthetic values of that sort possible, that makes them values for us."[64] Similar to how language enables us to communicate in more diverse and innovative ways (i.e., it provides us with a structural framework wherein we can do, act, think, live in a vast array of ways), art and culture does the same. As Dworkin puts it, "[T]he structural aspect of our artistic culture is nothing more than a language, a special part of the language we now share.... [It] depend[s] on a shared vocabulary of tradition and convention."[65] So the content of the impersonal state of affairs concerns the structural aspect of art:

> [A]rt qualifies for state support.... But art qualifies only on a certain premise: that state support is designed to protect structure rather than to promote any particular content for that structure at any particular time. So the ruling star of state subsidy should be this goal: it should look to the diversity and innovative quality of the culture as a whole rather than to (what public officials take to be) excellence in particular occasions of that culture.[66]

The valuation of art is impersonal because it does not appeal to some robust, comprehensive theory of the good life. The liberal state is not claiming that citizens will need to appreciate the great works of art in order to fully flourish. The content of the structural framework is not important here.

Ethical, moral and non-ethical values permeate both the micro- and macro-levels of political discourse. At the micro-level, citizens are able to endorse all three types of values. They may use ethical, moral or non-ethical arguments to persuade their fellow citizens to adopt the same values. At

---

[64] *A Matter of Principle*, 229.
[65] Ibid., 231.
[66] Ibid., 233.

the macro-level, the situation changes. Given that the primary role of any legitimate government is to express equal respect and concern for its citizens, a distinction emerges between the values it may and may not endorse. In particular, the abstract egalitarian principle politically obligates "the state to force us to live in accordance with collective decisions of moral principle, but it forbids the state to dictate ethical convictions in that way."[67] A Dworkinian liberal state is politically obligated to endorse moral values generally held by its citizens. The government, however, is prohibited from endorsing ethical values. The government has broad discretion concerning which non-ethical values it wishes to endorse. Dworkinian liberalism, however, relies on a qualification concerning the appropriateness of non-ethical values. A government may value a non-ethical good insofar as the government has good reasons to believe that the arguments for the value are plausible and that endorsements of the good will not violate both the micro- and macro-level principles.[68] Furthermore, once a liberal state chooses to endorse a non-ethical good, the principle of equal respect and concern politically requires the state to be unbiased and fair in its distribution and application of the good.

Let us take a closer look at why the above is true. First consider moral values. When we live by the principles of human dignity, we recognize that we are to be held responsible for our decisions and their effects on others. There emerge moral obligation and accountability between individual citizens. A government will fail to fulfill its primary role if it does not require that its citizens live by the moral values emerging from the two micro-level principles. We owe it to each other that we do not go around stealing, harming or deceiving others. A liberal government endorses these moral values when it makes theft, murder and perjury criminal: "The government we elect exercise dramatic coercive power. It forces individual citizens to act in ways that we, through it, demand. We extract

[67] *Is Democracy Possible Here?*, 21. (Dworkin makes this statement with the principle of personal responsibility as subject. As I have mentioned earlier, these two principles of human dignity are complementary and go hand in hand. And since the abstract egalitarian principle, the principle which stipulates the role of a liberal government, is derived from considerations of both principles of dignity, I contend that what Dworkin states here can also be applied to the principle of intrinsic value.)

[68] Henceforth, any discussion of likely candidates for governmental endorsement of non-ethical values will implicitly rely on this 'appropriateness' of valuation qualification.

people's money or property through taxes, and we put them in jail…. We not only do all this but also claim a right to do it: we expect our fellow citizens to treat our collective [moral] demands as creating not just threats but moral obligations…. We must satisfy moral conditions before we are entitled to that authority."[69] Therefore, acceptance of the macro-level principle presumes the recognition of moral values as a legitimate basis for legislation.

The Dworkinian liberal government may not endorse ethical values, though it may endorse non-ethical values. By endorsing some ethical value, the government will be taking on an inconsistent political standpoint. Consider a Dworkinian liberal state composed of 10 academics and 5 athletes. Suppose that all 10 academics want the government to subsidize the building of a biological laboratory on a particular plot of land, because they think that a life led in the ivy towers is the best life any individual person may lead. The 5 athletes oppose the building of the laboratory, and they would rather the government subsidize the construction of an Olympic-sized swimming pool on the same plot. The issue is put to a vote. Since the majority of citizens want a laboratory, the government subsidizes the construction of a research facility.[70] If the government subsidizes the construction of the research facility on the grounds that most of its citizens consider knowledge to be an ethical value worth pursuing, then it is endorsing knowledge as an ethical value. The state is affirming the robust ethical theory that knowledge is required for human flourishing. It is legislating from an ethical, personally judgmental standpoint. In this case, the government is disrespecting the human dignity of its citizens. It is asserting that certain life-plans are better than others; i.e., that the academics' life-plans are better than the athletes'.

It is important to note that a liberal government may (and at times is politically obligated to) tolerate the ethical views of its citizens. Individual citizens are allowed to associate freely with one

---

[69] Ibid., 95.

[70] Again, it is important to note here that the government is taken to be a collective. Though this collective has the same extension as its citizenry, it has a different sense. The collective government is not reducible to its citizens.

another. These associations may be built on some ethical foundations, and they may give rise to different communities within a society.[71] Provided that these ethical considerations are appropriate and do not violate the principles of human dignity, the government is obliged to tolerate these ethical communities. If it did not, then the government would be an oppressive one. Suppose that an academic, who became rich after discovering a cure for some persistent infectious disease, bids for the plot of land at a public auction and wins. The land is now his. If he decides to allow for construction of a laboratory on his land because he thinks that a good life consists in empirical investigation, then all else being equal the government must tolerate his ethical choice.[72]

On the other hand, if the government has non-ethical, impersonally judgmental considerations for subsidizing the construction of the research facility, then it may do so provided that these reasons are appropriate. As Dworkin puts it, "If government limits the freedom of timber companies in order to protect great forests, it appeals to the impersonally judgmental justification that such forests are natural treasures."[73] Let us look back at our example. If the government subsidizes the construction of the laboratory because it deems having a laboratory to be conducive to some non-ethical value (say, that the laboratory will produce cures for many infectious diseases and improve the national health of citizens), then its endorsement of the project is permitted. Again, governmental endorsement of a non-ethical value does not disrespect the human dignity of its citizens. For Dworkin, the government "must distinguish between laws that violate dignity by usurping an individual's responsibility for his own ethical values and those that exercise a community's essential col-

---

[71] This distinction is made by Rawls: "I believe that a democratic society is not and cannot be a community, where by a community I mean a body of persons united in affirming the same comprehensive, or partially comprehensive, doctrine" (*Justice as Fairness: A Restatement*, 3).

[72] A government need not always tolerate individual citizen's ethical beliefs and choices begrudgingly. I believe that a government will begrudgingly tolerate some citizens' ethical choice only if it conflicts with governmental endorsed non-ethical values. Perhaps, the government values exercise and performance because it desires a physically fit and strong population from which it may pool for military service. If so, then the government would be tolerating the academic's choice to building a research facility begrudgingly. In America, this kind of begrudging toleration happens often with free speech cases involving neo-Nazis and bigoted racists. However, I do not believe that this begrudging attitude is attached to all forms of toleration. There may exist complete indifference by the government.

[73] *Is Democracy Possible Here?*, 71.

lective responsibility to identify and protect nonethical values."[74] The government is not showing preference for one kind of good life over another, nor is it failing to recognize each citizen's responsibility for determining their own goals and life-plans.

A critical note before moving on. Dworkin admits that in practice, this distinction between values may be hard to delineate.[75] This common difficulty, however, does not diminish the distinction. As Dworkin points out, the Supreme Court made salient this distinction in its ruling in *Lawrence*. Dworkin contends that the court "decided that sexual orientation and activity are also a matter of ethical value rather than some other form of value."[76] Sexual orientation generally constitutes an important part of many people's lives. They concern convictions about the ethical value of our own lives. In other words, "[t]hese beliefs and commitments fix the meaning and tone of the most important associations people form; they are drawn from and feed back into their more general philosophical beliefs about the character and value of human life."[77]

iii. Liberty, Neutrality and Equality.

Liberty, neutrality and equality are all interpretive concepts: "We agree that each names a virtue, and we agree on obvious examples of what would be a violation of equality or liberty... but part of politics consists in arguing about what, more precisely, within the limits of these paradigms, the virtues consist in."[78] I bracket the issue of whether these values are in fact valuable, though I like Dworkin believe that they are. I want to focus more on the suppose conflict arising between liberty, neutrality and equality. For Dworkin, the traditional interpretation of liberty does conflict with

---

[74] Ibid.
[75] Ibid., 73. (As Dworkin states, "No doubt we can think of more troublesome cases in which it is less clear to which of these categories some belief or conviction belongs. The decisions of constitutional courts charged with enforcing the distinction between these categories are sometimes difficult. But the distinction is nevertheless crucial.")
[76] Ibid., 72.
[77] Ibid. (This consideration will be very important in my later analysis of Dworkinian liberalism.)
[78] Dworkin, "Do Values Conflict? A Hedgehog's Approach," 255. (Dworkin also considers concepts like democracy and community to be interpretive.)

equality. Traditional conceptions of liberty like Mill's or Berlin's make explicit reference to freedom.[79] As we saw earlier, equality is preserved when a government treats its citizens with equal respect and concern. This conception of equality surely would conflict with a traditional interpretation of liberty as freedom from outside interference to do what one wants. Consider distributive justice. If a government were to be completely laissez-faire (without some bare social minimum, difference principle, public works funding, etc.), then situations would arise in the distribution of goods that conflict with equality. Extreme inequality may arise, even if no one's liberty was hindered. Clearly, a government that allows for such inequality would not be treating all its citizens with equal respect and concern. If the citizens in the lowest end of the income-bracket are struggling to live, then a government that chooses not to intervene does not recognize the value of their lives. Dworkin concludes that the best concept of liberty includes "the set of rights that government should establish and enforce to protect people's personal ethical responsibility properly understood."[80] On the micro-level, liberty is constrained by the two principles of human dignity; on the macro-level, liberty is constrained by – but does not conflict with – the abstract egalitarian principle. A government that acts out of equal respect and concern for its citizens must necessarily respect the liberty of its citizens. The government must acknowledge that citizens can choose their own goals and make their own decisions. It fails to respect its citizens' liberties when it accepts or endorses ethically-laden legislation. If this situation does arise, then individual citizens are justified in invoking a rights-based

---

[79] Berlin, "Two Concepts of Liberty"; John Stuart Mill, *On Liberty and Other Essays*, ed. John Gray (New York: Oxford University Press, 2008).

[80] Dworkin, *Is Democracy Possible Here?*, 67. (Cashed out in terms of distributive justice, equality concerns primarily equality of resources: "Equality is preserved when no one envies the package of work and reward than anyone else has achieved" ["Do Values Conflict?"; 253]. Liberty consists of "your freedom to dispose as you wish of property or resources that have been awarded to you under a reasonably fair system of property and others laws [i.e., wherein there is equality of resources], free from interference of others, so long as you violate no one's rights" [ibid, 254]. 'Freedom' here is not taken in the political sense. What Dworkin means by 'freedom' is that "any time the government prevents someone from acting as he might wish, it limits his freedom [*Is Democracy Possible Here?*; 67].)

justification (i.e., rights as trumps) as a way to prevent the government from realizing the ethical value.[81]

Likewise, neutrality does not conflict with equality. There exists a traditional conception of neutrality as a fundamental (and foundational) principle of a liberal society. This traditional conception of neutrality is usually associated with some principle of toleration or indifference.[82] The government is taken to be completely indifferent to moral and ethical considerations. Dworkin's conception of neutrality, however, takes "as fundamental the idea that government must not take sides on moral [i.e., ethical] issues, and it supports only such egalitarian measures as can be shown to be the result of that principle."[83] A liberal government must generally be neutral with respect to the kind of lives its citizens wish to pursue:

> [Equality] must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of his equal worth. This abstract egalitarian principle requires liberals to oppose the moralism of the New Right, because no self-respecting person who believes that a particular way to live is most valuable for him can accept that this way of life is base or degrading… So liberalism as based on equality justifies the... principle that government should [be neutral] and not enforce private morality of this sort.[84]

As such, neutrality is to be determined within the parameters set out by the abstract egalitarian principle. If a government remains neutral despite there being some extreme (political and distributive)

---

[81] Dworkin takes rights to be used as 'trump cards' by individual citizens: "[T]hey will enable individuals to resist particular decisions in spite of the fact that general institutions that are not themselves challenged. The ultimate justification for these rights is that they are necessary to protect equal concern and respect; but they are not to be understood as representing equality in contrast to some other goal or principle served by democracy or the economic market" (*A Matter of Principle*, 198).

[82] This principle is also commonly associated with the liberal's 'harm principle.' For more information see, Mill, *On Liberty and Other Essays*.

[83] Dworkin, *A Matter of Principle*, 205. (N.b.: I am not misrepresenting Dworkin with my qualification to his quote. Again, I qualify this quote because in his earlier writings, Dworkin does not make explicit reference to the ethical and the moral terminology. I do not believe, however, that Dworkin's earlier philosophical position differs much from his more recent writings in this regard. He is still committed to this distinction throughout his writing and especially in this quoted selection. Elsewhere in *A Matter of Principle* wherein he discusses two possible conception of equality: i) equal respect and concern (i.e., Dworkinian equality) and ii) perfectionist equality. In discussing i), Dworkin comments that this conception of equality "supposes that government must be neutral on what might be called the question of the [ethical] good life" [191].)

[84] Ibid., 205-206. (Again, see footnote [62]. Evidently, the later Dworkin would substitute in 'ethics' for 'moralism.')

inequalities in its society, then the government does not show equal respect and concern for its citizens. The government is behaving unjustly.

Another reason why neutrality cannot be the constitutive property of a liberal government emerges. Recall the distinction between moral, ethical and non-ethical values. A government need not be neutral when it comes to non-ethical values. Government sponsorship of art is an example. A liberal government can justify its construction and maintenance of an art museum by appealing to impersonal (i.e., non-ethical) judgmental considerations. Perhaps a liberal society can justify its promotion of art to citizens, who might not necessarily see art as an ethical value to be pursued, on the non-ethical grounds that "art makes a general contribution to the community as a whole, not just to those who enter into special commercial [and ethical] transactions to enjoy it, a contribution that is not extrinsic to aesthetic and intellectual experience, but one that on the contrary, is exactly of that character."[85] Whether this impersonal consideration is appropriate will be determined by arguments from policy. If the argument from policy is sound, then it will be a legitimate course of action for the liberal government to pursue. Therefore, the government need not be neutral with respect to non-ethical values.

[85] Ibid., 225.

CHAPTER 3: CHALLENGES TO A LIBERAL THEORY OF GAY RIGHTS

As mentioned at the start of the paper, I believe that Dworkinian liberalism has the conceptual tools and principles needed to fulfill the gay rights demand. Before arguing for this point, let us first consider some objections to Dworkinian liberalism. These criticisms are leveled both by proponents and opponents of gay rights. I discuss two main classes of criticisms. The first class, I call *internal criticisms*: viz., even if we assume a Dworkinian liberal framework, it is nonetheless too neutral to fulfill the gay rights demand. These critics contend that Dworkinian liberalism can only suppress criminal sanctions against homosexuals, but it cannot guarantee the civil endorsement of same-sex marriages. The second class, I call *external criticisms*: viz., there are value considerations external to the Dworkinian liberal framework that politically obligate a government to discriminate against same-sex relations. Dworkinian liberalism is an inadequate political framework because it does not sufficiently take into account these external values. As will be argued in the next chapter, these internal and external criticisms are surmountable. Once a liberal government realizes its proper role, it must not bar same-sex relations on ethical grounds. Moreover, it will support said relations on the same moral or non-ethical justificatory grounds as it does heterosexual relations.

(a) Internal Criticisms

For this first class of criticisms, I focus on two commentators: Michael Sandel[86] and Carlos A. Ball.[87] Sandel contends that a liberal government cannot offer a robust justification for same-sex

[86] Michael Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality," *California Law Review* 77, no. 3 (1989): 521-538; Michael Sandel, "Book Review: Political Liberalism," *Harvard Law Review* 107, no. 7 (May 1994): 1765-1794; Michael Sandel, "Judgemental Toleration," in *Natural Law, Liberalism and Morality: Contemporary Essays*, ed. Robert P. George (Oxford: Oxford University Press, 1996), 107-112; Michael Sandel, *Justice : What's the Right Thing to Do?*, 1st ed. (New York: Farrar, Straus and Giroux, 2009).

relations because "[t]he justice (or injustice) of laws against… homosexual sodomy depends, at least in part, on the morality (or immorality) [i.e., the ethical values in Dworkin's terms] of those practices."[88] Ball, in a similar but distinct vein, contends that liberalism cannot continue to push aside the question of the good of same-sex relations if it wishes to fulfill the gay rights demand. Rather, gay rights proponents need a "political framework that permits the 'unbracketing' of moral issues when discussing homosexuality [that] can be formulated in a way that is helpful in convincing skeptics of the need to fully accept homosexuals (and their relationships) as good and valuable members of society."[89] Even though these are two distinct objections, their focuses are the same: viz., the liberal's aversion to legislating ethical values and her ready adoption of some principle of neutrality. An exegetical comment is needed before moving on. When Sandel and Ball refer to some 'moral' issue or debate, they are intending to refer to some kind of ethical consideration. That is, a liberal government cannot bracket ethical issues when fully endorsing civil recognition of same-sex relations.[90]

i. Liberal Neutrality & the Principle of Toleration

Sandel's overall argument against Dworkinian liberalism has two parts. In the first part, he attempts to demonstrate that the conceptual tools and principles available to the Dworkinian liberal are too weak to rebut opponents of gay rights. In the second part, Sandel argues for his own communitarian version of liberalism. Because Dworkinian liberalism is not able to satisfy the gay rights demand, the gay rights advocate should adopt communitarianism. I give a brief account of Sandel's communitarian framework below. My principal concern, however, is with the first prong of Sandel's

---

[87] Carlos Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism," *Georgetown Law Journal* 85 (1997): 1871-1943; Carlos Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* (New York: Routledge, 2003).
[88] Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality," 521.
[89] Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism," 1881.
[90] From henceforth, I will assume that when Sandel and Ball use the qualification 'moral,' they are talking really about the 'ethical.'

argument. As such, the rest of this section focuses on Sandel's distinction between liberal and judgmental toleration. Sandel argues that Dworkinian liberalism does not succeed because it fails to account for this distinction.

Let us elaborate on the political background in which Sandel is forming his criticism. Sandel is a communitarian. Communitarians, generally speaking, claim that the liberal's proclivity to detach the individual person from her society is fictitious and inappropriate: "If we understand ourselves as free and independent selves… we can [not] make sense of a range of moral and political obligations that we commonly recognize, even prize."[91] In other words, our identity is bound up with the cultural, social and historical traditions stitched into the fabric of the society in which we all live. We are "encumbered selves." Sandel sympathizes with a *narrative conception* of persons:

> Human beings are storytelling beings…. To live a life is to enact a narrative quest that aspires to a certain unity or coherence. When confronted with competing paths, I try to figure out which path will best make sense of my life as a whole, and of the things I care about. Moral deliberation is more about interpreting my life story then exerting my will. It involves choice, but the choice issues from the interpretation; it is not a sovereign act of will…. It also shows how moral deliberation involves reflection within and above the larger life stories of which my life is a part.[92]

Captured in our encumbered selves is some *teleos*, a purpose to our lives. A narrative conception of a human being presupposes that there exists a purpose like a plot that is played out in a novel. This understanding of the self, however, is diametrically opposed to the liberal's individual self. Herein lies Sandel's main criticism against Dworkinian liberalism as a general political framework. The individual self abstracts the person and her decisions away from society, thereby leaving unspecified any end. As Sandel notes, "If we are freely choosing, independent selves, unbound by moral ties antecedent to choice, then we need a framework of rights that is neutral among ends. If the self is prior to its ends, then the right must be prior to the good."[93] If we are narrative selves already at-

---

[91] Sandel, *Justice: What's the Right Thing to Do?*, 220.
[92] Ibid., 221-222.
[93] Ibid., 242.

tached to some final end, or purpose, due to our society, then it will be a mistake to hold the theory of the right to be prior to the theory of the good: "If deliberating about my good involves reflecting on the good of those communities with which my identity is bound, then the aspiration to neutrality may be mistaken. It may not be possible or even desirable, to deliberate about justice without deliberating about the good life."[94]

Sandel attempts to show that many of the liberal principles and justifications for government involvement in progressive policies are in fact not internally supported.[95] At present, I am concerned with whether Sandel's discussion of same-sex relations does require a liberal government to legislate some conception of the good.[96] To argue for his claim, Sandel focuses on liberal neutrality and the principle of toleration. He contends that there are two types of toleration: i) liberal toleration and ii) judgmental toleration. *Liberal toleration* brackets ethical values by "permitting some practice on grounds that take no account of the moral [i.e., ethical] worth of the practice in question."[97] Dworkinian liberalism assumes this kind of toleration. It requires a government to tolerate ethical values at the micro-level, but never to accept or endorse them at the macro-level. *Judgmental toleration* "assesses the moral [i.e., ethical] worth or permissibility of the practice at issue, and permits or restricts it according to the weight of those moral [i.e., ethical] considerations in relation to competing moral and

---

[94] Ibid.

[95] Sandel, *Justice: What's the Right Thing to Do?*, 224-225; Sandel, "Book Review: Political Liberalism," 1767-1768. (Sandel contends that a liberal account of obligation is too weak: "[I]t fails to account for the special responsibilities we have to one another as fellow citizens. More than this, it fails to capture those loyalties and responsibilities whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are" [*Justice: What's the Right Thing to Do?,* 224]. Regarding the liberal conception of rights, Sandel points out that "[t]he question is not whether rights should be respected, but whether rights can be identified and justified in a way that does not presuppose any particular conception of the good" ["Book Review: Political Liberalism," 1767]. He believes that rights cannot be identified separately from the good.)

[96] Clearly, if Sandel's general strategy is successfully, liberalism would indeed stand on shaky grounds. Note that oftentimes Sandel makes explicit reference to Rawlsian liberalism (i.e., Political Liberalism) when arguing against the priority of the right. Sandel, however, clearly intends for his criticisms to apply to other forms of liberalism including Dworkinian liberalism. Therefore, I do not believe that I am setting up a straw man. I do not believe that I am misapplying Sandel's objections.

[97] Sandel, "Judgemental Toleration," 107.

practical considerations."[98] This latter form of toleration is espoused generally by perfectionist liberalism, communitarism, new natural law, etc. With respect to homosexual activity, a Dworkinian liberal government that appeals to liberal toleration to justify noninterference will ensure that the same-sex partners' sexual activity will not be criminalized. The government may be able to guarantee some kind of right to privacy. The first part of the gay rights demand is satisfied. The Supreme Court enforced a right to privacy when it decided *Griswold v. Connecticut.*[99] The link between the right to privacy and liberal toleration was further highlighted by *Roe v. Wade*[100] and *Carey v. Population Services*.[101] For many gay rights advocates, the right to privacy seemed a powerful rights trump card. As a pragmatic choice, the right affords persons involved in same-sex relations some protection from interference. Prudential reasoning compelled many gay rights advocates to pursue the public policy of extending the right to privacy to the LGBT community. As Sandel remarks, however, liberal toleration has some significant disadvantages:

> The case for toleration that brackets the morality [i.e., ethics] of homosexuality has a powerful appeal…. It offers social peace and respect for rights without the need for moral conversion. Those who view sodomy as sin need not be persuaded to change their minds, only to tolerate those who practice it in private…. Despite its promise, however, the neutral case for toleration is subjected to two related difficulties. First, as a practical matter, it is by no means clear that social cooperation can be secured on the strength of autonomy rights alone, absent some measure of agreement on the moral permissibility of the practices at issue…. [Second,] it puts homosexual intimacy on a par with obscenity – a base thing that should nonetheless be tolerated so long as it takes place in private.[102]

Sandel is arguing that Dworkinian liberalism can tolerate homosexuals, but it may only do so in a way that discredits their lives as being "on a par with obscenity." Sandel believes that a robust liberal defense of same-sex relations needs to provide some kind of ethical considerations that show

---

[98] Ibid.
[99] *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state law prohibiting use of contraception. A constitutional right to privacy was fully recognized.)
[100] *Roe v. Wade*, 410 U.S. 113 (1973) (found the right to privacy to include a woman's right of choice and invalidated Texan legal prohibition of abortion.)
[101] *Carey v. Population Services*, 431 U.S. 678 (1977) (reaffirmed right to privacy, and found unconstitutional a New York state law limiting advertising and distribution of birth control.)
[102] Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality," 536-537.

same-sex relations permissible in order to satisfy the gay rights demand. Relying on liberal toleration, by itself, cannot ground the strong justificatory considerations desired by gay rights advocates. The only thing a right to privacy and liberal toleration can ensure is noninterference: "[Liberalism] leaves wholly unchallenged the adverse views of homosexuality itself."[103] It may ensure that society not criminalize same-sex relations. Justice Antonin Scalia touches upon this point in his dissent to the majority's opinion in *Romer*:

> The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare… desire to harm" homosexuals… but is rather a modest attempt by seemingly *tolerant* Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws….
>
> There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. The Court cannot be unaware of that problem; it is evident in many cities of the country, and occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable "alternative life style."… [Gay rights advocates] devote [their] political power to achieving not merely social toleration, but full social acceptance, of homosexuality.[104]

Scalia held that the 'Amendment 2' passed by the people of Colorado is constitutional since it "does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment." Putting aside the issue of constitutionality, the main point remains. Liberal toleration does not require that a government endorse gay rights fully. The gay rights advocate needs judgmental toleration. As such, Sandel concludes that "[a] fuller respect would require, if not admiration, at least some appreciation of the lives homosexuals live."[105] Dworkinian liberalism is unappealing because it does not allow for the kind of judgmental toleration needed for full recognition of same-sex relations. The Dworkinian liberal has to be able to judgmentally (and approvingly) tolerate same-sex relations. A robust liberal defense requires more than mere begrudging (or even invective) toleration.

---

[103] Ibid.
[104] *Romer v. Evans*, 517 U.S. 620 (1996) (Scalia dissenting.)
[105] Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality," 537.

ii. Perfectionist Liberalism

The second internal criticism is similar in kind to the first. The main claim, like before, concerns the liberal government's bracketing of ethical considerations when legislating laws and policies. Ball first attempts to demonstrate that Dworkinian liberalism is too weak to ground gay rights. He then argues that the gay rights advocate should adopt his version of liberalism because it does a better job at fulfilling the gay rights demand. I first address the basics of Ball's account of government, one which values personal autonomy as the fundamental ethical good. In the final part of this section, I discuss the internal problems Ball sees with Dworkin's political framework.

Ball adheres to *perfectionist* liberalism. The perfectionist liberal holds that "governments cannot ignore conceptions of the good and avoid assessments of what is normatively [and ethically] valuable."[106] So then, a perfectionist liberal state accepts a judgmental, as opposed to liberal, principle of toleration. Ball adopts a version of perfectionist liberalism set forth by Joseph Raz. This particular version of liberalism holds liberty, or person autonomy, as the basic intrinsic good: "For Raz, the value of liberty or freedom is intrinsic; liberty is a good not because of what it can bring to society, but because it has value in and of itself."[107] Liberty is a value to be promoted by the government on ethical grounds. Ball agrees with Raz that "[t]he state should promote policies consistent with a particular moral [i.e., ethical] good, namely, the attainment of individual autonomy."[108] One vital way for the government to promote liberty is by providing its citizens with different choices.[109] The government ought to facilitate "a range of acceptable options so the individual can strive toward her own

---

[106] Ibid., 1920.
[107] Ibid.
[108] Ibid., 1924.
[109] Ball warns us that providing choices is different from endorsing *one* particular choice: "While the government can and should *provide* choices, it must not select particular options for individuals because such a selection would violate the ideal of personal autonomy" (ibid., 1925). The reasons for providing a range of options to choose from concern the basic, intrinsic good of autonomy. If a government limits the possible choices to a singular option, then it is no longer the case that "personal autonomy is at the core of a free society" (ibid., 1924).

autonomy as an achievable end-state."[110] The liberal government is acting improperly when it fails to facilitate a sufficient range of options from which its citizens may choose.[111] Not all options, however, are equally acceptable. Some choices should not be endorsed by any government, liberal or not. For instance, the government should not allow its citizens the option to steal freely from one another. The liberal's harm principle is required for both the preclusion of these repugnant choices and the promotion of personal autonomy. This classic liberal principle is "derivable from a morality [i.e., ethics] which regards personal autonomy as an essential ingredient of the good life."[112] Given the perfectionist liberal framework, Ball argues that recognizing same-sex marriages is not only conducive but necessary in order for the government to facilitate an appropriate range of options for its citizens to pursue. Heterosexual marriage is an option made available by most, if not all, liberal governments. Allowing individuals the choice of participating in a heterosexual martial relationship promotes personal autonomy without hindering the autonomies of citizens whom do not wish to make the same choice. Ball argues that same-sex marriages, likewise, promote personal autonomy without hindering the autonomy of others. In fact, a liberal government that does not recognize same-sex marriages is restricting, or limiting, the range of options for persons involved in same-sex relations.[113] The government may end up harming these individual persons.[114] As such, Ball concludes that "[p]erfectionist liberalism imposes on us positive obligations to provide acceptable op-

---

[110] Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism," 1925.
[111] Ibid., 1929. (As Ball contends, "Individuals can be harmed if there is an insufficient range of choices that make attainment of an autonomous life possible. This harm, then, justifies governmental action that seeks to provide individuals with an adequate range of choices.")
[112] Ibid., 1930. (Ball quoting Raz)
[113] Ibid. (Ball notes that "[v]iewing the harm principle in this way… one realizes that the state may have a duty to recognize same-sex marriage as a means of providing gays and lesbians with the opportunity to attain personal autonomy. If same-sex marriages fall within the acceptable range of options necessary for the attainment of an autonomous life, then the state should recognize such marriages as a way of encouraging and promoting a particular moral [i.e., ethical] good, namely, the living of an autonomous life.")
[114] Ibid, 1929. (As Ball puts it, "Individuals can be *harmed* if there is an insufficient range of choices that make attainment of an autonomous life possible. This harm, then justifies governmental action that seeks to provide individuals with an adequate range of choices" [emphasis added].)

tions for [gays and lesbians] so they may *create* an autonomous life for themselves."[115] Promotion of autonomy as an ethical good politically requires the government to permit same-sex marriages.[116]

Ball contends that the Dworkinian liberal framework can provide only limited protection for members of the LGBT community. The liberal principle of tolerance, or noninterference, is not enough to ground a robust justification for gay rights. As Ball rightly points out,

> In formulating an effective political argument in favor of same-sex marriage, one should keep in mind exactly what gays and lesbians are asking of society. Demands for societal recognition of their relationships means that gays and lesbians are no longer asking simply to be "left alone." Neither the secret, private life, even if it were subject to constitutional protection, nor formal equality in the workplace and housing market, is sufficient any longer. Gays and lesbians are now asking that society fully recognize their relationships. They seek not only eligibility for the receipt of the legal and financial benefits associated with marriage, but also the normative acceptance of their relationships.[117]

Like Sandel's criticism against Dworkinian liberalism, Ball focuses considerably on the principle of noninterference. In particular, Ball contends, "[O]ne may tolerate another without accepting them because the latter (but not the former) requires a normative judgment."[118] From this point, Ball

---

[115] Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism," 1940.

[116] More recently Ball has modified his position slightly. He calls his new strain of liberalism moral liberalism. The moral liberal holds on to two basic tenets. The first basic tenet "recognizes that human beings share basic needs and capabilities, the meeting of which (in the case of needs) and the exercise of which (in the case of capabilities) are indispensable for the leading of full human lives" (*Morality of Gay Rights*, 75). Ball is greatly influenced by the capabilities approach to justice advocated by Amartya Sen and Martha Nussbaum. Since its citizens have basic needs (e.g., food, shelter, employment) and capabilities (e.g., to reason, to learn, to love), a government that does not recognize these basic characteristics of human flourishing is unjust. The second basic tenet of moral liberalism holds that the "exercise of one's autonomy is not primarily a function of being left alone, but is instead primarily a function of being permitted to have certain kinds of relationships with others" (ibid., 96). Ball modified his account of personal autonomy slightly. As Ball argues, "[W]e are not inherently individualistic creatures; instead, we all have a myriad of ties and relationships that play a crucial role in our ability to lead autonomous lives…. [We see] autonomy as emanating largely from our relationships with and our dependencies on others" (ibid., 76). Taken together the two basic tenets require the government to ensure an environment that is friendly to the fulfillment, facilitation and exercise of its citizens' basic needs and capacities. Therefore, moral liberalism is an appropriate interpretation of the liberal standpoint because "[i]t is not for society to tell individuals how to live; it is for society to make sure that individuals have the opportunity to lead full human lives" (85).

With respect to gay rights, the government should ask itself whether same-sex (intimate) relations are conducive to the fulfillment, facilitation or exercise of the kind of basic needs and capabilities required for leading a full life. Ball argues that same-sex relations are, in fact, valuable in this very manner. Since same-sex relations are appropriate relations for certain individual citizens to pursue, the government is obligated to designs its institutions to allow for this consideration. The overall basic need and capability here is one of sexual intimacy and not same-sex relations generally. Despite his slight change in position, I believe that Ball may still be classified as a Razian perfectionist liberal. Clearly autonomy plays a significant role in his political framework. Moreover, my later analysis of Ball will not be affected by the slight change in his account.

[117] Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism," 1875-1876.

[118] Ibid., 1875.

attempts to argue that the liberal government's recognition of same-sex relations "would also constitute a recognition that same-sex relations are normatively valuable."[119] In effect, Ball attempts to show that in order for any liberal government to recognize same-sex relations, the government must appeal to normative considerations concerning the goodness of the lives lead by persons in those relations. Ball attempts to demonstrate that the weakness of Dworkinian liberalism, namely, its formalistic and vague nature makes it unable to fulfill the gay rights demand.

His criticism has two parts. This divide results from Ball's reading of Dworkin. He believes that Dworkin's political theory has shifted throughout the years. He comments that the early Dworkin focused on the "use of majoritarian morality [i.e., ethics] as a rationale for enacting and enforcing [coercive] laws."[120] The liberal government cannot use its coercive power to enforce what the majority of society deems to be the good life. Ball concedes that the early Dworkin can ensure noninterference by the government. It cannot require, however, the government to recognize fully same-sex relations: "The problem with this Dworkinian critique is that an unwillingness by the state to recognize same-sex marriage… differs qualitatively from a state's use of majoritarian morality to criminalize, for example, same-gender sodomy; the latter, and not the former, involves state coercion that deprives individuals of their liberty…. Society's refusal to recognize same-sex marriage does not *forbid* lesbians and gay men from leading the lives they think are best for them; instead, it entails withholding societal recognition of and support for their relationships."[121]

Ball reads the later Dworkin as attempting to bridge the gap between ethical considerations of the good life and the proper role of government. He takes Dworkin to be "linking[ ] the ethics of individuals on the one hand and the institutions and values of a liberal society on the other."[122] Ball argues that Dworkinian liberalism, in considering that "the ethical considerations of individuals in

---

[119] Ibid.
[120] Ball, *The Morality of Gay Rights,* 30.
[121] Ibid., 33.
[122] Ibid.

leading good lives play an important part in determining the institutions and values of a liberal political community and vice versa, is to some extent accepting the relevance of the good in the definition of the right."[123] Even though Dworkin's attempt to incorporate the good into political principles is a step in the right direction, it is not enough. In particular, Ball worries that Dworkin does not offer a sufficiently substantial account of the connection between the good (i.e., the ethical) and the liberal government. Dworkin's liberalism is too vague and fails to elaborate the "social conditions that are required for the leading of a good life."[124] In a way, Ball reads the later Dworkin as being a quasi-perfectionist liberal. Although Dworkinian liberalism attempts to link the ethical good to the political, it is too formalistic and not robustly substantive enough to serve as a practical framework by which to design our political institutions.[125] As Ball puts it,

> The vagueness in that conception – the unwillingness to provide a thicker understanding of what it means to be human – means that in matters of human intimacy and relations, Dworkin, even when taking his later writings into account, can offer us only the same important but ultimately limited argument against moral coercion and paternalism on the part of the state…. If what Dworkin's more recent writings on equality and ethics means for lesbian and gay men is that the state should avoid using its power to enforce majoritarian notions of morality [i.e., ethics], then little has been added to his earlier critique.[126]

In other words, Ball contends that Dworkin's later position is just as deficient as his earlier one. Unless Dworkin gives us more exact specifications as to what it means to lead the good life and how persons go about instantiating it, gay rights advocates are in no better a position than before. Ball's main criticism is that (early or late) Dworkinian liberalism is too formalistic and vague. It lacks

---

[123] Ibid., 39.
[124] Ibid.
[125] As noted before, however, I believe Ball has misread Dworkin. When discussing the later Dworkin, Ball mainly focuses only on Dworkin's Tanner Lectures, "Foundations of Liberal Equality," ed. Stephen Darwall, *Equal Freedom: Selected Tanner Lectures on Human Values* (Ann Arbor: University of Michigan Press, 1995), 190-306. In *Sovereign Virtue*, chapter 6, "Equality and the Good Life," is a shortened and revised version of the earlier Tanner Lectures. In this chapter, Dworkin's focuses on arguing for an objective ethical standard. He is concerned about arguing for what he calls a "challenge model." His main concern here is philosophical ethics and not the proper role of the government itself. Whether his challenge model of the ethically good life is convincing, Dworkin argues that the micro- and macro-level concepts and principles discussed earlier are enough to ground liberal equality (*Sovereign Virtue*, 240-241): "I should admit now, however, that I believe I have less chance of persuading readers that they already accept this challenge model of ethics than I do of persuading them that they already accept the principles of equal objective importance and of individual responsibility [and subsequently, the abstract egalitarian principle] that I just described."
[126] Ibid., 39-40.

substantive (ethical) content, and this lack of which makes it unable to account for citizens' basic needs, capabilities and autonomy to engage in sexually intimate relationships. Again, we see the overarching internal criticism against liberalism: viz., the government cannot bracket substantive, ethical value judgments as to what constitutes the good life. Therefore, like Sandel, Ball maintains that Dworkinian liberalism is too diluted to fulfill the gay rights demand completely. It may bar criminalization of homosexuals, but it does not politically obligate a government to recognize civil same-sex marriages.

(b) External Criticisms

External criticisms of the Dworkinian liberal framework approach the question of gay rights from a different perspective than the internal criticisms. Rather than attempting to demonstrate that Dworkinian liberalism is too thin to ground a robust justification of gay rights, this second class of criticisms argues that there are external, value-laden considerations that obligate a liberal government to discriminate against, or disfavor, same-sex relations. Particular attention is given to new natural law. For new natural lawyers, the government must promote certain basic goods, one of which is the good of marriage. This basic good of marriage, however, is not realizable by individual persons in same-sex relations, non-procreational sex and masturbatory self-gratification. Therefore, the government ought to discriminate against citizens who engage in these non-marital acts. If these external criticisms are successful, then there exist compelling external value-laden considerations that obligate society to discriminate against same-sex relations. It follows that Dworkinian liberalism is an insufficient political framework because it fails to take into account these external value considerations.

i. New Natural Law Theory

In discussing the new natural law position against same-sex relations, I pay particular attention to the writing of John Finnis.[127] Though there exist slight differences between Finnis's position and that of other new natural lawyers, Finnis remains an appropriate representative of the theory as a whole. Finnis believes that new natural law is compatible with a limited, liberal government. The primary aim of the government is to promote the common good of political communities: "In any sound theory of natural law, the authority of government is explained and justified as an authority limited by positive law…, by the moral principles and norms of justice which apply to all human action (whether private or public), and by the common good of political communities – a common good which … is inherently instrumental and therefore limited."[128] A *common good* is "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community."[129] Finnis contends that this understanding of the common good is captured by expressions like 'the general welfare' or 'the public interest.'[130] But 'general welfare' should not be construed as utility. For Finnis, a common good is one in which the good of each person is served in part because of the benefits others are receiving. The common good can be thought of in terms of the 'public good.' What constitute the basic com-

---

[127] John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1982); "Law, Morality, and "Sexual Orientation"," *Notre Dame Law Review* 69, no. 5 (1993): 1049-1076; "Is Natural Law Theory Compatible with Limited Government?," in *Natural Law, Liberalism and Morality: Contemporary Essays*, ed. Robert P. George (Oxford: Oxford University Press, 1996), 1-26; "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," *American Journal of Jurisprudence* 42 (1997): 97-134.
[128] Finnis, "Is Natural Law Theory Compatible with Limited Government?," 1.
[129] Finnis, *Natural Law and Natural Rights*, 155.
[130] Ibid., 156.

mon values or aims will be determined by basic reasons – i.e., reasons that are "inherently intelligible, shared [and] common"[131] to all citizens of the society.

What Finnis calls "first principles of all deliberation, choice, and actions" constitute "the *basic reasons for action*."[132] With the first principles of practical reasonableness, there emerge some basic goods strived for by all members of any society: e.g., knowledge, skillful performance, bodily life, friendship, integrity and practical reasonableness, harmony and marriage.[133] These goods account for "the basic aspect of [a person's] well-being."[134] An exegetical note is needed. There is a nuanced difference between the basic human good and the common good of a political community that many commentators and even Finnis himself often do not make explicit. Finnis, as I read him, takes the *basic human goods* to be values that our faculty of practical reasonableness directs us, as individual citizens, to instantiate. In addition, we live together within a society, or political community. For Finnis, a community exists "wherever there is, over an appreciable span of time, a co-ordination of activity by a number of persons, in the form of interactions, and with a view to a shared objective."[135] The basic human goods, by means of our faculty of practical reasonableness and relational associations with others in the political community, directly dictate what the common good turns out to be.

---

[131] Finnis, "Is Natural Law Theory Compatible with Limited Government?," 3.
[132] Ibid., 4.
[133] Finnis, *Natural Law and Natural Rights*. (Finnis's own list of the basic and common goods changes slightly throughout his writing. The inclusion of marriage as a basic common good in his later writing is of particular interest. In fact, in his original list of the basic human goods (i.e.,, life, knowledge, play, aesthetic experience, sociability and friendship, practical reasonableness and religion), Finnis leaves out marriage completely. The implication to be drawn from this is that marriage "will be found, on analysis, to be ways or combinations of ways pursuing (not always sensibly) and realizing (not always successfully) one of the seven basic forms of good, or some combination of them" (ibid., 90). As Jeremy Garret points out, "Given the vigor with which Finnis has defended marriage as a distinct basic good from the mid-1990s on, and the overall importance he seems to attach to it in his several articles from that period, one might be surprised to learn that he does *not* place marriage on his original list of basic goods. Moreover, in reflecting on sexual intercourse as a 'human action, pursuit and realization of value,' Finnis claims that it may be 'play, and or expression of love or friendship, and/or effort to procreate,' but never even hints at the possibility that such pursuits might also realize (let alone as the prerequisite to the others) the later appended good of two-in-one flesh communion" [Garrett, "Why the Old Sexuality of the New Natural Law Undermines Traditional Marriage," *Social Theory and Practice* 34, no. 4 (2008): 610]. Also see Finnis, "Is Natural Law Theory Compatible with Limited Government?," 4.)
[134] Ibid., 85.
[135] Ibid., 153.

In other words, the common good shared by members of a political community will mimic, or track, the basic good shared by all human beings.

I make this exegetical point, because it makes salient Finnis's (implicit) rejection of the distinction between the ethical and the moral. This consideration will be important later on in my assessment of Finnis's position. Despite the common good(s) tracking the basic human good(s), Finnis argues that his position is compatible nonetheless with limited government: "Government is precisely not presented here as dedicated to the coercive promotion of virtue and the repression of vice, as such, even though virtue (and vice) are of supreme and constitutive importance for the well-being (or otherwise) of individual persons and the worth (or otherwise) of their associations."[136] Nevertheless, this consideration does not rule out governmental promotion of virtue (i.e., of the human goods). It only rules out coercive legislation to promote the basic goods. As Stephen Macedo comments in his response to new natural law theory, "Finnis manages to blunt liberal objections to natural law teachings on sexuality by arguing that while 'public morality' is a legitimate political concern, this does not mean that government should … punish vice 'as such'…. Governments should not, that is, be especially concerned to punish private vices through the criminal law."[137]

In addition, this account of limited government allows the state to promote the basic human and common goods while discriminating against things it deem to be contra to the goods. Same-sex relations reappear here. If same-sex relations (and, more specifically, gay marriages) violate any of the basic and common goods, then the government may still discriminate against these relations. As others have noted, "[T]he standard move among natural lawyers is to claim for marriage the status of a 'basic good' [that is violated by same-sex relations] and to couple that claim with the practical [reasonableness] principle that if something is a basic good, then acts and relations that instantiate it

---

[136] Finnis, "Is Natural Law Theory Compatible with Limited Government?," 6-7.
[137] Stephen Macedo, "Against the Old Sexual Morality of the New Natural Law," in *Natural Law, Liberalism and Morality: Contemporary Essays*, ed. Robert P. George (Oxford: Oxford University Press, 1996), 31.

are valuable."[138] Therefore, by discriminating against same-sex relations, the government would be promoting the good of marriage. So the pivotal question emerges: what makes it so that same-sex relations like gay marriages are not able to instantiate the good of marriage? Finnis considers same-sex relations to be morally and ethically equivalent to other nonmarital sex acts: e.g., penile-vaginal intercourse involving contraception, fellatio, cunnilingus, masturbation, etc. All nonmarital sex acts violate the good of marriage. The question becomes "[h]ow, then, is this good [of marriage] *violated* by nonmarital sex acts, including even the sex acts of someone [i.e., gays and lesbians] who persons could never marry?"[139]

The good of marriage is instantiated by a relation between two individual persons only if there is mutual affection and biological unity. The failure to realize both of these two features of sexual relations is the reason why nonmarital sex acts cannot instantiate the good of marriage. The requirement of *mutual affection* entails the full self-giving of one person to another. Finnis argues that "[s]exual acts cannot *in reality* be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other – in biological, affective and volitional union in mutual commitment, both open-ended and exclusive."[140] Note Finnis's emphasis on existing mutual affection 'in reality.' So when "two strangers engage in [sexual] activity to give each other pleasure, or a prostitute pleasures a client ... in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a grueling day on the assembly line," these sex acts involve only a fictitious perception of mutual affection.[141] In reality, there is no total self-giving between the two strangers, the prostitute and the client or the assembly worker. If these individual persons believe that they are giving themselves completely over to anoth-

---

[138] Garrett, "Why the Old Sexual Morality of the New Natural Law Undermines Traditional Marriage," 591.
[139] Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," 118.
[140] Finnis, "Law, Morality, and "Sexual Orientation"," 1067. (Also see "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," 118.)
[141] Ibid.

er, then they are deceiving themselves. The case for same-sex relations, Finnis contends, commits this kind of deceptive self-giving; only individual self-gratification exists in these nonmarital sex acts:

> But the committed liaison of two (why two?) persons of the same sex who together engage in sex acts is an artificially constructed type-case which is a secondary version of a central case radically different from the central case of marriage [as opposed to the valid secondary case of the marriage of a sterile couple]. Indeed, what is the central case of same-sex sexual relationships? Perhaps it is the anonymous bathhouse encounter, engages in with a view to being repeated in another cubicle later that night. Perhaps it is a same-sex threesome or four-some between currently steady, committed friends. Who knows? What is clear is that in the account of sex and friendship… there is *nothing* to show why a currently two-person same-sex liaison should have the exclusiveness-and-intended permanence-in-commitment that is inherent in the idea of marriage (including the marriage of a sterile couple).[142]

Moreover, Finnis contends that

> [t]he fact is that "gay" ideology… has no serious account whatever of why faithfulness [i.e., total mutual affection and self-giving] – reservation of one's sex acts exclusively for one's spouse – is an intelligible, intelligent, and reasonable requirement. Only a small proportion of 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 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* [i.e., complete and total self-giving] utterly central to *marriage*, is a sham.[143]

Therefore, intrinsic to same-sex relations is individualized self-gratification – and not mutual affection and commitment. In sum, "all nonprocreational sex amounts [to] the mere instrumentalization of bodies for mutual use [but not affection] and pleasure, all are the moral equivalent of mutual masturbation: simultaneous individual gratifications with no shared good in common."[144]

Additionally, same-sex relations have another similarity in common with other nonmarital sexual relations: viz., the non-realization of biological unity or organic complementary between the persons. This *biological unity* is required to bring about reproduction, an essential function of sexual relations. As Finnis puts it, "The union of the reproductive organs of husband and wife really unites

---

[142] Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," 127.
[143] Ibid., 130.
[144] Macedo, "Against the Old Sexual Morality of the New Natural Law," 32.

them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow them to *experience* their *real common good – their marriage*."[145] The sexual acts between husband and wife (i.e., penile-vaginal intercourse) are of the reproductive kind; the acts are so on account of the organic complementarity existing between the two persons. Finnis argues that sex acts between individuals of the same sex are nonprocreative. Such acts are not of the reproductive kind: "[T]heir genital [i.e., sexual] acts together cannot do what they may hope and imagine."[146]

As Garrett points out, however, new natural law theorists like Finnis must contend that biological unity is "intrinsically (rather than accidentally)" of the reproductive kind. It is essential that the organic complementarity between two individuals be of the reproductive kind. Ergo, marital sex acts require a man and a woman. Not every marital sex act need to result in progeny. Furthermore, it may turn out to be the case that one or more of the individuals are sterile, yet these sterile husbands and wives are still united biologically. That is, a sterile couple may still engage in sex acts of the reproductive kind. Sex acts between a husband and wife (even a sterile husband and wife) is of the reproductive kind because "in willing such an act one wills sexual behavior which is intended as and is (a) the very same bodily and behavior as causes generation (intended or unintended) in every case of human *sexual* reproduction, and (b) the very same as one would will if one were intending precisely sexual reproduction as a goal of a particular marital sexual act."[147] This consideration is why sex acts between husbands and wives – even sterile pairs – are still marital. What really is needed for biological unity is the *genuine intention* to engage in sexual acts of the reproductive kind. It is only accidental, and not essential, that the sterile pair cannot actually reproduce. Consequently, "[t]he marriage of a

---

[145] Finnis, "Law, Morality, and "Sexual Orientation"," 1066.
[146] Finnis, "Is Natural Law Theory Compatible with Limited Government?," 15.
[147] Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," 129.

sterile couple is true marriage, because they can intend and do together *all* that any married couple *need* intend and do to undertake, consummate, and live out a valid marriage. It cannot have the fullness that a fertile marriage can have, and in that respect is a secondary rather than a central-case instantiation of the good of marriage."[148] Because they are only accidentally sterile, the sterile couple constitutes a secondary case of marriage. Unlike the sterile couple, the same-sex couple is essentially sterile. That is, A&B, whose sex organs are taken together (i.e., penile-penile or vaginal-vaginal), are necessarily nonprocreative. New natural law makes explicit three categories of sexually intimate relations: i) fertile marriages (penile-vaginal without contraception]), ii) sterile marriages (still penile-vaginal) and iii) non-marital sex (including same-sex relations). Type (i) is a central, primary case of marriage; type (ii) is a secondary case. Type (iii) can never instantiate the marital good.

Additionally, the same-sex couple cannot genuinely intend that their sex acts be of some reproductive kind. In reply to Macedo's suggestion that "gays can have sex in a way that is open to procreation, and to new life,"[149] Finnis claims that individuals in same-sex relations are deceiving themselves if they think such sex acts are of the reproductive kind:

> Here, fantasy has taken leave of reality. Anal or oral intercourse, whether between spouses or between males, is no more a biological union "open to procreation" than is intercourse with a goat by a shepherd who fantasizes about breeding a faun; each [the same-sex couple and the goat-shepherd pair] "would" yield the desired mutant "were conditions different." Biological union between humans is the inseminatory union of male genital organ with female genital organ; in most circumstances it does not result in generation, but it is the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation.[150]

It is a common view among new natural law theorists that "same-sex 'marriage' is less like a homosexual sex act than it is a square circle; strictly speaking, it is not so much immoral, as it is im-

---

[148] Ibid., 127.
[149] Stephen Macedo, "The New Natural Lawyers," *The Harvard Crimson*, October 29, 1993, http://www.thecrimson.com/article/1993/10/29/the-new-natural-lawyers-pieditors-note/.
[150] Finnis, "Law, Morality, and "Sexual Orientation"," 1066 (footnote 46).

possible."[151] Since sex acts between persons in same-sex relations are unable to realize mutual affection and biological unity, these persons are engaging in nonmarital acts. Insofar as these nonmarital acts do nothing to help realize the good of marriage, society "can rightly judge that it has a compelling interest in denying that homosexual conduct – a 'gay lifestyle' – is a valid, humanly acceptable choice and form of life, and in doing whatever it *properly* can [i.e., by non coercive means]… to discourage such conduct."[152] Consequently, once a liberal government recognizes the common good of marriage, it is obligated to discriminate against same-sex relations. Finnis's limited government may prohibit criminalization of same-sex relations, but it may (indeed, for new natural law theorists it must) never recognize civil same-sex marriages. This restricted use of coercion to promote the basic and common goods makes new natural law theory compatible with a limited government. But new natural law's complete preclusion of civil same-sex marriages makes the theory incompatible with the gay rights demand. Dworkinian liberalism is incorrect because it precludes the recognition of these external value considerations of the marital good.

---

[151] Garrett, "Why the Old Sexual Morality of the New Natural Law Undermines Traditional Marriage," 595 (footnote 19).
[152] Finnis, "Law, Morality, and "Sexual Orientation"," 1070.

CHAPTER 4: RESPONDING TO THE CRITICS

Dworkinian liberalism *can* ground a robust justification for gay rights. My claim is that the conceptual distinctions (i.e., ethical versus moral; ethical, moral and non-ethical values, etc.) and the micro- and macro-level principles (i.e., the principles of human dignity and the abstract egalitarian principle) constitutive of the Dworkinian liberal framework allow it to satisfy completely the gay rights demand. Not only will the Dworkinian liberal state be prohibited from placing criminal sanctions on same-sex relations, it must also permit the civil recognition of same-sex marriages. This second prong is especially so given the similar moral and non-ethical considerations shared by both opposite-sex and same-sex relations. If a government endorses opposite-sex marriages on some moral or non-ethical grounds, it will be more than likely the case that those same value considerations will compel the government to endorse same-sex marriages.

Admittedly, the above is an overarching claim. I do believe that a Dworkinian liberal state is politically (deontologically) obligated to fulfill the gay rights demand. But to argue for this strong claim requires that I survey all moral and non-ethical value considerations and arguments for governmental endorsement of heterosexual marriages to see whether those same considerations apply equally to homosexual marriages. I limit my analysis to arguing for a more modest claim: i.e., Dworkinian liberalism is *capable* of satisfying the gay rights demand. So then, my argument in this section is more formal than substantive. With this more modest claim in mind, I reply to both the internal and external critics. To the internal criticisms, I argue that Dworkinian liberalism is able to account for the very things these critics find lacking in the framework. Contra Sandel, I argue that Dworkinian liberalism allows for both liberal and judgmental toleration. Contra Ball, I argue that the formalistic nature of the framework does not suffer from vagueness and impracticality. Dworkinian liberalism is substantive enough to give us some bare guidance as how a government ought to act. Moreover, the

formal nature of Dworkinian liberalism is an advantage for it allows the framework to incorporate the very value considerations Ball contends the framework lacks.

In the second part of this section, I shift focus to new natural law. Contra Finnis, I argue that Dworkinian liberalism may adequately capture the good of marriage. This is partly the case because Dworkinian liberalism captures the concept of equality better than new natural law. Dworkinian liberalism, with its conceptual distinctions and principles, recognizes the heterogeneous nature of people's conception of marriage and other values. New natural law theory makes broad generalizations about values. Additionally, there exist internal consistencies within the new natural law's classification of intimate relations and sex acts.

Before moving on to my analysis, I want to define some symbolism. Throughout my analysis when I discuss individual citizens, I denote them with a capitalized letter. I suppose that two individual persons A and B are involved in a same-sex relation: A&B. Depending on the context, it should be clear as to whether I intend A&B's relation to be non-marital or marital. Another couple, C and D are involved in an opposite-sex relation: C&D. Let us suppose that C is the wife, and D the husband. The same exegetical note about context applies. All other individual persons introduced later on in my analysis will follow a similar scheme of symbolism.

(a) Replies to the Internal Criticisms

Recall that both Sandel and Ball contend that a liberal government cannot bracket ethical considerations when discussing gay rights. Sandel contends that Dworkinian liberalism "leaves wholly unchallenged the adverse views of homosexuality itself."[153] Without ethical considerations, the internal critics contend that the Dworkinian liberal state cannot fulfill the gay rights demand: the crim-

[153] Sandel, "Moral Argument and Liberal Toleration: Abortion and Homosexuality," 537.

inal prong is ensured but the civil marriage prong has not been met. In what follows, I attempt to show that Dworkinian liberalism is much stronger than the internal critics take it to be. Contra Sandel, Dworkinian liberalism may incorporate liberal toleration and judgmental toleration. Contra Ball, Dworkinian liberalism may incorporate some key elements of his perfectionist liberalism – while remaining neutral with respect to its ethical considerations. Particular focus is given to personal autonomy. The neutral liberalism of Dworkin's framework does not bar it from encompassing these internal value considerations.

i. Toleration Revisited

According to Sandel, the liberal principle of non-interference can provide at most only begrudging toleration of same-sex relations. Central to Sandel's criticism of Dworkinian liberalism is the distinction between liberal toleration and judgmental toleration. Dworkinian liberalism, Sandel contends, is restricted to liberal toleration – and not judgmental toleration. So A&B's same-sex relation is at most begrudgingly tolerated by a Dworkinian liberal government. A robust defense of gay rights requires judgmental toleration of same-sex couples. It requires that the government makes value judgments concerning the (positive) worthiness of such relations. In what follows, I attempt to show that Dworkinian liberalism need not find much difficulty with Sandel's distinction.

First, let us take a closer look at liberal toleration. With respect to gay rights, Sandel claims that a government that liberally tolerates A&B's same-sex relation generally does so begrudgingly. Yet when we consider the conceptual distinctions and principles contained within Dworkinian liberalism, we see that liberal toleration must be qualified in a significant way. Remember that a government abiding by the Dworkinian liberal framework must treat its citizens with equal respect and concern (i.e., it must abide by the abstract egalitarian principle). As such, it cannot legislate or promote ethical considerations; it may only do so on non-ethical or moral grounds. With respect to lib-

eral toleration, let us make more specific what it means to assess the value of some action. For the Dworkinian liberal there exist three main classes of values: ethical, moral and non-ethical. A liberal government that liberally tolerates an action begrudgingly on ethical grounds is in direct violation of the abstract egalitarian principle.[154] If the government begrudgingly tolerates A&B's same-sex relation after making an ethical assessment of their relation, then the government is acting improperly. It does not express equal respect and concern for A's and B's lives. Tolerating some Φ begrudgingly implies a contrary attitude to Φ. By begrudgingly tolerating A&B's same-sex relation, the government is expressing that it deems A's and B's lives and life-plans less worthy. Its reluctant toleration signifies that it deems A's and B's lives to not be good as compared to C&D's. So in response to Sandel, the government may not legitimately take "homosexual intimacy [to be] on par with obscenity" on ethical grounds. It is true that liberal toleration requires the government to not make assessments of *ethical* values. So the Dworkinian liberal state is prohibited from both criminalizing same-sex relations and discriminating against civil same-sex marriages on ethical grounds. But it is not true that since the government may not make ethical assessments of the value of A&B's same-sex relation, that the government may begrudgingly tolerate their relation in any way whatsoever. There is an important qualification here: viz., the government may not express disapproval on ethical grounds.

Admittedly, Sandel may respond that the above reply is insufficient for gay rights advocates. This insufficiency occurs because although a government may not begrudgingly tolerate on ethical grounds, it may do so on moral or non-ethical grounds. It is true that a government may endorse specific moral and non-ethical values without disrespecting the human dignity of its citizens. So Sandel may counter that the government may tolerate A&B's relation, yet view their relationship to

[154] Note that this claim is different from the claim put forth in Chapter 2 when discussing the academic and the athlete. There the government continues to act properly if it tolerates the ethical convictions of it citizens (with qualifications concerning appropriateness), and the government may tolerate begrudgingly its citizens' ethical convictions if they are detrimental to its own moral or non-ethical values.

be on "par with obscenity" on moral or non-ethical grounds (or both) – but not on ethical grounds. Therefore, Dworkinian liberalism does not get the same-sex couple what they desire: full ('non-disapproving') judgmental toleration. I believe that this is a legitimate concern. It is one that I am not fully able to alleviate in this paper. I do provide some arguments that should minimize this concern. But I admit that I cannot give an absolute answer, which would require extensive survey of all moral and non-ethical considerations with respect to marriage. Nonetheless my previous point remains. If a liberal government wishes to (liberally) tolerate an action begrudgingly, the grounds for its toleration must be moral or non-ethical – and *not* ethical – considerations.

Bracketing the above concern about liberal toleration, let us focus on judgmental toleration. I think Sandel is right in claiming that a government needs to be able to judgmentally tolerate same-sex relations in order to fully recognize relations like A&B's. I contend, however, that Dworkinian liberalism does allow for a government to judgmentally tolerate some action. The liberal government is not restricted to (moral and non-ethical) liberal toleration. When a government tolerates something judgmentally, it makes value assessments. In particular the government, in deciding to permit an action, deliberates on the "moral worth or permissibility of the practice at issue."[155] Again, we need to bring back into our discussion the distinction between ethical, moral and non-ethical values. Dworkinian liberalism bars deliberation by the government on ethical grounds. Remember that Sandel does not affirm the Dworkinian distinction between ethics and morality, so his use of the term 'moral' does not tell us much. If by "moral worth or permissibility," Sandel means deliberation based on Dworkinian moral values (and not ethical values), then Dworkinian liberalism has no qualms with (moral) judgmental toleration. Indeed, given that Dworkin requires a government to endorse moral values, judgmental toleration of this kind is politically necessary. If it turns out that homosexual relations and marriages are detrimental to some moral values, then the government may

[155] Sandel, "Judgemental Toleration," 107.

legitimately bar them. If it turns out that same-sex relations are consistent with some moral values, then the government must (morally) judgmentally tolerate them. In this latter case, the government permits A&B's relation to continue without disapproval. And if the moral consideration concerns marriage, then the government is politically obligated to recognize A&B's civil, same-sex marriage.

Likewise, if by "moral worth or permissibility," Sandel means deliberation based on non-ethical values, then Dworkinian liberalism additionally allows for (non-ethical) judgmental toleration. For instance, if it turns out that same-sex relations promote a non-ethical good within a polity, then the government is politically obligated to (non-ethically) judgmentally tolerate A&B's relation. Again, in this latter case, the government permits A&B's intimate relation to continue without disapproval. It recognizes A&B's relation fully. Therefore, Dworkinian liberalism is compatible with judgmental toleration with respect to moral and non-ethical value considerations. The government need not hold same-sex relations to be on par with obscenity.

Nonetheless, a concern remains. Sandel can concede that given the distinction between ethical, moral and non-ethical value assessments, the Dworkinian liberal state is not restricted solely to exercising liberal toleration. Indeed, it may judgmentally tolerate something. He could concede this point, yet continue to argue that Dworkinian liberalism meets the needs of the gay rights advocate at most two-thirds of the way. The government may judgmentally tolerate same-sex relations after making some moral or non-ethical assessment of the value of such relations. But, there is nothing to bar the government from making some moral or non-ethical assessment about the disvalue of same-sex relations. Moreover, it seems that the strongest defense of gay rights will require judgmental toleration by the government on ethical – and not moral or non-ethical – grounds. Since Dworkinian liberalism does not allow for ethical deliberation by the government, it does away with the strongest possible defense for same-sex relations. Therefore, it is still not a viable alternative.

I have two responses to these concerns. First as mentioned before, I am concerned in this section with demonstrating that Dworkinian liberalism allows for both kinds of toleration. My analysis has been formal – not substantive. I have not argued for what kinds of moral or non-ethical values might ground judgmental toleration for or against A&B's sexual relation. Second, I do not agree that from a macro-level, liberal perspective, that a robust defense of same-sex relations will be one laden with ethical values. That claim may turn out true on the micro-level, where individual citizens may use ethical arguments to persuade their fellow citizens to accept homosexual marriages as being on par with heterosexual marriages. Insofar as Dworkinian liberalism is *capable* of offering a robustly adequate defense of A&B's relation without appealing to ethical considerations, both prongs of the gay rights demand may be satisfied.

ii. Perfectionist Liberalism Revisited

As a perfectionist liberal, Ball takes personal autonomy (i.e., liberty) to be the ultimate ethical good; it is something the government should actively endorse. The government does this by creating a sufficient range of options from which citizens may choose. Same-sex relations are to be included in the list of available options. Ball argued that Dworkinian liberalism is too watered-down (i.e., too "vague") to provide governmental recognition of A&B's relation. A neutral Dworkinian liberalism cannot incorporate the role of autonomy into its political framework. In this section, my general strategy will be to argue that Dworkinian liberalism is much stronger than Ball takes it to be. Again, my arguments here are more formal then substantive. Like my analysis of Sandel, I argue that Dworkinian liberalism *can* provide an adequate justification for same-sex relations and marriages while remaining neutral to ethical considerations. Additionally, I make the corollary claim that Dworkinian liberalism can account for most of the basic elements of Ball's perfectionist liberalism.

In reply to the perfectionist liberal, I ask the reader to recall the two fundamental principles of human dignity at play on the micro-level of discourse: the principle of intrinsic value and the principle of personal responsibility. Dworkin takes the principle of personal responsibility to capture the concept of liberty (or personal autonomy). We are responsible for making our own choices and decisions. When we are treated in ways that violate this principle (perhaps when some choice is coerced upon us without our genuine endorsement), our personal autonomy is violated. Dworkin, himself, takes the two principles to be formal. But as I have argued before, there exist some thinly substantive elements to these two principles. For instance, the two principles require that we are responsible for reciprocally recognizing the objective value of others' lives, in addition to our own. It follows that autonomy is an essentially formal and (thinly) substantive element at the micro-level. Since these micro-level principles justify the macro-level, abstract egalitarian principle, a government that fails to *value* personal autonomy (i.e., personal responsibility) will also violate the abstract egalitarian principle. It is acting improperly. Therefore, Dworkinian liberalism does take autonomy as important. What matters is the manner by which the liberal government values personal autonomy. It is important to remember that when discussing the proper role of the government, we are theorizing on the macro-level. At this level, a Dworkinian liberal government may only directly endorse moral and non-ethical values. It may not endorse ethical values; else it would not be treating its citizens with equal respect and concern. Are moral and non-ethical ways of valuing personal autonomy enough to ensure prohibition of criminal sanctions against same-sex relations and full recognition of civil, same-sex marriages? Or does the government, as Ball contends, need to endorse autonomy as an ethical value in order to fulfill the gay rights demand?

I answer the first question in the affirmative and the second in the negative. What does it mean to value personal autonomy morally and non-ethically? Suppose autonomy is valued morally. If a government allows citizens to govern themselves, and it, on moral considerations, provides

them with options, then it may legitimately do so. Indeed, I believe that the Dworkinian liberal state is required to morally value autonomy at least partly. This claim is true because of the thinly substantive nature of the two principles of human dignity. Surely what we owe to others and ourselves (i.e., the decisions we make and for which we are held accountable) concerns morality. If it is morally valuable for a government to permit its citizens to make their own choices by allowing them to engage in sexually intimate relations (including same-sex relations), then surely it may endorse autonomy. Moreover, if it is morally valuable for a government to permit its citizens to enter into marital relations (both heterosexual and homosexual) with each other, then the government permissibly may endorse marriage in this manner. And if the moral considerations for endorsing autonomy are correct ones, then the government is politically obligated to endorse autonomy. Therefore, Dworkinian liberalism accounts for the significance of personal autonomy and the option to engage in intimate sexual and marital relations. As such, provided that there are adequate and appropriate moral considerations, the Dworkinian liberal state is politically obligated to recognize same-sex relations.

Alternatively, if personal autonomy is viewed as a non-ethical value (provided these are appropriate non-ethical considerations), then Dworkinian liberalism is additionally compatible with autonomy. For instance, suppose that allowing citizens to make their own choices is conducive to society in general. Perhaps, the sense of personal autonomy that results is essential to competition, which may lead to scientific discoveries and inventions. These are possible non-ethical grounds for governmental endorsement of personal autonomy. In fact, I want to make a stronger claim here. I believe that a Dworkinian liberal state is committed to viewing personal autonomy as essential to a well functioning society. This claim is true because of the relationship between the principles at the micro- and macro-levels. There are pragmatic and prudential (non-ethical) reasons for governmental endorsement of autonomy. Without autonomy at the micro-level, there will surely be disastrous consequences on the macro-level of political discourse. This claim is best illustrated by way of analogy.

Consider the field of economics. At the micro-level of economic discourse, individual agents buy and sell commodities. Suppose these agents are not allowed to make decisions (to buy or to sell) freely. If the agents did not act freely (i.e., their personal autonomy are limited) in buying and selling the commodities, then it may well turn out that at the micro-level these agents are not optimizing their marginal benefits. Yet what these agents do inextricably affects the macro-level. At the macro-level, the country's economy may not function smoothly. In this case, it would be wise for the government to allow its citizens to freely engage in economic transactions. Shifting back to our discussion, there emerge similar prudential considerations. At the macro-level of political discourse, if citizens are not allowed to exercise freely their autonomy, then society may end up in a less optimific state. There may be political instability.[156] Therefore, personal autonomy may (and I think more strongly, 'it must') be valued at least non-ethically by any liberal government. If A&B's intimate relation or marriage is an exercise of their personal autonomy (provided that the two principles of human dignity are satisfied), then the government may be required to fully recognize same-sex relations. Thus on either manner of valuing personal autonomy, the gay rights demand can be met.

Next, I want to address an emerging concern. Ball may concede that Dworkinian liberalism may allow for moral and non-ethical valuation of personal autonomy. Yet, it is unclear whether such is the most appropriate way to value autonomy. In particular, Ball could respond by saying that these moral and non-ethical justificatory considerations may bring about some governmental recognition of A&B's choice to form an intimate relationship. But such recognition is inadequate. It does not fulfill the gay rights demand. To satisfy the gay rights advocate, ethical considerations of autonomy are still needed. As Ball puts it, "Gays and lesbians are now asking that society fully recognize their [choice to engage in] relationships. They seek not only eligibility for the receipt of the legal and financial benefits associated with marriage, but also the normative acceptance of their relation-

[156] We see this often in totalitarian political regimes.

ships."[157] I respond to this concern by making salient an ambiguity inherent in the objection. Remember that there are two levels of discourse: a micro- and a macro-level. 'Normative acceptance' may occur at both levels. At the macro-level, the state (as a collective power or entity) is in the business of moral and non-ethical legislation. Given that there are plausible moral and non-ethical considerations for endorsing personal autonomy by way of recognizing same-sex relations, then there may be normative acceptance at the macro-level. The government normatively accepts same-sex relations and marriages, and it does this without appealing to ethical value considerations. The concern vanishes at the macro-level.

If by 'normative acceptance,' Ball has in mind acceptance between individual citizens, then we are now within the confines of the micro-level of discourse. Our focus shifts to the interpersonal interactions between individual persons. Suppose what is meant by 'normative acceptance' is that A&B's neighbors C, D, E, etc., approvingly accept A&B's same-sex relation or marriage. At the micro-level, Dworkinian Liberalism does not restrict the use of ethical considerations and convictions. Individual citizens, in their everyday interactions and interpersonal communications with one another, may appeal to ethical considerations. A&B may do so in order to persuade C, D and E to accept their definition of the good life as being inclusive of both heterosexual and homosexual relations. Again, the above is true provided the two principles of human dignity are respected by each citizen. So the force of this objection disappears once we rid the ambiguity in the level of discourse. If the gay rights advocate demands prohibition of criminal sanctions against same-sex intimate relations or full recognition of civil, same-sex marriages by the state, then moral and non-ethical considerations will suffice. If same-sex couples demand full recognition of their relationships by their fellow citizens, then it is the couples' job to provide their neighbors with persuasive ethical arguments. Therefore, insofar as a Dworkinian liberal state can offer a robust defense of same-sex relations on moral

[157] Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism," 1876.

and non-ethical value considerations (while remaining neutral to ethical ones), the gay rights advocate should be satisfied with her government.

Since Dworkinian liberalism may endorse personal autonomy on moral and non-ethical grounds, let us move on to Ball's additional criticism that Dworkinian liberalism is too underdeveloped (i.e., too 'vague') to fulfill the gay rights demand. Earlier in my exposition, I pointed out that Ball is misreading Dworkin when he argues that Dworkin "link[s] the ethics of individuals on the one hand and the institution and values of liberal society on the other."[158] Ball reads the later Dworkin as wanting to bridge the gap between the (ethical) good and the political. This reading is for the most part inaccurate. Nonetheless there remain some legitimate concerns in Ball's reading. Recast in light of the micro- and macro-level principles, we may read Ball as arguing that the relationship between the two principles of human dignity and the abstract egalitarian principle is too 'vague' for Dworkinian liberalism to be capable of offering a robust justification of gay rights. Recast this way, Ball's concern emerges from the formalistic nature of the three principles. Sure there are formal constraints on acceptable interpretations of the principles, but what is really needed is some substantive content to the principle. Without practical substance, these principles cannot fulfill the gay rights demand.

In response to this modified concern, I ask the reader to recall my earlier discussion about the thinly substantive nature of the principles of human dignity. Regarding the first principle, there is the substantive element that everyone's life is valuable. Regarding the second principle, there is the substantive element that we are at minimum responsible for the respectful recognition of the objective value of others' lives. So then the abstract egalitarian principle emerges from both the mostly formal and thinly substantive nature of the two principles of human dignity. Ball may interject and claim that even given this additional consideration, the thinly substantive natures of the two prin-

[158] Ball, *The Morality of Gay Rights*, 8.

ciples are still too weak to do any robust justificatory work. Contra Ball, I argue that these aspects of the principles make the conceptual tie between the micro-level and the macro-level principles a strong and practical one. These principles can do the work called for by the gay rights advocate.

The formal nature of the principles of human dignity results in the abstract (and somewhat formal) nature of the principle of equal respect and concern. There may be a multiplicity of acceptable interpretations about what it means for a government to treat its citizens with equal respect and concern. But as mentioned before, there exist formal and substantive constraints placed on the range of acceptable interpretations. That a government may not legislate on ethical grounds is a formal constraint. Clearly a government that recognizes (or bans) same-sex relations and marriages on ethical grounds is not treating its citizens with equal respect and concern. It is telling its citizenry that it deems such relations to be (non)promotive of the good life. There are also substantive constraints, one of which may require the government to mandate that its citizenry be accountable for recognizing and respecting the objective value of others' lives. A government that allows its citizens to freely injure and steal from one another is abiding by an unacceptable interpretation of the abstract egalitarian principle. It would be violating the human dignity of its citizens. Ball is correct when he contends that Dworkinian liberalism deals adequately with paternalistic governments wishing to push some ethical agenda. He is wrong, however, when he claims that that is all the Dworkinian liberal framework is capable. The mostly formal and thinly substantive natures of the principles are advantageous in that they allow for moral and non-ethical considerations at the macro-level of government. This consideration is significant as it highlights particular virtues of the Dworkinian framework: flexibility and heterogeneity in value considerations.

For instance, Dworkinian liberalism has the conceptual tools necessary for incorporating Ball's claim concerning intimate heterosexual and homosexual relations and the government role in providing options for its citizens. If there are acceptable non-ethical and moral grounds for govern-

mental recognition of A&B's and C&D's intimate relations, then the government may proceed in fulfilling the need by making available public institutions that allows for facilitations of such relations. Perhaps a government might view the option to form intimate relations to be required for a happy citizenry. A happy citizenry may consume and spend more (i.e., economic growth) or promotes stronger bonds among citizens (i.e., fraternity and patriotism). In effect, a happy populace may ensure stability. The government, on these non-ethical considerations, may encourage more citizens to engage in intimate heterosexual and homosexual relations.

The mostly formal, yet (thinly) substantive, nature of the Dworkinian liberal framework makes it much stronger than Ball contends it to be. Dworkinian liberalism does more than preclude paternalistic or majoritarian considerations of the good life in regulating governmental actions. It allows (and sometimes politically obligates) the government to address the personal autonomies of its citizens when legislating policy. Again, if the government can provide adequate non-ethical and moral justifications for baring criminal sanctions against sodomy and recognizing civil same-sex marriages, then the gay rights demand has been met.[159]

Let us recapitulate. At the end of our discussion of the internal criticisms, we see that a Dworkinian liberal state may bracket ethical value considerations and still recognize fully same-sex relations. It can do this on account of the moral and non-ethical considerations available to it when legislating policy. So then, the question becomes whether it *does* have the adequate moral and non-ethical value considerations to recognize same-sex relations. Though I cannot give a full positive argument for this second claim, I do believe that all, or most of the politically significant, moral and non-ethical considerations that have been proffered for governmental recognition of opposite-sex

[159] Everything stated in my analysis of the perfectionist liberal applies equally well to Ball's slightly modified version of moral liberalism. The Dworkinian liberal government may use moral or non-ethical value considerations in its fulfillment of the basic needs and capabilities of citizens and its promotion of personal autonomy as emerging from citizens' relationships with each other. The mostly formal nature of Dworkinian liberalism allows the framework to incorporate these central features of the two tenets of moral liberalism.

relations apply equally well to same-sex relations. Therefore, a government that affirms the former is politically obligated to affirm the latter.[160]

(b) Replies to the External Criticism

Since new natural law criticizes the Dworkinian liberal framework from an external standpoint, my arguments against these criticisms must take on a different approach. Recall that Finnis claims that there exist some external considerations, which Dworkinian liberalism fails to adequately capture. In particular, Finnis focuses on the good of marriage. Since Dworkinian liberalism cannot satisfactorily capture the good of marriage, it is an undesirable liberal framework from which to construct our society. My aim in this section will be to show that the Dworkinian liberal can account for these concepts better than new natural law. I consider two concepts: marriage and equality. My arguments against new natural law consist of both an internal criticism and an external criticism. My internal critique of Finnis's position consists of two claims: i) there exists a *line-drawing problem*, which

[160] Numerous substantive moral and non-ethical arguments have been discussed by commentators. Many involve equal protection arguments by drawing analogies between the LGBT communities and other traditionally disadvantaged minorities: see Patricia A Cain, *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement* (Boulder: Westview Press, 2000); Andrew Koppelman, *Antidiscrimination Law & Social* Equality (New Haven: Yale University, 1996); Martha Nussbaum, "A Right to Marry? Same-sex Marriage and Constitutional Law," *Dissent*, 2009; for discussions concerning prejudiced based discrimination of gays and lesbians, see Greg Behrman, *The Invisible People: How the U.S. Has Slept Through the Global AIDS Pandemic, the Greatest Humanitarian Catastrophe of Our Time* (New York: Free Press, 2004); Ronald Dworkin, "Lord Devlin and the Enforcement of Morals," Yale Law Journal 75 (1996): 986-1005 (reprinted in *Taking Rights Seriously*); H.L.A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963); Martha Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004); for discussions on the institution of marriage restricted to heterosexuals as culturally and historically valuable see Louis Crompton, *Homosexuality & Civilization* (Cambridge: The Belknap Press of Harvard University Press, 2003); Ronald Dworkin, *A Matter of Principle;* Dworkin, *Is Democracy Possible Here?;* Dworkin, *Sovereign Virtue*; Dworkin, "Three Questions for America"; William N. Eskridge, Jr., "A History of Same-Sex Marriage," Virginia Law Review 79 (1993):1419-1513; John Scott Gray, "Rawls's Principles of Justice as Fairness and Its Application to the Issue of Same-Sex Marriage," *South African Journal of Philosophy* 23, no. 2 (2004): 158-170 (discussing marriage and family as basic institutions within the basic structure of society); for discussion of societal benefits of same-sex marriages, see William N. Eskridge, Jr. & Daren R. Spedale, *Gay Marriage: For Better or for Worse?: What We've Learned from the Evidence* (New York: Oxford University Press, 2006); for discussions questioning ties between societal recognition of same-sex relations and other sexual deviances, see John Corvino, "Homosexuality and the PIB Arguments," Ethics 115 (April 2005): 501-534; David Richards, *The Sodomy Cases : Bowers v. Hardwick and Lawrence v. Texas* (Lawrence: University Press of Kansas, 2009).

emerges as a result of Finnis's account of sterile couples, and ii) new natural law is committed to controversial metaphysical claims about the essence, or function, of sex organs. With respect to issue (i), I argue that there exists a difference in degree – and *not* a difference in kind – between sterile couples and same-sex couples. With respect to issue (ii), I argue that a liberal government should not endorse controversial metaphysical claims about the essence of sex organs. Next, I move on to my external criticism of new natural law. Like the internal criticism, it has two parts. I argue that Dworkinian liberalism, with its more formal (yet thinly substantive) principles of human dignity, can account for the good of marriage on less metaphysically and politically controversial grounds. Given the conceptual distinctions and the micro- and macro-levels of discourse, Dworkinian liberalism permits the good of marriage to be valued in a multitude of ways by the government and its citizens. In the second part of my external criticism, I address the good of equality. I argue that a Dworkinian liberal framework can better account for equality than new natural law. Finnis contends that his strain of limited government treats its citizens as equals. Yet, I believe that there exist considerations suggesting that the new natural lawyer's political framework does not accord the kind of (desired) equality as well as the Dworkinian liberal framework. Overall, my claim is formal: Dworkinian liberalism may adequately accommodate many values and goods our society holds dear better than new natural law. As will be seen, I rely heavily on a point made by Macedo in his criticism of new natural law. New natural law makes broad generalizations about values that break down when looked at from different individual citizens' perspective. In other words, it fails to take into account the heterogeneity inherent in our value considerations.

i. The Good of Marriage.

New natural law's theory of the marital good rests on claims concerning the essence of persons' sex organs. These claims, however, commit the theory to making a distinction between sterile

marriages and same-sex marriages that is untenable. Recall that Finnis takes the sterile marriage case to be a secondary one (i.e., not a central one) of marriage. There exists a distinct line marking a difference in kind between sterile couples and same-sex couples. The former group may instantiate sexual acts of the reproductive kind; the latter group may not. The good of marriage is still instantiated between the sterile partners since they are intending genuinely to engage in sex acts of the reproductive kind. Yet, I argue that new natural law fails to take into account possible intermediate cases of marriages. Finnis's account would lead us to believe that there are only relations that are of the reproductive kind (i.e., central cases of marriage and sterile marriages) and relations that are not of the reproductive kind (i.e., same-sex marriages). This account is a misrepresentation of the marital good. Rather there exists a continuum of intermediary cases between sterile couples and same-sex couples. The line-drawing problem concerns Finnis's failure to account for these intermediate cases. I argue that new natural law's commitment to a difference in kind between sterile couples and same-sex couples is untenable. Rather, these intermediate cases lying on the continuum between sterile couples and same-sex couples suggest that there exists a difference in degree. As such, new natural law's restriction of the marital good to just purely heterosexual couples becomes unjustifiable.

To demonstrate the line-drawing problem, let us consider a heterosexual sterile couple E&F; where E is the wife and F is the husband. Suppose further that the main reason E&F decided to marry was to spend the rest of their lives together in a mutually affectionate, committed relationship. This scenario is romantically idealistic, but perhaps common place nonetheless. Both E&F know that each is sterile, and there is no remote chance that they will be able to procreate by themselves. They engage in sex fully knowing that they are not able to procreate. But they also recognize that the pleasure they share will contribute greatly in helping to realize their life-plans of living a completely committed relationship. It does not seem too farfetched to contend that the first principles of practical reasonableness would recommend that E&F engage in sex despite their sterility. Engaging in

sex will help to realize their mutual goal – viz., a life-long, intimate relation with the other. Finnis cannot reject their shared, common goal since it relies on mutual affection and commitment, and not mere self-gratification. For this particular sterile couple, the principles of practical reasonableness do not compel them to recognize the marital good to be linked essentially with procreation.

E&F's conception of the marital good differs slightly from Finnis's conception. The issue is whether E&F are actually participating in the marital good. If they are, then marriage may not require procreation. I believe that E&F are participating fully in the marital good. Finnis clearly agrees, yet he differs in his analysis of sterile couples like E&F. Finnis may object that my above account of the sterile couple leaves a key element out of the picture. Remember that Finnis takes the sterile couple to be participating in the good of marriage so long as their relation is mutually affectionate and they genuinely intend that their sex acts are of the reproductive kind. So the reply is that I have left out this aspect of genuine intention. Because E&F genuinely intend to engage in procreative sex, they are biologically united. Therefore, procreation is still essential. But how is it possible for E&F to *genuinely intend* to engage in acts of the reproductive kind when both E and F know of their sterility? I argue that this element of genuine intention does not do the kind of justificatory work Finnis requires it to do.

First, this element of genuine intention does not add much to Finnis's account of marriage. Recall our same-sex couple, A&B. Finnis contends that A&B cannot genuinely intend that their sex acts be of the reproductive kind since such is an impossibility. Like a shepherd intending that his sex acts with a fawn is of the reproductive kind, A&B's cannot intend their sex acts to be of the reproductive kind. A&B are deceiving themselves in thinking that they may engage in procreation. The same kind of reasoning, however, applies to sterile couples. If E&F know that they are incapable of procreation, then it is unclear how they can genuinely intend that their sex acts be of the reproductive kind. If they know that they will never be able to conceive a child, then they cannot genuinely

intend to engage in sex acts, the purpose of which is procreation. It does not matter that their sterility is an accidental and not an essential feature of their reproductive organs. It may be accidental that a bald person is bald. I do not suppose any of us consider having hair on one's head to be an essential feature of one's scalp. Supposing that the bald person has not a single strand of hair on his head, should we consider him to be combing his hair even if he genuinely intends to do so? Even if the person's scalp is only accidentally non-functional (i.e., bald), he cannot genuinely intend to be engaging in acts of the hair-combing kind. The same reasoning applies to sterile marriages like E&F's.

It follows that on Finnis's account, self-deception is required whenever E&F engage in sex. To genuinely intend that their sex acts are of the reproductive kind, they need to deceive themselves of their (accidental) sterility. Perpetual self-deception is needed for E&F to instantiate the marital good. If perpetual self-deception if needed, it is hard to see how E&F's case differs significantly from A&B's case. The deceptions between E&F and A&B cannot be a difference in kind. At most, the difference in deception between E&F and A&B can only be a *difference in degree*. It does not matter that E&F is a secondary case, and not a central case. As a secondary case, sterile marriages like E&F's are still taken to instantiate the marital good. Yet if E&F's relation commits the same *kind* of self-deception that Finnis claims A&B's relation commits, then new natural law is committed to two undesirable claims. Either E&F, like A&B, are not able to instantiate the marital good; or A&B, like E&F, are able to instantiate the marital good. Either claims lead to unfavorable consequences for the new natural lawyer.

Finnis may contend, however, that my above analysis is again inadequate: i.e., that I have failed to see clearly the distinction between accidental and essential features. It is only accidentally so that E&F's reproductive organs do not function properly, and so they are still capable of biological unity. However, it is not accidentally so that A&B cannot procreate. It is an impossibility that same-sex couples can procreate. E&F's genuine intention to engage in sex acts of the reproductive kind is

tied to the accidental non-functionality of their sex organs. A&B's intention is tied to the essential non-functionality of their sex organs. This disanalogy between the two couples indicates a difference in kind between E&F's and A&B's genuine intentions. Therefore, the kind of self-deception is not the same between the two couples.

This objection, however, is implausible once we look at possible intermediary cases between sterile couples and same-sex couples. Specifically, consider people who do not fall in line with the black-and-white dichotomy of possessing male-female sex organs. Hermaphrodites, or intersexuals, may have two sex organs. Many intersexuals undergo sexual assignment surgery shortly after birth, though there is growing expert opinion that early intervention is unnecessary and perhaps damaging to their full development. Often the reproductive organs of intersexuals do not function properly. Suppose H is an intersexual. H has female reproductive organs, which are accidentally non-functional. But since H is intersexed, H also possesses male sex organs. That is, H has male reproductive organ, which are accidentally non-functional. Since Finnis is committed to taking a person's sex to be an essential feature in the marital relation (i.e., biological unity), H's sex organs are taken to be both essentially female and male. Suppose that H is in a committed relationship with another person G, and H discloses the fact about H's intersexuality to G. Would we want to bar H from marrying G? I believe that most of us would answer in the negative. This sentiment is reflected in the current status of the legal system in America where there is a lack of laws prohibiting intersexuals from marrying. Moreover, I contend that G&H are capable of realizing the marital good. In fact, Finnis seems committed to believing that is so. Supposing that G&H truly love each other and genuinely intend to engage in sex acts of the reproductive kind, then G&H are instantiating the marital good. It should not matter that H has both male and female sexes. G&H's relation may be seen as another secondary case of marriage like E&F's. In addition, G&H's relation involves the same kind of genuine intention as E&F's relation.

Finnis may counter by claiming that G&H are not able to engage in sex acts of the reproductive kind like purely heterosexual couples (recall C&D). This move is implausible. Is there much difference between G&H and E&F? Suppose, G possesses functioning male sex organs. The new natural lawyer may concede that H does have female sex organs, which are nonfunctional like F's. Yet, he may further contend that H differs from F because H also has male sex organs. Therefore, H – unlike F – cannot genuinely intend to engage in sex acts of the reproductive kind. Again, this is ad hoc justification.[161] If H has both male and female sex organs, one of which can biologically unit with G's in a particular configuration, then clearly G&H, like E&F, can genuinely intend to engage in sex acts of the reproductive kind. And like F, it is only accidentally the case that H's sex organs are not properly functional. Moreover, my argument is even stronger if we suppose that H has both functioning male and female sex organs. Admittedly, this latter case is rarer in real-life, but it does happen.[162] In this case, G&H's marital relation would turn out to be even more central to realizing the good of marriage than E&F's. G&H are able to conceive children; their sex organs are not accidentally non-functional like E&F's. In this later case, G&H are both mutually affectionate and biologically united.

Ultimately, the case of intersexuals makes Finnis's distinction untenable. Once G&H's relation is deem to be at minimum a secondary case of marriage, it is hard to see why A&B's relation would not also be deemed marriage. To highlight the line-drawing problem further, consider another intermediary case. If we look at the case of transsexuals, we see the further difficulties arising from the controversial black-and-white dichotomy presupposed by Finnis's account of the marital good. If the new natural lawyer concedes the above case (wherein H is an intersexual with sex organs that

[161] It also has the implausible consequence of requiring intersexuals to undergo sexual reassignment surgery to one singular sex in order to get married.
[162] Some intersexuals are born XX/XY; they possess both functioning male and female gonads. As such, they are able to procreate.

do not function properly), he must also permit transsexuals to marry.[163] Suppose T undergoes sexual reassignment surgery to become female. So, one may claim that T has female sex organs. T's female sex organ would be non-functional; but this non-functionality is merely accidental. Finnis may stop me here. Surely it is not accidentally the case that T's female sex organs are non-functional like F's or H's. For T, her sex organs are essentially non-functional. This difference between T and F (and G) exists because T's 'reassigned' sex organs are missing components essential to a fully functioning female sex organ: e.g., ovaries, uterus, etc. F may have these key components; it just happens to be the case that one or more of these components is defective and non-functional.

This reply, however, is problematic. It opens the way to a slippery slope. If we are going to account for the essential nature of sex organs (and the resultant configuration of two persons' sex organs) with metaphysical claims about what components of a person's sex organs are essential for the person to engage in marital sex, then we will end up with counterexamples for every claim about the essentiality of each component. We will end up barring many cases involving persons we take to be truly, and unanimously, instantiating the good of marriage.

For instance, suppose C undergoes a hysterectomy on account of some severe tissue growth on her uterine cavity.[164] At the end of her surgery, C is one step closer to resembling T. Both C and T are missing a uterus, presumably a component of the female sex organ. To make my point even more salient, let us carry out this example to the extreme. Suppose that more bad news befall C after her hysterectomy. After some post-surgery check-ups, C's gynecologist observes that the growth has also spread to C's ovaries and vaginal wall. The malignant growth is so severe that all of C's sex or-

---

[163] See Macedo, "Against the Old Sexual Morality of the New Natural Law," 37. (As Macedo states, "Suppose one gay male has a sex-change operation [has his penis removed and a vagina installed]. Is he then permitted on natural law grounds to have sex with another man? Or – leave aside the sex change operation – suppose a gay man eschews oral or anal sex in favour of intercrural sex [inserting the penis between the thighs of the partner] does this resemble sterile heterosexual behavior closely enough to have 'procreative significance'?" Even though Macedo mentions this point, he does not rigorously pursue it as a reply to Finnis. I believe focusing on the case of transsexuals will make salient the questionable distinction in kind between E&F and A&B that new natural law makes.)

[164] A common condition of this kind is called 'endometriosis.'

gans have to be excised. At the end of the surgery, there does not seem to be much differentiating her situation from T. Properly speaking, both C and T are missing the sex organs needed for engaging in acts of the reproductive kind. It would do Finnis no good to claim that C's sex organ is only accidentally non-functional, while T's is not. Clearly, C has no sex organs left after the surgery. If Finnis concedes that C, after her surgeries, is still able to instantiate the good of marriage with D, then he is committed to saying the same of T and her partner. For Finnis to make that claim would be for him to concede that a person's sex organ is not necessary for the instantiation of the marital good.

Therefore, a person's sex organ and ability to engage in penile-vaginal intercourse is not essential to her standing in a marital relation to another person. There emerge more direct, substantive arguments against new natural law theory once the above formal consideration is recognized.[165]

---

[165] These arguments follow more closely the general responses to Finnis: viz., by showing that same-sex couples are capable of procreation and mutual affection. Several arguments can be made from the above consideration against new natural law theory. These arguments are not my primary focus here since I am mainly concerned with a formal analysis of new natural law rather than a substantive one. I mention them here because they will be beneficial to the reader who wants a more concrete, substantial challenge to new natural law.

Consider procreation. Once we see that biological fit of the penile-vaginal kind is not essential to marriage, we can see how the reproductive function of marriage may still be compatible with gay marriages. If sexual behaviors are of the reproductive kind when they actualize procreation, then as Macedo points out nothing bars same-sex couples from actualizing procreation. Lesbians may undergo in vitro fertilization to become pregnant, gays may hire a surrogate. The lesbian and gay couples are engaging in a sexual act that helps to actualize procreation, since a new life is being formed. Finnis may counter by saying that the couples are not able to procreate by themselves but require a third party. Therefore, they are not really participating in the marital good. This reply is implausible since many heterosexual couples do the same thing. In cases where both heterosexual partners' sex cells are not fully functioning, the couple may opt to use someone else's sperm or egg for fertilization. There is no difference between this latter case and the case for the lesbian and gay couples. There is a third party involved in bringing about this actualization of progeny. If Finnis is committed to allowing for the latter to be recognized as marriage (specifically as engaging in sex acts intended to actualize procreation), he must also allow for the former relations to be recognized. If he denies this consideration and appeals to essentiality and accidentiality, then we are back to my previous formal arguments.

For other substantive arguments asserting mutual affection and procreation in same-sex marriages see: William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America 1861-2003* (New York: Viking, 2008); Andrew Koppelman, *Antidiscrimination Law and Social Equality*, (New Haven: Yale University, 1996); Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* (Chicago: The University of Chicago Press, 2002); Richard D Mohr, *The Long Arc of Justice: Lesbian and Gay Marriage, Equality, and Rights* (New York: Columbia University Press, 2005); Kory Schaff, "Kant, Political Liberalism, and the Ethics of Same-sex Relations," *Journal of Social Philosophy* 32, no. 3 (2001): 446-462 (addresses weakness of 'natural ends' arguments for sex; criticisms apply equally well to new natural law); Human Rights Watch (Organization), Immigration Equality (Organization), *Family, Unvalued : Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law.* (New York: Human Rights Watch; Immigration Equality, 2006 (containing interviews from committed, long-term bi-national same-sex couples). For a discussion of problems arising for both pro- and anti-gay arguments committed to a distinct, controversial metaphysical position on sex and sexual orientation, see Edward

Finnis may continue to contend that C has sex organs that are essentially female while T does not. This claim, however, is obscured and circular at best. In both the intersexual and transsexual cases, the configuration of the penile-vaginal sex organs (i.e., biological unity) is not essential to one's position in the marital relation. We may extend our analysis further. It may be claimed that that T possesses accidentally non-functional female sex organs. Measured in degrees, we could claim that T is more capable of taking part in the marital relation than C. T at least has some physiological sex components that resemble the female sex organ. C has nothing at all to resemble the female sex organ. T's sex organ may be non-functional, but at least they possess the same form as typical female sex organs. This result is clearly problematic for Finnis since his distinction between E&F and A&B is untenable once it is conceded that possessing a particular kind of sex organ and a particular configuration of sex organs are accidental – and not essential – to a couple's ability to realize the marital good. Therefore, the distinct line Finnis draws between sterile couples and same-sex couples is untenable.[166]

My second internal criticism focuses on the new natural lawyer's claims about the essences of persons' sex organs. In particular, my criticism concerns the controversial metaphysical doctrine(s) the theory requires a government to take up. How do we determine the essence of a certain sex organ such that we can judge that when it is not used in some manner, the sex organ is being

---

Stein, "Law, Sexual Orientation, and Gender," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman and Scott. Shapiro (Oxford and New York: Oxford University Press, 2002), 990-1039.

[166] The distinction Finnis draws between the goodness of procreative and non-procreative sex acts between heterosexual couples may also break down. Finnis argues that a heterosexual couple engaging in non-procreative sex (i.e., those involving the use of contraception) would not be instantiating the good of marriage. But again consider not only the case of sterile couples but other non-central cases. For example, some people are born with two of the same kind of reproductive organs. Oftentimes these are fully functioning sex organs. Suppose a woman possesses two female sex organs: e.g., two vaginas, two uterus, two sets of ovaries, etc. There have been documented cases women with duplicate sex organs have become pregnant with two babies, one in each uterus. Suppose these double pregnancies were painful and the offsprings were born less developed given the competition for nutrients. (We see this often with twins.) These women may wish to prevent future double pregnancies. Suppose such a woman engages in sex with a male partner. She and her partner want another child, but not a double pregnancy. As such, they elect to use contraception half of the time when engaging in sex. Suppose for the woman's first set of sex organs, the partner uses a condom; for the second set, he does not use any contraception. Or perhaps the male partner does not use a condom at all. Even if we suppose that the woman elects to use contraception (e.g., spermicidal cream, diaphragm, etc.) for one of her sex organs while engaging in sex with her male partner, the same intuitions play out. The new natural lawyer is committed to the inconsistent claim that the heterosexual couple is both instantiating and not instantiating the marital good at the same time.

used contrary to its essence. More importantly, even if we can judge when a sex organ is being used contrary to its essence, is it reasonable and proper for the government to dabble in such a metaphysically laden field? Recall that the new natural lawyer contends that the essence of a sex organ involves some kind of reproduction. Finnis's account of the essence of the male sex organ suggests that the function of the male sex organ is perhaps to produce and transfer sperm to the female sex organ in order to engage in procreation. If there is a defect in the male sex organ, then the non-functionality that results is only accidental. A parallel receptive function plays out for the female sex organ. Finnis's metaphysical commitments about the essence of sex organs may be correct, but they are metaphysical nonetheless. His position may be correct, yet still controversial in that many other citizens may not possess the same view. It is debatable whether most people are even willing to commit themselves to one particular metaphysical position on the essentiality of sex organs. If most citizens disagree about these metaphysical doctrines, how can we expect a government to commit itself adamantly to a definite, singular position? The seemingly controversial nature of Finnis's metaphysical claims is a reason why a liberal state should not dabble in substantive metaphysical questions concerning the essence of sex organs. Dworkinian liberalism has this advantage over new natural law theory. The Dworkinian liberal state need not (indeed sometimes, it is politically obligated not to) take up a controversial metaphysical position.

The new natural lawyer may rebut, however, by claiming that the government does in fact make claims about the essential function of various organs, including sex organs. Clearly the laws that proclaimed sodomy to be a crime against nature makes implicit appeal to some kind of metaphysical claim concerning the essence of sex organs. To be using one's sex organ in a sodomite manner is to be using it improperly in a way contrary to its essence, its nature. For instance, the Supreme Court's decision in *Rose v. Locke*[167] made an implicit appeal to the essential function of sex or-

[167] *Rose v. Locke*, 423 U.S. 48 (1975).

gans when it decided that a Tennessee law concerning 'crimes against nature' did not violate the due process clause by being too vague in its extension to cunnilingus.[168] So the objection is that the government readily dabbles in discussions about the essences of sex organs. This objection, however, misses my point. My point is that a government *should* not dabble in this kind of metaphysical talk. My point is normative and not descriptive, so this objection would not work. Clearly there is some appeal in my normative claim given the recent, successful push for governmental decriminalization of sodomy as a 'crime against nature' in America.

ii. Dworkinian Interpretation of the Marital Good

My external criticism of new natural law concerns the marital good and equality. In this section my focus is on the good of marriage. The marital good is valued by the new natural lawyer, but it may also be valued by the Dworkinian liberal. It is plausible to assume that a Dworkinian liberal, who supports gay rights, would value the good of marriage. The main difference between the two political frameworks, however, lies in the different permissible manners of valuation. I contend that that the manner in which new natural lawyers value the marital good neglects the heterogeneous nature of the marital relation. There is more than one singular way to value the good of marriage. Because of its insufficiency in accounting for this external consideration concerning the (vastly) differing ways of valuing and instantiating the marital good, new natural law is a undesirable political framework.

The new natural lawyer values marriage as a basic good. The first principles of practical reasonableness recommend us to value the marital good in a unique way. We are to possess a singular, shared conception of the marital good. On the other hand, the Dworkinian liberal may value marriage as an ethical, moral or non-ethical good. She recognizes that on the macro-level of political dis-

[168] I would like to thank Professor William Edmundson for pointing this Supreme Court decision out to me.

course, her government may only value marriage as a moral or non-ethical good. At the micro-level, she has flexibility (with qualifications of appropriateness) in terms what how she goes about valuing the marital good. At this level, her valuation of the marital good may differ slightly from her fellow citizens'. There exists no such flexibility in valuation for the new natural lawyer. Every citizen is recommended by their faculty of practical reasonableness to possess the same ethical valuation of the good of marriage. New natural law insufficiently captures the heterogeneous valuation of marriage among citizens because it over generalizes. This point is echoed in Macedo's response to Finnis's account of the marital good and same-sex marriages,

> All this reveals a strange feature of the new natural law's version of teleological ethics, namely its overbreadth. The new natural law asserts that *universal* validity of ends that are in general good for the species, even when *those ends make no sense as applied to particular individuals*…. Moral judgement on the new natural law view is a blunt instrument, inattentive to the good of those who differ from the majority of the species. Why should we be required to generalize – or over generalize – our ethical judgements in this way?[169]

Macedo has argued that Finnis's account is both too narrow and too broad, and this point is so because of the above consideration about over generalization. I agree with Macedo. However, my focus here is not so much the extension of Finnis's account of marriage but the justificatory grounds on which it rests. The new natural law account of marriage fails to capture the nuanced and heterogeneous nature of our instantiations of the marital relation in part by relying on ad hoc justificatory considerations. Dworkinian liberalism can capture many distinct and differing conceptions of the marital good better than new natural law. Therefore, Dworkinian liberalism does a more adequate job of incorporating the external value consideration of the marital good.

To see why the above claim is true, let us recall that new natural law theory holds mutual affection and biological unity to be essential to the proper instantiation of the marital good. The first principles of practical reasonableness compel us to recognize these two features as essential to the marital good. The issue here is whether these two essential features adequately and accurately cap-

[169] Macedo, "Against the Old Sexual Morality of the New Natural Law," 37-38. (emphasis added)

ture the good of marriage as an ethical good. Do the first principles of practical reasonableness compel us to recognize marriage as requiring both mutual affection *and* biological unity? I disagree with Finnis. Our faculty of practical reasonableness (the faculty by which we deliberate about our goals, life-plans, etc.) does not compel each and every citizen to recognize marriage as an ethical good requiring mutual affection *and* organic complementarity. In fact, to generalize about marriage in that way has the disadvantage of failing to recognize some plausibly acceptable instantiations of the good of marriage. This is the deficiency of Finnis's account of marriage. It over generalizes. If the new natural lawyer's first principles of practical reasonableness cannot compel many people, whose faculties of practical reasonableness are in properly functioning order, to accept the marital good as such, then clearly something has gone awry. The new natural lawyer's political framework fails to sufficiently capture the good of marriage.

On the other hand, Dworkinian liberalism can capture the heterogeneity in instantiation of the marital good. It can adequately account for the good of marriage because it rest on more formal principles like the principles of human dignity and the abstract egalitarian principle. These principles presuppose some thin substantive theory of the good, but they do not presuppose the same kind of controversial, substantive metaphysical claims about the essences of sex organs to which new natural law is committed. There need not be one proper way to value the marital good under Dworkinian liberalism. In particular, the Dworkinian liberal framework allows for different valuations at different levels. At the micro-level, individual citizens may value marriage as an ethical, moral or non-ethical good. Some citizens may end up valuing marriage as an ethical good similar to the new natural lawyer's conception; some may differ in their manner of valuation. Some citizens may even value standing in the marital relation to another person as a moral good, one that creates special moral obligations and demands. Others may value marriage from some impersonal justificatory standpoint. Perhaps marriage ensures the passing on of genetics and familial heritage, and possessing good genes is

something valued non-ethically. At the micro-level of political discourse, a multiplicity of valuation of the marital good may be permitted by Dworkinian liberalism. Additionally, there exists flexibility in valuation at the macro-level. I believe that the most likely candidates for government endorsement of the marital good will fall within the class of non-ethical values.

The Dworkinian liberal government cannot value marriage as an ethical good since it would be disrespecting the human dignity of its citizens. Suppose J and K are two opposite-sex persons who are engaged in a monogamous, intimate relationship. J&K, however, do not intend to get married. If the government endorses marriage on ethical grounds, it would be sending the message that ceteris paribus C&D's life plans are better than J&K's. That is, C&D are leading a better (ethically good) life than J&K. This government violates J&K's human dignity to set their own goals and life plans. As for a moral valuation of the marital good on the collective, macro-level, it seems unlikely that arguments for such a valuation can achieve the near overlapping consensus required for the moral value to be accepted and endorsed by the government. Though some citizens may individualistically value the marital good as a moral good, it will be difficult to achieve near unanimous concession among all citizens that the marital good is a moral good. Keeping promises and not inflicting unduly suffering on others seem to be near universal moral values. Most, if not all people, would accept these as things we owe to each other. So these two latter goods will be more easily accepted as a moral good on the macro-level than the marital good. Therefore, the government may be less willing to accept arguments for the moral valuation of the marital relation.

So at the macro-level, non-ethical valuation of the marital good seems like the best candidate. There may be many distinct non-ethical value considerations, some better than others. The substance of the non-ethical valuation of marriage does not matter so long as it does not violate any of the micro- and macro-level principles. Some non-ethical interpretation of marriage will be more popular with and convincing for the government and citizens than others. This need not worry the

gay rights advocate. Indeed, this consideration may be used as an advantage. It allows for diverse non-ethical interpretations of the good of marriage to be promoted. For instance, a government may endorse marriage on the non-ethical ground that marriage as an institution motivates citizens to reproduce, thus ensuring a growing population. There may be no requirement of procreation as conceived by new natural law. Reproduction may be broadly construed; it may include procreative methods like in vitro fertilization, surrogacy and even adoption. An argument can be made that allowing gays to marry may strengthen familial ties between same-sex partners. As a result, the same-sex couple may end up looking into options like surrogacy or adoption, both of which may boost society's population level. Admittedly, this is a very crude and simplistic non-ethical consideration. But if by allowing same-sex couples of marry, the government can further its societal goals, then the government may do so. So even though it may turn out that only a non-ethical valuation of the marital good is viable on the macro-level, there exists flexibility in terms of the content of the impersonal justificatory consideration taken up by the government. Therefore, Dworkinian liberalism can better capture the multifaceted nature of the marital good than new natural law. Additionally, insofar there are compelling non-ethical considerations for governmental decriminalization of sodomy laws and full recognition of civil same-sex marriages, then Dworkinian liberalism is capable of fulfilling the gay rights demand.

iii. Equality Revisited

The above analysis of the marital good is partly a result of the role equality plays in the Dworkinian liberal framework. Dworkinian liberalism can account for equality better than new natural law. Finnis's new natural law fails to adequately account for equality because it permits a government to disrespect the human dignity of its citizens. By allowing the government to legislate on ethical considerations, the new natural lawyer's limited government does not treat its citizens as equal. It

creates second-class citizens. To understand why new natural law fails to capture this concept of equal worth and dignity, let us look at a response Finnis directs at the Dworkinian liberal. After discussion of Finnis's response, I argue that it commits new natural law to an inconsistent position. It is a situation in which the limited government both respects and violates the equal worth and dignity of its citizens. Overall, I contend that Macedo's concerns with new natural law's use of broad generalizations based on what the majority thinks constitutes the good life remains.

In a direct reply to Dworkinian liberalism, Finnis contends that a government may justify its action by appealing to some conception of the good (i.e., ethical) without disrespecting the dignity of its citizenry:

> To constrain people's actions on the ground that the conception of the good which (if they are done in good faith) those actions put into effect is a bad conception, may manifest not contempt but rather a sense of the equal worth and human dignity of those people; the outlawing of their conduct may be based simply on the judgement that they have seriously misconceived and are engaged in degrading human worth and dignity, including their own personal worth and dignity…. In no field of human discourse or practice should one equate judging persons mistaken… with despising those persons or preferring those who share one's judgement…. In sum: either those whose preferred conduct is legally proscribed come to accept the concept of human worth on which the law is based, or they do not. If they do, there is no injury to their self-respect; they realize that they were in error, and may be glad of the assistance which compulsion lent to reform. (Think of drug addicts.) And if they do not come to accept the law's view, the law leaves their self-respect unaffected; they will regard the law, rightly or wrongly, as pitiably (and damagingly) mistaken in its conception of what is good for them. They may profoundly resent the law. What they cannot accurately think is that a law motivated by a concern for the good, the worth and dignity of everyone without exception, does not treat them as an equal.[170]

In other words, if a government endorses a particular conception of the good, which is "motivated by a concern for the good, the worth and dignity of everyone," then the government will not be disrespecting the dignity of its citizens. Dworkinian liberalism surely can agree with this statement, provided that the conception of the good is an appropriate moral or non-ethical one. Finnis, however, clearly means good in the sense of the ethically good life. Yet, Finnis's rejection of the distinction between the ethical and the moral (and subsequently, the distinction between ethical, moral

[170] John Finnis, "Is Natural Law Theory Compatible with Limited Government?," 23 footnote [42].

and non-ethical values) makes his account of equal worth and concern for human dignity deficient. Finnis's position sounds plausible until we inject more substantive claims into his analysis. A result of Finnis's position is that once more substantive, ethical goods are endorsed by the government, a person who recognizes that "a law motivated by concern for the good, the worth and the dignity of everyone" may think that her government has failed to treat her as an equal. Her self-respect and her respect for others may be damaged irreparably. Liberal governments may have good intentions when endorsing ethical goods, but nothing precludes its citizens from feeling devalued. We see this phenomenon often in the case of second-class citizens.

Finnis's interpretation of equality allows a government to coercively compel someone to adopt a life-plan, which the person may not genuinely accept. In such a situation, the person's dignity is not being fully recognized since her government fails to recognize her personal autonomy to choose her own life-plan. Finnis's limited government fails to realize that endorsing an ethical good does not in reality show equal respect and concern for the dignity of its citizens. To recognize human dignity is to recognize the value of her life and her ability to choose her own life goals. It is inconsistent to hold that a government is able to treat its citizens with equal respect and concern and that it may do so by coercing them to choose a particular life-plan to pursue on the ground that the plan is ethically good. This situation is a classic case of paternalism. It is inconsistent regardless of whether the government in all earnestness endorses the ethical good because it thinks that by doing so it shows equal respect and concern for the citizen. Consider a benign but clear example. Assume that being healthy and living a long life is something most people would take to be part of living well. Living a healthy life usually requires exercise and a healthy diet. A government may appeal to these ethical considerations of a healthy, (ethically) good life when it passes legislation requiring its citizens go on a diet. Furthermore, the government may do all this with the good intention that doing so expresses respect for the equal dignity of its citizens. So on Finnis's account of limited gov-

ernment and equality, a government that forces (i.e., coercively pressures) its citizenry to eat at least one salad a day would be treating each citizen as an equal. The government may legitimately discriminate against persons who dislike salads. It is telling them, "We do respect your dignity, it's just that we prefer your friend's healthy lifestyle over your unhealthy one because the former is what it means to live well." The government is disrespecting the dignity of its citizens who dislike salads, and it does this because it does not consider their lives as ethically good as the lives of salad-eating citizens.

This interpretation of equality and the proper role of government is problematic. The steak-and-potatoes person is justified in believing that her dignity has not been fully respected by her government. Self-respect is not some isolated aspect of our humanity. I have self-respect when I value my own dignity. But surely if external forces are strong enough, I may end up disvaluing my dignity when I choose a life-plan that I do no genuinely endorse. If a government coercively compels me to eat salads, I may end up doing so. Perhaps there is enough peer pressure or I am afraid that I will be singled out for choosing a steak rather than a salad. I would not like to be a second-class citizen. I end up choosing the salad, but there is no genuine endorsement on my part. That is, I have compromised my human dignity, my self-respect. I have compromised my ability to decide my own goals and life-plans and the worth of my life in doing so. Clearly, there exist less genial real-life examples. Consider the treatment of Blacks in apartheid South Africa and antebellum America. It was not until *Brown v. Board of Education*,[171] that the 'separate but equal' doctrine of *Plessy v. Ferguson*[172] was ruled as having no place within the public sphere of education. It is profound to realize that for most of this country's history, blacks were second-class citizens. There existed countless ethical arguments (often bigoted and ill-founded) that the American government used to force blacks into be-

[171] *Brown v. Board of Education (no. 1)*, 347 U.S. 483 (1954) (struck down the 'separate but equal' doctrine and called for desegregation of public education); also see *Brown v. Board of Education (no. 2)*, 349 U.S. 294 (1955) (set forth more specific guidelines for desegregation of public schools)
[172] *Plessy v. Ferguson*, 163 U.S. 537 (1896) (affirmed the 'separate but equal' doctrine for use in public domain)

ing second-class citizens. The black citizen who is forced to give up her bus seat for a white passenger need not "accept the concept of human worth on which the law is based." Yet Finnis is clearly wrong in claiming that "their self-respect [is] unaffected…. They may profoundly resent the law. What they cannot accurately think is that a law motivated by a concern for the good, the worth and dignity of everyone without exception, does not treat them as an equal." Surely the black citizen is made to feel inferior to the white citizen, even if the law passed by her government was motivated by concern for the good. Contrary to Finnis's assertions, it is inconsistent for a government to value truly the equal dignity of its citizens while endorsing a particular conception of the good life. Therefore, new natural law's rejection of the distinction between ethical, moral and non-ethical goods, commits it to an inconsistent conception of equality.

Let us bring our above discussion back to same-sex relations. A government, which believes it is respecting the equal dignity of its citizens by advocating that living well requires engaging in the good of marriage as instantiated by one man and one woman, will in fact be disrespecting the human dignity of its citizens. The government fails to recognize the personal autonomy and responsibility of its citizens to choose their own life plans, to develop their own goals and to value their own ethical goods. Finnis's limited government fails to recognize that A&B are capable of making and pursing their own life plans, and it picks one out for them on account of its own conception of the good life. It is suggesting that A&B are not able to recognize the good life. It does not matter whether the government does this in the earnest belief that it is doing so because it values their human dignity. They are not being treated as equals when compared to C&D who already share the same-life plans as the government. Finnis's limited government treats same-sex couples as second-class citizens. Therefore, Dworkinian liberalism accounts for equality better than new natural law.

CONCLUSORY REMARKS

I hope to have demonstrated successfully how gay rights may be discussed rigorously from a liberal standpoint. A liberal framework may fulfill both prongs of the gay rights demand. It prohibits the government from criminalizing sexually intimate acts between gays and lesbians. It also creates a positive obligation by the government to recognize civil same-sex marriages. My arguments in this thesis were mostly formal. I have argued for the modest claim that Dworkinian liberalism has the conceptual tools needed to satisfy the gay rights advocate. I have argued that contrary to the internal critics, Dworkinian liberalism is capable of successfully incorporating value considerations needed for a robust defense of same-sex relations. Contrary to the external critics, I have argued that Dworkinian liberalism's conceptual distinctions and principles permit a multiplicity in valuation of goods. Dworkinian liberalism adequately captures the heterogeneity inherent in persons' instantiations of values. Throughout the thesis, I have bracketed more substantive arguments about moral and non-ethical considerations for governmental recognition of same-sex marriages. Though I did not directly address them here, I do believe that most, if not all, moral or non-ethical considerations for governmental recognition of opposite-sex relations apply equally well to same-sex couples. When a liberal state values the good of marriage non-ethically, the principle of equal respect and concern politically obligates the government to be unbiased and just in its distribution and application of said good to same-sex couples. Equality creates a positive political obligation on the government to reach out to the LGBT community.