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ON THE STEPHEN MACEDO AND JOHN FINNIS EXCANGE:

NATURAL LAW, LIBERALISM, AND HOMOSEXUALITY:

A CRITICAL ASSESSMENT

by

BRIAN B. COLEMAN

Under the Direction of Andrew Altman

ABSTRACT

This essay is an exploration of the debate between John Finnis and Stephen Macedo on the value of homosexuality. In "Is Natural Law Theory Compatible with Limited Government?" Finnis, a natural law theorist, rejects value-neutralist arguments, stating that the political community can and should make value judgments about its members' life-choices and that such normative evaluations are compatible with liberalism. Particularly, Finnis argues that homosexuality is in its essence always harmful and degrading, thus unable to participate in the basic human goods it imitates. Furthermore, he argues that the political community in liberal democratic societies is justified in discouraging homosexual conduct as a viable way of life. Macedo, while also rejecting pure value-neutralist liberalism, carefully considers but rejects Finnis's argument, which rests on an unrealistic description of value and ends of human sexual activity.

INDEX WORDS: Natural Law Theory, John Finnis, Stephen Macedo, Homosexuality, Liberalism, Limited Government, Value-Neutralist, Basic Human Goods

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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

2006

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August 2006

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1 Introduction

Homosexuality is at the forefront of the culture wars in the United States today. Perhaps most significant is the current nationwide push for constitutional (whether state or federal) amendments defining marriage as an exclusively heterosexual union. Whether these pushes stem from outright political maneuvering and rabble-rousing on the part of politicians is not the issue. Most importantly, these rulings, legislative pushes, and social trends show that the justifications for or against homosexuality and homosexual marriage need a clarification from our greatest contemporary legal and moral philosophers beyond what the scope of the law tells us. We need a forthright discussion of how to treat homosexuality in the public and legal domains.

In 1993, Colorado's Amendment 2 case *Romer v. Evans* brought several important legal scholars into a direct debate over homosexuality and civil rights.[1] Among those legal scholars, John Finnis and Stephen Macedo continued the discussion about homosexuality and the political community. This essay will explore part of their debate, found in their respective essays from *Natural Law, Liberalism, and Morality*, which centers on how a liberal democratic society should treat homosexual acts.[2]

The dominant position among legal and political philosophers is that homosexual activity and marriage should enjoy equal status with heterosexuality. Much of the

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[1] *Romer* v. *Evans* 517 U.S. 620 (1996).
[2] John Finnis, "Natural Law Theory and Limited Government" and Stephen Macedo, "Against the Old Sexual Morality of the New Natural Law" in *Natural Law, Liberalism, and Morality* Robert P. George, ed. (Clarendon Press, Oxford, 1996). Hereafter cited as NLLG, and AOSM, respectively.

prevailing literature argues that homosexuality is not inherently less valuable, and that it is wrong for the government to criminalize or discourage such conduct. Not all legal scholars share this mainstream view. Finnis represents a group of new natural law theorists who argue that while homosexual conduct should not be criminalized, it should be discouraged. His contemporary natural law theory has made a case for delineating the foundations of limited government and with it what constitutes viable options for the good life. With respect to individual autonomy, Finnis embraces the liberal tradition of limited government that is sympathetic to plurality, yet rejects value "neutrality." According to Finnis, "a theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct."[3]

But what does this mean? Essentially, there are certain basic human goods that motivate reasonable action on the part of individuals, families, communities, and governments, and delimit the role and scope of government. Finnis believes that homosexuality is a distraction from some of these basic human goods and harmful for the individuals who participate in it. Finnis claims his position is based upon a view of sexual activity that is in line with human goods and the benefit of the individual. While he maintains that homosexual conduct should be discouraged (and denied any endorsement as a viable preferences for human activity), it is not justifiable to criminalize these acts or the individuals who participate in them.

This paper is primarily a critical examination of Finnis's view of the morality and politics of homosexual activity guided by Stephen Macedo's own rebuttal of the Finnis

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[3] John Finnis, *Natural Law and Natural Rights*, (Claredon Press, Oxford. 1980), p. 18. Hereafter cited as NLNR.

position. Macedo, sympathetic to some aspects of Finnis's natural law theory, carefully considers but soundly rejects Finnis's argument. For Macedo, Finnis's view of sex is too narrow and leads to absurd results. Finnis's argument in "Is Natural Law Theory Compatible with Limited Government?" can be viewed as two interrelated parts. First, that homosexuality is in its essence always harmful and degrading, thus unable to participate in the basic human goods it imitates. Secondly, that the political community (in liberal democratic societies) is justified in discouraging homosexual conduct as a viable way of life.

In this paper I will first lay out basic aspects of Finnis's broader theory of natural law that are relevant to this debate, including his description of basic human goods and practical reason. Then I will describe their connection to limited government, explaining Finnis's anti-neutralist liberalism before bringing in his discussion of homosexuality. Next I tie together Finnis's view of limited government and homosexuality, exploring his position on how the public (the political community) should treat homosexuality. In the last two chapters I will explain Macedo's critique of Finnis followed by an evaluation of their exchange with my own conclusions.

2 John Finnis's Natural Law

Basic Human Goods and Practical Reason

All human beings (as rational agents) are motivated to act by the things they believe to be good for them. That is, they seek to obtain what they see as good and avoid what they see as harmful. All human beings share the "basic human urge" toward a "few basic values in a vast diversity of realizations."[4] Basic human goods are actualized though human action (they are lived) by real individuals, and should not be understood simply as abstract concepts. Finnis identifies seven basic human goods can neither be reduced nor derived from other goods, and are the motivation and aim of action.[5] Further, these basic forms of human good are *always* reasons for action.[6] The seven basic goods are: friendship, religion, knowledge and aesthetic appreciation, bodily life, skillful performance, marriage, and practical reasonableness.[7] "Practical reasonableness" (or practical reason) is what guides and informs us as to what the basic human forms of good are and why and how we should seek them. For Finnis, individuals generally seek these same (categorical) types of goods (with the aid of practical reason, itself a basic human good), which he believes are fundamental and incommensurable with one another.

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[4] Finnis, NLNR, p. 84.

[5] Ibid., p. 92, NLLG, p. 4. These goods are equally primary. There is no *one* Good, but a plurality of goods that inform the many ways to live well.

[6] There are other goods that give reasons for action, but Finnis thinks they can ultimately fall back into these basic categories or combination of categories. NLNR, p.90. *Sound* reasons for action should always pertain to some form or combination of forms of basic human good .

[7] Finnis does not maintain that his description of the goods in this list is necessarily exhaustive or complete, so it would be wrong to claim that these are *the* standards that we must always go by. Also, it is important to note that I refer to the list in Natural Law Theory and Limited Government, p. 4. It differs slightly from the one in NLNR, but substantially. The major difference is that marriage is independent in the newer list.

To say that these goods are incommensurable is to say that they cannot be ranked or measured against one another. According to Finnis, they are all equally fundamental and indemonstrable as goods:

> First, each is equally self-evidently a form of good. Second, one can not be analytically reduced to being merely an aspect of any of the others, or to being merely instrumental in the pursuit of any of the others. Thirdly, each one, when focused upon, can reasonably be regarded as the most important. Hence, there is no objective hierarchy amongst them.[8]

Although the basic human goods are in a sense equal, they are all uniquely special, and all have distinct claims for their respective importance in fostering human flourishing. For example, for Finnis it would not make any sense to say that friendship is more important than knowledge. They are both self-evidently good and essential to a good life. Individuals might value and emphasize one good in particular, but that does not mean the other goods lose their standing as basic human goods. Individuals should pursue all basic human goods in one way or another, with the inevitability of some taking precedence in particular individuals' lives.[9] For example, aesthetic appreciation and knowledge might be emphasized in and art dealer's life, while a professional athlete might emphasize skillful performance. "Each of us has a subjective order of priority amongst the basic values."[10] Because of the multitude of choices for one's life, there will be opportunity costs incurred with respect to basic human goods, yet this in no way diminishes their priority or status. However, it would be both wrong (practically unreasonable) to say that one human good is fundamentally more important than another, just as it would be wrong and incorrect to believe that other human goods can be excluded from one's life.

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[8] Finnis, NLNR, p. 92.
[9] Ibid., p. 85. "Human beings and thus whole cultures differ in their determination, enthusiasm, sobriety, farsifhtedness, sensitivity, steadfastness, and all the other modalities of response to any value."
[10] Ibid., p. 93.

Natural law according to Finnis is the theoretical and practical exploration of incommensurable basic forms of human good and the basic requirements of practical reason (itself a basic human good), which are the universal guiding platforms for human action and political community.[11] Therefore, natural law according to Finnis does deal with making distinctions about what is both good and bad for individuals and groups of individuals. That being said, Finnis claims that his version of natural law is not derived from moral absolutes, whether theologically or metaphysically based. Instead, it is explicitly concerned with determining what is reasonable and what is not: hence, he favors "practical reasonableness" to "morality."[12] Practical reasonableness, one of the basic human goods, takes on the (seemingly foundational) role of delineating and guiding "good" human acts and ends.[13]

Once the basic tenets and methodology of practical reason are set out clearly, then we can formulate moral standards on the basis of what is "unreasonable-all-things-considered" and "reasonable-all-things-considered."[14] Practical reason is based upon nine "requirements" that Finnis argues are self-evidently rational guidelines for determining right and wrong ways to act.[15] In this way, practical reason really guides us in achieving the other basic human goods by helping us determine what one ought and ought not to do. Therefore, Finnis claims that his natural law theory (as based upon practical reason) is not a catalogue of moral pronouncements, but is instead the

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[11] It is practical, because human action is always concerned with the concreteness of life lived, and theoretical, because it practical application requires some conceptual knowledge of the realm of human affairs to be successful.
[12] Ibid., p. 15, 23.
[13] The importance of "practical reasonableness" for Finnis's system is paramount, and raises more questions than can be adequately dealt with here.
[14] Ibid., p. 23.
[15] Ibid., pp. 100-127. Such as not excluding any of the basic forms of human goods, formulating a life-plan, remaining open to other life-choices and the choices of others, to not carry out acts that directly harm any of the basic human goods, etc.

explication of the natural tools we use to guide our actions. While morality is an explicit issue for natural law theory, both morality and natural law are essentially concerned with reasoning about our actions. "Natural law theory explores, expounds, and explains the deep structure of morality, but morality is a matter of what reasons require, and reasons are inherently intelligible, shared, common."[16]

[16] Finnis, NLLG, p. 3.

Natural Law and Limited Government

The *political community* "properly understood" is "one of the forms of collaboration needed for the sake of" basic human goods.[17] The political community is the group of citizens who come together to formulate the *common good*. The common good is the "point" (or goal) of the "communication and co-operation" of the community, a goal that is always concerned with some form of the instantiation of *basic human goods*.[18]

However, there are three distinct types of common good "which provides the constitutive point of a distinctive type of community and directly instantiates a basic human good."[19] Of these three, two of them play a major part in the argument put forth by Finnis later: friendship and marriage. But for now, the common good is the instrument of the political community in the service of achieving some goal or goals. Both the common good and the political community are instruments explicitly formed to help promote individuals in their fulfillment of basic human goods.

Finnis rejects the notion of a life of complete self-sufficiency, or "a life lacking in nothing."[20] The social nature of human beings, their need for family and community, is vastly dependent upon others: it calls for political community. The government, the institution that serves as agent of the political community, is needed because human beings exist in a plurality (a community), and some basic goods can only flourish fully with certain institutions in place. The reason for constitutional government is not to solve

[17] Finnis, NLLG, p. 5.
[18] Ibid., p. 4.
[19] Ibid., p. 5. To paraphrase, these are friendship, marriage, and religious community. These common goods are basic goods in themselves, while other types of common good related to human association and co-operation are instrumental.
[20] Ibid., p. 7.

the *need* for political community,[21] but simply to aim towards "human integral fulfillment" by formally articulating and carrying out the needs of the individuals that make up the political community.[22]

Because all human action is in the pursuit of basic human goods, and all sound governments (and political communities) are instruments in the service of achieving these goods, no political, social, or legal theory can be "value-free" or "value neutral." Furthermore, according to Finnis, any sound (positive) law itself provides reasons for action: it imposes authority and obligation by the fact that it conforms to practical reason. Therefore, all positive law has a normative dimension in that it guides us in what we ought and ought not do: a normative dimension imbedded both in its foundation (its aim or purpose) and in its execution (it provides reasons for and against action). For Finnis, only a theory of natural law such as his can explain and evaluate these normative dimensions of the law, because it is intimately concerned with the most common and universal reasons for action: basic forms of human good. It is a philosophy of human action, and any sound analysis of law pays close attention to these fundamental reasons for action in its descriptions. Practical reason and basic human goods provide the moral and rational foundations for limiting the power of the government (i.e., both the government's function, and the extent of its authority).[23]

According to Finnis, the government is rationally limited in three crucial and potent ways: by constitutional law, by moral norms, and by its "general justifying aim,

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[21] Finnis has a Aristotelian view of the political, in that the political community is a natural outgrowth of man's social and political nature. While much of convention is fabricated by man, the political community is not purely creation for Aristotle and Finnis, as it is for others, notably modern philosophers such as Hobbes who intended, to some extent, to solve the political problem itself.
[22] Finnis, NLLG, p. 7. The complete fulfillment of which is impossible. Nevertheless, it is the goal and aim of the political community and its reason for existence.
[23] Ibid., p. 2.

purpose or rational."[24] Practical reason tells us that constitutional government (and the laws it supports) is instrumentally good and hence generates a duty to follow the specific laws of a sound political order. Laws "should be based upon reasons, not merely emotions, prejudices, and biases."[25] Therefore, practical reasonableness insists on the Rule of Law (constitutional law) and not of Men.[26]

The political community needs the government to actualize the Rule of Law, with the government creating, publishing, and enforcing laws. But the government must be a free and open one, subject to debate and scrutiny, with the understanding that it can and will err, sometimes against its own citizens: "the resolution of all these problems of human rights is a process in which various reasonable solutions may be proposed and debated and…settled…but does not pretend to be infallible or to silence further rational discussion or…forbid…reconsideration."[27] Throughout this process, practical reason and the "moral norms" of a society guide the law and its application. Moral norms or principles are the "principles and norms of reason, which are limits, side-constraints, recognized in the conscientious deliberations of every decent person."[28] These are the moral principles insisted upon by society that are articulated through practical reason, and thus apply to every individual, including government officials.

But most importantly, government is limited by its instrumental character. Neither the government, nor the political community, nor the common good are foundational and thus good in themselves. Instead, they are instruments with the purpose

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[24] Ibid., p. 4.
[25] Ibid., p. 12.
[26] Ibid., pp. 1-2. The Rule of Law is favorable to the rule of men according to Aristotle and Aquinas, and, of course, lies at the heart of modern liberal government.
[27] Finnis, NLNR, p. 220.
[28] Finnis, NLLG, p. 3.

of attaining basic human goods, the only true ends-in-themselves. Natural law theory according to Finnis posits basic human goods as foundational, self-evident, non-derivable, and incommensurable, with the government the rational instrument of the political community (itself an instrument) in the service of promoting these basic human goods (through its promotion of the common good). Thus, Finnis believes that natural law theory properly understood is not only compatible with limited government, but directed towards it. Better put, modern, constitutional government can be properly understood as the intention, or aim, of any sound natural law conception of good political rule. [29]

[29] Ibid., p. 2. One that is based on the rule of law, separation of powers, elections, etc.

Limited Government and Individual Flourishing

The overriding rationale for the government is to promote the conditions that the political community has decided help insure human flourishing in the attainment of basic human goods. This, according to Finnis, is the overarching function of government: to serve as a powerful instrument in the service of individuals, families, and communities.[30] Yet basic human goods should always "trump" the collective interest or a collective enterprise when there is a conflict, because it is inherently reasonable and logically consistent that they should.[31] Policy and legislation that is intended as advancement of some aggregate common good (or interest) is an instrumental good meant to promote public morality.[32] While the government can advocate a public morality, it should not fill the role of making life-choices for individuals or groups.

Understanding the basic human goods as non-instrumental trump cards against the instrumental common good begins to sound like a discussion of rights. Finnis would like us to understand his theory as a more robust and accurate depiction than that of rights (and of the human condition) because of the fundamentally non-instrumental character of these basic human goods. Impediments to these goods are necessarily things to be avoided at all costs, and excessive government interference in these goods amounts to impediments (whether good-intentioned or not).

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[30] Ibid., p.6.

[31] This is a different conception from Ronald Dworkin's concept of trumping rights. See Robert P. George's *Making Men Moral*. (Oxford: Claredon Press, 1993)

[32] Logically, the common good itself cannot be advanced if individual basic goods are restricted. Finnis claims to have not only a better foundational understanding of basic human goods and natural rights, but a more positive and consistent understanding of the relationship between individuals (and their claims to moral independence) and the government.

If these basic goods are so essential to be like rights, how far can (and should) the political community go in using the government to promote such goods, and how far can (and should) it go to discourage behavior that it feels is damaging to these goods? For Finnis, political community does go a long way in using government to secure conditions favorable to human flourishing, and in discouraging the "harmful and evil." But the government should only be used in a limited way to regulate human associations:[33]

> Such regulation should never (in the case of the associations of a non-instrumental common good [e.g., friendship]) or only exceptionally (in the case of instrumental associations [e.g., business partnerships]) be intended to take over the formation, direction, or management of these personal initiatives and interpersonal associations.[34]

The political community should never use the government to directly manage the lives of individuals participating in basic human goods and the associations that actualize them (e.g., marriage, friendship, etc.), even in some cases where vice is occurring between adults. Therefore, Finnis argues that it is not acceptable for the government to coerce or direct people by making "secret and truly consensual adult acts of vice a punishable offence."[35]

When in the search of basic human goods, even when that search is flawed, the government can only discourage certain truly private acts. Yet it is not inconsistent for the political community to foster those goods and activities seen as valuable and reasonable, and to criticize those that are deleterious or injurious of human good. It must always be balanced with a view to a distinction between private and public vice and virtue: the restraint of limited government does not trump the promotion of public

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[33] Finnis, NLLG, p. 8.
[34] Ibid,, p. 5. Brackets mine.
[35] Ibid., p. 8.

morality, which means that the human acts involved are tolerated legally but publicly denounced.

This leads us to the central issue of this paper, and it should be clear that Finnis is not advocating a stance of neutrality with respect to choices about the "good life," including homosexual lifestyles. While the human individual has a wide variety of life choices that are practically reasonable courses of action for his life, some choices are more reasonable than others. These adhere more closely to what practical reason says are elemental to the basic human goods, while others do not (some are downright harmful). Homosexuality is one such case of defective and harmful human action that mimics real human goods. For Finnis, monogamous homosexuality is a defective form of friendship and love. While it may resemble friendship and love, it does not share in the important characteristics and traits that truly actualize friendship and love.

But it is not the duty of government officials to interfere with the independent associations of its citizens. It is also important not to pursue overly aggressive paternalistic policies and that "an attempt for the sake of the common good to absorb the individual altogether into common enterprises would be disastrous for the common good."[36] Thus, while homosexuality is viewed by Finnis as contrary to natural law, he sees more harm than good[37] in directly pitting the government against particular instances of participation in such behavior. Yet the refusal to punish private, personal acts of sodomy does not entail social, political, or legal tolerance of homosexuality and homosexual lifestyles; it does not become manifested in a liberal prescription as an equal

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[36] Finnis, NLNR, p. 168.

[37] Or, more precisely (as this implies a sort of weighing of moral choices and therefore a sort of consequentialist or utilitarian ethical process), the good of citizens to act privately without constant supervision supersedes the good of society in cases such as personal sexual conduct)

and neutral conception of the good life, but rather as a sort of "don't ask, don't tell" policy similar to the military position made famous under President Clinton. Finnis takes a dual position on homosexuality and government which he puts forward as consistent and non-contradictory: that the political community should not seek to criminalize homosexuality, but it should seek to discourage and denounce it. At this point I turn to a more detailed discussion of Finnis's view of good and bad sex, after which I will flesh out this "dual position" and his defense of it.

Natural Law and Sex

John Finnis argues that even the most monogamous and loving homosexual acts are deluded, incomplete attempts to form the conjugal, heterosexual bond of marriage. Such acts, even when done in the context of a loving, monogamous relationship do not meet any basic form of human good (play, friendship, knowledge, marriage), but instead are more closely related to masturbation. Whether homosexual or heterosexual in nature, masturbatory acts at best treat one's own body and the bodies of others as instruments, and at worst are extremely degrading and injurious to those whom participate in them.

In fact, views that single out homosexuality without recognizing that heterosexual acts done outside marriage (or performed in non-procreative fashion) are essentially the same, reveal simple prejudices. It is wrong to consider the sexual acts of heterosexuals, whether married or not, to be simply good while those performed by homosexuals to be simply bad. Only biologically connective sex done with mutual affection within the context of marriage is valuable, instantiating the basic human good of marriage (marriage necessarily being limited to a man and a woman), a common good that cannot be achieved by any other action.

For Finnis, sex is a good only when it meets the dual conditions of a biological and mutual affection of friendship.[38] That is, oral sex between married couples is still essentially masturbatory in nature because it fails to meet the biological requirement, as does all homosexual sex. Sex itself is not necessarily a basic form of human good, and

[38] Finnis, NLLG, p. 15. Biological union of the penis and vagina which is the true method of conception. The biological union has "procreative signifigance" even when it is done without the possibility or intention of conception.

good sex must meet the dual criteria of biological union and loving friendship within marital conjugation (between a man and a woman).[39] "Reality is known in judgment, not in emotion," Finnis says, indicating that it is not enough that two individuals simply feel in love with one another.[40] There is a real giving of oneself to another in marriage, a friendship and mutual affection that gets expressed in the real biological union between them. All other sex, Finnis (at least explicitly) considers to be purely instrumental towards physical gratification.

Finnis relies on the classical and pre-modern tradition of natural law to lend philosophical weight and authority to his placement of heterosexual marriage and sex as essentially procreative and the only good form of sex.[41] He believes that the classical thinkers had very deep and thoughtful reflections on homosexuality and heterosexuality and unanimously concluded that the latter is the higher and more perfect good of the two. Importantly, many of these thinkers were unbiased by revealed religion (the Judeo-Christian tradition) and lived in homoerotic cultures, which makes them special authorities.[42] This authority comes from a presumed isolation from (what some might call) prejudices, uncritical mores, or reactionary biases against homosexuals (especially

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[39] It is implied that marriage, as understood, reflects a deep commitment between two individuals that is giving and whole. Certainly, marriages of convenience or ones in which a spouse is cheating, etc., cannot qualify for participation in the full good of the conjugal, sexual union.

[40] Finnis, NLLG, p. 15.

[41] Finnis references a wide section of these thinkers, who he believes come to similar conclusions about homosexuality: Aristotle, Plato, Aristophanes, Augustine, the Stoics, Plutarch, and Thomas Aquinas. It is important to note, however, that his interpretations of these authors on the subject of homosexuality has been subject to much debate and scrutiny. Most notably, Martha Nussbaum has been one of Finnis's biggest critics. Nussbaum has consitently argued a position that directly contradicts the one of Finnis. In fact, Nussbaum testified in Colorado's Amendment 2 hearings that homosexuality was never considered to be immoral or shameful in classical Greece. See Martha Nussbaum and John Finnis, "Is Homosexual Conduct Wrong? A Philosophical Exchange" Vol. 209 Issue 20 *New Republic*, 12 (1993). John Finnis, "Law Morality and Sexual Orientation" 69 *Notre Dame Law Review* 1049 (1994). The exchange between Nussbaum, Finnis, Robert George, and others regarding her testimony during the (in)famous Colorado trial is intriguing and centers on some controversy regarding the interpretation of Greek texts and the Ancients' views of homosexuality.

[42] Finnis, NLLG, p. 12. Most notably Socrates, Plato, and Aristotle.

Christianity). Finnis supports the general conclusions of the "Platonic-Aristotelian and later ancient philosophical rejections of all homosexual conduct" with the aim of supplementing his (new natural law) argument with theirs.[43] He writes,

> At the heart of [their] rejections of all homosexual conduct…are three fundamental theses: (i) the commitment of a man and woman to each other in the sexual union of marriage is intrinsically good and reasonable, and is incompatible with sexual relations outside marriage; (ii) homosexual acts are radically and peculiarly non-marital, and for that reason intrinsically unreasonable and unnatural; (iii) furthermore, according to Plato, if not Aristotle, homosexual acts have a special similarity to solitary masturbation, and both types of radically non-marital act are manifestly unworthy of the human being and immoral.[44]

These conclusions are not only supported by a long history of great thinkers working within the natural law tradition, but are available to us through reason and should be endorsed in the public realm.

Finnis also argues that many early thinkers failed to fully articulate the special status of marriage beyond that of its intention of procreation and family. He notes that Augustine came close to articulating such a special status for marriage in his recognition of the "natural *societas*" of the union of the two sexes.[45] If marriage's special status as a human good stands solely on the basis of procreation and family, then sterile couples would apparently be incapable of participating in this good. Therefore, there must be something special and unique about marriage that is not limited to family and procreation: it must truly be a special case and basic form of human good. Through sex, husband and wife (although sterile) represent and function as a "biological

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[43] It is not only a supplement to his thought, however, as he sees his view to generally be in line with theirs, stemming from and representing a reasoned and reflective approach to the subject.
[44] Finnis, NLLG, p. 14.
[45] Ibid., p. 13.

unit…actualizing and experiencing the two-in-one-flesh common good and reality of marriage."[46]

Here it is important to note that Finnis is describing marriage both as a basic human good and as a kind of (non-instrumental) common good. This appears to be simply an identification required by the fact that there is a plurality involved, if only a pair. The married couple is a sort of community, in that they are a spouses working together as "complementary, bodily persons whose activities make them apt for parenthood," and they are suited for children yet still a community without them.[47] This common good (which appears to be some sort of synergistic reaction) exists even when conception is not possible, because the biological union has "procreative significance." Procreative significance is foundational to marriage, yet marriage is not instrumental. It is not a tool used for the sake of procreation and the production of offspring, but a good in and of itself.[48] It is neither instrumental for the good of each spouse, nor for the creation of new life. This is the "fulfillment of a communion" that is an intrinsic stand-alone good: an "integral amalgamation of the lives of the two persons."[49]

For Finnis, marriage represents a "double blessing." It essentially actualizes two basic goods that are common to both partners--friendship and procreation--yet is not exclusively either one. Marriage is not merely an instrumental good for the purpose of procreation and propagation of the species, but for the higher friendship that is actualized in the "two-in-one-flesh" sexual bond.[50] Therefore, even sterile couples who cannot actualize the good of procreation can participate in it while truly actualizing the

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[46] Ibid., p. 16.
[47] Ibid., p. 5.
[48] Ibid., p. 13.
[49] Ibid., pp. 13-14.
[50] Ibid., p. 16.

biological union and expression of their friendship.[51] What is common with both sterile and infertile couples is the intentionality of the act of sex: the uniting of one flesh in the good of marriage, whether or not conception is achieved.

But does this physical union of two sexes imply an ought from an is? According to Finnis it does not infer normative values from natural (biological facts), because the procreatively significant sex act is not merely enough: it must include the mutual affection of friendship within the context of a loving marriage. This represents a combination of factors that reveal the difficulty in trying to accuse Finnis of deriving moral norms from natural facts. Heterosexual relations can be means to simple sexual fulfillment. But they also have available to them the expression of a deeper bond of friendship in marriage through natural faculties given for a higher good, whereas homosexual relations simply do not.

Again, for Finnis, sodomy is essentially the same as masturbation in that it is merely an attempt to achieve some measure of orgasmic satisfaction. In this way our bodies are a means to the end of satisfying our conscious desires for sexual stimulation. The act of sodomy is only the utilization of another body to achieve the same desired end as masturbation, just as many other body parts can be used (in a utility, or tool-like sense) for reaching such satisfaction. Only conjugal love and sexual activity is the more perfect form of friendship (the highest form): homosexual conduct is a mere imitation, striving and failing to maintain the superior heterosexual bond and friendship. Finnis believes his reasoned approach supplemented with the classical tradition is what separates new

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[51] Finnis somewhat breaks from the rigid, theological understanding of marital sex being purely for the sake and end of procreation and that using our sexual organs for something contrary to their natural function is a sin. This position separates the new natural law theorists from many traditional natural lawyers in that it allows for marriage to be a basic good and that sex within that context can be good without necessarily being procreative (but as long as it has procreative significance). It also accounts for sex after pregnancy.

natural law theory from the arbitrary prejudices of many people who condemn homosexuality. Because homosexuality is categorically the same as heterosexual non-procreative sex acts (and adulterous ones), homosexual behavior is seen as unnatural within the context of the recognition of the good of sex with a narrow, yet relatively clear definition.

3 The Common Good

I now return to the public element of this debate, and the "dual position" mentioned above. How should the political community approach homosexuality within a natural law framework such as Finnis'?[52] Most importantly for Finnis, the idea that liberalism entails that the government remain neutral with respect to conceptions about the good life is false. He argues that not only is neutrality a bad idea practically, it suffers from theoretical flaws in its description of private and public life.[53] Finnis briefly takes on the major theories that favor neutrality, including Ronald Dworkin's, with respect to conceptions of the good life. For Finnis, the issue in part turns upon how we view the distinction between the private and the public.

Finnis claims that a simple demarcation between the public and private is not possible, because people's motivations and reasons for acting in the public must be informed (or more likely overwhelmingly influenced) by their basic desires and inclinations.[54] However, Finnis does believe that we should stay out of the private concerns of citizens at least with respect to criminalization. Yet there is no distinction in making pronouncements about homosexuality: the public can and should denounce such private acts as harmful to basic human goods. In this section I juxtapose the anti-neutralist position of Finnis with a neutralist conception of liberalism put forth by Ronald Dworkin.

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[52]If, as Finnis maintains, homosexuality is harmful to the individuals who participate in it and to the common good in general.
[53] With others such as Robert P. George, and to a limited extent (as we shall see), Stephen Macedo.
[54] Finnis, NLLG, p. 10. Also, see above in my discussion of Finnis on limited government.

Ronald Dworkin's Neutralist Liberalism

Private conceptions of the good life, according to liberal theorists such as Ronald Dworkin, should be kept out of the public discourse. When the political community debates a public issue, it is necessarily driven by peoples' personal motivations. We are always motivated and act on the basis of those goods that we value, whether for ourselves or others, by what Dworkin calls personal preferences and external preferences. While there are public and private issues that we confront in our lives, our approach to them can only come from the perspective of those foundational goods that spread out throughout the human community: those that we value generally and cherish most.

External preferences refer to the ideals, or conceptions of the good life, that we (as individuals) would like to see manifest themselves in the behavior of others. These are the things we favor and disfavor for others. Personal preferences are just those preferences we hold for ourselves. They are essentially self-reflective and not other-directed as external preferences are. Yet both external and personal preferences bring "pleasure when satisfied and displeasure when ignored."[55] Both are genuine desires and it would seem that people would be genuinely motivated to pursue the fulfillment of both. Dworkin argues that in pursuing policy and objectives aimed at the collective interests of society, both personal and external preferences motivate and justify policy. External preferences, however, should not be assigned "critical weight," because any policy decision based on them "invades…the right of citizens to be treated as equals."[56]

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[55] Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1977), p.267.
[56] Dworkin, *Taking Rights Seriously*, p. 275.

Dworkin specifically accepts that individuals often do act in ways that are contrary to what is best for them or for their particular community. Sometimes people participate in activities that are not in the interest of themselves (beyond impulse or desire-satisfaction), but are instead decidedly bad for their own flourishing and well-being. Dworkin also acknowledges that people do not have a right to liberty in the broad sense that they can do what they want to do, unfettered by government interference.[57] Yet the government must always respect certain liberties because they are grounded in firmly established right to equal concern and the right to moral independence: the right for each individual to enjoy their own personal preferences so long as no one's rights are being violated.

Thus individual rights (almost) always trump the interest of the government (or more precisely for Dworkin, the legislature) in promoting the instrumental value of the collective good (public policy) when such policy conflicts with or acts to constrain the civil rights of individuals. Such rights, or better put, the "liberal conception of equality," strongly curtails the community's (and its legislature) limited concern with the (base, dehumanizing, or degrading) purely self-harmful actions of its citizens, because such concern implies a preference for certain types of action (or more precisely, particular conceptions of the good life). When public policy *conflicts* with (or constrains) established liberties or rights, then it should be overturned, whether the policy put forth is concerned with the well-being of individuals themselves, or with promoting a broader,

[57] Dworkin, *Taking Rights Seriously*, p. 267.

more universal social goal.[58] In each case, the fundamental rights that individuals have are binding and of higher political status than the aim of the proposed policy.

The ultimate principle(s) at work in this anti-perfectionist stand is the principle of neutrality with respect to conceptions of the good life: specifically the government's duty to respect the individual rights and autonomy of its citizens to pursue their own versions of such a life. Pure value neutrality, however, might not even logically entail that such a principle be adopted by the institutions found within the system at large, or that such a principle necessarily arise. For, value neutrality as a non-principle is only relativism. And relativism cannot claim that value-neutrality is better than non-neutrality about conceptions of the good life. Surely if my values must be respected by all, but if my values incline me not to respect others' autonomy, then we have reached an impasse. So this political form of value neutrality does not grant people a type of open-ended liberty.

Thus, Dworkin must mean something both more nuanced, substantive, and constrictive when he talks about neutrality. It is constrictive in the sense that neutrality in the public realm is a type of good, or something to be pursued because it is better than competing alternative types of political coordination. We might call this the "strong-political" sense of neutrality. But we might go one more step in identifying what this sense of neutrality is. That is, there is possibly a more fundamental type of politically desirable, non-utilitarian principle at work here. That principle is equality; or more precisely, the abstract principle of equality that requires neutrality in conceptions of the good life by treating all citizens with equal concern and respect. Dworkin clearly distinguishes between "liberalism based on neutrality" and "liberalism based on equality"

[58] Under Dworkin's theory, it appears either unnecessary or impossible to disentangle the two intimately connected ways in which rights trump governmental intrusion into the lives of its citizens mentioned above.

in *A Matter of Principle*, arguing that the latter is free of the significant defects of neutrality.[59] Dworkin elsewhere calls this the "liberal conception of equality."[60] Because pure value-neutrality can cause inequality, "laws are needed to protect equality, and laws are inevitably compromises of liberty."[61]

In Dworkin's essay "Liberalism," he argues that equality is basically accepted by liberals and conservatives alike.[62] That is, most reasonable people in contemporary America believe in (and support upholding) equality as a political ideal. Such a version of liberalism which embraces political neutrality, Dworkin writes, is not based on skepticism or on an atomistic view of humans, nor is it "self-contradictory." Political neutrality based on equality is "a principle of political organization that is required by justice, not a way of life for individuals."[63] In this essay and in *Taking Rights Seriously*, he distinguishes two ways in which equality is a political ideal: as (1) "treatment as an equal" and (2) "equal treatment."[64] It is both the (1) principle that the government treats all its citizens with equal concern and respect, and (2) that the government does its best to promote the basic conditions (equality of resources) needed for human flourishing and well-being. The first principle of equality as political ideal is the truly fundamental or constitutive principle, according to Dworkin.

This first principle of equality establishes the dignity of the individual against the fluctuating preferences of society and the demands of government. It denies that there should be an attempt at balance between the competing demands of society and the

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[59] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), p. 205.
[60] Dworkin, *Taking Rights Seriously*, p. 273.
[61] Ibid., p. 267.
[62] See Ronald Dworkin, "Liberalism", in Michael Sandel (ed.), *Liberalism and its Critics* (New York, NY.: New York University Press, 1984).
[63] Dworkin, "Liberalism", p. 78.
[64] Dworkin, *Taking Rights Seriously*, p. 227.

individual.[65] For when the "government errs on the side of the individual, then it simply pays a little more in social efficiency…" while erring "against the individual inflicts an insult upon him" that "is worth a great deal." By curtailing the social agenda or policy, the government simply loses out on the possible gains that it might have achieved for them. This is a hypothetical type of loss that has no real substance because it is based on the possibility of future gains. But the loss the individual faces if the government infringes upon his liberty is much greater, because it has true substance in the present.[66]

[65] Ibid., p. 198.
[66] Ibid., p. 199.

Finnis's Anti-Neutralist Liberalism

For Finnis, the Dworkinian position, with its strict demarcation between private, personal preferences, and public, external preferences, represents a dualism that views the individual as split or divided into two persons. According to Finnis, one's public acts are at the same time one's private acts: they are part of one's one and only real life."[67] For Finnis, some life choices and actions are not practically reasonable and should not be endorsed, whether truly private or not. If homosexuality is not a valuable life choice or action, then individuals and communities should do what they can to discourage it. The political community's rationale requires that the state "deliberately and publicly identify, facilitate and support the truly worthwhile, including moral virtue," and conversely, to dissuade the opposite.[68] In this way the political community dissuades harmful behavior for the sake of individuals' well-being. Dworkin's neutralist liberalism turns a principled blind eye towards the unreasonable and reasonable alike and thus does a genuine harm to individuals by not treating them as valuable.

But can we rely upon practical reason to tell us clearly what is harmful for all individuals? Finnis's system entails that the reasons and judgments that claim certain human activities are good and valuable--while others are not--should be "widely accessible" to all. He believes that all people have the capacity to understand the "best reasons" for the value in marriage and the corruptive nature of homosexuality.[69] Those

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[67] Finnis, NLLG, p. 10.
[68] Ibid., p. 8.
[69] Those formulated based on reason, without recourse to common prejudice or other influences. They are sound "reasons as reasons". See p. 11, NLLG.

reasons must not be based upon prejudice or loathing. Any public or political descriptions of homosexuality must be based upon sound reasons. Thus, Finnis argues the ruling in *Bowers v. Hardwick* to be inappropriate because it fails to explain "why and in what respects homosexual conduct is bad."[70] In line with the requirements of practical reason and the Rule of Law, public morality should be based on sound reasons that are clear and open to all, and not merely on the whims of the majority.

Some argue, however, that complex philosophical reasons and moral principles might not be clear to all people. And clearly, homosexuality is clearly not considered inherently harmful or "bad" in the eyes of many. But for Finnis, those who participate in certain harmful lifestyles might be especially unreflective persons, or not fully realize how and why they are harming themselves. He denies that the principles and reasons that inform moral norms are inaccessible to the common or everyday man.[71] Even the classical natural law philosophers, he argues, do not claim that certain moral principles are too obtuse or complicated for most people. Upon reflection (and sometimes a little nudge from family, friends, community, etc.), almost everyone should be able to see the reasonable or unreasonableness of moral principles and judgments. Many who do see homosexuality as unreasonable do not have the explicit formulation of why it is wrong, just that it is somehow opposed to (and in some hostile opposition towards) the goods they do value.[72] Even those who participate in such acts (including homosexuality) can,

[70] Finnis, NLLG, p. 12.
[71] Ibid., p. 11.
[72] Ibid., p. 14.

and should come to view them (if they reflect upon it carefully) as harmful and contrary to their own well-being.[73]

Although only individuals can "make themselves good or evil," the cooperative nature of the political community reveals the non-individualistic nature of human action, which requires that "fellow members" encourage "morally good conduct."[74] Remaining neutral with respect to life choices is unreasonable because of the social and communal nature of human life, and because of a person's responsibilities to his or her fellow humans. Dworkin's argument against paternalist policies and attitudes is that they fail to give due equal concern and respect to the individuals they criticize. According to Finnis, criticizing the actions of a certain segment of the population (homosexuals) is reasonable because it is compatible with respecting that individual's well-being.[75] It is not directed at some instrumental common good, but towards the individuals themselves and their own flourishing. Finnis argues that his version of equal concern and respect (formulated in part with the assistance of Robert P. George) takes the person as a unique individual, deserving of the best that is possible for him or her. Publicly denouncing homosexuality does not neglect the good of the individual, but instead takes the good of the individual as primary.

Finnis would like us to take for granted that "equal concern and respect" and neutrality are not synonymous in the way that Dworkin contends. If this premise is accepted along with the premises that all conceptions of the good life are far from equal

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[73] However, it is clear that many do not, and claim that such a notion is degrading to them. Finnis can only maintain that these people are simply deluded.
[74] Finnis, NLLG, p. 8.
[75] This is a reference to Ronald Dworkin. Finnis argues that the neutrality and equal concern and respect connection has sufficiently been refuted by others, most notably Robert P. George in *Making Men Moral*. It is important to note that George and Finnis disagree on the issue of criminalization for certain vices, with George for and Finnis against.

in the eyes of liberal justice and that homosexuality is harmful and degrading to those who participate in it, then some "publicly justifiable restraint" (of homosexual behavior) is legitimate. That is, homosexuals can be constrained by the government in some limited, but publicly justifiable ways. First, homosexuality should be discouraged, and second, homosexual relationships should not be recognized by the law. For Finnis, any public endorsement of homosexuality does a great disservice to the community through hostility towards:

> those members of the community who are willing to commit themselves to real marriage in the understanding that its sexual joys are not mere instruments or accompaniments to…marriage's responsibilities, but rather are the actualizing and experiencing of the intelligent commitment to share in those responsibilities.[76]

Granting homosexuality equal status does direct harm to the goods that heterosexual married couples and families participate in. Because marriage is a basic human good, individuals form and share views about what are practically reasonable characteristics of marriage.

Yet despite the public intolerance of homosexuality, homosexual acts (when participated in private) should be exempt from scrutiny and coercion at the hands of political authority. The "government is precisely not...dedicated to the coercive promotion of virtue and the repression of vice."[77] This is respect for the toleration of truly private acts, even those that are degrading and incomplete forms of basic human good, that reflects the greater duty (or more fundamental duty) of the political community to not interfere excessively with individual associations. It is harmful for the political community to pry and invade the daily lives and activities of individuals. Here it is only

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[76] Ibid., p. 16.
[77] Ibid., p. 4.

appropriate for family and friends to intervene, because only they would properly know the details of one's everyday life.

So government should not extend its scope to punishing private acts of homosexuality: yet this is neither a tacit nor explicit call for neutrality with respect to private lives. The public and political community should not through any of its cultural and social outlets support masturbatory sex or homosexuality as a valuable human activity. "Paternalism on the part of the political community is justified…like the educative function of parenthood itself, to be no more than a help and support to self-correction and self-direction."[78] What is tolerated in the private is not necessarily, in turn, tolerated or endorsed in public. There is a consistent principle involved here, according to Finnis, and it rests upon the duty and role of government. The role of the state, or political authority, is limited in its attempts to foster the conditions for human flourishing. The private by its nature is hidden, and to a certain degree must be kept so to retain the integrity and aim of the political authority. It is overreaching and harmful for the government to be involved in punishing vice through paternalist policy. Yet the actions of individuals, even when hidden and tolerated, are not granted equal consideration by the political community. Those corrupt acts must not be treated as acceptable, even in the context of being "private" and out of the scope of scrutiny. That is, it is not simply a matter between consenting adults. Don't ask, don't tell really requires a literal silence on the part of the participants.

[78] Finnis, NLNR, p. 220.

4 Stephen Macedo

But what if the fundamental distinction separating loving homosexual acts from heterosexual acts within marriage is arbitrary? Stephen Macedo argues that it is. Macedo believes that the natural law argument put forth by Finnis is wrong: homosexual acts can express the same sorts of feelings that heterosexual acts do, and should be considered morally justifiable by natural law. However, Macedo recognizes that Finnis's argument strives to go beyond the common prejudicial condemnation of homosexuality by delineating the boundaries of the natural law teaching on sex that is "fair-minded." Within these boundaries, all non-marital sex acts (that lack procreative significance) are treated similarly, with no special (discriminatory) status for homosexual acts as "peculiarly perverse and unnatural."[79] Homosexuality is not especially degrading when compared with other instrumental sexual gratification, including the sexual acts of non-married heterosexuals. They are all equally incapable of participating in the genuine human goods they mimic because they are all essentially masturbatory.

Despite this apparent even-handed approach, such a strict and narrow definition of "good sex" (non-instrumental sex) only leads to an unreasonable and incomplete view of love and sex in general. Macedo insists that one should not stop at showing how both homosexual and heterosexual sex are equally demeaning when purely instrumental (and thus are equally reprehensible), but that the inverse should be true as well. That is, loving monogamous sex between committed couples can and should be considered good

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[79] Stephen Macedo, "Against the Old Sexual Morality of the New Natural Law" in *Natural Law, Liberalism, and Morality* Robert P. George, ed. (Clarendon Press, Oxford, 1996), p. 34. Hereafter cited as AOSM.

regardless of sexual orientation. Once we do make a wise and rational reflection, natural law theorists will begin to see that the distinction between homosexual love and heterosexual love (in specific circumstances) is arbitrary and not reasonable at all. "The new natural law's own moral stance, properly understood, provides grounds for affirming the good of sexual relationships between committed, loving homosexual partners."[80] The natural law position of Finnis "properly understood" can reveal how committed homosexual relationships can embody the same goods as committed heterosexual relationships.

While Macedo finds Finnis's position on sex too narrow and rigid, he is partially sympathetic to the new natural law's views about the possibility of the political community making normative judgments about sexuality. Specifically, he finds some agreement with them about the need to publicly promote basic human goods: especially friendship and marriage. Macedo, like Finnis, takes issue with strict neutralist positions (like Dworkin's) regarding individual choice. When supporters of liberalism argue that individuals should enjoy equal concern and respect in their personal choices (such as homosexuality), they have not adequately defined what moral grounds such choices are based upon. Instead, they have merely defended such activity on the basis that it is freely chosen or self-directed. He writes that "mere choice and self-definition are thin grounds on which to argue for the recognition of" rights for homosexuals.[81] While Finnis takes issue with *Bowers v. Hardwick's* majority opinion because it fails to explain exactly how

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[80] Macedo, AOSM, p. 28.
[81] "Sexuality and Liberty: Making Room for Nature and Tradition?" in Sex, Preference, and Family: Essays on Law and Nature, ed. David Estlund and Martha Nussbaum (Oxford University Press, 1997), p. 88.

homosexuality is harmful, Macedo takes issue with Justice Blackmun's dissent because he fails to adequately defend the rights of homosexuals in a morally robust way.

> The case for acknowledging Michael Hardwick's constitutional right would have been greatly strenghthened if it had been shown that doing so would provide the opportunity for gays and lesbians not simply to define themselves or make choices but to pursue the same sorts of basic goods, such as love and intimate friendship, that are so central to heterosexual lives.[82]

For Macedo, homosexuals can participate in basic human goods, and it is imperative that the argument for homosexual rights be based upon these terms. It is in the best interest of homosexuals as individuals (Macedo would say that it is a non-instrumental good for the sake of the individual) to have the right to express themselves in committed relationships and for the political community to support and endorse such relationships.

Thus, Macedo supports what he calls "judgmental liberalism," which admits that "decent, elevated forms of human sexuality require a self-restraint and moderation."[83] The government does and should value some conceptions of the good life as better than others, so we must not take strict value-neutrality as an unqualified central principle of limited government.[84] While some neutrality with respect to very controversial opinions is necessary, it is not hypocritical to endorse certain life-choices, institutions, or behaviors above others. "While liberal principles support a wide range of individual freedoms, they also allow space for political judgments to be made about better and worse ways of using our freedom."[85]

While Macedo believes Finnis has unfairly stereotyped all homosexuals' relationships as endorsing radical sexual liberationist policies, he recognizes severe harm

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[82] Ibid., p. 88.
[83] Ibid., p. 86.
[84] Macedo, AOSM, pp. 27-28, 43.
[85] Ibid., p. 28.

to individuals and society both in promiscuity and views of sexuality (or of man in general) that promote extreme freedom of choice.[86] He writes that such "simplistic celebrations of liberations from inherited constraints…ignore the potentially tyrannical nature of sexual passion."[87] The lifting of traditional constraints and duties that come with marriage and family (duties that are important for both individuals and society) should not be considered part of the agenda of a homosexual movement that calls for equal moral, social, and political consideration. For Macedo, making moral judgments about activities that are genuinely harmful does not conflict with "the protection of a robust and fair-minded array of basic rights."[88] Again, for Macedo, such judgments are in line with sensible appraisals about what is harmful for individuals. The important element is that we include homosexual relationships with heterosexual ones in promoting the good of monogamy and marriage.

Within this context of limited agreement, Macedo believes he has a strong critique of the Finnis position. Macedo claims that Finnis's position equates all homosexual acts to those promiscuous and non-procreative heterosexual acts: promiscuity is a distraction from basic human goods, another form of the instrumental use of bodies together with valueless relationships void of any bonds. Macedo believes that for Finnis, homosexuals, when engaged in sex, *are always being promiscuous:* they are always using their bodies instrumentally, and not towards and within the context of a greater good and bond of marriage. Masturbation is like promiscuity, so that Finnis's description of all non-marital, biologically unitive sex is masturbatory and promiscuous

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[86] Ibid., p. 41. In fact, he might be considered to be quite conventional in his views about relationships and monogamy, and furthermore, about human beings in general.
[87] Macedo, "Sexuality and Liberty," p. 86.
[88] Ibid., p. 87.

by nature. Promiscuity is a genuine evil that distracts individuals from basic human goods, so public morality should do all it can to discourage all types of promiscuous sexual activity.

For Macedo, the breakdown of the family is (and to him, rightly so) inherently heterosexual. It is heterosexuals who divorce, or have unprotected, unmarried sex, abortions and unwanted children (it seems safe to assume he means that these are children born out of wedlock, left to be raised by the single parents or the state).[89] The movement against homosexuals is therefore a sort of misplaced hysteria stemming not from a real firm basis of immorality and social disintegration (partly caused or contributed to by homosexuals), but from prejudice: a prejudice possibly exaggerated by the current poor state of affairs with respect to the family and the values of it. "There is a crisis of the family in America, but what could be easier…than to fasten our attention on a long despised class of people who bear no children?"[90] Furthermore, there is no possibility of homosexual couples become pregnant accidentally and/or having unwanted children. Macedo writes, "uncontracepted heterosexual sex risks the *great evil* of bringing unwanted children into the world."[91]

But Macedo points out that homosexuals can be monogamous, and he claims that lesbian couples are very stable and monogamous.[92] Promiscuity is a universal problem and therefore a problem not with respect to types of sex, but of a greater cultural or moral problem. Again, it is unfair to blame only homosexuals for the evils of society, and

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[89] Macedo, AOSM, p. 32.
[90] Ibid., p. 31.
[91] Ibid., p. 32.
[92] Ibid., p. 33. He speculates that lesbian couples are possibly more monogamous and committed overall than heterosexual couples. This is an attempt to invalidate myths or stereotypes about an inherent promiscuity related to homosexuality.

Macedo believes that the genuine good of the Finnis position is that it does not make such a distinction. Macedo does seem to think that men overall are more promiscuous, and that heterosexual men seem to be sometimes bound, or forced into monogamy by the constraints of family and social pressures. So if the real issue is promiscuity, why not extend cultural support to homosexuals (including the right to marry) and promote an atmosphere of monogamy?[93] Wouldn't this only assist homosexual men in settling down and becoming less promiscuous? Macedo's view is that if the common good (being a reflection of desiring the flourishing and well-being of individuals) entails leading individuals towards the good life, then allowing marriage and publicly endorsing monogamy for all sexual orientations should be embraced by natural law theory. But because homosexuality can actualize such goods, according to Finnis, there is a barrier stopping such endorsement.

Here we come to the most important part of Macedo's critique of Finnis' view: that of non-marital sex. The first and foremost problem with Finnis' limited definition of good and valuable sexual relations, according to Macedo, is the grouping of all non-marital and non-procreative[94] sex acts into one general category. As we have seen, Macedo sees a limited benefit in this grouping, because it breaks down arbitrary distinctions between homo- and hetero- sex acts. But for Macedo, there is room for further distinction, because even heterosexuals must acknowledge that sometimes sex is neither purely instrumental (nor masturbatory) or intended specifically for procreation.

Surely, argues Macedo, some forms of non-procreative sex are better than others, because "it is simplistic and implausible to portray the essential nature of *every form* of

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[93] Macedo, AOSM, pp. 32-33, and pp. 42-43.
[94] Again, for Finnis non-procreative entails sex that is not of the union of the vagina with penis.

non-procreative sexuality as no better than the least valuable form."[95] Equating the sexual exchange between an individual and a prostitute with sex between a pair of long-time friends or committed couples does and should strike one as being fallacious. Macedo claims that although it is probably right to grant little to no value in promiscuous sex, grouping such sex with all other forms of non-procreative sex without further meaningful distinctions is wrong.

Next, Macedo extends this critique to sterile, heterosexual married couples.[96] According to the Finnis, sex between these individuals, although the possibility of conception and procreation is non-existent, is still valuable (it has procreative significance) and good in itself. But what is the difference between this sex and the hypothetical relationship a married homosexual couple might have? Macedo writes that sterile, heterosexual sex would be "for pleasure and to express their love or friendship or some other shared good. It will be for precisely the same reasons that committed, loving gay couples have sex."[97]

Furthermore, the distinction relies upon an incorrect perception; that sterile heterosexual couples form a biological and personal unit. It may be a personal unit, but Macedo points out that no special biological unity takes place between sterile couples, because of their particular medical handicap. Macedo appeals to an analogy created by Andrew Koppelman between penises and unloaded guns.[98] It would be nonsensical to charge someone with murdering another person with an unloaded gun, just as it would be

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[95] Macedo, AOSM, p. 35.
[96] Furthermore, for Macedo the same reasons apply to elderly couples (who are sterile because of age) have sex. However, I believe there might be a distinction that can be made between couples who are sterile because of physiological problems, and the elderly whose reproductive organs have ceased to function reproductively, although I am not sure if it is of importance or relevance to the arguments here.
[97] Macedo, AOSM, p. 36.
[98] Ibid., p. 37.

wrong to ascribe the same unity in the sex act that results in conception with sterile heterosexual sex. "It's far from clear in what sense, that has any moral weight, the genital organ of a sterile man can properly and precisely be called a reproductive organ. It is not fit for reproduction."[99] If merely having the right "equipment," regardless of whether or not its function is being fully realized is sufficient condition for meaningful sex, then what is to keep someone who has had a sex change operation from meeting the minimal requirements? Macedo points out that making "biological unity" such a central part of valuable sex comes "perilously close to deriving an ought from an is."[100] More importantly, however, it stresses the material aspect over the non-material aspects of loving relationships. The commitment, affection, and care that individuals have for one another appears to become subordinate to (and cancelled out completely in some cases) simple biological facts.

When the natural law theorists broadened the good of sex to include sterile couples, they made a commitment to endorse "sex as a good so long as it is bound up in enduring intimacies, love, and shared commitments," according to Macedo.[101] Macedo believes that sterile couples have, just as some homosexuals may, a fantasy or misperception that their sex can be procreative. Finnis is wrong to argue that the sterile couples can participate in this procreative good simply because they have the right biological equipment (lacking some specific necessary part needed to complete conception) because it is a real impossibility, just as it is in the homosexual acts of loving couples (who, Macedo thinks might also strongly want to participate in). The

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[99] Andrew Koppelman, *Is Marriage Inherently Heterosexual?* 42 The American Journal of Jurisprudence. 51 1997.
[100] Macedo, AOSM, pp. 38-39.
[101] Ibid., p. 40.

components of intimacy and friendship between monogamous couples form a real foundation for non-instrumental, valuable sex. Finnis's natural law position that attempts to make the intimacies, love, and shared commitments an integral part of sex gets frustrated by his equation of all non-biologically unitive sex with masturbation. For Macedo, sterile couples do participate in shared goods through sex simply because those goods do not have to depend ultimately upon biological facts. So Finnis's version of natural law is right in broadening the scope of valuable sex to accompany sterile and elderly couples.

If Finnis's argument regarding the biological complementarity of sterile couples is right, as Macedo believes it to be, then the only way to salvage the categorical condemnation of all homosexuality must hinge on the non-existence of stable and loving homosexual relationships. That is, by labeling homosexuality as essentially promiscuous and masturbatory, it is incapable of participating in basic human goods. Macedo contends that homosexuals can and do have loving relationships that are similar to heterosexual relationships. Again, he agrees that many homosexuals engage in mere promiscuity, just as heterosexuals do, and that it is right to condemn such actions and liken them to masturbatory acts.[102] But he argues that Finnis generalizes the common misconception that homosexuals are promiscuous by nature to fit his argument. Empirical evidence might show that homosexual men are somewhat promiscuous, but Macedo doubts that the same evidence would not show heterosexual men to be very similar. So how can we justify condemning one group (homosexuals) on the basis of actions (promiscuous sex) that other groups participate if we do not think that valuable sex rests

[102] Ibid,. p. 41.

so heavily on the presence of one biological fact? Macedo answers that there is no justification, and that Finnis has only succeeded in clarifying the most thoughtful and deep condemnations of homosexuality as being based on arbitrary distinctions and misrepresentations.

5 Evaluation and Conclusion

Now that both Macedo's and Finnis' positions have been explained, a further critique of their exchange is in order. I begin with an overview of points of agreement between the two, after which I lay out a brief taxonomy for each with respect to their views of good and bad sex. I will then discuss this taxonomy and my critique of it with respect to both Finnis and Macedo. My critique of Macedo leads directly into a final discussion about the range of valuable sexual expression. I conclude with my own position that there is something unique and special about heterosexual marriage and procreative significance, yet this does not exclude homosexual relationships as meaningful expressions of basis human goods.

But first, I begin with an overview of points of agreement between Finnis and Macedo. Both Macedo and Finnis seem to agree that society should be particularly judgmental about sexuality. Promiscuity certainly should be discouraged, while stable, marital relationships should be condoned and cherished. Both philosophers purport to take a limited government approach to private matters of conduct while participating in reasoned appraisal of what may or may not be "good" for the social order or community. They both reject (pure or extreme versions of) neutralist liberalism, such as Dworkin's version described above, in this important respect: there are better and worse ways of using one's freedom, especially with respect to sexuality.

In essence, they both find liberalism consistent with value judgments about life

choices.[103] It is clear that promiscuity and divorce are problems within our society and that those problems have roots and origins that need clarification and normative social proclamations made about them. More generally speaking, there are genuine forms of human goods that should be promoted, and actions that degrade or distract from those goods that should be discouraged. Marital union is to be valued and promoted as a genuine good (a good valued over less stable and more individualistic relationships), while "open relationships" and promiscuity degrade both those who take part in them and the common good in general. It is perfectly reasonable for the politically community to discourage such conduct because such moral judgments are entirely compatible with the well-being of individual's and are thus in-line with equal concern and respect. I agree with both Finnis and Macedo in their belief that rejecting pure neutralism conforms with equal care and respect for individuals.

Their disagreement, as we have seen above, stems from their view of what constitutes *valuable sexual expression*. What can we say is reasonable when it comes to the sexual use of our bodies for something beyond pleasure? That is, when does sex help actualize or participate in basic human goods (or is more than mere instrumental gratification)? For Finnis, homosexual acts can never be considered as capable of valuable sexual expression. And heterosexual acts are valuable when done in a loving marital context. For Macedo, homosexuality can be valuable in certain contexts, just as heterosexual acts are valuable in some contexts and not valuable in others.

Below is what I believe is a helpful (but ultimately overly-simplistic) clarification on the good sex/bad sex views of Finnis and Macedo. Because the arguments herein

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[103] For a similarly themed article about liberal values, see Michael Sandel, "Judgmental Toleration". in *Natural Law, Liberalism, and Morality* Robert George, ed. Oxford: Clarendon Press. 1996.

revolve around sex (categorized as valuable or degrading), we can attribute a basic taxonomy of sex to each respective philosopher:

> **Fα** (Finnis's "good sex") = Procreatively significant sex taking place within a loving, committed, heterosexual marriage. This sex must have the character of being the biological connection or unity of the penis with the vagina.
>
> **Fβ** (Finnis's "bad sex") = all sex *not* Fα. This includes any and all other sex acts, whether done within marriage or not. Even sex within a marriage that has the biological unity Finnis demands for Fα might fall into this category if it is not done lovingly, or if the marriage is one of convenience, etc. All of Fβ is essentially masturbatory.
>
> **Mα** (Macedo's "good sex") = Sex acts that are done lovingly in a committed relationship. The participants need not be married.[104]
>
> **Mβ** (Macedo's "bad sex") = Sex performed instrumentally, i.e., for pure physical satisfaction. One has little or no regard or connection with one's partner beyond the mutual gratification sought.[105]

I believe this taxonomy reveals two key points: First, that Macedo's rejection of Finnis's good sex is perfectly reasonable and conforms with both rational argument as well as experience. Second, that an over-simplistic view of valuable sex, resting on a good sex/bad sex dichotomy (regardless of where you draw the line), fails to reflect reality.

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[104] Macedo's argument seems to imply this take place between only two people and that polyamorous relationships are not included here, although this is not explicitly discussed.

[105] It is unclear what Macedo's views on "bad sex" are or would be given the context of his rebuttal of Finnis. While Finnis's views appear very clear (as he has set forth a very clear description of valuable sex), Macedo has merely shown that this description overlooks the complexities of love and sex. Macedo himself has not put forth a description or rank order of acceptable sex that I am aware of. It might be prudent to say that while Macedo seems to support monogamous relationships, he might not be willing to delineate or constrain the activities valuable to the particular individuals involved in such relationships.

Critique of Finnis

The taxonomy above, as presented, may need to be qualified with respect to Macedo, but for now it will be useful for my critique of Finnis. Finnis's position, as I have outlined it above, does not need any qualification. Finnis says "non-marital intercourse, *especially* but not only homosexual, has no such point and therefore is unacceptable."[106] For Finnis, there is something wrong about non-marital intercourse, but there is something especially wrong and different about homosexuality. Yet he ultimately likens all non-procreative sex to masturbation, thus not clearly making any differentiation between heterosexuality and homosexuality in this key respect. He always connects homosexuality and masturbation to *non-marital* sex acts (and even those marital sex acts that are not procreatively significant), which leaves no room for admitting any types of varying valuable sexual expression.

Let us assume that procreatively significant sex is the highest and most fully complete form of sex. Does that by default rule out all other playful and loving sex acts between spouses? While his definition of marital sex is complex and in some ways edifying, his outright equation of all other sex with masturbation makes any and all non-procreatively significant sexual expression between loving couples simple, selfish acts of independent gratification. Finnis makes claims that are unreasonable both to heterosexuals and homosexuals in his attempt to describe valuable sex in universal terms. So it seems that Finnis has painted himself into a corner with respect to his view of sexuality, especially in denouncing homosexuals. For if the point of married life is

[106] Finnis, NLLG, p. 14.

mutual affection, help, goodwill for the sake of the union, and sterile couples can actualize these things just as well as fertile ones, why can homosexuals not participate in this basic human good(s)?

Finnis's natural law attempts to be consistent and universal but his position paints a stagnant and unrealistic picture of "good sex" versus "bad sex." Ultimately, his consistency entails an absolutism that excludes too much and describes the realm of human relationships in too simplistic of terms. His view of valuable sex (as represented as Fα), is as Macedo points out, an aspect of his absolutism that is troubling to liberals. It involves discouraging ways of life that may actualize participation in basic human goods. It not only excludes aspects of sexual expression that many couples might find valuable, it is overly simplistic in the way it lumps all bad sex together as masturbatory. It is not necessarily the case that if sex does not meet a certain standard that it must be relegated to the status of harmful and degrading. Why maintain such a rigid and narrow understanding of sexual expression? Is it truly the case that all forms of sex $\sim F\alpha$ are masturbatory to their core? Macedo is correct when he concludes that Finnis "provide[s] no reasonable grounds for regarding loving sex within committed relationships as morally equivalent to the most casual and promiscuous sex among strangers."[107] Such a rigid demarcation should strike us, as Macedo says, as being grossly out of line with our own experiences, hopes, and values.

[107] Macedo, AOSM, p. 42.

Critique of Macedo

For Macedo, I follow a similar line of criticism. While I ultimately agree with his rejection of Finnis's system as too rigid and narrow, his view of good sex also suffers from being overly simplistic (or underdeveloped). Macedo's discussion of valuable sex is couched in his rebuttal to Finnis, and is not explicitly meant to set out a system of his own, yet he does make strong judgments about when sex is and is not valuable. Now, Mβ seems to genuinely warrant the disapproval of individuals and society, and Finnis would surely agree. But Macedo's argument for Mα seems to imply in many places that as long as sex is done in a loving, committed relationship, it is valuable. This may be the case, and it may be that the loving, committed aspect of sexual expression is the common denominator of valuable sex. Yet this does not rule out further differences between individuals and sexual expression. That is, it is not *necessarily* the case that since Fα is too narrowly construed, we must accept Mα in its most robust form, or that the rejection of Fα entails that all loving sex is categorically the same.

Macedo's argument for accepting homosexuality is to show how loving but non-procreative heterosexual sex and homosexual sex are really not very different. For Macedo and others (like myself), the idea that Fα encapsulates all valuable sex really clashes with their own beliefs and experiences. Acknowledging that all expressions of love in sex must not necessarily have procreative significance, and that many couples cannot achieve procreative significance because of sterility, allows Macedo to group all types of sex in the second category together, effectively equating them categorically. Yet in rejecting Fα, Macedo tacitly implies that all loving sex acts categorically the same.

Whereas he explicitly states that neither absolutism or "utilitarian reductionism….are adequate to the complexity of the moral realm" he fails to elaborate his position with respect to the characterization of sexual acts.[108]

Therefore Macedo's reasonable rejection of Fα in no way closes the door to further reflection on the value of marriage and sexual relationships, and does not entail that all loving sex is categorically the same. I would like to explore what the implications of accepting the premise that Fα is too *narrow*, without necessarily accepting the robust form of Mα. (i.e., accepting as *de facto good* whatever sexual activity is done within a committed, loving relationship). First, however, a few points of clarification regarding my (possibly unfair) taxonomy of Macedo's good sex/bad sex. Macedo does seem to leave room for adjustment and further discussion. Macedo clearly believes that sex is a varied and complex thing, therefore my taxonomy above is not completely fair to him. Furthermore, he may well embrace further distinctions between valuable and invaluable sexual acts and agree that I have done him a disservice by forcing him into an either/or system (like Finnis's). In fact, Macedo points towards the possibilities of some further differentiation in "Sexuality and Liberty," writing that there might be to innate, natural differences between males and females which gives heterosexual couples an added dimension of complementarity that is missing from homosexual couples.[109] I will return to this point in a moment.

Despite these speculative differences, Macedo seems to believe that the political community does not have any obligation or need to rank different sex acts. That is, sex acts that are done lovingly should be viewed and promoted equally by the political

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[108] Macedo, AOSM, p. 30.
[109] Macedo, "Sexuality and liberty," p. 98.

community. In fact, he does argue that the political community should draw the line where he has it, only pronouncing judgments on Mβ. The political realm should remain isolated from any speculative discussions of differences or relative advantages between homosexuality and heterosexuality. He writes that "speculative reasons for thinking that heterosexuality has possible advantages may be inappropriate grounds for public policy."[110] Both homosexual couples and heterosexual couples should retain equal rights and encouragement to stability from the political community.

Macedo's argument is partially designed to make the case for homosexual marriage. He writes: "Extending marriage to gays and lesbians is a way of allowing that the natural lawyers are not all wrong."[111] Macedo points out that the political community has "legitimate" reasons to help "stabilize and elevate sexual relations."[112] So does Macedo's argument for homosexual relationships entail opening the door for homosexual marriage? It seems perfectly reasonable for Macedo to draw the conclusions he does, and it is a proper starting point for a debate about the possible value of homosexual marriage, both for individuals and for liberal justice. If homosexual, committed couples can express themselves in ways that include sexuality, some form of marital union seems a legitimate way of helping to solidify their commitment. This does not entail, however, that homosexual marriage should or can be essentially the same as heterosexual marriage. A discussion of the merits of homosexual marriage versus those of heterosexual is related to this debate, but should come out of a further look at how I have set things out so far. Therefore, I first want to address the implications of accepting the premise that Fα is too

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[110] Ibid., p. 98.
[111] Macedo, AOSM, p. 43.
[112] Macedo, AOSM, p. 43.

narrow, without necessarily accepting the robust form of Mα. Should we not explore such differences before accepting homosexual marriage?

I believe reflections such as the ones made by Macedo in his essay "Sexuality and Liberty" help us move away from the simple good sex/bad sex dichotomy, while still making moral judgments about sexuality. While sexual expression should always rest on loving commitment, not all sexual expression is the same. In fact, it can differ in fact both by the acts themselves, and by the participants. I see no reason why differences can be discussed and evaluated within a greater context of limited government. That is, the differences involved are important, meaningful, and I think imperative to any discussion of homosexual marriage. Such a permeated understanding, I think, is desired to better understand what is tolerable and intolerable, good and harmful, for individuals and the political community.

It might be perfectly reasonable to make the case that there is something special and unique about hetereosexual marriage and family. We might want to accept a more curtailed view of Mα that puts heterosexual, married sex that participates in the tripartite goods of friendship, union, and procreation out front. As Macedo points out, there might be something truly unique and complementary about heterosexual marriage. He asks us to consider an "original position" of sorts where we would have the choice of sexual orientation in starting life anew in a world devoid of prejudice and where marriage and adoption is open to homosexuals.[113] In such an original position, would most people choose heterosexuality over homosexuality? Are there "intrinsic" advantages to heterosexuality?

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[113] Macedo, "Sexuality and Liberty," p. 97.

Macedo admits that heterosexuals share a unique "biological tie with children" that is "unavailable to homosexuals by nature." Now this obvious biological difference itself is not debated, but its significance is of utmost importance. But Macedo "imagines" a reason for a possible advantage of heterosexuality. This advantage turns on natural differences between the sexes, differences he believes quite possibly exist, which gives opposite sexes a kind of complimentarity missing in homosexual couples. This complementary relationship is one built around differences that somehow fit together to form something greater, and begins to sound much like Finnis's discussion of heterosexual marriage.

So with heterosexual spouses there is an added dimension beyond both their loving bond and their biological unity (whatever its significance). This added dimension is a complementarity based upon sexual differences, which does rest on brute biological terms. Is Macedo saying that biological facts can inform our judgments? Not necessarily in the political community, but such biological facts are so inextricably tied out with the central issues here (valuable sex), that they play a major role in our judgments. These brute biological facts, particularly the notion of procreative significance, are important, and I think essential to the discussion.

Macedo rejects any significant difference between the loving acts of the sterile elderly and those of homosexuals. Yet does sterile sex equal homosexual sex? Biologically, it obviously does not, but such a distinction should not exclude homosexuals. However, such a biological distinction might still merit a symbolic distinction. For in marital contracepted recreational sex there is still an implicit natural connection between the two sexes and the component of committed friendship within the

bonds of marriage. The implicit reproductive end of sexual relations and marriage does not exclude the possibility of participating in basic goods such as play and friendship with either contracepted sex between fertile married couples, nor between infertile couples. While such sex might not have conception as its aim (or a possibility) it does involve a tacit recognition of reproduction and the good of marital union.

Such a view of heterosexual marital union does not exclude homosexuals from participating in something like it, although they cannot achieve this sort of union. Macedo's challenge still stands strong regarding whether there is something inherently promiscuous about homosexuality, thus making it problematic for Finnis to argue that it should be publicly criticized and condemned. There surely are homosexuals who are committed to each other with sex between them being an expression of their love for one another--a love that might be well-expressed publicly through marriage. Yet we might still publicly support arguments that claim there is something special and unique about heterosexual marriage. Despite Finnis's weaknesses, he makes a strong case for something truly special and unique about some hetereosexual married couples. It does seem that we should still take procreative significance seriously despite its clear flaws. Remember that Macedo's critique of Fα is strongly based upon sterile couples and does not address the truly unique character of Fα where there is procreative significance.

It is clear that even to sterile couples the act of sexual intercourse is meeting many of the basic behavior and biological conditions of procreative sex; they are simply missing some necessary condition that prevents them from conception. Indeed, as the natural law theorists point out, the union of heterosexuals is, to some degree, a union of one flesh. They deny the unloaded gun analogy is comparable because they see the

> sexual organs of human beings are not instruments, or 'equipment,' which have their value and intelligibility as means of accomplishing ends extrinsic to them. Rather, sex organs are parts of the personal reality of the human being. Thus, when spouses unite genitally-when they mate-their biological unity is truly interpersonal.[114]

The sexual union of spouses creates a "biological unity" of one, symbolically joining them in a greater good. The bodies of the individuals involved in this unity are more than instruments, and you cannot break any part of the individual down into instrumental parts. The bodily whole of each individually is connected through a biologically, yet symbolically loving act.

The natural law theorists therefore carve out a unique and distinct realm for heterosexual, marital sex that is both interpersonally and biologically grounded. The biological component cannot be manifested between homosexual couples, thus denying them this sort of unity. I admit that this sort of mystifies the penile-vaginal union, but does it not have some sort of symbolic significance beyond the committed love and the sharing of pleasure? Macedo does not deny that the reproductive sex organs of persons are for the purpose of procreation (and not simply sexual gratification), but he does play down the important empirical facts of nature and how human beings go beyond it in procreation with the establishment and maintenance of families. He wants to hold Finnis to his contention that he is not vacillating between facts to norms (the existence of these natural capacities to an "ought" is making an unconnected judgment about what one should do).[115] However, there might really be a special status for marital loving,

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[114] Gerard V. Bradley and Robert P. George, "Marriage and the Liberal Imagination," 84 Geo. L. J. 301, 307 (1995).

[115] Is it not the case that the pleasure derived from sexual acts an "is" itself; a biological fact? Most if not all human actions have normative dimensions (Macedo discusses eating), even those connected to our brute physiological drives, which makes them tied up inextricably with both normativity and fact.

procreative sex, which exceptions like the existence of sterile couples (and their ability to participate in some of these same marital goods) does not destroy.

While it is true that people can give themselves in loving relationships that do not meet Finnis's strict requirements, Macedo must also, I believe, concede that the stronger (or maybe higher) natural function of human sex is heterosexually oriented. But it does not exclude the ability for homosexuals to participate in some reflection of this good, despite their disability to conceive a child. Homosexual behavior within the context of a loving, monogamous (marriage) relationship surely cannot be equated with masturbation, as Finnis claims. So here is clearly some connection that is formed between same-sex partners in a loving environment, which they consider to be similar to heterosexual ones.

However, the highest behavioral manifestation of sex is the good in marriage of a combination of procreative significance and friendship is a bundled and indisputably unique thing (as described well in Fα). What Macedo fails to establish (which he may not desire to do) is the equation of this bundled conception with the most loving, monogamous homosexual couples act of sex; in fact, his argument is only negative and is based purely on Finnis's incomplete defense of the obvious. While homosexuals and sterile couples may both engage in loving sex that can never be procreative (although with advances in technology this might easily change), non-sterile heterosexual couples clearly can participate in the bundled conception of sex that includes love and the procreative aim. He would in all probability agree with me here, but I do believe he should make a stronger concession to it.

In fact, Macedo may only be looking for a reasonable place for homosexual union to inhabit. The concession that loving, marital procreative sex (as expressed in Fα) is the

highest ideal and expression of human sexuality, would be a judgment in line with Macedo's denial of the strict neutralist position on views of the good life. We might accept part of what is expressed in Fα without limiting ourselves to it as a complete view of human sexuality. This might allow for certain rights for homosexuals (or at least some recognition that their sex can be valuable in some ways), but it would not be some theoretically or categorically equal status with respect to natural law and the understanding of human sexual love. Valuable sexual expression must not be simply understood as Fα or Mα, but as a many faceted but hierarchical type of thing. And ultimately, it is a private matter that the political community should take care in appraising or ranking, while never interfering in the truly private acts of individuals.

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