

1-1-1995

Marriage and the Liberal Imagination

Gerard V. Bradley

Notre Dame Law School, Gerard.V.Bradley.16@nd.edu

Robert P. George

Follow this and additional works at: http://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Sexuality and the Law Commons](#)

Recommended Citation

Bradley, Gerard V. and George, Robert P., "Marriage and the Liberal Imagination" (1995). *Scholarly Works*. Paper 878.
http://scholarship.law.nd.edu/law_faculty_scholarship/878

This Response or Comment is brought to you for free and open access by the Faculty Scholarship at NDLScholarship. It has been accepted for inclusion in Scholarly Works by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Marriage and the Liberal Imagination

ROBERT P. GEORGE* AND GERARD V. BRADLEY**

In an article marked by the intelligence and fairmindedness for which his work is widely—and rightly—admired, Stephen Macedo has argued against our view that sodomy, including homosexual sodomy, is intrinsically nonmarital¹ and immoral. His goal is to show that “new natural law”² theorists, such as Germain Grisez, John Finnis, and the two of us, have no sound argument for drawing moral distinctions—which would, in turn, provide a basis for legal distinctions (particularly in the area of marriage)—between the sodomitical acts of “devoted, loving, committed homosexual partners”³ and the acts of genital union of men and women in marriage. We propose in this response to defend our view against Macedo’s criticisms.

We heartily commend Macedo’s efforts to understand and accurately represent the view we defend. Nevertheless, we are not entirely happy with his formulations of it. Neither Grisez, nor Finnis, nor either of us perceives the central moral wrongness of sodomitical and other nonmarital sex acts as consisting in their being “distractions from” genuine human goods. A more adequate, though unavoidably more complex, formulation of our position is the following: (1) Marriage, considered not as a mere legal convention, but, rather, as a two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type,⁴ is an

© 1995 by Robert P. George and Gerard V. Bradley.

* Associate Professor of Politics, Princeton University.

** Professor of Law, University of Notre Dame.

1. We hold that marriage, as a one-flesh communion of persons, is intrinsically, and not merely instrumentally, good. In *marital acts*—that is, sexual intercourse that consummates and actualizes marriage by uniting the spouses in a reproductive-type act, thus making them, in no merely figurative sense, two-in-one-flesh—spouses participate in this intrinsic goodness. Because the biological reality of human beings is “part of, not merely an instrument of, their *personal* reality,” the biological union of spouses in marital acts constitutes a truly *interpersonal* communion. John Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1066 (1994). Sodomitical acts, by contrast, lack this unitive capacity, and thus cannot actualize marriage. Such acts are, therefore, nonmarital *even when performed by persons who are married to each other*. It is precisely in this sense that sodomy is intrinsically nonmarital.

2. Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 264 (1995).

3. *Id.* at 279.

4. The concept of a reproductive-type act is biological-functional. It refers to the species-specific pattern of behavior suited to the reproductive function. Although that function is completed only if certain nonbehavioral conditions also obtain, the pattern of behavior remains the same even if those conditions do not obtain. The reproductive-type acts of humans and other mammals are acts of inseminatory union of male with female genital organs. The freely chosen reproductive-type acts of spouses are marital in that they actualize and enable the spouses to experience their interpersonal communion, of which such acts are the biological matrix. It is important to see that, though all marital acts are reproductive in

intrinsic (or, in our parlance, "basic") human good; as such, marriage provides a noninstrumental reason for spouses,⁵ whether or not they are capable of conceiving children in their acts of genital union, to perform such acts. (2) In choosing to perform nonmarital orgasmic acts, including sodomitical acts—irrespective of whether the persons performing such acts are of the same or opposite sexes (and even if those persons are validly married to each other)—persons necessarily treat their bodies and those of their sexual partners (if any) as *means* or *instruments* in ways that damage their personal (and interpersonal)⁶ integrity;⁷ thus, regard for the basic human good of integrity provides a conclusive moral reason not to engage in sodomitical and other nonmarital sex acts.⁸

Macedo attacks the claims we have formulated in (1) above by offering to show that whatever values can possibly be realized in the acts of genital union of sterile spouses can equally be realized by those spouses—or similarly committed couples, whether of the same sex or opposite sexes—in oral or anal sex acts. His challenge to proponents of the natural law position is to identify a valid reason for sterile married couples to engage in acts of genital union that is not, at the same time, a valid reason for such couples (or others, married to each other or not, fertile or infertile, "gay" or "straight") to engage in oral or anal sex if they prefer or desire it.

In effect, Macedo denies that what we refer to as the "reproductive-type acts" of spouses can have the special value and moral significance we

type, not all reproductive-type acts are marital. Acts of fornication and adultery can be reproductive in type, though they are intrinsically nonmarital. And even the reproductive-type acts of spouses lose their marital quality when they are wholly instrumentalized to ends extrinsic to marriage. See *infra* text accompanying notes 19-21. The marital quality of spousal intercourse is not vitiated, however, by the fact that reproduction is impossible for all married couples most of the time—due to the periodic infertility of the female spouse, even during her fertile years, and eventually the permanent loss of fertility with age—and for some married couples all of the time—due to some defect in the functioning of reproductive organs.

5. "Marriage," "reproductive-type acts," and "spouses" are thus so interdefined that (as would have gone without saying down to yesterday) marriage is inherently heterosexual and a man's spouse is necessarily a woman (and vice versa)—and the terms are used in this way throughout our response. This terminology begs no questions, because we confront and respond openly, and with reasons, to all the relevant questions in appropriate terminology.

6. We believe that acts that damage personal integrity also damage interpersonal integrity in two ways: first, they unavoidably damage the ability of persons performing them to relate properly to others as bodily persons; second, in acts in which two or more persons cooperate in immorality, they also damage the integrity of their specific relationship, which, like every friendship, is perfected precisely by cooperation in good and upright activities.

7. Although we do not make the argument here, we follow Grisez in holding that nonmarital sex acts also damage the capacity of persons for bodily self-giving in marriage. Also, note that we use the term "integrity" for what Grisez refers to as "self-integration."

8. Paul Gilbert has observed that "[f]ew philosophers have . . . developed an ethic of sexuality as something other than an appetite requiring regulation." Paul Gilbert, *Sexual Morality*, in *THE OXFORD COMPANION TO PHILOSOPHY* 825 (Ted Honderich ed., 1995). As this formulation of our position makes clear, those of us associated with what Macedo calls "the new natural law theory" are among the few.

ascribe to them. He attempts to show that we hold a "double standard" in maintaining (a) that sodomitical acts *cannot* be marital; and (b) that penile-vaginal acts, even of spouses who know (or at least believe) themselves to be temporarily or permanently sterile, *can* be marital.⁹

Macedo also rejects the claims we have formulated in (2) above about the damage to personal (and interpersonal) integrity, and hence, the intrinsic immorality, of choosing to perform nonmarital orgasmic acts. He affirms, and claims that many people will find it "deeply unreasonable"¹⁰ of us to deny, that *pleasure* (including sexual pleasure) is a good in itself and, as such, provides a basic reason for acting. Relatedly, he argues that there is something implausible about our claim that it is necessarily wrong for persons sometimes to use their bodies as mere instruments in the pursuit of pleasure and other extrinsic goals. He attempts to show, by way of a *reductio ad absurdum*, that the principle that we believe excludes sodomitical and other nonmarital sex acts as immoral would, on our argument, also exclude as immoral such obviously innocent pleasures as chewing sugarless gum, "which gives pleasure but has no nutritional value."¹¹

In Part I of this response, we rebut Macedo's charge of maintaining a double standard in holding that acts of genital union of sterile spouses can be marital and, as such, intrinsically good, while sodomitical acts are intrinsically nonmarital. In Part II, we reply to his critique of our claim that nonmarital sex acts damage integrity and are thus morally bad, and we suggest that, in rejecting central tenets of our view, he undermines his own apparent moral objections to promiscuity and to the sexual liberationist ideology that licenses it. And in Part III, we reply to some claims he makes regarding the political relevance of our view of marriage and sexual morality.

I. THE ABSENCE OF A DOUBLE STANDARD

Macedo asks: "What is the point of sex in an infertile marriage?"¹² We answer that the point of sex in such a marriage is exactly the same as the

9. See Macedo, *supra* note 2, at 278-81. It is important to notice that nothing in our claim that sodomitical acts are intrinsically nonmarital, or in Macedo's strategy for rebutting our claim, turns on whether the acts in question are performed by persons of the same sex or of opposite sexes. We do not hold—indeed, we deny—that oral or anal sex acts can consummate and actualize heterosexual, but not homosexual, marriages. Macedo does not argue that such acts can consummate and actualize homosexual, but not heterosexual, marriages. We maintain that only the *reproductive-type* acts of spouses can be marital. Macedo denies that acts of penile-vaginal intercourse between spouses that cannot be reproductive—or, at least, acts that are known (or thought) by them to be incapable of being reproductive—can have value and significance that is lacking in other orgasmic sexual acts that they (or persons in similar relationships of commitment) might perform for the sake of pleasure, feelings of closeness, or some other end or combination of ends. See *id.*

10. *Id.* at 282.

11. *Id.*

12. *Id.* at 278.

point of sex in a fertile marriage, namely, the *intrinsic* good of marriage itself, which is consummated and actualized in marital acts.

But isn't procreation the point of sex in fertile marriages, at least according to the natural law tradition? It is true that St. Augustine, among others, seems to have treated marriage as a purely instrumental good whose primary value has to do with procreation and the nurturing of new human beings.¹³ Others, however, including Grisez, Finnis, and ourselves, reject the instrumentalizing of marriage and marital intercourse to any extrinsic end, including the great good of having and rearing children.¹⁴ In our view, children conceived in marital intercourse participate¹⁵ in the good of their parents' marriage and are themselves noninstrumental aspects of its perfection; thus, spouses rightly hope for and welcome children, not as "products" they "make," but, rather, as gifts, which, if all goes well, supervene on their acts of marital union.¹⁶ *The intrinsic intelligible point of the sexual intercourse of spouses, however, is, in our view, marriage itself, not procreation considered as an end to which their sexual union is the means.*

Macedo's argument against our position presupposes that the point and

13. See, e.g., St. Augustine, *De bono coniugali* (9.9), in SAINT AUGUSTINE: TREATISES ON MARRIAGE AND OTHER SUBJECTS 21-22 (Charles T. Wilcox et al. trans., 1955).

14. See, e.g., Germain Grisez, The Christian Family as Fulfillment of Sacramental Marriage, Paper Delivered to the Society of Christian Ethics Annual Conference (Sept. 9, 1995) (unpublished manuscript, on file with *The Georgetown Law Journal*).

15. On the idea of basic goods as "participated in" by persons, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 64 (1980). On the participation of children in their parents' marriage, see Grisez, *supra* note 14, at 1-8. What Grisez says in these pages pertains to marriage as a natural (and basic) human good, and not exclusively to *sacramental* marriage as fulfilled by the *Christian* family. His *theological* treatment of marriage as a sacrament follows. *Id.* at 8-10.

16. This understanding of children as gifts to be accepted and valued for their own sake—rather than as objects that may be willed and brought into being for one's own purposes—obviously coheres well with certain theistic metaphysical views, including Jewish and Christian views. It can, however, also be accommodated by Buddhist and certain other nontheistic views. We believe that some understanding along these lines of the moral relationship of parents to the children they may conceive is essential to the rational affirmation of the dignity of children as *persons*: i.e., as *ends in themselves*, and not mere *means* of satisfying desires of their parents; as *subjects* of justice (including fundamental and inviolable human rights), rather than *objects* of will. Alternative understandings, we believe, run into severe difficulties in explaining why children may not properly be understood—and rightly treated—as the *property* of their parents.

Liberals are often puzzled by the tendency of natural law theorists—"new" as well as old—to object on moral grounds to the production of human beings by *in vitro* fertilization. After all, the natural law tradition strongly affirms the goodness of transmitting life to new persons. Why, then, should couples who are incapable of begetting children in acts of marital intercourse not resort to *in vitro* processes in order to become parents? The short answer is that the manufacturing of children is inconsistent with respect for their basic equality and human dignity. For a careful articulation and defense of this position, see *In Vitro Fertilisation and Public Policy, Evidence Submitted to the Government Committee of Inquiry into Human Fertilisation and Embryology by the Catholic Bishops' Joint Committee on Bio-Ethical Issues, on Behalf of the Catholic Bishops of Great Britain* (May 1983).

value of sex can only be *instrumental*. Notice the difference between the answer we just gave and the answer Macedo himself gives to the question: "What is the point of sex in an infertile marriage?"

Not procreation: the partners (let us assume) know that they are infertile. If they have sex, it is 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.¹⁷

He then asks, posing the question as a challenge to those who deny that sodomitical acts can be marital, "Why are these good reasons for sterile or elderly married couples but not for gay and lesbian couples?"¹⁸

It is our position, however, that the reasons Macedo identifies are *not adequate reasons* for spouses—fertile or infertile—to engage in sexual relations. Nor is procreation an adequate reason for fertile spouses to have sex. We reject the proposition that sex can legitimately be instrumentalized, that is, treated as a mere means to any extrinsic end, including procreation.¹⁹ Any such instrumentalization, we believe, damages the basic human good of integrity.²⁰ Again, the intrinsic point of sex in any marriage, fertile or not, is, in our view, the basic good of marriage itself, considered as a two-in-one-flesh communion of persons that is consummated and actualized by acts of the reproductive type. Such acts alone among sexual acts can be truly unitive, and thus marital; and marital acts, thus understood, have their intelligibility and value intrinsically, and not merely by virtue of their capacity to facilitate the realization of other goods.

Macedo's argument presupposes the truth of the very proposition we deny, whether we are arguing with people to our "left," such as Macedo and other liberals, or with strict Augustinians to our "right": namely, that

17. Macedo, *supra* note 2, at 278.

18. *Id.*

19. Suppose that King Henry VIII engages in sexual intercourse with a wife—one whom he has for all other intents and purposes cast aside—precisely and solely for the sake of producing an heir. (He would, let us further suppose, just as soon produce that heir by *in vitro* means, were they available to him.) Do Henry and his wife perform a marital act? Not in our view. Although their act of sexual intercourse occurs in the context of marriage, and is, indeed, reproductive in type (and perhaps even in result), its marital quality is vitiated precisely by its instrumentalization to what is for him an extrinsic end (i.e., producing an heir).

The situation is different, of course, if Henry loves his wife and hopes for an heir. In this case, their marital intercourse is valued for its own sake *and* as a way of attaining another good. Moreover, in hoping that their marital act will be fruitful, Henry and his wife are not seeking a child as a product. See *infra* note 21.

20. This is not to suggest that other goals may not rightly be sought and realized in and through marital intercourse. Marriage, like other basic human goods, has important instrumental as well as intrinsic value. Goals compatible with marital love—playfulness, cheer ups, distractions from grief, etc.—may properly be integrated with the intrinsic good of marital union without reducing that basic good to the status of a mere means.

the value—the point—of marriage and marital intercourse can only be instrumental. Thus, we believe, Macedo's challenge begs the central question in dispute between those, like Macedo himself, who believe that justice requires the legal recognition of same-sex "marriages," and those of us who deny that such "marriages" are morally possible. For however much we and other natural law theorists share the view that marital intercourse should be not only chaste, but also pleasurable and expressive of tender feelings—indeed, however much we believe that procreation, rightly desired,²¹ is a great good and a perfection of marriage—we hold that marriage and marital intercourse are intrinsically good; and, again, we deny that sexual intercourse may legitimately be instrumentalized to any extrinsic end.

If our view is correct, then there is no real problem of "homosexuality and the conservative mind," at least insofar as natural law theorists of our stripe qualify as "conservatives." There is, rather, a problem of marriage and the liberal imagination. Criticisms of our view along the lines of those advanced by Macedo seem compelling to liberals because they cannot imagine that the point and value of sexual relations, inside or outside of marriage, can be anything other than instrumental. They presuppose that the sexual relationship of partners in marriage, if it has any point and value at all, *must be instrumental* either to pleasure, the expression of feelings, and the like on the one hand, or to procreation on the other.

This problem of imagination is analogous to the problem some people have—though Professor Macedo himself is most decidedly not among them—in affirming the intrinsic value of "pure" scientific study and humanistic learning. Some people simply fail to "see the point" of an education that is not, in some sense, instrumentalized to the extrinsic goals it helps enable students to achieve, such as marketable skills and enhanced social status. They cannot imagine why someone would pursue intellectual knowledge just for its own sake. (A doctoral student working on, say, *The Canterbury Tales* is bound at some point to be asked by an apparently baffled friend or relative: What is the point of studying Chaucer so that you can teach his writings to other people, who will be studying them in

21. That is, desired under a description that does not reduce the child to the status of a product to be brought into existence at its parents' will and for their ends, but rather treats him or her as a *person*—possessing full human dignity—which the spouses are eager to welcome (and take responsibility for) as a perfective participant in the community established by their marriage (i.e., their family). (It is in this sense that we speak of children as "gifts" that "supervene" on marital acts.) This is not to suggest that there is anything wrong with spouses engaging in marital intercourse because they "want" a child. It is merely to indicate the description under which the "wanting" of the child is consistent with his or her dignity as a person, and to highlight our view that the marital significance of properly motivated spousal intercourse obtains whether or not conception is hoped for, results, or is even possible. Perhaps we should also record here our view that the intrinsic worth and dignity of a child is in no way diminished by any moral defect in the act that brings that child into existence.

order to teach them to other people, and so forth?) In fact, skeptics about the intrinsic value of intellectual knowledge suppose that rational people who claim to be engaging in such an enterprise must, in reality, have at the back of their minds some extrinsic goal that renders intelligible their choice to spend time, money, and effort on intellectual pursuits.

Of course, values such as knowledge and (if we are correct) marriage, in addition to their intrinsic worth, typically have significant instrumental value. Consequently, people who fail to grasp the intrinsic value of such basic human goods ordinarily do not judge them to be valueless. People who are skeptical of the intrinsic value of marriage need not, and typically do not, find the idea of marriage pointless and baffling. They cannot imagine, however, why spouses would perform marital acts, not (or not merely) as a means to, or of, procreation, pleasure, expressing feeling, and the like, but above all, and decisively, for the sake of marriage itself, understood as actualized in such acts.

Intrinsic value cannot, strictly speaking, be demonstrated. *Qua* basic, the value of intrinsic goods cannot be derived through a middle term. Hence, if the intrinsic value of marriage, knowledge, or any other basic human good is to be affirmed, it must be grasped in noninferential acts of understanding.²² Such acts require imaginative reflection on data provided by inclination and experience, as well as knowledge of empirical patterns, which underlie possibilities of action and achievement. The practical insight that marriage, for example, has its own intelligible point, and that marriage as a one-flesh communion of persons is consummated and actualized in the reproductive-type acts of spouses, cannot be attained by someone who has no idea of what these terms mean; nor can it be attained, except with strenuous efforts of imagination, by people who, due to personal or cultural circumstances, have little acquaintance with actual marriages thus understood. For this reason, we believe that whatever undermines the sound understanding and practice of marriage in a culture—including ideologies that are hostile to that understanding and practice—makes it difficult for people to grasp the intrinsic value of marriage and marital intercourse.

Although much in our culture has tended in recent years to undermine the institution of marriage and the moral understandings upon which it rests, longstanding features of our legal and religious traditions testify to the intrinsic value of marriage as a two-in-one-flesh communion. Consummation has traditionally (though, perhaps, not universally) been recognized by civil as well as religious authorities as an essential element of marriage.²³ “Physical defects and incapacities which render a party unable

22. See FINNIS, *supra* note 15, at 34; Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1388-89 (1988).

23. GA. CODE ANN. § 19-2-1 (1991), states the prerequisites to a valid marriage as “(1) Parties able to contract; (2) An actual contract; and (3) Consummation according to law.”

to consummate the marriage, existing at the time of the marriage, and which are incurable are, under most statutes, grounds for annulment"²⁴ This requirement for the validity of a marriage, where in force, has never been treated as satisfied by an act of sodomy, no matter how pleasurable. Nothing less (or more) than an act of genital union consummates a marriage;²⁵ and such an act consummates even if it is not particularly pleasurable. Unless otherwise impeded, couples who know they are sterile can lawfully marry so long as they are capable of consummating their marriage by performing such an act.²⁶ By the same token, a marriage cannot be annulled for want of consummation on the ground that one of the spouses turned out to be sterile. A marriage can, however, be annulled on the ground that impotence (or some other condition) prevents the partners from consummating it.²⁷

On the legal duty of husband and wife to consummate marriage by penile-vaginal intercourse in English law, see TONY HONORE, *SEX LAW* 16-18 (1978). Homer H. Clark, Jr. claims that the "conventional view" in the United States is that a "ceremonial" (i.e., noncommon law) marriage "is valid notwithstanding that it is not consummated." HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 39 (2d ed. 1988). However that may be, Clark concedes that the rule continues to be otherwise in various jurisdictions in which "an unconsummated ceremonial marriage is 'little more than an engagement to marry.'" *Id.* (quoting *Akrep v. Akrep*, 63 A.2d 253 (N.J. 1949)). (Clark nowhere suggests that "consummation" refers to anything other than the (initial) coition of spouses, defined as "physical union of male and female genitalia . . . leading to the ejaculation of semen from the penis into the female reproductive tract." WEBSTER'S NEW COLLEGIATE DICTIONARY (1977)). Clark himself professes to find the requirement of physical consummation, in effect, to be an "impenetrable mystery." CLARK, *supra* at 39 n.66. From the viewpoint of liberal morality, the requirement is indeed mysterious. But the liberal understanding of marriage and sexual morality, as we have labored to show, is hardly the sole possibility. Nor is the understanding embedded in the English or American law of marriage. An alternative moral understanding along the lines of the one we defend makes perfect sense of the consummation requirement as well as certain other features of marriage law as it has traditionally stood (e.g., monogamy).

24. 4 AM. JUR. 2D *Annulment of Marriage* § 30 (1962) (footnote omitted); see also HONORE, *supra* note 23, at 21.

25. See 4 AM. JUR. 2D *Annulment of Marriage* § 32 (1962) ("Capacity for imperfect or unnatural copulation is not enough; sexual intercourse in the proper meaning of the term is ordinarily [sic] and complete intercourse."); see also HONORE, *supra* note 23, at 18.

26. See 4 AM. JUR. 2D *Annulment of Marriage* § 30 (1962) ("Barrenness or inability to beget or bear children, if associated with complete power of copulation, is . . . not a ground for annulling a marriage."); see also HONORE, *supra* note 23, at 18. Honore supposes that "from this it follows, if the law is to be consistent, that a marriage can be consummated even if husband or wife use contraceptives." *Id.* As a logical or philosophical matter, however, this does not in fact follow. There is no inconsistency in holding both (a) that sterile acts of genital union of spouses can be marital, and (b) that the choice to contracept vitiates the marital quality of spousal intercourse. See *infra* note 30. In any event, as Honore points out, English law since 1948 as a matter of fact treats contracepted intercourse—so long as it is "ordinary and complete" penile-vaginal intercourse—as sufficient to consummate marriage. HONORE, *supra* note 23, at 18. English law here has been made consistent with the teaching of the Church of England, which reversed its position on the immorality of contraception earlier in this century.

27. "The legal definition of impotency within the meaning of annulment statutes implies

We believe that the law, in its rules regarding consummation, embodies an important insight into the nature of marriage as a bodily—no less than spiritual and emotional—union that is actualized in reproductive-type acts. Liberals, however, may well consider the law simply to be misguided on this point. Marriage, they may argue, is a one-flesh union only in a metaphorical sense. It is, in reality, they may say, an emotional union that is served in various ways by the mutually satisfying orgasmic acts of spouses. Consummation, they may contend, ought not to be a requirement for the validity of marriage, or, if it is to be a requirement, it should be considered to have been satisfied by a wider range of possible sexual behaviors.

In the end, we think, one either understands that spousal genital intercourse has a special significance as instantiating a basic, noninstrumental value, or something blocks that understanding and one does not perceive correctly. For the most part, our liberal friends, such as Stephen Macedo, honestly²⁸ do not see any special point or value in such intercourse.²⁹ For them, spouses have no reason, apart from purely subjective preference, ever to choose genital intercourse over oral or anal intercourse. And because oral and anal intercourse are available to same-sex couples, such

some malformation or organic defect existing at the time of marriage, by reason of which there cannot be natural and perfect coition—vera copula—between the parties.” 4 AM. JUR. 2D *Annulment of Marriage* § 32 (1962) (footnote omitted). “Vera copula” plainly refers to what we have called acts of the reproductive type, whether or not they are, or can be, reproductive in fact. See *JG v. HG*, 33 Md. 401 (1870) (“The rudimentary condition of [the appellee’s] sexual organs, and their imperfect development, not only rendered conception impossible, but there was on her part an incapacity for *vera copula*. That is to say, she was not capable of the act of generation in its natural and ordinary meaning, but only of incipient and imperfect coition.”); see also HONORE, *supra* note 23, at 17–18.

28. This is not to say that the *culture* in which such failures of understanding can honestly occur can come into being without culpable and bad faith rationalizations of morally corrupt dispositions and choices. In this respect, as in most others, there is nothing special about sexual immorality or its cultural impact.

29. The failure of imagination, which, we believe, obscures for many people the intrinsic value of marriage and marital acts, is rooted in certain moral and metaphysical beliefs they have come to hold about the human person and human good(s) more generally. People who reject traditional standards of sexual morality tend to understand human beings dualistically, that is, as nonbodily persons who inhabit nonpersonal bodies. This dualism subverts a psychologistic conception of value that effaces the distinction (which is strictly maintained in the natural law tradition) between human goods on the one hand, and good human feelings on the other. On this distinction and its importance for practical philosophy, see generally JOHN FINNIS, *FUNDAMENTALS OF ETHICS* (1983); Robert P. George, *Human Flourishing as a Criterion of Morality: A Critique of Perry’s Naturalism*, 63 TUL. L. REV. 1455 (1989). On person-body dualism and some of its implications for normative ethics, see DAVID BRAINE, *THE HUMAN PERSON: ANIMAL AND SPIRIT* (1992); JOHN FINNIS ET AL., *NUCLEAR DETERRENCE, MORALITY AND REALISM* 304–09 (1987); Robert P. George, *Life as an Evil; Death as a Good: A Critique of Callahan’s Inversion*, in SET NO LIMITS: A REBUTTAL TO DANIEL CALLAHAN’S PROPOSAL TO LIMIT HEALTH CARE TO THE ELDERLY 15 (Robert L. Barry & Gerard V. Bradley eds., 1991) [hereinafter George, *Life as an Evil*]; Patrick Lee, *Human Beings Are Animals*, in *ETHICS, METAPHYSICS AND POLITICS: ESSAYS FOR GERMAIN GRISEZ* (Robert P. George ed., forthcoming).

couples have as much interest in marriage and as much right to marry as couples of opposite sexes.

By contrast, many other people perceive quite easily the special value and significance of the genital intercourse of spouses, and see that this value and significance obtains even for spouses who are incapable of having children, or any more children. They are therefore confident that sodomitical acts cannot be marital (though they divide over the question whether contracepted intercourse retains its marital quality).³⁰ Thus, as a matter of common sense, they deny that marriage, as a moral reality, is possible for couples of the same sex.

The central issue can be brought into focus by considering the case of an elderly married couple who simply no longer experience pleasure in their acts of genital intercourse. They are, however, still physiologically capable of performing such acts and can do so without emotional repugnance. Is there any point to their continuing to perform them? Can it be reasonable for them to do so, at least occasionally, as a way of actualizing and experiencing their marriage as a one-flesh union? We say yes. We suspect that Macedo and most other liberals would say no. Our answer is valid if marriage, and the genital acts that actualize it, are intrinsically good and, thus, have an intelligible point even apart from their capacity to produce pleasure.

What we have said so far is sufficient to establish that there is no logical inconsistency in our approving of the marital acts of spouses, fertile or otherwise, while disapproving of their—or anyone else's—sodomitical or other nonmarital sex acts. We maintain no "double standard." Still, a logically flawless position may nevertheless be false. The proposition that alligators are good opera singers suffers from no logical faults; it just happens to be false (or, at best, a metaphor). Someone who believed that proposition to be true in a literal sense would simply be wrong. By the same token, it is possible that we are simply wrong in believing that marriage, as a one-flesh communion of persons, is possible. Perhaps marriage, thus conceived, is an illusion or, at best, a mere metaphor to describe a relationship marked by more or less intense psychological closeness combined with sexual intimacy and certain sorts of commitments and obligations.

30. Those who argue that contraception vitiates the marital quality of spousal genital acts have the stronger case. Nobody, we believe, performs a reproductive-type act when he or she deliberately thwarts that act's reproductive potential. Many thoughtful scholars have, however, taken an opposing view, arguing that particular contracepted acts within marriage remain marital so long as the marriage as a whole is open to children. *See generally* JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS* (1965); JAMES T. BURTCHAELL, *THE GIVING AND TAKING OF LIFE* (1989); David Novak, *Religious Communities, Secular Society, and Sexuality: One Jewish View*, Paper Presented at Brown University (Apr. 1995) (unpublished manuscript, on file with author).

Do spousal acts of genital union have the intrinsic value we ascribe to them? If not, then such acts have no more value than other orgasm-inducing acts that spouses might perform on each other's bodies, should they mutually prefer to do so, and which may be performed by couples of the same sex as well as by those of opposite sexes. If marital acts, as we describe them, have no intrinsic value—if, that is to say, marriage as a one-flesh union is impossible for anyone—then the situation of sterile heterosexual couples is indistinguishable from that of similarly committed homosexual couples. Either couples of both sorts should refrain from sex altogether, or couples of either sort may more or less freely engage in any mutually agreeable sex acts of their choosing.

Macedo declares that "[t]he 'one-flesh communion' of sterile couples would appear . . . to be more a matter of appearance than reality."³¹ Because procreation is unattainable for sterile spouses, they cannot really be united biologically; "their bodies," he asserts, "like those of homosexuals, can form no 'single reproductive principle,' no 'real unity.'"³²

We disagree. When animals (including humans) mate, they are united biologically whether or not conception is possible. In mating, the male and female pair is, indeed, a "single reproductive principle." Reproduction is one act; yet the act is performed by the mated pair as an organic unit. So, as Grisez remarks:

Though a male and a female are complete individuals with respect to other functions—for example, nutrition, sensation, and locomotion—with respect to reproduction they are only potential parts of a mated pair, which is the complete organism capable of reproducing sexually. Even if the mated pair is sterile, intercourse, provided it is the reproduc-

31. Macedo, *supra* note 2, at 279.

32. *Id.* at 278. Macedo goes so far as to argue that even fertile couples who conceive a child in sexual intercourse do not really unite biologically, because, in his view, "penises and vaginas do not unite biologically, sperm and eggs do." *Id.* at 280. Sperm and eggs, however, are parts of the biological reality of persons, just as penises and vaginas are. Neither sperm nor eggs, neither penises nor vaginas, are properly conceived as nonpersonal "equipment" that is "used" by persons, considered as standing over and apart from these and other aspects of their biological (i.e., bodily) reality. So, in our view, *persons*—males and females—who unite genitally in marital acts really do unite biologically (and, because—as Finnis has observed, see Finnis, *supra* note 1—the biological reality of human beings is part of their personal reality, they unite personally), whether or not, as a result, egg and sperm unite in the conception of a child. In denying that human males and females really unite biologically when they mate—whether or not their mating is, or is even intended to be, procreative—Macedo slips into person-body dualism, as he does elsewhere, in claiming, for example, that "[i]f the presence of nonworking equipment [in the case of sterile couples] of the 'right' sort is a crucial distinguishing feature of permissible sexual relationships, artifice might supply [by way of a partial sex change operation, for example] what nature has not." Macedo, *supra* note 2, at 280. For what we believe is a decisive argument against the most plausible forms of person-body dualism, see Lee, *supra* note 29. For arguments that complement and reinforce the one Lee advances, see BRAINE, *supra* note 29, at 19-68; FINNIS ET AL., *supra* note 29, at 304-09; George, *Life as an Evil*, *supra* note 29, at 23-27.

tive behavior characteristic of the species, makes the copulating male and female one organism.³³

Of course, nonhuman animals cannot mate *for reasons and by choice*, the way humans can.³⁴ And, as we see things, their mating cannot have the intrinsic value and moral significance of human mating. (Even animals that mate for life do not marry, at least under our conception of marriage.) Marriage is a "reflexive" good; it includes the free choices of the parties' consent. And, as Grisez points out, marriage "fulfills both biological *and moral* capacities by making two bodily and free persons into one . . . without in the least compromising their individuality."³⁵

Macedo's claims would be plausible, we think, only on an understanding of reproductive organs and their functioning that we find highly implausible. According to this understanding, which is implicit in his frequent references to sexual organs as "equipment," these organs cease being reproductive organs during times at which they are not effectively performing, or, in any event, are not capable of effectively performing, reproductive functions. At these times, a penis or a vagina is no more a reproductive organ than a finger, tongue, mouth, or rectum. So, under this understanding, animals (including humans) performing during infertile periods the precise behaviors that constitute mating during fertile periods are not, in fact, mating.

In contrast, Finnis has argued that the inseminatory union of male with female genital organs, though it only occasionally results in procreation, is "the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation."³⁶ Macedo, in response, offers an analogy (borrowed from Andrew Koppelman): "pointing a gun at someone and pulling the trigger is in general behavior suitable for murder, but not when the gun is unloaded."³⁷

This analogy would hold if, and only if, it were true that human (and other animal) acts of inseminatory union are in general behavior suitable for reproduction, but not when the nonbehavioral conditions of reproduction do not obtain. But this proposition is not true. Animal (including human) intercourse, unlike pulling the trigger of an unloaded gun, is part of a complex biological function, namely, reproduction. Such intercourse constitutes reproductive functioning, even if the process of which it is a part is, due to nonbehavioral factors, incomplete. This is why we easily

33. Grisez, *supra* note 14, at 6.

34. However, even sterile (nonhuman) animals do mate, and nobody has any difficulty recognizing that as a reproductive-type performance on their part.

35. Grisez, *supra* note 14, at 6.

36. Finnis, *supra* note 1, at 1066 n.46.

37. Macedo, *supra* note 2, at 280.

recognize the mating of animals we know to be sterile as mating, and not as failed attempts to mate.³⁸

The unloaded gun analogy breaks down further when we consider the specifically human acts we refer to as marital acts. 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 (inter)personal. If, as we believe, this unity has intrinsic, and not merely instrumental, value, it provides the spouses with a noninstrumental reason for performing marital acts. Thus, the intelligibility of these acts in no way depends on the possibility of procreation.

Guns, unlike sexual organs, are not parts of the personal reality of human beings. The value of guns is purely instrumental. Their intelligibility depends entirely upon their utility in accomplishing the ends of those who own and use them (for example, the hit man, the soldier, the hunter, the gun collector). An unloaded gun is simply useless to, say, a hit man. It is pointless for him to take aim at an unsuspecting victim and pull the trigger. It simply does no good, even in the hit man's rather perverse sense of "good." As action, it is unintelligible. But if, as we believe, the genital union of spouses makes them truly one-flesh, then the marital acts of spouses, fertile or not, are perfectly intelligible. They are not pointless. On the contrary, *qua* unitive, they are intrinsically good.

The mating of spouses, then, is something altogether different from shooting a gun. Mating is mating, not because it is in fact reproductive (human mating usually is not reproductive), but precisely because it is, in Grisez's words, "the reproductive behavior characteristic of the species,"³⁹ or, in Finnis's words, "the behavior which, as behavior, is suitable for generation."⁴⁰ Mating is fundamentally unlike shooting in that it is an irreducibly *unitive* activity; and its unitive significance obtains for the mated pair irrespective of the procreative potential of their particular acts of genital intercourse. And, inasmuch as the interpersonal unity achieved in the mating—the reproductive-type acts—of spouses is intrinsically good, spouses have a reason to mate quite irrespective of whether their mating will, or even can, be procreative.

II. THE MORAL HARM OF NONMARITAL SEX ACTS

We have argued that sodomy is intrinsically nonmarital. Is it immoral? In our view, all nonmarital sex suffers from at least one grave moral defect:

38. By contrast, where a male mounts a female but, for whatever reason, does not manage to achieve vaginal penetration, what we have is precisely a failed attempt to mate.

39. Grisez, *supra* note 14, at 6.

40. Finnis, *supra* note 1, at 1066 n.46.

Sex that is not for the intrinsic good of marriage itself—sex, that is to say, which is wholly instrumentalized to pleasure or some other goal—damages personal (and interpersonal) integrity by reducing persons' bodies to the status of means to extrinsic ends.

The body, as part of the personal reality of the human being, may not be treated as a mere instrument without damaging the integrity of the acting person as a dynamic unity of body, mind, and spirit. To treat one's own body, or the body of another, as a pleasure-inducing machine, for example, or as a mere instrument of procreation, is to alienate one part of the self, namely, one's consciously experiencing (and desiring) self, from another, namely, one's bodily self. But these parts are, in truth, metaphysically inseparable parts of the person as whole. Their *existential* separation in acts that instrumentalize the body for the sake of extrinsic goals, such as producing experiences desired purely for the satisfaction of the conscious self, disintegrates the acting person as such.

So, in our view, while sexual intercourse is valuable and morally good when it actualizes (and, thus, allows spouses to experience) the one-flesh communion of their marriage, sex that is wholly instrumentalized is intrinsically morally bad, even when the ultimate goals to which orgasmic activity is chosen as a means (for example, sharing a pleasurable experience, getting a good night's sleep, expressing tender feelings, generating feelings of closeness) are in themselves innocent and even desirable. This, we believe, is the idea Finnis had in mind when he provoked Macedo's vigorous objections by saying:

[I]n reality, whatever the generous hopes and dreams and thoughts of *giving* with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a gruelling day on the assembly line.⁴¹

However harsh this judgment sounds, it is certainly true if, as we believe, the sexual acts of same-sex partners, unlike the reproductive-type acts of spouses (but like the sodomitical acts even of spouses), cannot be truly unitive and, thus, marital. Hence, the sexual acts of same-sex partners (and the nonmarital acts of partners of opposite sexes—even if married to each other) cannot realize a truly *common* good, but can, at best, do no more than, as Finnis says, "provide each partner with an individual gratifica-

41. *Id.* at 1067.

tion.”⁴² And thus,

[f]or want of a *common good* that could be actualized and experienced by and in this *bodily union*, that conduct involves the partners in treating their bodies as instruments to be used in the service of their consciously experiencing selves; their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.⁴³

It is precisely in response to Finnis’s claim that instrumentalized sex damages integrity that Macedo declares that “[m]any will find deeply unreasonable . . . the judgment that pleasure is not in and of itself a good.”⁴⁴ Drawing an analogy between sex and eating, he asks:

Is eating for the sake of mere pleasure unnatural or irrational? Is it permissible to chew sugarless gum, which gives pleasure but has no nutritional value, . . . or is doing so the gastronomic equivalent of masturbation (assuming that we are not doing it to exercise the jaw or clean the teeth)?⁴⁵

However others may judge the matter, we certainly deny that pleasure is an intrinsic good. Pleasure can motivate people, but it does not provide a basic *reason* for acting. Pleasure motivates by appealing not to the practical intellect of the deliberating and choosing subject, but rather to some sentient part of the self. Thus, pleasure must be distinguished from basic

42. *Id.* What Finnis says, and we say, is necessarily true of the sexual acts of same-sex partners is, as we have tried to make clear, no less true of the sodomitical and other nonmarital sexual acts of partners of opposite sexes, including partners in marriage.

43. *Id.* at 1066-67 (footnote omitted). Macedo asks rhetorically: “Is it plausible that there are *no* distinctions to be drawn here? My guess is that most committed loving couples—whether gay or straight—are sensitive to the difference between loving sexual acts expressing a shared intimacy and mere mutual masturbation.” Macedo, *supra* note 2, at 282. Our claim, however, and Finnis’s as we read him, is not that no distinctions of any sort can be drawn, but rather that nonmarital sex acts of all types share a decisive moral flaw: they instrumentalize the body in a way that damages the integrity of those who choose such acts. Unlike masturbatory acts, acts of fornication, adultery, and sodomy can seem to unite persons. It is therefore entirely understandable that people who perform such acts prefer them to mere masturbation and, generally, prefer to perform them with people for whom they have affection. At some level, such people are, we believe, interested in the one-flesh union of persons we understand as marriage. If, however, acts of fornication, adultery, and sodomy cannot, in reality, unite persons in this way, then, as Finnis says, “those acts cannot do more than is expressed or done if . . . a man masturbates to give himself pleasure and a fantasy of more human relationships . . .” (Of course, there are important respects in which distinctions among nonmarital sex acts certainly can be drawn. Even if, as we believe, no nonmarital sex act can be morally good, some—for example, those involving injustice and other evils beyond that of the wrongful instrumentalizing of one’s body and that of one’s partner—are worse than others.)

44. Macedo, *supra* note 2, at 282.

45. *Id.*

human goods, such as knowledge and, as we argue, marriage, which provide *rational* (as well as emotional) motivation.⁴⁶

Now, this is by no means to suggest that pleasure is bad. Rather, its value depends on the moral quality of the acts in which pleasure is sought and taken. In morally good acts, pleasure is rightly sought as an experiential aspect of the perfection of persons' participation in the basic goods that provide *reasons* for their acts. Integrated with the good of marriage, for example, pleasure is rightly sought and welcomed as part of the perfection of marital intercourse (just as, in our view, procreation may be rightly desired). However, to simply instrumentalize intercourse to pleasure (or procreation) is to vitiate its marital quality and damage the integrity of the genital acts even of spouses.

The body is not rightly treated as a machine for having experiences; it is, rather, a part of the personal reality of the human being whose every act (including spiritual acts) is also a bodily act, and whose body, as an intrinsic (and not merely instrumental) part of the person, participates in his or her fulfillment. Among the fulfillments of persons is their integrity as unified actors. This integrity is no mere means of accomplishing ends extrinsic to itself; it is, rather, an end in itself, and, as such, provides a noninstrumental reason for action (and restraint). To be rationally concerned about, and to act to maintain, their personal integrity, people need no reason other than the basic good of personal integrity itself.

Thus, we believe that it is contrary to reason—bad and immoral—to sacrifice one's psychosomatic integrity, or to instrumentalize a part of oneself, for the sake of some desired experience, whether it is getting drunk, enjoying a psychedelic drug trip, or having an orgasm. But what about eating just for the pleasure of it? What about chewing sugarless gum?

Grisez has observed that people regularly perform bodily acts without reducing their bodies to the status of mere means to extrinsic ends. In eating, for example, as in speaking, watching a film, playing a musical instrument, or engaging in marital intercourse, "the body functions as part of oneself, serving the whole and sharing in the resulting benefits."⁴⁷ In

46. Although we disagree with ethical noncognitivists who (following David Hume) deny the possibility of ultimately rationally motivated action, we share with them the view that pleasure and other subrational motivating factors ought not to be confused with basic *reasons* for action. Of course, speaking loosely, one can refer to any cause or motive as a "reason." In moral analysis, however, it is critical to distinguish those ends (if any) that provide rational motivation from those that provide merely emotional motivation. The former are *reasons*, strictly speaking; the latter are not. See Robert P. George, *A Defense of the New Classical Natural Law Theory*, 41 AM. J. JURIS. (forthcoming 1996). For a valuable exposition and defense of ethical noncognitivism, see Jeffrey Goldsworthy, *Fact and Value in the New Natural Law Theory*, 41 AM. J. JURIS. (forthcoming 1996).

47. 2 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE* 650 (1993).

masturbation and other nonmarital sex acts, by contrast,

one does not choose to act for a goal which fulfills oneself as a unified, bodily person. The only immediate goal is satisfaction for the conscious self; and so the body, not being part of the whole for whose sake the act is done, serves only as an extrinsic instrument.⁴⁸

As Macedo himself notes, the analogy between sex and eating becomes interesting only in a case in which one, say, eats *purely* for pleasure.⁴⁹ Ordinarily, if usually unreflectively, the pleasure of eating is integrated into people's larger worthwhile projects. In eating, people typically do not treat their bodies as mere machines for inducing pleasurable experiences for the satisfaction of their conscious selves. That is to say, people typically do not choose satisfaction of some want or desire merely as sentient beings, rather than as integrated persons. Thus, the fact that people may obtain pleasure in eating does not render the act disintegrative.

The same is true of chewing gum. People ordinarily, if usually unreflectively, chew gum as part of larger projects, just as rocking in a chair, twirling a pencil, or going for a walk are characteristically parts of larger projects (such as our project of trying to think through the argument we are presenting in these pages). People typically do not chew gum to "pleasure themselves" in a manner akin to masturbation. The nature of the pleasure available in chewing gum or in eating offers people little in the way of subrational motivation to treat their bodies as mere instruments of their consciously experiencing selves, and, thus, to compromise their psychosomatic integrity. In this respect, the pleasure of chewing gum or eating is like the pleasure of rocking in a chair or taking a walk, and unlike the pleasure of having an orgasm or, we suppose, using hallucinogenic drugs.

Chewing gum, rocking in a chair, and taking a walk are examples of "innocent pleasures." The pleasure they provide is effortlessly integrated with larger projects (such as concentrated thinking), and for most people these activities present no hazard to any aspect of the person's well-being. (Chewing or smoking *tobacco*, by contrast, presents a different sort of case, not because these activities are disintegrative, but rather because they may imperil physical health.) The important point is that in the activity of chewing gum, no existential separation of the bodily self and the consciously experiencing self is typically effected. In that activity, the body is not typically commandeered into the service of a project that is fully and accurately described (and, thus, morally specified) as producing pleasure, whether as an end in itself or as means to other ends.

48. 2 *id.*

49. Macedo, *supra* note 2, at 282.

The above argument shows, we think, that masturbation and other nonmarital sex acts are not morally similar to eating or even to chewing sugarless gum. It does not, however, show that eating or chewing sugarless gum could never share the moral defect we claim is common to all such acts—hence, our use of the term “typically” as a hedge. In the extreme case, someone could, we suppose, produce an ingestible product—a genetically re-engineered broccoli, perhaps—that could induce orgasms or pleasurable experiences of that order. Less dramatically, a person could, we imagine, pursue pleasure in eating or chewing gum in a way divorced from larger projects such that his activity could only accurately be described as “pleasuring himself” in a way analogous to the masturbator or psychedelic drug-tripper. It is difficult to imagine what—short of hallucinogenic mushrooms or orgasm-inducing broccoli—would tempt a person to take such a turn, but anything, we suppose, is possible. In that case, we would say that eating and gum chewing damage personal integrity insofar as those acts effect an existential alienation of the body from the conscious self by *simply* using the body as an experience-inducing machine. Thus, such behavior should, for moral reasons, be avoided.

Our view about the disintegrative quality of nonmarital sex tends to strike liberals as exceedingly odd. Something like our view, however, must be affirmed by anyone who supposes, as Macedo seems to, that there can be something morally wrong, and not merely imprudent, about some forms of consensual sex. “Sexual liberationists” can afford casually to dismiss the idea that sex can damage integrity. They have no interest in developing a principled moral critique of consensual adultery, promiscuity, prostitution (“sex work”), bestiality, and the like. Liberals who reject liberationism, however, had better take care before dismissing our view.

Our goal has been to identify a principle that makes sex something other than an instrumentalization of the body and disintegration of the bodily self. Macedo himself, it is clear, has some sympathy with this goal. “Liberationists,” however, will rightly challenge him to produce a principled moral critique of promiscuity that really distinguishes nonpromiscuous homosexual relations from the promiscuous lifestyles *they* prefer, which, they will say, “intrinsically realize” goods such as play, bonhomie, friendliness to strangers, and, to be sure, “pleasure.” We do not believe that Macedo will be able to meet this challenge.

III. THE POLITICAL RELEVANCE OF OUR VIEW

Now, suppose that our view of marriage and sexual morality (or something quite like our view) is morally correct. Macedo argues that it is, nevertheless, politically irrelevant. Noting that Grisez and Finnis, like the two of us, believe that contracepted sex, no less than sodomitical acts, is

nonmarital and morally bad, he says:

[T]o the extent that the state has an interest in discouraging homosexuality on . . . natural law grounds, it has an equal interest in acting against all extramarital and contracepted sex. To the extent that the state exhibits no interest in discouraging the use of contraceptives, it has evidently rejected new natural law reasoning and must find some other grounds to justify discouraging homosexuality.⁵⁰

Acknowledging that our view does not “single out homosexuality as singularly perverse and ‘unnatural,’ ”⁵¹ he argues that its very “fair-mindedness and broad sweep” in rejecting all nonmarital sex acts, even those engaged in by spouses, “may also make [it] politically irrelevant. . . . This natural law philosophy cannot be of help to any but those few Americans who accept its extremely broad strictures.”⁵²

It is true that most Americans do not agree with us about the immorality of contraception, at least in the case of contraception within marriage; it is also true, however, that most Americans do not agree with Macedo about the moral possibility of same-sex “marriage.” We suspect that most Americans—or, at the very least, a minority substantial enough to be politically salient—hold a basic view of sexual morality that resembles ours in understanding marriage to be a one-flesh communion and, precisely as such, the principle of rectitude in sexual behavior. If many, or even most, of these Americans differ with us on contraception (or divorce, though divorce raises issues that are much more complicated), their difference does not go to the root. They simply disagree with our claim that contraception vitiates the marital quality of spousal genital acts.⁵³ Although their view is opposed to ours in this respect, and though, we suppose, it rests on a certain (“physicalist”) misunderstanding of what constitutes a reproductive-type act, it is defended by responsible people who affirm the fundamentals of our understanding of marriage and sexual morality.⁵⁴ It is on these fundamentals that we, and they, hold that sodomitical acts cannot consummate and actualize marriage.

Moreover, even those who share our views about contraception need not hold, as Macedo thinks we must, that the state has an “equal interest in acting against all extramarital and contracepted sex.”⁵⁵ A huge variety of prudential considerations enter into the questions of whether and how the

50. *Id.* at 276.

51. *Id.* at 277.

52. *Id.*

53. *See supra* note 30.

54. We have in mind here, particularly, the scholars whose work we cite in *supra* note 30.

55. See the discussion of *Griswold v. Connecticut*, 381 U.S. 479 (1965), in Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 350-53 (1993).

state should act against any immoral conduct, especially conduct that typically involves little or no injustice.⁵⁶ Such considerations might militate strongly in favor of a legal immunity for married couples to use contraceptives. On this basis, someone opposed to contraception on moral grounds might nevertheless support the decision of the Supreme Court in *Griswold v. Connecticut*.⁵⁷ Indeed, given the stated ground of that decision, one might even affirm the Court's reasoning, namely, the "perfectionist"⁵⁸ argument that the centrality of confidentiality and spatial privacy to marital friendship require legal immunity for married couples from investigation and prosecution for using contraception without regard to the question of whether contracepting is morally good or bad.⁵⁹ People can, in other words, consistently hold that contraception is bad for marriage but that laws against contraception are worse. At the same time, they can hold (though they need not) that the state should ban the distribution of contraceptives to unmarried people and strongly discourage, if not forbid, extramarital sex. Certainly, at a minimum, they can hold that the state ought not to institutionalize (or otherwise support or promote) same-sex or other intrinsically nonmarital sexual relationships or recognize "marriages" between people of the same sex or others who cannot consummate marriage as a one-flesh communion.⁶⁰

56. For a classic expression of this idea in the natural law tradition, see ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, q. 96, art. 2. See also ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* at viii-x (discussing prudence), 31-33 (discussing Aquinas), 42-47 (discussing value and limits of "perfectionist" law and policy).

57. 381 U.S. 479 (1965) (recognizing that right of privacy in marriage allows use of contraception). Finnis, for example, rejects contraception on moral grounds yet supports this decision. See Finnis, *supra* note 1, at 1076.

58. On "perfectionism" and perfectionist reasons for limiting governmental means of enforcing morality, see GEORGE, *supra* note 56, at 129-30, 161-88 (discussing Joseph Raz's "perfectionist" liberalism).

59. As far as we can tell, neither Justice Douglas nor any other Justice in *Griswold* stated or clearly implied a view about the morality of contraception. We suppose (on other grounds) that most, if not all, the Justices believed that contraception in marriage is morally acceptable. A Justice who took the opposite view could, however, have concurred in the decision.

60. Society, in our view, has a compelling interest in marriage (rightly understood) and stable family life. This does not mean that there are no moral limits to the means that governments may employ to protect the institution of marriage. It does mean, however, that governments may, and should, decline to treat all sexual relationships as legally equal or confer the status of marriage on intrinsically nonmarital relationships. What Joseph Raz—who does not agree with our moral analysis of homosexual sexual activity—says of monogamy applies to the constitutive aspects of marriage more generally: "Monogamy, assuming that it is the only valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions." JOSEPH RAZ, *THE MORALITY OF FREEDOM* 162 (1986).