

Law and Sexual Behavior

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This is an essay about the function of law as it confronts sexual behavior. Therefore the first thing that needs saying is that it cannot be a paper about compassion. To be sure, Christians, not to say human beings in general, are called upon to act with compassion and care toward all, particularly those who suffer, whatever the cause. Since we are enjoined to visit those in prison it is to be assumed that compassion is to encompass even those who have fallen under the punishment of the law. We are indeed also called upon to apply law with compassion. But this essay is not about that. This disclaimer needs to be entered because the vast majority of discussions about sexual behavior, especially of homosexual behavior, become arguments about compassion. Discussants relate tragic and agonizing stories about failures in compassion. Those who wish to talk more "objectively" about law and ethics are faulted for lacking compassion. But we get nowhere arguing about who is more compassionate than whom. Is compassion to be exercised at the expense of law? Toward whom is one then acting compassionately? Of course we are to act compassionately toward those who, are caught in the immense web of tragedy that problems of sexual identity and practice have spun about us today. Of course we are to act justly and compassionately toward those who suffer from AIDS or whose civil rights are violated. Let us assume that from the outset. But this is a discussion about law and sexual behavior, not about compassion. A major dimension of the problem, mostly obscured or forgotten, is that law has no compassion. As the Apology to the Augsburg Confession insists several times over, "Law always accuses."¹¹

The second thing to be noted is that the basic concern here is with law as it relates to sexual behavior, not to "orientation" or "sexuality." This disclaimer needs to be entered for at least two reasons. First, the major focus here will be on what the Lutheran tradition has called the civil or political use of the law, later—no doubt misleadingly—termed the "first" use of the law.¹² In its civil use, the law directs itself toward behavior and actual practice, not orientation. I tend to agree with James Burtness; when he insists that behavior not orientation is the issue.¹³ The second reason for talking about behavior rather than orientation is that claims made about "sexual orientation" and "sexuality" are both too inconclusive and even largely beside the point for our discussion here. Human sexual drives, passions, and obsessions are many and varied—in all of us, no doubt. We are told that there is a broad spectrum of desire, sometimes in one and the same person, such that it would be inaccurate to pin us down to a single "orientation." The notion that we have something called a "sexuality" of a particular sort within us determining our being that can be discovered scientifically and must be obeyed if we are to be honest with and true to ourselves is a modern invention that seems particularly pernicious.¹⁴ To be sure, such notions have peculiar power and cast us into states and predicaments that are real enough. No doubt it is one of the ways in which law knows no compassion. But our question here is not directly about all of that. Our question is about how we are called to behave in our sexual relations with others under law, particularly in its civil use, whatever our "orientations."

The End and Establishment of Law

Before becoming more specific we must make some more general observations about the way law works from a theological perspective. Scriptural passages about sexual behavior provide a good illustration. First off, one who takes those passages with any degree of seriousness should soon become terrified. This is particularly true of passages about sexual behavior such as Romans 1:16-32, where Paul concludes his announcement of the revelation of the wrath of God with the frightening words, "They know God's decree that those who practice such things deserve to die, yet they not only do them but even applaud others who practice them." The most appropriate response to law in the first instance would no doubt be something like that of Paul in Romans 7:24: Who will deliver us? If what the Scripture says is true, how shall we escape? The only real answer of course is Christ. Christ and Christ alone is the end of the law to faith (Rom. 10:4). But if Christ is the end of the law to faith does that mean that law is now "overthrown" as Paul puts it in Romans 3:31? Is the law rendered useless? By no means, Paul replies. Rather the law is "upheld" or "established," set in its rightful place. As I have argued elsewhere,¹⁵ the proper Christian understanding of law therefore "resonates," to borrow an image from chemistry, between two poles. The first is the gospel declaration that Christ is the end of the law that everyone who has faith may be justified (Rom. 10:4). The second is a question posed for us: "Do we then overthrow the law by this faith?" To which the reply is, "By no means! On the contrary, we uphold the law." Faith in the end, that is, does not impatiently try to abrogate the law, but puts it in its proper place (Rom. 3:31).

We need to look at this "resonance" more closely. Christ is the end of the law that those who have faith may be justified. That is the first and most crucial pole in the resonance. One cannot begin to understand the place of law in theology unless one is absolutely clear that in Christ it is all over, done with. This is simply another way to say that law is not the way of salvation. There is no way one can buy salvation by the doing of the law. The issue before us is not directly one of salvation. Proper behavior does not merit salvation. Salvation begins not when law begins but when law ends. In Christ we are free from the law. Legalism is over as and to the degree that one is in Christ.

But it must be noted carefully that only Christ is the end of the law, nothing else, no one else. Human beings have just two possibilities in this regard. We can live either "under the law" or "in Christ." And for the time being, of course, since we are simultaneously just by faith and sinners in actuality, we live under both. But only Christ is the end of the law and only when Christ conquers all does law stop. One must be grasped firmly by this, particularly with regard to sexual behavior, because when we come up against laws that call our behavior into question we usually attempt by one means or another to erase, discredit, or change the laws. We become antinomians. If we don't like the law we seek to remove or abolish it by exegetical circumlocution, appeals to progress, to genetics, to the authority of ecclesiastical task-force pronouncements, or perhaps just the assurance that "things have changed." But all of these moves are not the end of the law. It is folly to believe they are. As Luther put it, this is a drama played in an empty theater.¹⁶ Law just changes its form and comes back at us—usually worse than before. Law is authoritative ultimately not because it is written in law books or even in the Bible, but rather because it is written "in the heart." So only one who is stronger

can end it. That is Christ, the bringer of the new age and a new "heart." Christ, as Luther insisted, must reign in the conscience.^[17] That is easily talked about, he constantly warned, but hard to hold in actual experience.

But Christ the end of the law is only one pole of the resonance. The second comes in the question, "Do we then by this faith render the law of no effect?" Is the law then useless? "Absolutely not!" says Paul. On the contrary precisely by faith in Christ we uphold the law; we establish it in its rightful place. How are we to understand this? How is law established by a faith that believes its end? There is truly a "resonance" here. A faith that knows of the true end of law in the double sense of goal and cessation will at the same time "establish the law," that is, allow the law to stand just as it is. In the light of the end one can gain some understanding of how God puts the law to its proper uses. Indeed, knowing the end, faith supports the law until the end is given. If the end is given and assured, there is no need to try to "make the law of no effect." That happens only when faith is lost. Without faith, that is, there is no hope. There is no end in sight. Law just goes on forever. Since I know of no end, I lose trust. Then I must fend for myself. Reduced to my own resources, I have no recourse but to exercise the antinomian option. I must bring the law to an end somehow, explain it away, reduce it to a size I can manage, or erase it entirely. When faith is gone the self arrogates to itself mastery over the law. But that of course is a futile game. Law has no compassion. It does not end at our say-so.

The Uses of the Law

The proper establishment of the law through faith in Christ means that in Christ the law comes up against its real limit. Only then can we begin to see what it is truly for. Law, according to Luther, has two uses, the civil and the theological use.^[18] But we must take some care here. The doctrine is often wrongly taken to mean that the two uses could easily be separated and assigned, perhaps, to different spheres of operation, the civil having to do with politics and the natural, perhaps, and the theological with "religion" and the sacred. It is no doubt true that in the two uses we do face, so to speak, in different directions—toward the world of the neighbor and the civil realm on the one hand and toward our relation to God on the other—but the separation cannot be rigidly maintained in practice. That would be much too simplistic and could lead to a superficial reading of our situation, especially in matters of sexual behavior. The doctrine of the uses of the law is simply an attempt analytically to discern what law actually does. Law does two things to us, come what may. It sets limits to sinful and destructive behavior, usually by some sort of persuasion or coercion—ultimately by death itself,^[19] and it accuses of sin. That is simply what it does. We have no choice in the matter. It works that way. To be noted also in this is what law does not do and cannot do. Law does not save. It is not a way of salvation. Nor is law a remedy for sin. In its civil use law insists upon and promotes moral behavior but it does not stop sin thereby. As a matter of fact, as more astute interpreters like Paul knew, precisely in coercing morality law only makes sin worse (Cf. Rom. 7).

The Civil Use of Law and Sexual Behavior

Since we do not, in matters of sexual behavior, have to do directly with the question of salvation, we are concerned first and foremost with the question of the civil use of law. The civil use of law ushers us into a strange and exciting new world, the world of the neighbor. Talk of the end of the law is unfortunately often taken to imply that the door is suddenly open to a certain relaxation and permissiveness. To think so, however, would be a fatal mistake. What the end of the law opens the door to is the world of the neighbor, the world in which the self is turned outward toward the other. As Luther put it in "The Freedom of the Christian," the believer who is "free lord of all, subject to none" is at the same time "the perfectly dutiful servant of all, subject to all."^[20] Being in Christ means being set free from self for the neighbor. Thus the purpose of the civil use of law is to take care of God's creation and God's creatures. To be sure, law is not therefore to be imposed as an absolute which must be obeyed for its own sake. "The sabbath was made for humankind not humankind for the sabbath." In its civil use, law is rather to be applied so as best to exercise the care demanded in particular situations.

But here considerable caution must be invoked, particularly in the case of sexual behavior lest we take the antinomian turn. The pressure to set the law aside by reinterpretation, accommodation, declaring it obsolete (e.g., on the ground that biblical writers were not aware of current understandings of sexual "orientation"), and so forth, is immense. Such attempts to circumvent the law usually proceed by appealing to the supposed adaptability of the civil use of law. This is perhaps the neuralgic point in the discussion. The argument from compassion takes center stage. Would it not be more "caring" and more gracious for the Christian church simply to go the route of accommodation? Should the church not relax the conditions for entrance to the estate of marriage enough to welcome loving and committed homosexual couples or at least devise a parallel or related form of "blessing" for such unions? As the argument usually goes, "What harm is done if it is a relationship between consenting adults?" That is to say, does not our particular situation enjoin a revision in the civil use of law?

To such questions at least two things need to be said. First of all, the widespread notion that the doctrine of the uses of the law gives permission for fundamental changes in the **content** of the law is quite mistaken.^[21] The doctrine of the uses of the law is just what it says. It concerns the use and not the content of the law. The idea that law could be so altered in content that the civil use would be somehow milder than or even contrary to the theological use is quite foreign to the doctrine. Law may indeed be **applied** variously according to the situation but the basic content remains the same. Some like to point out that we no longer demand the death penalty for sexual misbehavior as was the case in Old Testament times. But that does not mean that what was once prohibited is now suddenly considered acceptable. A change in penalty does not mean change in content. It can also be the case, as Luther insisted, that commands issued to the people of God in Old Testament times do not apply universally. This was particularly true of commands to attack and destroy enemies in specific instances. Some at the time of the Reformation were tempted to use such commands as legitimation for a species of holy war. But this would be a misuse of law. It is not enough just to say that a given command is "The Word of God." We must always be careful to note whether a command applies to us.^[22] But even this does not mean that the content is altered. It is simply a matter of whether a given law applies universally or not. Some in the church like to argue also that since the church has changed its mind on matters like divorce or ordination of women it seems consequent that it could change its stance on sexual behavior as well. But in questions of the civil use of law it is not legitimate to argue that one example of change justifies another. Each case has to be argued individually.^[23]

The second thing that needs to be said is that the fundamental concern of the civil use of the law is for the care of the social order. The purpose of laws regulating sexual behavior is to foster healthy, joyous, and socially fruitful sexual relationships and to guard against the social destruction that results from aberrant sexual behavior. The struggle to establish an order within which sexual behavior can be beneficial to society has been a long and arduous one. According to some, the very foundation of Western civilization itself rests on the success of this struggle. Dennis Prager, for instance, argues very powerfully that the biblical demand for all sexual activity to be channeled into marriage changed the world. The prohibition of non-marital sex, he insists, "quite simply made the creation of Western civilization, possible."¹⁴¹ When there are no controls on or boundaries to sexual activity, sex dominates both religion and social life. Sex is then a means of exercising power and establishing dominance. Advocates for relaxing the traditional Judeo-Christian stand against homosexual behavior often like to argue that such behavior was common and accepted in ancient societies. But a moment's reflection ought to be sufficient to reveal that such arguments can hardly be advantageous to their cause. Ancients, it seems, were simply not concerned about gender. Boys, women, slaves, could all equally be objects of desire. What was important socially was to dominate, to penetrate rather than be penetrated. Such considerations ought in any case to be sufficient to waken us to the realization that the civil order itself hangs in the balance in this discussion. It is really not sufficient just to lay claim to a little compassion or to muse a bit about "what harm does it do?" What is being harmed is the very social order itself. And that is the concern of the civil use of the law. In its civil use, law has to be concerned about the whole social order itself, not just about individual convenience. A faith which knows the end of the law sees also that the law is established thereby and will be watchful about all attempts to alter its fundamental content.¹⁴⁵

The Estate of Marriage

The product of the concern for the social order in Christian tradition is the estate of marriage. Marriage is the publicly acknowledged joining of a man and a woman together. But marriage is not only the public and ceremonial ratification of their mutual consent. That is indeed essential but it is more than a contract between two people. It involves admittance to and entrance into an **estate**, a civil reality above and beyond the mutual consent and/or even the loving commitment of the man and the woman involved. The tradition has always insisted that the estate of marriage is divinely ordained and thus especially God-pleasing.¹⁴⁶ It is simply not the case that marriage was looked upon as a kind of necessary evil, a hedge against lust. Luther, for instance, used the I Corinthians 7:9 passage that "it is better to marry than to burn" primarily as a criticism of Roman attempts to claim celibacy as a state higher than marriage. It was better to marry than burn under the burden of falsely required vows. The foundation for the idea of marriage as an estate ordained by God, however, is much more positive. It is to be found in such passages as the account of creation in which God blesses the man and the woman and enjoins that they "be fruitful and multiply" (Gen. 1:28) and also the subsequent ratification of the creation account by Jesus in Matthew 19:4-6, "Have you not read that the one who made them at the beginning made them male and female, and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? So they are no longer two but one flesh. Therefore what God has joined together, let no one separate." The estate of marriage has a positive purpose. The two become one flesh, a substantial unity in difference. The estate is to be a blessing to the married couple, to protect against the vagaries of passion, feeling, and sexual waywardness. And, of course, it is concerned to foster a family life conducive to the raising of children. Society has a tremendous stake in this. The law in its civil use is one expression of this concern.

If we are at all concerned to restore some sanity to social life today in an age of rampant sexual irresponsibility and egocentrism we would do well to pay some heed to what the tradition has to say about the estate of marriage as an application of the civil use of law that flows from it. Attacks on marriage are nothing new. It has always been a rather precarious venture and the butt of much ridicule, satire, and cynicism. Luther even in his day notes that "the estate of marriage has universally fallen into . . . awful disrepute." Pagan books, he laments, "treat of nothing but the depravity of womankind and the unhappiness of the estate of marriage . . ." Nor will Luther tolerate the idea that women are only a necessary evil to assuage the lust of men. Such ideas Luther insists are "the words of blind heathen, who are ignorant of the fact that man and woman are God's creation." It is blasphemy against God's creation. He even anticipates that if women were to write books they would say the same things about men!¹⁴⁷ A passage from Luther's treatise on "The Estate of Marriage" both recognizes the threat to marriage and indicates the protection the estate intends.

The world says of marriage, "Brief is the joy, lasting the bitterness." Let them say what they please, what God wills and creates is bound to be a laughingstock to them. The kind of joy and pleasure they have outside of wedlock they will be most acutely aware of, I suspect, in their consciences. **To recognize the estate of marriage is something quite different from merely being married. He who is married but does not recognize the estate of marriage cannot continue in wedlock without bitterness, drudgery, and anguish; he will inevitably complain and blaspheme like the pagans and blind irrational men. But he who recognizes the estate of marriage will find therein delight, love and joy without end ...**¹⁴⁸

Indeed, in what will probably seem to us a kind of simplistic naivete, Luther can say that recognition of the estate of marriage as pleasing to God should override even its most difficult trials.

We err in that we judge the work of God according to our own feelings, and regard not his will but our own desire. This is why we are unable to recognize his works and persist in making evil that which is good, and regarding as bitter that which is pleasant. Nothing is so bad, not even death itself, but what it becomes sweet and tolerable if only I know and am certain that it is pleasing to God.¹⁴⁹

Such words may cause moderns to shudder or shake their heads but that is only an indication of how little concern there is about pleasing God—which is quite probably at the root of all our problems to begin with!¹⁵⁰

The Homosexual and the Uses of the Law

We have now arrived at the most difficult and controverted part of the discussion, the use of law in either approval or disapproval of sexual misbehavior—in this case specifically of genital sexual relations between people of the same gender. The question before the church is whether law in its civil use can under any conditions be extended to approve or condone such behavior. Two things must be said at the outset to get the question in proper focus. First of all, we may take it for granted that the Bible and the Christian tradition following it unambiguously rejects genital sexual relations between people of the same gender as it was known to them in their day.¹⁵¹ Any attempt to deny that would be pure sophistry. The argument today thus has to take the form of asserting that

new knowledge or insight has fundamentally changed the conditions for judgment and application of the law in its civil use. So the question usually comes down to whether current experience of "homosexuality" as an "orientation" does not call for a change in the church's stance. The Bible, it is usually admitted, condemns homosexual acts but ostensibly knows nothing about **orientation**. So, it is said, conditions have changed. The question therefore is whether such argument is sufficient to alter the long-standing biblical tradition.

Second, since in the Christian tradition genital sexual activity is permitted only within the estate of marriage our question must be as specific as possible. Can or should the church modify or expand its understanding of marriage so as to put its blessing on life-long committed relationships between persons of the same gender involving genital sexual activity? If so, on what grounds? What social or moral good would such sexual activity *per se* promote such that the biblical rejection of it could be set aside? Since the church holds that genital sexual activity is **in any case** permissible only within marriage, that must give the question precise form. All such relationships outside of marriage, whether between those of the same or of opposite gender are unacceptable. If genital sexual relations between people of the same gender are to be approved and/or blessed, the only way that could be done would be to bring them within something akin (at least) to the estate of marriage. Can this be done in terms consonant with our understanding of the uses of the law?

The thesis of this paper is that it cannot. Since our primary concern here is with the civil use of law we had best begin with that. Separation of the two uses cannot, ultimately be made, so in the end we shall have to say something about the theological use of law as well'. But first, about the civil use. As we have seen, the law in its civil use is concerned with the moral and social import and consequences of our actions. As we have already indicated, "orientation" is much too ambiguous both conceptually and in application to be of use as a basis for ethical decisions. Humans, apparently can have various "orientations," inborn or otherwise but that is not sufficient ground for ethical approval of what they are "oriented" toward. Indeed, if the doctrine of original sin is still valid, many of our "orientations" would be restrained or opposed by the civil use of the law. That certainly is why law is necessary. The question to be answered, therefore, must be about the social and moral value of genital sex acts between people of the same gender. In much of the discussion that follows I lean rather heavily but loosely on the arguments of James P. Hanigan in his helpful book, *Homosexuality: The Test Case for Christian Sexual Ethics*.^[22] Hanigan rightly insists that the question must be very specifically focused on the sex act itself.^[23] Homosexuals, of course, can and indeed do become intimate friends and have "loving, committed, relationships," and can be mutually supportive and so on. But so can single friends of the same sex who may share living quarters, care and concerns, be sustaining and supportive and even enjoy a common life together but neither have nor desire sexual relations with one another. Life-long loving and committed relationships are in themselves not sufficient to justify genital sexual activity. We have many such relationships in which genital sexual activity either plays no part or would even be harmful and destructive—most obviously, as we are tragically aware today, relationships with children. Therefore the question we cannot get around is what social or moral value would same-gender genital sexual acts add even for the most loving and committed couples such that they should be recognized as valuable by society or blessed by the church? It is no doubt true that the genital sexual activity of homosexuals has personal and private significance for them. But our question has to be about the social and moral import. In what way does it build up the community, or preserve its unity, or perpetuate it? Why should it be recognized or promoted as a "life-style"?

Some might like to argue that societal legitimization for committed homosexual couples can serve to heal the wounds of society and/or assuage the personal agony and suffering of homosexuals, curb the spread of AIDS and so forth. But that is hardly an argument for the social value of such genital relations. It would seem rather to be an indication of social danger. It is of course true that our mutual experience of having to care for and about one another in the midst of crises like these can teach us vital social lessons. But that is not to say that there is social value in what causes the crisis. When it is held that society and/or the church ought to "bless" committed homosexual unions what inevitably results is a kind of double standard. Homosexual unions come to be looked upon as something less than ideal, less than marriages between man and woman.^[24] They are permissible for the satisfaction of the individuals involved as a kind of defensive and protective measure to forestall greater discomfort or tragedy. They are permitted and thus apparently justified morally out of sympathy simply because that appears to be the only way sexual satisfaction can be realized. The end (sexual satisfaction) justifies the means ("blessing the union"). We succumb to the prevailing assumption that everyone has a basic right to "life, liberty, and the pursuit of sexual satisfaction." But there is no such positive right to sexual satisfaction and the means one uses to achieve it are not justified just because it is the only way satisfaction can be realized. "The goodness of what is desired as a means must be established as worthy of moral choice by something other than the end they may or may not realize in and through this choice."^[25] There can be no double standard. If homosexual unions are to be blessed by church or society it would have to be on the same ground and for the same reasons that marriages of persons of opposite sexes are blessed.^[26] Nor is there an unquestionable right to marriage.^[27] Society has always claimed the right to refuse marriage in some cases (incest, for instance) and to see to the fulfillment of legitimate social and personal responsibilities. Hence society also rules on the permissibility of dissolving marriages. Focusing attention on the moral and social value of the genital sex act itself as we have done here quite naturally requires deeper reflection on the kind of value sex is. Why, finally, should the genital sexual activity of a married man and woman be of value morally and socially where that of persons of the same gender is not? That is the question. What kind of value is sex? As Hanigan points out, sex can be and has been variously valued. It can be valued as a means to an end: a means to earn a living (prostitution); a way to manipulate and control others; to enhance one's self-esteem; to gain attention; to be popular; feel alive. But if it is only a means to an end one treats others only as means, the occasion for one's enrichment, or "self-fulfillment."^[28] Such a valuing would, of course, be quite contrary to the law in its proper civil use. The law is there to see to it that we serve the neighbor, not use him or her merely as occasions for self-fulfillment. But the attempt can also be made to value sex simply for its own intrinsic worth as a physical experience. But where that is the case, technique takes over. The most moral sex is the most physically pleasurable and the sexual virtuoso the most virtuous. While concern for technique has its rightful place, valuing sex in this manner is completely to individualize it. The other is treated once again just as an occasion for one's self-gratification. One need not even have a sexual companion since masturbation or even a machine would do just as well, perhaps better.^[29] But if genital sexual activity cannot be properly valued only as a means to an end or simply for its own intrinsic worth that means it can find proper value only within a higher purpose. It can only signal participation in larger reality. Its true value consists in the fact that it is a symbolic activity.^[30] One should say, I believe, that it is a symbolic activity in Paul Tillich's sense of symbol as participating in the reality which it symbolizes. The sexual activity itself symbolizes and participates in the great mystery of unity encompassed by the biblical calling that the "two shall become one flesh." It is even said to be a unity akin to that between Christ and the church (Eph. 5:31-32). Participating in that gift of unity as a symbolic act, it focuses, celebrates, expresses and enhances

the meaning of all substantive activities and relationships.^[311] The most significant aspect of these relationships, no doubt, is the personal relationship, love and care, between the sexual partners. But it is more even than that. The sexual act itself is a participation in the mystery of unity.

But could this not be said to be the case between homosexual partners as well? It is difficult if not impossible to see how it could be. If the genital sexual act is symbolic as we have suggested, what does such an act between homosexuals symbolize? In what reality does it participate? It is not enough just to say that it symbolizes "committed, interpersonal love." As already pointed out, genital sexual activity is in no way necessary to such love and in many instances would be destructive of it. Committed relationships do not justify just any sort of sexual behavior. If they did why should not those "oriented" toward "bisexuality" be justified in having both male and female as permanent partners? Once again we are thrown back on the question of what specific value homosexual genital intercourse adds such that it should be blessed. If marriage is to be understood as entry into an estate under the civil use of law, then it should be the case that genital sexual activity involved must itself be seen in the light of one's vocation to serve God and the neighbor through a life of love in the world. "The heart of the matter rests with the claim that the sexual activity itself must be an essential aspect of the exercise and realization of [one's] vocational calling and have social as well as personal import."^[321] Same-gender sexual relations cannot fulfill this vocational calling. In the first place, the calling is that in sexual activity the "two shall become one flesh." This is not possible for persons of the same sex.^[331] The most obvious outcome and instance of two becoming one flesh is in their children. Homosexual sexual intercourse obviously cannot do that. Furthermore, persons of the same gender cannot become one flesh in the sense of a shared life of love as a unity in difference. They cannot become one out of two in the sexual act itself.^[341] At best the sexual activity of homosexuals can only imitate but not participate in what the act symbolizes.

In the estate of marriage, however, sexual intercourse participates in the reality symbolized. Hanigan puts it well. When married couples engage in sexual intercourse and realize the substantial goods of their actions, they are exercising and realizing both the personal and social meaning of their calling, to be for one another ... and thereby to establish and secure that center of life and love around which family develops and grows and serves society. Their sexual relationship is fundamentally essential to carrying out the vocation.^[351]

This is quite obviously not to say that sexual intercourse has meaning and is justified only in relation to procreation. That should be clear from the manner in which the symbolic nature of the sex act has been maintained. Thus even couples who for one reason cannot have children participate in the reality symbolized and carry out their particular vocations in that light. It is to say, however, that the relation between sexual intercourse within the estate of marriage and procreation ought not be broken or denied. Procreation is not, indeed, the M **only** justification for sexual intercourse, but it is part of the reality being symbolized. In reacting against stricter "natural law" views and possessing the means to sever the relation between intercourse and procreation altogether society today has too readily succumbed to making sex simply a means of self-gratification. Society has always had and must take a vital interest in its children and must pay attention to them today. Children all too often are the victims sacrificed on the altar of sexual self-gratification. This too is the concern of the civil use of law.

To bring this section of the paper to a close we set again the question with which we began. Should the civil use of law be so extended as to allow the church, or even society itself, to bless committed same-gender relationships? Shall such relationships be taken within something akin to the estate of marriage? The civil use of law is concerned with moral and social good. So in the end we are left with our question: What social and moral good is created specifically by the genital sexual activity of persons of the same gender? The conclusion of this paper is that no such social or moral good can be discovered. There appears to be no good reason why church or society should alter its understanding of the estate of marriage to include or bless same-gender genital sexual activity. indeed, to do so is to put society itself at great risk.

Concluding Observations on the Theological Use of Law

The argument pursued in this paper is not likely to be of much comfort to anyone. Those who consider themselves "homosexuals," should they read it, will no doubt be angered, hurt, perhaps depressed. Many whose sexual "preferences" are otherwise may also feel themselves put off or offended. They might even sense that their own sexual autonomy is under attack. They would, of course, be right. Or one might, as I do, find considerable sadness in the fact that words such as these have to be written. There is no joy in this, or in the writing of it. But that is simply a result of the fact that law has no compassion and, indeed, always turns to accuse and to worm its way into the conscience. As Gustav Wingren could put it, the civil use of law always passes over into the theological.^[361] We cannot stop it. It always accuses because we fail to put it to its proper use. As I have indicated throughout, it is not possible to make a clean or absolute separation between the civil and theological use. In "establishing the law," attempting to set forth the civil use clearly and forthrightly as we have done here, the accusing voice inevitably begins to sound as well. And we should make no mistake about it. It will sound **even if we attempt to silence it by altering or abolishing the laws that attack us.**^[371]

We need to understand this if we are at all to comprehend the nature of the crisis that confronts us. Appeal is repeatedly made to society and church today to make laws in regard to sexual behavior more permissive. Anyone who writes on the subject no doubt feels the pressure of such appeal. But we cannot offer false comfort. To succumb to the pressure is to take the antinomian turn, to think one can wish the problem away by the simple expedient of erasure. It may, of course, be true that many laws concerning sexual behavior ought to be changed. But the problem is deeper, especially when law passes over into its theological use. What used to be called the "natural" law, in the sense of the law "written on the heart," inexorably does its work. What that law enjoins is love of and service to the neighbor. That is its fundamental and inerradicable content. Whenever any form of behavior, sexual or otherwise, becomes solely a means of self-gratification, rather than finding its higher reason for being in service the law attacks. Sexual behavior is of course particularly vulnerable here. But it is surely not the only culprit. Hatred, violence, cruelty, and injustice toward those whose sexual behavior is improper under the law comes also under accusation. But if I, thinking to do those who

plead for laxity a favor, propose to use whatever authority I have to change or abolish the laws supporting service to the neighbor I will likely only make matters worse. I will only have justified the self-gratification all the more and made the accusation potentially more insistent.

This is to say that pastorally the church simply cannot do the rampant sexual misbehavior of our day any good by accommodation or erasure. The law will never go away, as long as sin and death remain. Antinomianism is the one heresy that is theologically impossible. That is why Luther called it a drama played in an empty theater. There is no audience before which it could possibly play. One can erase laws on the civil level, of course, and that will most often be socially debilitating, but theologically the accusation remains. Law has no compassion. It does not go away, it just changes its shape. Can we not see the law taking its revenge today? Is it not tragic that in order to accommodate "sexual preference" society should be divided into camps by "sexuality"—each according to its own "law"? Is it not tragic that human beings should be driven to define their very essence first and foremost in terms of their "sexuality"? Is it not tragic that we come, willy-nilly, to see ourselves as driven by some supposed species of biological fate? That we have to discover or come to some understanding of who we are? The law, it seems, is no longer "in the heart" but somewhere in the genes or the DNA. Is it the case that now at last by appealing to a law written in the genes we have discovered the ultimate protection from the law "written in the heart"? Long ago it was said: "I see in my members another law at war with the law of my mind and making me captive to the law of sin which dwells in my members" (Rom. 7:23-24). Has the old battle between the spirit and the flesh now decisively and finally been settled in favor of the flesh by biology? But are we then at the mercy of the lab technician? When or where will it end? Our supposed protection becomes our prison. Thus does the law work its way among us. There are no loopholes.

Law has no compassion. That is just as it should be. But it is not the end of the matter. Compassion is the business of the gospel. To return to what we said at the outset, there is another pole to the doctrine of the law. Christ is the end of the law to everyone who has faith. Christ is the **only** end. There is no other. That is the reason the treatment of law can and must be so uncompromising. For where the law is watered down or jettisoned we come under the most diabolical illusion of all—that there is no longer any need for Christ. We must not take that road. What the church has to offer in these, as in all matters, is not accommodation but absolution and a new life. That is the greatest service to the neighbor we can do. True, many today may find this to be of small comfort. But that may be only because they fail to realize how desperate the battle is.

Notes

1 *The Book of Concord*, translated and edited by Theodore G. Tappert (Philadelphia: Fortress Press, 1959) 112:38; 125:128; 130:167.

2 Even though Luther generally mentions the civil use of law first, he apparently never adopted the practice of numbering the uses of the law, no doubt for good reason. Numbering gives the impression that there is a kind of succession or order in which the first, as a kind of general or "non-christian" use, precedes the second, and then of course the third comes as the final step. The practice of numbering arises only when one wants to set apart and advocate a "third" and distinctively "Christian" use. Distinction in the uses of the law then becomes the outline of a progress from "civil" to "Christian" life and eventually a paradigm for the "process" of salvation history. Luther's original view is simply an account of the way law actually and always works—and is supposed to work in this life. Law restrains evil in civil and political life. Theologically it accuses of sin. The distinction between the civil and theological uses of law is an analytical move. The uses are not temporally distinguishable functions but an analytical account from the point of view of faith of what law actually does. See Lauri Haikola, *Usus Legis* (Uppsala Universitets Aarskrift 1958: 3) Wiesbaden: Otto Harrassowitz, 30, n. 13, and Gustaf Wingren, *Creation and Law*, Translated by Ross MacKenzie (Philadelphia: Muhlenberg Press, 1961) 149-150. Wingren's chapters on the uses of the law 149-197 as well as Haikola's book on the subject are exceedingly important and helpful.

3 James Burtness, "Is Orientation the Issue?" *Word & World*, 14:3 (1994): 233-238.

4 At present I find the "constructionist" interpretation of sexual behavior like that of David Halperin in *One Hundred Years of Homosexuality and Other Essays on Greek Love* (New York: Routledge 1990) 15-53, most persuasive. The best way to account for the great variations in sexual behavior and preference throughout history and across cultural lines is to postulate that they are the product of social constructs. Categories like "homosexuality" and "heterosexuality" are constructs of very recent vintage. To hold that they are social constructs, however, is not to say that the conditions that result from them are unreal or merely illusory. Social constructs construct social realities. It is precisely this to which we have to attend and about which we have to make critical judgments. That is where law in its civil use enters the picture.

5 "The Normative Character of Scripture for Matters of Faith and Life: Human Sexuality in Light of Romans 1:16-32," *Word & World*, 14:3 (1994): 305-314.

6 WA 39[1]:355.

7 LW 26:120 et passim. WA 40[1]:213.9-214.7 et passim.

8 Discussion about a "third use" is beyond the scope of this paper.

9 Many will object that this is far too negative a view of law and try to spell out a more "positive" use. Perhaps that can be done. However, all too often what results is simply a kind of covert antinomianism. The law is "tamed" and its coercive and accusing function forgotten. This leads to wholesale ignorance of the way law works. One does not need to apologize for the law, nor does it work to "tame" it. Law will not become a domestic house pet in any case. Furthermore, is it not a "good" and "positive" thing to restrain evil and preserve society from self-destruction?

10 LW 31:344; WA 7:21.1-4.

11 See Lauri Haikola, *Usus Legis*, 25 ff.

12 LW 35:170; WA 16:384.19-386.14.

13 One ought to distinguish carefully among different sorts of change and the various reasons for them. The church may have changed its practice of remarrying and admitting divorced persons, but it has not declared divorce to be a good thing. Or one may change because the original position was not solidly based on biblical teaching or because the biblical teaching itself is not completely clear or consistent. I would argue that to be the case in the question of women's ordination. But it is beyond the scope of this paper to open such questions. For further reference, see the fine discussion by Craig R. Koester, "The Bible and Sexual Boundaries," *Lutheran Quarterly*, 7:1 (1993): 375-390.

14 Dennis Prager, "Judaism's Sexual Revolution," *Crisis*. (1993): 30.

15 Wingren appropriately reminds us that entering into the world of the neighbor does, of course, involve entering into a society which we have not created. Simply to disregard the conventions and rules of solidarity in that society is to disregard the forces

which check and restrain human tendencies to evil. One may indeed criticize inadequacies but that is not the same as rejection or the attempt to put something entirely new in place. *Creation and Law*, 165.

16 For a comprehensive treatment of these matters see William H. Lazareth, *Luther on the Christian Home*. (Philadelphia: Muhlenberg Press, 1960), especially chs. 6 and 7.

17 LW 45:36; WA 10[2]:293.7-18.

18 LW 45:38; WA 10[2]:294.18-26. Emphasis mine.

19 LW 45:39; WA 10[2]:295.9-15.

20 One cannot help but wonder whether the change of wording in the marriage ceremony in the recent revision of the hymnal of the ELCA (*The Lutheran Book of Worship* - the "green book") does not already reflect a down-playing and weakening of the idea of the estate of marriage. The old *Service Book and Hymnal* (the "red book") began the ceremony forthrightly with the traditional words: "Dearly beloved: Forasmuch as Marriage is a holy estate, ordained of God, and to be held in honor by all, it becometh those who enter therein to weigh, with reverent minds, what the Word of God teacheth concerning it..." Then follow the foundational passages. The *Lutheran Book of Worship* however, begins with a prayer that the joy brought by the presence of the Lord at the wedding at Cana might also be present now. There is no reference to the estate of marriage as such even though, to be fair, one must note the repeated acknowledgement that marriage is established by God. But the basic idea that the couple is entering into the estate of marriage seems missing.

21 See the helpful article by Donald H. Juel, "Homosexuality and the Christian Tradition," *Word & World* 10 (1990): 166-169, and again the article by Craig R. Koester.

22 New York: Paulist Press. 1988. Especially chapters 3 and 4, 59-112. We can only briefly recount parts of Hanigan's much more comprehensive argument here and may thereby do him an injustice. Readers are directed to his book for the full picture. To be sure, Hanigan is Roman Catholic. But his arguments can stand on their own account. Roman Catholic moral theologians who have rejected simple obedience to authoritarianism are often much cleaner and straightforward in the kind of argument needed to support the civil use of law than their Protestant counterparts. Cited hereafter simply as Hanigan.

23 Hanigan, 77.

24 *ibid.*, 72-73.

25 *ibid.*, 72.

26 *Ibid.*, 73.

27 *Ibid.*, 71.

28 *Ibid.*, 75.

29 *Ibid.*, 76.

30 *Ibid.*, 89 f. Hanigan speaks of it as a symbolic or ritual activity. However, I have several questions about his understanding of the nature of ritual activity so I prefer to limit the discussion here to the value of sexual intercourse as a symbolic activity

31 *Ibid.*, 77.

32 *Ibid.*, 99.

33 *Ibid.*, 99.

34 *Ibid.*, 100.

35 *Ibid.*, 103.

36 "The first work of the Law, that of compulsion, is continually passing into the second work of the Law, that of accusation. It exercises both of these functions at the same time. It differs only in the mode of its reception. At one time I am forced to look outwards to the world which is purer than I am, and which has a right to my services. At another time I am forced to look inwards to myself, but I am less pure than the world, and remain so whatever I may do. The first and the second uses of the Law coincide." Wingren, *Creation and Law*, 181.

37 Frederick Gaiser ["A New Word on Homosexuality? Isaiah 56:1-8 as Case Study," *Word & World*, 14:3 (1994): 280-293] uses a case of prophetic abrogation of the Torah's law forbidding eunuchs entry into the assembly to raise the question whether such prophetic authority could or should be exercised today to abrogate biblical proscription of homosexual acts, thus granting entry and welcome to practicing homosexuals in the church. The argument perhaps needs more attention than can be given here, but from what has already been said the following points can be made. First, the question is not one of abrogating this or that law. In Christ the whole law has been abrogated. Christ is the eschaton, the end of the law to faith. Second, the problem is not one of gaining entry to the "assembly" or the church. Since Christ is the end of the law, the door is open. No one can shut it and as far as I can see, no one is doing so. But it is only as repentant sinners that we all enter through that door. But then the real question begins: "What happens now?" Third, I have tried to argue that abrogation is no simple matter. We **could**, of course, simply declare a given law invalid. Gaiser uses Luther's astonishing freedom in claiming that Christians are now free to write their own decalogue as evidence for this. Nevertheless Gaiser apparently believes that the more difficult question is whether we **should** do so. That is correct as far as it goes. But as this paper argues, beyond the **should** is the troublesome question of whether and to what degree we **can actually succeed** in doing so. Does not the law most of the time have too much "weight" from Bible, tradition, and "nature?" Only Christ can end it, and that eschatologically. To believe is to be grasped by that. So we live for the time being in the "resonance" between the end and the establishment of the law. The Christian, however, is precisely the one freed to enter the world of the neighbor as dutiful servant of all. The Christian, it is to be assumed, will write a new decalogue precisely to establish the law on a more careful basis, not to abrogate it. But this means that for now we are cast back upon the appropriate civil use of the law and the way in which the civil threatens to turn over into the theological use, driving us always to Christ.