

# *Marriage and the Boundaries of Sex in New Natural Law Theory*

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## I. Introduction

Beginning over two decades ago, and particularly since the 1990s, the so-called ‘new natural law’ theorists have had much to say about the content of and philosophical foundation for a morally coherent sexual ethics and therefore the proper public regulation of sexual behavior. This sexual ethic’s most remarked upon features are the marking as morally illicit homosexuality as way of life, masturbation, and indeed all non-reproductive-like sexual acts, both within and without marriage and

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regardless of the sexual orientation of the participants.<sup>2</sup> But, with the increasingly more extensive transformation of the old regime of sexual regulation both in the United States and elsewhere in the world,<sup>3</sup> as the old joke goes, it appears that few are listening.

What this article will suggest is that we are too hasty if we simply take the disjuncture between law and policy developments on the one hand and the moral demands of new natural law theory on the other to signal the irrelevance of the new natural law to our efforts to theorize the proper scope of a publically regulated sexual ethic. Indeed, we see in these very advances a concern expressed with the seeming inability of both current jurisprudence and philosophic resources to draw the moral distinctions demanded by *both* those in favour of the transformations, and those not. In Justice Scalia's dissenting opinion in *Lawrence v. Texas*, which overturned the *Bowers v. Hardwick* decision upholding prohibitions on sodomy, he notes that in protecting the liberty of individuals to define their own lives with regard to intimate relations,

the Court makes no effort to cabin the scope of its State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; decision to exclude them from its holding.<sup>4</sup>

But these sorts of concerns also have found their earlier, philosophic expression in the important critic of new natural law sexual ethics, Stephen Macedo, who has acknowledged that the new natural lawyers and other '[c]onservatives are right to remind us that public policy plays a legitimate role—even in a liberal regime—in favoring better over worse ways of life and promoting a healthy moral culture'.<sup>5</sup> To do so, Macedo suggests, is for progressive philosophic and legal thinkers to learn that '[t]he natural lawyers are fundamentally right in their insistence that we must make value judgements in the realm of sexual morality'.<sup>6</sup> Here Justice Scalia is in agreement with Macedo that in the realm of sexual ethics as elsewhere, '[t]here is no escape from moral substance' for there is 'the need to specify and defend criteria for distinguishing groups worthy of special support from those who are not'.<sup>7</sup>

2 Two frequently cited examples from John Finnis, one of the foundational formulators of the explicitly secular version of the new natural law: 'Thus, even at the level of behavior—i.e., even leaving aside its inherent sterility—gay "marriage," precisely because it excludes or makes no sense of a *commitment* utterly central to *marriage*, is a sham' (John Finnis, 'The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations', *The American Journal of Jurisprudence*, vol 42, 1997: 97–134, p. 130; hereafter, 'Good of Marriage'); and, political communities have 'a compelling interest in denying that homosexual conduct—a "gay lifestyle"—is a valid, humanly acceptable choice and form of life' (John Finnis, 'Law, Morality, and "Sexual Orientation"', *Notre Dame Law Review*, vol. 69, no. 5, 1994: 1049–1076, p. 1070; hereafter, 'Sexual Orientation').

3 Most notably the opening up of civil marriage to same-sex couples, recently in California (2008), earlier in Massachusetts (2004), and nationally in Netherlands (2001), Belgium (2003), Spain (2005), Canada (2005), and South Africa (2006).

4 *Lawrence v. Texas* [2003] 539 U.S. 558, 123 S.Ct. 2472, p. 590.

5 Stephen Macedo, 'Homosexuality and the Conservative Mind', *The Georgetown Law Journal*, vol. 84, 1995: 261–300, p. 286. Hereafter, 'Conservative Mind'.

6 Stephen Macedo, 'Against the Old Sexual Morality of the New Natural Law', *Natural Law, Liberalism, and Morality*, Robert P. George (ed.), <x>: Oxford University Press, 2001: 27–48, pp. 27–28. Hereafter, 'Old Sexual Morality'.

7 Macedo, 'Sexuality and Liberty: Making Room for Nature and Tradition?', *Sex, Preference, and Family: Essays on Law and* (continued...)

The broad philosophic and legal rejection of the substance of the new natural law's sexual ethics have been rooted in the seemingly identification of two paradoxical features of new natural law: a formidably sophisticated system of ethical reasoning combined with moral conclusions that are seen to be 'strikingly simplistic and implausible' and which, moreover, 'trade rather heavily on stereotypes'.<sup>8</sup> So, while liberal theorists condemn the new natural law because of both these features,<sup>9</sup> even pragmatic supporters of the new natural law's central substantive conclusions have abandoned the arguments and reasoning behind them.<sup>10</sup>

What we will suggest in this article is that the new natural law contains robust philosophic resources that are (perhaps surprisingly) amenable to the very progressivist jurisprudence that has slowly in the process of transforming the dominant sexual regime in the West while nonetheless allowing it to solve the philosophic problem of defending boundaries within a sexual ethic for which the new natural law first came to note and came to be generally rejected. In this sense, this article is an attempt to show how the resources of the new natural law theory have been articulated by their original formulators in a sexual ethic that has occluded the full potentiality of those very resources by understanding them to demand a single, narrow content of morally licit sexual relations. These resources consist in bringing to bear on sexual ethics the importance of what we will call 'moral projects' that are neither subject to the plasticity of liberal conceptions of self-authorship that ultimately lie behind sexual progressivism in the spheres of public policy, law, and the thought of liberal thinkers like Macedo who are otherwise attentive to liberalism's inability to solve the boundary problem.

7 (...continued)

*Nature*, David M. Estlund and Martha C. Nussbaum (eds.). New York: Oxford University Press, 1997: 86–101, pp.90, 89. Hereafter, 'Sexuality and Liberty'.

8 Macedo, 'Conservative Mind', pp. 282, 285; for his appreciation of the new natural law's sophistication, see p. 276.

9 In the former case because the mode of ethical reasoning is inimical to the demands of public reason <x>, and in the latter case because it contributes to a reactionary that is inimical to the 'basic justice of fairly extending fundamental rights and opportunities to all' (Macedo, 'Sexuality and Liberty', p. 86).

10 The *New York Times Magazine* reports the following amusing story. Students at Princeton University founded the Anscombe Society to promote chastity and the 'Goods of Family, Marriage, and Faithful Love' inspired by the Catholic theorist Elizabeth Anscombe. Although unstated in the piece, an examination of the position statements of the Anscombe Society reveal a deep correspondence with the contemporary formulation of new natural law theory—unsurprising given that their 'informal faculty advisor' is the new natural law theorist Robert George (see [http://www.princeton.edu/~anscombe/position\\_statements/Position%20Statements.htm](http://www.princeton.edu/~anscombe/position_statements/Position%20Statements.htm)). Despite the shared religious affiliation, and the shared goals, students at Harvard took a different approach:

'We wanted to take it in a completely different direction,' Justin Murray, one club founder, told me. Murray and other members of the Harvard-Radcliffe Catholic Student Association admired Princeton's effort to fit into the 'intellectual discourse of a top school'—but didn't want to make people at Harvard 'dig deep into the philosophical catacombs,' as he puts it, just to understand why they should keep their clothes on. Harvard students are more emotionally involved in their causes, he told me. They're more about getting things done, 'making people happier, better and making society more just.' Murray didn't think Anscombe's 'excessively abstract' logic would appeal to his classmates; nor, he added, would the Anscombe Society's position against gays. 'We wanted to make abstinence look fun, interesting,' he said. (Randall Patterson, 'Students of Virginity', *New York Times Magazine*, March 30, 2008: 38–43, pp. 40–41.)

In order to bring out these resources we need to focus on the axle around which the new natural law sexual ethic turns: the ability of the concept of marriage to generate out of its logic the entirety of the bounds of morally licit sexual relations. In this way, the examination of the new natural law presented here differs from those that have tended to focus on examinations of the place of facticity in new natural law arguments<sup>11</sup> and thereby reverse the moral valence that explicitly animates the new natural law theory itself.

We begin, in part II, with an exploration of the foundations of the new natural law moral theorizing that shows its reasoning to implicitly involve a three step process of what we will call ‘moral transformation’. This process of moral transformation sets the stage for part III in which we examine three forms of argument employed by the new natural law theorists to link a particular form of sex—‘reproductive-like’—to marriage. In the concluding section, part IV, we briefly sketch how the failure of these arguments uncovers new potentialities within the new natural law resources.

## II. Uncovering the Three Moral Transformations of New Natural Law Theory

The new natural law mode of theorizing is marked by the exercise of practical reasoning in which fundamental, indemonstrable and therefore basic human goods are taken up by individuals into their actions and decision making. Sections A and B explore each of these facets of the new natural law theory, showing that each of these moments is also a process of reconfiguring the moral potentialities of the world that moves from given world, to concept, to individual. Using this idea of moral transformation, section C uncovers an implicit third moral transformation critical for our understanding of the possibilities of a new natural law sexual ethics, a transformation from individual to community.

### A. Basic Values and the Denaturalization of Value

The new natural law moral theorizing is explicitly an attempt to disarticulate norms from facts, and thereby correct a perceived defect of the natural law theories of the seventeenth century that has led various interpreters to understand the natural law theory to make claims about their interpenetration.<sup>12</sup> Responding to one contemporary formulation of this understanding of natural law, John

11 E.g., Stephen Macedo’s identification of a ‘the new natural law’s double standard’ of treating sex within marriage of sterile heterosexual couples as different in kind from sex within a homosexual relationship (Macedo, ‘Conservative Mind’, pp. 278–280); Paul J. Weithman, ‘Natural Law, Morality, and Sexual Complementarity’, *Sex, Preference, and Family: Essays on Law and Nature*, David M. Estlund and Martha C. Nussbaum (eds.). New York: Oxford University Press, 1997: 227–246; and, Todd A. Salzman & Michael G. Lawler, ‘New Natural Law Theory and Foundational Sexual Ethical Principles: A Critique and Proposal’, *Heythrop Journal*, vol. 47, 2006: 182–205.

12 Finnis locates this defect in an that runs from Gabriel Vasquez’s *Commentary* (1605), Francisco Suarez’s *De Legibus* (1612), to Hugo Grotius *De Jure Belli ac Pacis* (1625) (John Finnis, *Natural Law and Natural Right*. New York: Oxford University Press, 2001 [1980], pp. 42–48; hereafter *Natural Law*). Indeed, Rousseau himself understands the received natural law tradition in just this way: ‘Grotius denies that all human power is established for the sake of the governed: he gives slavery as an example. His most frequent mode of argument is always to establish right by fact’ (Rousseau, *SC*, Bk. I, ch. 2 [4], pp. 352–3/42). This error, for Finnis, has two related sources: first in the interpreters of Grotius’ famous  
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Finnis, the preeminent theorist of the secular form of the new natural law, makes clear this break between the defective tradition of the natural law and the originary possibilities that the new natural law theorists are attempting to reclaim from Thomastic thought: “Thus it is simply not true that “any form of a natural-law theory of morals entails the belief that propositions about man’s duties and obligations can be inferred from propositions about his nature”.”<sup>13</sup> Finnis’ first move in this disarticulation is to distinguish between two spheres of inquiry. One uses theoretical reason and therefore has as its object the identification of what something is in an unqualified way, a determination of ‘what is the case’. The other uses practical reason and has its object the identification of ‘that [which] is to be pursued and realized’ in human action.<sup>14</sup> To replicate the task of theoretical reason in miniature within the sphere of human beings by inquiring into the relevant facticities of human existence (e.g., are human beings naturally sociable? are they naturally possessors of property? are they naturally gendered or oriented to those of the opposite sex?) and then compare this ‘central case’ to the specific situation at hand to determine what is morally relevant is a double violation of the proper sphere of ethical inquiry by neither understanding the proper task of moral inquiry (what is to be done, not quiddity) and its proper site (what is rationally choice-worthy, not facticity).<sup>15</sup>

In this great sundering of norm from facticity, Finnis’ answer recovers the Aristotelian and Thomastic insight that actions are choice worthy only if they participate in some good—understood as a purpose or end or *telos*—towards which the action moves. The good is thus the pattern that makes an action comprehensible as a *potentially* moral act.<sup>16</sup> In sundering norm from fact, the nature of this patterning good cannot be a mere matter of consistency of description—e.g., empirically patterned, conforming to some, say, mean variation—but instead must be an a-historical, non-

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remarks that the whole account of natural law ‘would take place even though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs’ and, as a consequence, making central Grotius’ apparent claim that the requirements of natural law can be derived solely from a principle of man’s nature, his sociability’ (Grotius, *The Right of War and Peace*, Richard Tuck (ed.) (from the edition by Jean Barbeyrac), Indianapolis: Liberty Fund, 2005 [1625]: Book I, Preliminary Discourse, §11, p. 89); second, in misappropriations by the Vasquez and Suarez of Aristotle’s and Aquinas’ thought (Finnis, *Natural Law*, pp. 45–46).

13 Finnis, *Natural Law*, p. 33; the quoted critic is <x>. This insight is basic to the new natural law position and is very frequently made as a defence against what is seen by its defenders to be a consistent misinterpretation of new natural law theory, even those by those friendly to Thomastic thought or otherwise ‘Catholic moralists of unassailable orthodoxy’ (Gerald V. Bradley and Robert George, ‘The New Natural Law Theory: A Reply to Jean Porter’, *The American Journal of Jurisprudence*, vol. 39, 1994: 303–315, p. 303).

14 Finnis, *Natural Law*, pp. 42, 12.

15 Compare Grotius’ method that seemingly begins with the attempt to locate ‘the many Actions proper only to Mankind [ . . . ] [particularly] his Desire of Society, that is, a certain Inclination to live with those of his own Kind, not in any Manner whatever, but peaceably, and in a Community regulated according to the best of his Understanding;’ (Grotius, *The Rights of War and Peace*, Prelim. §7, pp. 79–81). Cf. Finnis’ further remark that the principle which ground ethics ‘are not [to be] inferred from [ . . . ] “the function of a human being”, nor are they [to be] inferred from a teleological conception of nature or any other conception of nature’ (Finnis, *Natural Law*, pp. 33–34).

16 This idea is paradigmatically present in Aristotle famous opening of his *Nicomachean Ethics* with: ‘Every art and every inquiry, and similarly, every action and every intention is thought to aim at some good; hence men have expressed themselves well in declaring the good to be that at which all things aim’ (Aristotle, *Nicomachean Ethics*, Hippocrates G. Apostle (trans.), Grinnell, IA: The Peripatetic Press, 1984, Bk. A, ch. 1, 1094a1–5).

empirical pattern.<sup>17</sup> Only a rational pattern, properly can be called “good”. Yet, even in this disarticulation, the new natural law position does not retreat to Plato’s unitary, good that involves, in Hegel’s sarcastic rebuke, ‘the setting up of a *world beyond* which exists God know where’.<sup>18</sup> For the good as such a ‘world beyond’ denies two qualities of the good that the new natural law wishes to establish. First, that the good is not unitary because not all rational purposes are obligatory or valuable for everyone.<sup>19</sup> Second, the good cannot be pursued—i.e., cannot *become a moral end*—unless it is translated into human action. So, we can see that for the new natural law, the severing of norm from fact is not the severing of the good from the world.<sup>20</sup>

In this way, the establishment of rational goods is the establishment of *potential* ends of human action, what Finnis calls therefore ‘principles of practical reasoning’. As the deep pattern of human action these principles or basic goods constitute a first moral transformation by reconfiguring the *direction* of moral meaning from the good to the world. We can see this first moral transformation in the way that these rational goods allow one ‘to make sense of someone’s commitments, projects, and actions over a period [of time]’.<sup>21</sup> Because the good illuminates what is *potentially worthy* in our complex of ‘commitments, projects, and actions’, Finnis can say that to reflect upon the goods that make one’s life comprehensible as worthy of pursuit ‘is, in a way, an attempt to understand one’s own character, or nature’.<sup>22</sup> To know our nature is to know the way in which our life activity participates in ends. In this first moral transformation, what we are is what we aim at—not as we see and know it, not relative to our own personal (internal) understanding, but relative to the rationally objective ends that can illuminate those actions and choices as moments of the participation in the good. We are thereby both denatured (facticity ceases to define our nature) and re-natured: our nature is defined by another source, equally indifferent to our radically subjective plans. The basic goods—unlike these assemblage of reminders—‘are objective; their validity is not a matter of convention, nor is it relative to anybody’s individual purposes’.<sup>23</sup>

Despite the appearance of excluding subjectivity, of making moot the idea of a moral significance of choice, this first moral transformation simultaneously opens the door to it. For the new natural law, unlike its Aristotelian and Platonic antecedents, posits that no unitary good can make comprehensible all potentially choice-worthy activities. Instead, there are a multiplicity of goods or ‘basic values’ that are, each one, ‘indemonstrable (because self-evident)<sup>24</sup> and therefore mutually incommen-

17 Finnis, *Natural Law*, pp. 15–16, 24.

18 G.W.F. Hegel, *Elements of the Philosophy of Right*. Allen W. Wood (ed.), H.B. Nisbet (trans.), New York: Cambridge University Press, 1996, Preface, p. 20.

19 Finnis, *Natural Law*, p. 62.

20 Hegel makes the same point when, in his famous couplet—‘What is rational is actual/and what is actual is rational’ [Was vernünftig ist, das ist wirklich;/und was wirklich ist, das ist vernünftig.] —he introduces the idea that the rationality of the good is only achieved in its actuality, and, as the new natural law also see, actuality only is achieved when it is rationally patterned (Hegel, *Philosophy of Right*, Preface, p. 20).

21 Finnis, *Natural Law*, p. 64.

22 Finnis, *Natural Law*, p. 81.

23 Finnis, *Natural Law*, p. 69.

24 Finnis, *Natural Law*, p. 85.

surate in value and incapable of some *ontologically* hierarchical arrangement.<sup>25</sup> In Finnis' list, these basic goods are life, knowledge, play, aesthetic experience, sociability, practical reasonableness (which means 'to bring an intelligent and reasonable order into one's own actions and habits and practical attitudes'),<sup>26</sup> and religion.<sup>27</sup>

## B. Requirements of Practical Reasonableness

The first moral transformation—the denaturing of facticity and the re-maturing of basic values as the horizon for potentially choice-worthy action or the self-construction of our nature—sets the stage for the second—the translation of these abstract, basic values into concrete modes of action and ways of life appropriate to myself and my concrete situation. The terms of this translation—what Finnis calls 'the basic requirements of practical reasonableness'—are not arbitrary but given by the nature of the basic goods.<sup>28</sup> The complex requirements of these terms need not concern us here since we will have the opportunity to explore some of its details in the context of the attempt to bind sex to marriage below. More important for our project is the result of the successful translation. We can call these concrete sets of activities and basic values involved 'moral projects'.

Here we encounter the second moral transformation implicit in the new natural law moral theorizing. In taking up a moral project, we have the actualization or self-creation of our own nature. The transformation of our potential nature becomes here its actualization. Finnis points to this second transformation when he speaks of this translation of basic values to moral projects as the pursuit of 'reasonableness in self-constitution'.<sup>29</sup> In this way, although the new natural law theorists reject the term, the requirements of practical reasonableness herald the birth of a 'second nature'.<sup>30</sup> In the moment of practical reasonableness Finnis provides a way for individuals to give meaning to their lives, literally to construct a new living nature.

25 As Robert George points out 'Grisez and Finnis deny that anything in our grasp of fundamental practical principles warrants the conclusion that there is an objective hierarchy among the basic goods to which these principles refer' (Robert P. George, 'Recent Criticism of Natural Law Theory', *The University of Chicago Law Review*, vol. 55, 1988:1371–1429, p. 1396.

26 Finnis, *Natural Law*, p. 88.

27 Finnis, *Natural Law*, pp. 86–90. As Finnis says, 'There is no need for the reader to accept the present list, just as it stands, still less its nomenclature' (Finnis, *Natural Law*, p. 92). For example, the new natural law thinker, Mark Murphy, provides a list of basic goods that overlaps Finnis', but adds to it 'inner peace', 'happiness', and 'excellence in agency' (Mark C. Murphy, *Natural Law and Practical Rationality*. New York: Cambridge University Press, 2001, ch. 3.3).

28 Finnis, *Natural Law*, pp. 102–103.

29 Finnis, *Natural Law*, p. 134.

30 <Finnis on 'second nature'>. In a way that shows surprising similarities to Rousseau's and Hegel's insights into the moral transformation required for participation in community, in Hegel's words, the ethical process is one that begins by 'consider[ing] them [human beings] as natural beings and shows them how they can be reborn, and how their original nature can be transformed into a second, spiritual nature' (Hegel, *PR*, §§ 4, 151Z). This 'second nature' is similar to Rousseau's call for the abandonment of our given nature, the 'total alienation of each associate with all his rights to the whole community' (Rousseau, *Social Contract*, Bk. IV, ch. 6 [6], pp. 360–361/50)—each receives a new nature and a new form of freedom that makes the old, natural freedom into slavery (Rousseau, *Social Contract*, Bk. I, ch. 9 [3], p. 365/54; see also Rousseau's remark that 'Anyone who dares to institute a people must feel capable of, so to speak, changing human nature' (Rousseau, *Social Contract*, Bk. II, ch. 7 [3], p. 381/69).

Where before this first and second moral transformation, my facticity—say, a condition of being lame—constituted the defining horizons of possibility to engage in moral projects,<sup>31</sup> now that defining *possibility* is given by the way in which my moral project participates in a basic value. So, I now ask, for example, not whether my facticity permits me to engage in a foot race, but whether such an action and decision making is *potentially choice-worthy*—i.e., whether it participates in a basic value (say, that of ‘play’ or ‘health’). My inclination to run, to compete in a footrace, does not stand in contradiction with my given nature, but stands as a *possibility* of my nature, something which, if I were to actualize it, *would* be moral and therefore actualizing of both the good and nature. My lameness, of course, presents one condition which would have to be taken into account, but not a *moral condition*, not one that *fundamentally* bears upon whether that decision would be good or not for me. Similarly, when the good redounds upon conventional facticity, the specific arrangement of institutions and norms at play in any given situation, its apparent normative power is removed.

The initial severing of the good from the world and the re-knitting of it we first see here is not, for the new natural law, accompanied by an attempt to remake or abandon social institutions. Even with the severing of the first transformation, the diversity of human activity catalogued by anthropologists and psychologists provide ‘an assemblage of reminders of the range of possibly worthwhile activities and orientations open to one’.<sup>32</sup>

### C. Community and Family as Institutionalization of the Moral Project

The result of the second moral transformation can first appear to signal the destabilization of the moral possibilities of existing institutions. As an ‘assemblage of reminders’ they serve seemingly an instrumental purpose: as stake posts demarking a potential moral horizon that only I can make actual through my practical reasoning. So, it can seem that when the good redounds upon convention, it robs convention of its moral validity. As Finnis himself notes, the logic of the new natural law position so far could lead us to ask ‘are these and all other requirements [of the new natural law] really in the service of one’s own self, one’s own self-constitution, self-realization, self-fulfilment?’<sup>33</sup> Yet, Finnis hints at the possibility of a moral rebirth of institutions, just as the second transformation signals a moral rebirth of the individual, in the opening sentence of his study when he observes ‘[t]here are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only these institutions can satisfy’.<sup>34</sup>

It is the new natural law response to the problems of the second transformation that carry its moral theorizing beyond the individual and to what we can see is a third and final moral transforma-

31 In the way, for example, that the facticity of being a woman or a natural slave constitutes the horizon of moral possibility for Aristotle (Aristotle, *Politics*, <X>).

32 Finnis, *Natural Law*, p. 81; see also p. 73. This is not to say that the new natural law theorists see social institutions in their current shape as unproblematic as ‘reminders’, for ‘even the most elementary and easily recognizable moral implications of those first principles [i.e., the good] are capable of being obscured or distorted for particular people and, indeed, whole cultures, by prejudice, oversight, convention, the sway of desire for particular gratifications, etc.’ (Finnis, *Natural Law*, p. 30).

33 Finnis, *Natural Law*, p. 134.

34 Finnis, *Natural Law*, p. 3.



tion. This final moral transformation is the implication and completion of individual moral projects in a community or partnership: the ancient sense of sense of a sharing-with or partnership: the idea of *koinônia* that, e.g., structures Aristotle's investigation of the different modalities of human relationships in his *Politics*.<sup>35</sup>

The implication of individual moral project is a partnership occurs through the idea of friendship, when interrogated both point towards the third transformation (as the institutional actualization of moral projects) and raises marriage as the most complete form of community. Both features of this third transformation will help us as we move forward to try to grasp the arguments that link sex to marriage and thereby underpin the substantive content of the new natural law sexual ethic.

Finnis identifies a 'requirement [of practical reasonableness—i.e., of translating basic goods into moral projects] of favouring and fostering the common good of one's communities'.<sup>36</sup> This requirement is understandable in both a practical and a theoretical sense. Practically, moral projects, as action in the world, implicate an individual in shared empirical situations. In so far as the practices I take up are part of the existing 'assemblage of reminders' of the potentially moral projects, to modify that 'assemblage' such that it is no longer universally available (say, because it now corresponds so idiosyncratically to my albeit potentially-moral inclinations) is to cause this reminder, not to cease to participate in the good (because otherwise my practical 'reasoning' would neither be rational nor potentially moral), but to cease to participate in a way that preserves the participation in the good already present in the world. The institutions reminding us of the range of action and decision through which the good can be pursued by me do so only because of their shared, institutional existence. So, in this practical sense, our moral actions, right from the beginning, often enter us into a community because we have (even if only implicitly) entered into 'an ongoing state of affairs, a sharing of life or of action or of interests, an associating or coming-together' that, for Finnis, 'is constitutive of human groups, communities, societies'.<sup>37</sup>

Our moral projects enter us into a community for theoretical reasons as well—i.e., for reasons that are immanent in the very structure of the basic good and its actualization as a moment of action or decision-making. That is, because the moral project is animated (insofar as it is a *moral* project) by a good that, as we have seen, 'is not a matter of convention, nor is it relative to anybody's individual purposes',<sup>38</sup> anyone who also participates in the project, even separately, share in, in a fundamental way, in the very same project. In this sense, the third moral transformation is simultaneously present with the second. In Finnis' words: 'self-love (the desire to participate fully, oneself, in the basic aspects of human flourishing) *requires* that one go beyond self-love (self-interest, self-preference, the imperfect rationality of egoism . . .)'.<sup>39</sup> yet in this mere simultaneity, this sharing with lacks the substantiality of the moral project. The move beyond 'self-love' is not lived in the way the moral project is lived.

35 Aristotle, *Politics* <X>.

36 Finnis, *Natural Law*, p. 125.

37 Finnis, *Natural Law*, pp. 135, 152 respectively.

38 Finnis, *Natural Law*, p. 69.

39 Finnis, *Natural Law*, p. 143, emphasis added.

In this practical and theoretical sense, moral projects are unifying relationships: they bind us to a world beyond ourselves. Finnis calls this unifying relationship or more properly this consciousness of a unifying relationship with others, 'friendship'. Friendship in its most complete articulation moves beyond both merely instrumental or practical relationships and the implicitness of the shared good:

For if A and B are friends, then the collaboration of each is for the sake (at least in part) *of the other*, and there is community between them not only in that there is a common interest in the conditions, and common pursuit of the means, whereby each will get what he wants for himself, but also in that what A wants for himself he wants (at least in part) under the description 'that-which-B-wants-for-himself', and vice versa. Indeed, the good that is common between friends is not simply the good of successful collaboration or co-ordination, not is it simply the good of two successfully achieved coinciding projects or objectives; it is the common good of mutual self-constitution, self-fulfilment, self-realization.<sup>40</sup>

Yet, in moving beyond instrumentality, Finnis' concept of friendship does not seem to move to full institutionality in the way we suggested marks out the third transformation but rests still within the sphere of individual actions and decision-making. For, in its fullest articulation, when friendship is present as 'the common good of mutual self-constitution, self-fulfilment, self-realization', the 'common good' seems only present in the second nature (the 'self-constitution'), now mutually implicated, of the friends. Finnis emphasizes this absence of an institutionally actualized common good when he goes on to what their sharing-with means: this "for the sake of each other", [ . . . ] mean[s] that the concern of each for the other is founded, not in the devotion to some principles according to which the other (as a member of a class picked out by that principle) is entitled to concern, but in regard or affection for that individual person as such'.<sup>41</sup> That is, neither this common empirical circumstance nor even the common ideational circumstance (the 'principle') constitutes friendship, but only the commitment of one individual to the other, neither abstracted from all circumstance and context so that what one is committed to is not 'the individual person as such' but their humanity, nor simply the reduction of the individual to those 'conditions' and 'means' which give that individual the possibilities and concrete ways in which they pursue and indeed construct their individuality.

There is, however, something productive of an institution within Finnis' concept of friendship. We can see the theoretical foundation for this productiveness in two observations that he makes about friendship. The first concerns the mutuality of the relationship between friends: 'It follows that A must value his (A's) own well-being for the sake of B, while B must value his (B's) own well-being for the sake of A. And so on. The reciprocity of love does not come to rest at either pole'.<sup>42</sup> By this reciprocity, Finnis could mean that friendship has no end point, it is a ceaseless movement of concern, decision, and activity that circulates between the well-being of the friends, without there being anything other than the well-being of A and B or this practical movement of friendship between these poles. The second, is that 'In friendship one is not thinking and choosing "from one's own point of view", nor from one's friend's point of view. Rather, one is acting from a third point of view, the

40 Finnis, *Natural Law*, p. 141.

41 Finnis, *Natural Law*, p. 142.

42 Finnis, *Natural Law*, p. 143.

unique perspective from which one's own good and one's friend's good are equally "in view" and "in play"<sup>43</sup>.

This third point of view, 'benevolent "ideal observer"' constitutes an objective common good, one that emerges out of this friendship and is indeed constitutive of its possibility. In this way, friendship can transcend existing or given institutions with their own ordering of the values and means at play by overlaying a new third point or intermediary between individuals that concretely articulates what the possibilities of friendship *in this particular case are*. This third point of friendship, this objective middle, is that form that Finnis calls the 'dialectic of friendship' (the apparently restless reciprocity of love which 'does not come to rest at either pole') takes. The decision to pursue the basic good of friendship is the implicit decision to bring into being the actuality of that friendship in the form of this 'third point of view'. This third point is the actuality of the moral decision. By contrast, living reference to this third point in my decisions and actions—an activity of practical reasoning which 'is simply an extension of what comes naturally to friends'<sup>44</sup>—the limits and defects of my individual decision making (that I can sometimes be swayed and distorted by desires for gratification, etc.) are thereby transformed and bounded in a way that is at least further resistant to my transgression of that common good which sustains me in this unifying relationship.

What shape might this 'third point of view' take? Finnis immediately follows the discussion of the community of friendship with the ways that there might be 'the widest sharing in friendship'.<sup>45</sup> This form of sharing is not possible, he argues, if we side with Plato's *Republic* over that of Aristotle's *Politics* and try to institutionally widen the family so that '[a]ll these women are to belong to all these men in common, and no woman is to live privately with any man. And the children, in their turn, will be in common, and neither will a parent know his offspring, nor a child his parent' thereby achieving 'that city in which most say "my own" and "not my own" about the same thing, and in the same way'.<sup>46</sup>

The problem for Finnis is not that the concept of the family is inimical to the complete form of community of friendship but rather that the power of the family to be the institutional articulation of friendship is diminished: 'Plato's proposal, made in the name of friendship, is tantamount to a drastic dilution, "watering-down", of friendship—a radical emaciation of a basic aspect of well-being'.<sup>47</sup> Finnis turns to the family because it has the special status of articulating and concretely institutionalizing this third point of view. The family is the third transformation: the moral project made living not as my self-constitution, my second nature, but now as an actualized institution and nature that has the very objective status which the basic values that begun the process of new natural law moral theorizing.<sup>48</sup> The family has a special status, for the new natural law, because the family not only 'constitutes

43 Finnis, *Natural Law*, p. 143.

44 Finnis, *Natural Law*, p. 143.

45 Finnis, *Natural Law*, p. 144.

46 Plato, *Republic*, Bk. V, 457d; 462c–d.

47 Finnis, *Natural Law*, p. 145.

48 For the new natural law theorists, the family has another status as well because it articulates within it all the modalities or 'orders' of possible relations (forms of human interaction): first, it is an articulation of all orders of unifying relations: the physical unity of genetic interrelationship; the unity of understanding acquired through common experience and learning together (Finnis, *Natural Law*, pp. 136–137); the unity of creation through the family's 'range of especially subtle

(continued...)

an incomparably fine thing for a friend to give or receive',<sup>49</sup> but, we might say, is the very concrete form of that sharing-with, and attitude of sharing-with, that 'does not come to rest at either pole' and which allows one to 'ac[t] from a third point of view'.<sup>50</sup>

We can see the degree to which Finnis' understanding of the family implies this institutionalization of the disposition of friendship. Finnis tells us the family is an institution that is justified in 'its contractual or quasi-contractual permanence and exclusiveness, for its possessiveness and its possessions [ . . . ] only to the extent that each member of the family is enabled to grow in self-possession (of which self-giving in friendship is one basic aspect)'.<sup>51</sup> Unlike other institutions such as the market or a game, the family has as its goal nothing other than the goal of individual flourishing. Its goal is not only a basic good (friendship), but the persistence of the framework in which individuals, who are valued as 'this particular individual as such', can identify and pursue, and be supported in the identification and pursuit, of the basic aspects of human flourishing. In this way, the family takes the individual, or allows the individual, to be taken away from the family as the locus of well-being and the centre of activity without dissolving. It is a good, thus that does transcend given institutions and their power to influence and shape according to their particular, internal purposes. And, instead, the family overlays—makes concrete the possibility—from which individuals can 'enter into a whole network of associations with their [the family members'] neighbours',<sup>52</sup> where 'neighbours' are not to be understood geographically, but as the minimum institutions and resources for a potentially flourishing life external to the family.<sup>53</sup>

The family's shape—as parents bound by an originary institution of marriage in a particular relationship that is open to children—is, for Finnis necessarily generated out of the requirements of its participation in the basic good of friendship: i.e., the way it emerges out of moral actions as the necessarily continuous actions and decisions that allow and individual to share-with, in the most complete and concrete way, another as a friend. Finnis only gives us two examples: where the boundaries are structured by given nature (and not the successive rebirth of that nature marked out by the second and third moral transformation we have brought out above)—i.e., where the transformative power of the institution as moral articulation cannot reach: one is psychological, 'a woman can give her maternal affection only to a child that is hers (or that she can treat as hers)'; the other is material, 'if a family is thus to contribute to this growth of its members in freedom, friendship, and all-round good, it must be liberated from the requirements of unremitting toil by all its members for material necessities'.<sup>54</sup>

48 (...continued)

modes of communication with one another'(p. 137), and, that moral unity that is a quality of the family 'inasmuch as each of its members [ . . . ] is <word?> to finding his or her own fulfilment (at least in part) in helping the other members to fulfil themselves' (p. 138).

49 Finnis, *Natural Law*, p. 145.

50 Finnis, *Natural Law*, p. 143.

51 Finnis, *Natural Law*, p. 146.

52 Finnis, *Natural Law*, p. 145.

53 Finnis, *Natural Law*, pp. 145–146.

54 Finnis, *Natural Law*, p. 145.

In both cases, the nature of the family is not defined by these given facts: they merely act as conditions that must be taken into account in the moral project that is the family. The family shape and morality is determined by the nature of friendship. Indeed what is simply given by nature in the family—the genetic unity, the sexual relations, the conditions of natural dependency of children on parents, and other such natural facts—does not tell us what the family *is*. So, the central moral importance of the family as the starting point of the new natural law sexual ethic, and the institution of marriage that animates it, becomes comprehensible if we understand that marriage is the articulation of the three-fold process of moral transformation which forms the internal, albeit implicit, logic of the new natural law moral theorizing. These moral transformations completely replace the importance of natural fact or natural processes.

Now, then, we must turn to the arguments used by the new natural law theorists to move from the internal demands of the moral project marriage to the concrete conclusions concerning the boundaries of morally licit sexual relations.

### III. Linking Sex to Marriage: Three Arguments

Within the new natural law tradition, we can locate three arguments that seem as if they could provide the rational sinews within the moral project of marriage that bind sex to it. Each of these three arguments attempts to cast the problem of the use of our sexual attributes and capacities outside of marriage (and the inappropriate use of them within marriage) as one that involves the overturning or undermining of proper direction of moral theorizing—the movement from basic good, to moral project, to institutional actualization—rather than that such use involves the inappropriate negotiation *from* our sexual capacities and attributes *to* a moral project and its foundational basic good.

These three arguments are a definitional one (section A), an argument about the nature of moral willing (section B), and an argument about moral action (section C). Together they constitute both a series of arguments that increasingly implicate accounts of the facticity of sexual capacities and activity into the process of moral theorizing. these arguments constitute different attempts to generate the rich content (albeit also narrow and exclusive) of the new natural law sexual ethic. The failure of each of these arguments does not cast us out of the new natural law, but is the occasion to think about the alternative sexual ethic that it generates.

#### A. Argument from Definition: Parenthood and Two-In-One-Flesh Communion

The first and seemingly easiest way to bind sex to marriage is to include the former within the latter's definition. There is no need in this approach even to adopt the new natural law's moral theorizing. When marriage is defined as requiring procreative-like sex for its completion, the definition of marriage creates a boundary around sexual activity. A 'boundary' because sex is invoked by this institution or relation as a necessary component that must be harnessed to its ends. In this sense, marriage provides the *orthos logos*—the right reason, with its invocation of the right time, right place,

right person, right way, in the right amount, etc.—for sex. A marriage without sex, in the way that marriage definitionally demands, is not, then, a marriage.<sup>55</sup>

In the this definitional binding of sex to marriage, there is a challenge, what we can will call the challenge of partiality. While marriage may be able to set the bounds of sexual activity because of the nature of marriage itself demands it, this linking of marriage to sex is not the linking of sex *simply* to marriage. That is, the challenge is of the definitional linkage, if it is to provide a complete sexual ethic, is to include and morally transform and bound *all* sexual activity and intent, even those that take place outside of the moral project of marriage.

The new natural law approach uses two different ways to bind sex to marriage and thereby imply that sex as a whole is to linked to marriage. The first of these ways can be found in the work of John Finnis, the second, in Patrick Lee and Robert George.

Finnis incorporates sexual activity into his understanding of marriage in a way that does not allow marriage to be fully comprehensible without it. ‘Parenthood and children and family are the intrinsic fulfillment of a communion which, because it is not merely instrumental, can exist and fulfil the spouses even if procreation happens to be impossible for them’.<sup>56</sup> Marriage does not fail to be marriage in the absence of children, but the condition of parenthood, along with friendship ‘are the parts of its wholeness as an intelligible common good’.<sup>57</sup> We must not take Finnis’ separation of the production of children from the good of marriage to mean that the definition of marriage is comprehensible apart from parenthood. Parenthood can be one of ‘the parts of its wholeness’ because the *logic* of marriage as a particular type of communion demands or necessitates that the communion take on the additional aspect of parenthood. So, parenthood (like friendship) could not be removed from the definition of marriage (here we need to understand this ‘definition’ as the *logos* of marriage) without transforming what marriage is, its logic did not necessitate parenthood.

55 The difference between a definitional link rooted in new natural law theorizing and one that is not concerns how the demands of marriage are to be derived. For example, Susan Shell and David Blankenhorn posit marriage as the concept that definitionally binds and bounds sexual activity, but they stand outside of the new natural law tradition because they posit an end to marriage that is rooted not in a basic good, but in certain features of facticity: the capacity for sexual reproduction. E.g., Blankenhorn writes:

In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are—that are understood by society to be—emotionally, morally, practically, and legally affiliated with both of the parents.

That’s what marriage is. (David Blankenhorn, *The Future of Marriage*. New York: Encounter Books, 2007, p. 92)

Similarly, Shell can say that <because same-sex couples cannot reproduce they can no more be married than a live person could have funeral—it is definitionally impossible> (Susan Shell, ‘The Liberal Case Against Gay Marriage’, *The Public Interest*, <no.> 156 (Summer), 2004: <x-y>).

56 Finnis, ‘Sexual Orientation’, p. 1065.

57 Finnis, ‘Sexual Orientation’, p. 1066.

Finnis understands this good of parenthood in terms of sexual activity of spouses, more specifically: '[t]he union of the reproductive organs of husband and wife'.<sup>58</sup> Parenthood, of course, does not require this sort of genital union on the part of the spouses either because of adoption or new reproductive technologies. In this sense, Finnis' emphasis on *parenthood* as part of marriage's common good does not necessarily bind sex to marriage. At most, sex is bound to marriage as a matter of empirical generalization: i.e., procreative sex is the empirically common source of the parental relationship. This empirical relation that makes possible something approximating the new natural law moral valence. Parenthood becomes that aspect of the logic of marriage that ought then to animate sexual relations within marriage. So, to abandon this aspect of the good is to deform the larger good of marriage itself, for Finnis. Finnis means for this deformation to apply both within the moral project of marriage as well as out of it. It does so in two senses. First, within marriage, to accept the good of marriage is to accept all of its moral necessities. Second, outside of marriage, the definition of marriage is regulative in two ways. Finnis assumes that sexual activity aims at the form of communion that marriage, as an institution, articulates. Therefore sexual activity that does not first involve marriage takes up an articulation of 'their *real common good—their marriage*',<sup>59</sup> but without allowing this good itself to be their end. Additionally, sexual activity in which 'their reproductive organs cannot be an actualizing and experiencing of the *marital good*' (by which Finnis means the good of biological reproduction which can result in parenthood)<sup>60</sup>—even if such a couple were *formally* married—violates the definition of marriage because, for Finnis, the living activity of the (married) couple forsakes an aspect of the whole good of the concept of marriage.

When parenthood is the link to sex within the definition of marriage, the link can only be maintained through the conflation of parenthood and the antecedent biological union of reproductive organs of the spouses. The good of parenthood is a good that *involves* facticity (there are parents, there is a child), but exists as a set of relations—i.e., as a set of concepts or ways of orienting ourselves to each other. Parenthood is, in this way, much more like the structure of the basic values when they are transformed into moral action and decision making: one is oriented not by the internal structure of the biology (although one cannot ignore this aspect of facticity as well)—what we can call after Aristotle <'mere life'>—but by the demands of the good. One makes meaningful the internal structure of facticity (the mere life) by integrating it into the moral concerns: the translation of the basic goods into actions and decisions. That is, Finnis is required to conflate the idea of parenthood to the idea of biological union in order to give the *particular* content to the sexual ethic.

By defining an aspect of the good of marriage in terms of parenthood, Finnis remains true to the underlying logic of moral transformation within the new natural law. Goods are present not as acts (natural facts) but as intentional relations—i.e., relations in which there is a third point of view or a common good that animates and gives meaning to the actions. Yet, the inability of this definition of marriage necessarily to bind sexual relations to it both within marriage (parenthood could be achieved—and may only be achievable other than through genital union) and outside of marriage (the conscious intent for which sexual relations occur need not be the ends of marriage) accounts for the

58 Finnis, 'Sexual Orientation', p. 1066.

59 Finnis, 'Sexual Orientation', p. 1066.

60 Finnis, 'Sexual Orientation', p. 1066.

subtle transformation of that definition by Robert George and Gerard Bradley and then furthered in the work of Patrick Lee and Robert George.

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 a reproductive type, is an intrinsic (or, in our parlance, 'basic') human good; as such, marriage provides a noninstrumental reason for spouses, whether or not they are capable of conceiving children in their acts of genital union, to perform such acts.<sup>61</sup>

There are two transformations here. First is to sever marriage from its original meaning as the practical translation of the basic good of *friendship* (or sociability) thereby allowing it to stand as a basic good *different in kind* from friendship. Now as equiprimordial with friendship, the definition of marriage would seem to further weaken the exclusivity of the link hoped for between marriage and sex by the new natural law. For friendship (of some sort) is the relationship in which sexual relations frequently occur and in which the activity takes on meaning related to that end without yet being marriage either as the desire for the formal institution or as the good of parenthood. So, by separating the good of friendship from the good of marriage, the empirically largest and most conceptually allied sphere of sexual activity is cut adrift from the morally regulative force of marriage. Where Finnis can have marriage as the most complete form of friendship, Lee and Bradley's definition does not allow it: *basic* goods are basic because they are irreducibly unique, albeit commensurable with one another as moral projects if not as absolute values.<sup>62</sup> Yet, Lee and George compensate for this seeming loss of the exclusive link in a second transformation of the definition of marriage. This transformation makes ontological Finnis' conflation of parenthood with genital union as the moment of actualization of marriage where for Finnis' logic of parenthood, marriage does not require for its perfection the *production* of children, as if marriage was the instrumental means to that former irreducible end, Lee and George take up this conflation so that parenthood's logically required 'orient[ation] toward the begetting, nurturing, and educating of children together' become *procreation* as this 'community's natural fulfilment'.<sup>63</sup>

Now marriage is defined by a particular act, the 'two-in-one flesh communion' in which 'a real organic union is established', a union that 'is a literal, biological point'.<sup>64</sup> This biological reality 'makes sexual intercourse within it appropriate, because in such a community sexual intercourse can immediately actualize (initiate or renew) the good of marriage'.<sup>65</sup> However this 'appropriateness' obscures the *necessity* that the 'two-in-one flesh communion' now has. This form of genital union is the actualization (initiation or renewal) of the institution of marriage. That is: for Lee and George, without this union, the marriage as an institution would not have an actuality, it could not be initiated, nor could it be renewed. This way of thinking about genital union crucially differs from

61 Robert P. George and Gerard V. Bradley, 'Marriage and the Liberal Imagination', *The Georgetown Law Journal*, vol. 84, 1995: 301–320, pp. 301–302.

62 Finnis, <x>.

63 Patrick Lee and Robert P. George, 'What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union', *The American Journal of Jurisprudence*, vol. 42, 1997: 135–157, p. 143. Hereafter, 'What Sex Can Be'.

64 Lee and George, 'What Sex Can Be', p. 143.

65 Lee and George, 'What Sex Can Be', p. 143.



Finnis' formulation of marriage in terms of parenthood, but not from the version to which he slides in which he says of those 'who are not and cannot be married (for example, man and man, man and boy, woman and woman)' that '[f]or want of a *common good* that could be actualized and experienced *by and in this bodily union*' their relationship in its reality lacks morality.<sup>66</sup> Yet, the requirements of new natural law theory with its three moral transformations require that the common good is always present in marriage, as a basic good and that it is this rational *common good* that is *actualized*. In this way, the idea of 'consummation' (i.e., 'initiation') and renewal, signal something else: that some, now new, moral power is present within the act of genital union.

The idea of the consummation of marriage is similar, or perhaps is a species of, the requirements of practical reason because it says that the good (in this case marriage) cannot exist without becoming the structure of my actions and decision making. But it is different because if the consummation of marriage is understood by Lee and George to be not simply an instance of marriage, but its completion, then it alone brings marriage into existence so that marriage's moral force may then structure and integrate all other forms of action and decision-making including subsequent acts of genital union. In this way, then, there is a semi-falsification of the moral status of this genital union: it has powers to complete a moral possibility—in a sense to bring this moral possibility into full existence—not simply as a requirement of practical reason, but separate from this requirement because it allows marriage not to move from moral possibility to moral action but to move from some semi-moral possibility to full moral possibility. Once the marriage is consummated, brought to actual moral possibility, marriage does not need to be re-consummated, and indeed, if both spouses are willing (or unable), genital union need not occur again,<sup>67</sup> even as the imperative to have marriage structure the actions we do (such as treating the other as a friend) or refrain from doing (such as not engaging in adultery) remain.<sup>68</sup> Within the new natural law this tendency towards the fetishization of genital union whether in the form of the consummation of marriage or in the idea of marriage as a two-in-one flesh communion is in tension with the moral logic of new natural law theorizing because such fetishization requires both that one conceptualize the site of the good as the internal structure of our facticity, and that this internal structure (not the basic value grasped by reason) be morally transformative of moral potentiality into actuality.

66 Finnis, 'Sexual Orientation', p. 1066.

67 <See Grisez, vol.3>.

68 For example, we see Moses Maimonides note this same fetishization of consummation:

'Before the revelation of the Torah, when a man would encounter a woman in the street, if both consented to marriage, he would bring her into his house and would have intercourse in privacy, and thereby she would become his wife.

Upon the revelation of the Torah, the people of Israel were commanded that if a man wishes to marry a woman, he must first acquire her in the presence of witnesses, and only thereafter does she become his wife [ . . . ]. (Moses Maimonides, 'Code of Maimonides: Book of Women', Treatise 1, Chap. 1:1, *Sex Ethics in the Writings of Moses Maimonides*. Fred Rosner (ed.), Northvale, NJ: Jason Aronson, Inc., 1994, p. 111.

Understood in terms of Finnis' parenthood, consummation is not the activation of marriage—as if this power existed independently within the biological structure of human reproduction—but rather is an instance of the complete acceptance of the ends of marriage as my ends and therefore my willingness to accept that I could bring into existence further articulations of that good which I have accepted as the ordering principle for my action and decision-making. A failure to consummate the marriage means, here, not a failure of the physical act of genital union (for that physical act is but the outward shape of the truth of the act), but a failure to commit myself to the good of marriage where and when that good can articulate itself. Since new natural law theorizing demands the moral power resides in the institution of marriage, not in the physical act of genital union, 'consummation' of marriage can really only properly mean any such activity in which the spouses are open to, or embrace the further integration and articulation of the good of marriage throughout those areas of their life that can be integrated.

The way in which both Finnis' and Lee and George and Bradley's definitions move points to what is necessary to truly secure the link of sex to marriage, even within the institution of marriage itself. Finnis' preservation of parenthood, and Lee and George's, and George and Bradley's attempt to define marriage itself as a basic good that includes within it a two-in-one flesh communion simultaneously shows that the turn to the nature or biological reality of sexual activity stands outside of the new natural law tradition if that biological activity cannot also imply a rational end that animates it. No account of biological reality *by itself* can be sufficient or determinative without an account of moral theorizing itself demanding this activity. In other words, it is not enough to show that parenthood is a moral consequence of the project of marriage, or that the two-in-one flesh communion is a basic good, it is necessary to show how the process of moral willing, the volitional act of carrying out this practically reasonable project links marriage to sex.

So, we see that the bare definitional attempt points to the need to move beyond this mere definition in two ways: first, the emphasis on parenthood points to the need to investigate the biological reality present in the important new natural law concept of 'personal integrity'; and, second, the emphasis on biological union points to the need to develop an account of the moral willing around sex present as, what Finnis calls the problem of 'conditional willing'.

## B. Arguments from Personal Integrity

The idea of personal integrity, although the direct focus of investigation in Finnis' early development of new natural law, is nonetheless present within his thought in the idea of practical reasonableness as the unity of individual moral volition and action which we have seen worked out in the context of sexual ethics above. We see its presence in his statement that

[s]exual acts cannot *in reality* be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other—in biological, affective and volitional union in mutual commitment, both open ended and exclusive which like Plato and Aristotle and most peoples we call marriage.<sup>69</sup>

69 Finnis, 'Sexual Orientation', p. 1067.

Here, adumbrated, are the three main dimensions that are constitutive of personal integrity. Two of these correspond to two major features of new natural law moral theorizing. The first is the intentional or 'volitional' element apart from which no apprehension of a basic good is possible. The second is the facticity of our 'biological' being, that we exist not as disembodied, but as embodied, and that our bodies are always implicated in the actualization of moral projects. For, even to engage in the moral project of knowledge operationalized as a moment of pure contemplation—e.g., that state which Aristotle says that gods are always in, and we, sometimes<sup>70</sup>—involves the body: it must be, say, made still or its needs stilled. And in this stilling, the body is made to act and this action is implicated in any successful carrying out of the moral project. The third element is the 'affective' or emotional dimension. To have a unified self, is to have each moment integrated into a single or personal reality.<sup>71</sup>

When we find the idea of personal integrity elaborated in the work of Lee and George, the focus shifts to the possibility of uniting or integrating reason and biology in sexual acts. In this way, Lee and George intend to use these possibilities of integration to demarcate the boundaries of moral sexual acts. These boundaries are to then show the necessity of both marriage's inclusion of sexual activity of a particular sort and that sexual activity itself binds itself exclusively to the moral project of marriage.

### 1. *The Audacity of Personal Integrity: Beyond Hierarchy and Consummation*

The idea of personal integrity has an audacity to it not present in the metaphysically more challenging position of a hierarchical ordering of the soul that animates Platonic and Aristotelian accounts of the choice-worthy life and the well ordered community—even as that hierarchy is made possible by the positing of the idea of the Good and forms or divine mind and an encompassing teleology. This audacity consists in the idea that reason can be wholly reconciled to the world and that world to reason. Rational action need not, by necessity, use the world instrumentally and action in the world need not necessarily reduce reason to mere instrumental calculation. This audacity of a real, practical unity of our rational and physical reality—or of reason and the world—attracts, e.g., the early Hegel to a consideration of natural law. In his formulation, natural law is capable of standing between <'abstract moral systems and an empiricism'>. Only the inauthentic forms of natural law fall to either one of these extremes—taking the universal to be mere inductions from empirical circumstances or

70 Aristotle, *Metaphysics*. <x>

71 That this affective dimension has a much lower place within the elaboration of personal integrity given by Lee and George can be explained by the context in which their sexual ethics is forged. That is: the attempt to show the relation of sex to marriage where the boundaries of moral sex acts and the boundaries of moral marital configurations are both in play. And the main boundary-pusher is same-sex marriage—because it challenges this link by challenging the moral boundaries of each. What is no longer in doubt in the new natural law tradition—or perhaps more accurately, the point that is conceded—is that an affective dimension of same-sex relationships is possible. There is a 'mutual devotion which some homosexual persons hope to manifest and experience by' their sexual relations (Finnis, 'Sexual Orientation', p. 1069). So, within this context of the engagement of the affective part of the human facticity is not relevant. If there could be no *feeling* of love or devotion possible for same-sex couples, then the possibility of personal integrity would be sabotaged right here. But if such feelings are not impossible—as Socrates himself seems to indicate both in the *Gorgias*, where he states his love of Alcibiades and mentions Callicles for Demos (Plato, *Gorgias*, 481d–82a) in the very dialogue that Finnis repeatedly turns to demonstrate with Socrates' invocation to Callicles of the male prostitute (Plato, *Gorgias*, 494<x>; cf. John Finnis, 'Good of Marriage', p. 124 n. 109)—then the salience of the integration of feelings becomes less as a practical issue, even if it remains as a theoretical one.

the positing of the universal (as intuitions) which then require no empirical content).<sup>72</sup> For Hegel, a 'scientific' account of natural law demonstrating the necessity of this co-penetration of reason and the world is possible. The new natural law attempt to show the exclusive link between sex and marriage is nothing other than the implicit attempt to carry out this same sort of philosophic project: to move from the *could-be-linked* to the conceptual necessity of the link.

The idea of personal integrity is both similar to, but crucially differs from, the new natural law arguments about the consummation of marriage. They are similar in that consummation expresses the necessity of a link between the concept of marriage and our actions in the world: marriage is not actualized without this one act of genital union; conceptual unity must implicate physical (genital) unity. Nonetheless, the idea of consummation is only imperfectly congruent with the ideal of personal integrity because with consummation as the link, the power of genital union implicitly exists apart from that of marriage. Once the good resides in the facticity of human reproduction, consummation seems to fall into the error, which Finnis and Hegel identify, of inducing the universal (marriage) from the empirical. Consummation as the new natural law speak of it, takes one aspect present within the audacity of personal integrity—that the rational and the physical are separate principles in the sense that one is not foundational or derivable from the other—and distorts the logic of personal integrity by now making the actualization of this physical union the unique moment in which the moral concept of marriage is actualized. The rational end of marriage is required, but it is the physical act which alone initiates and renews. In this way, consummation bears the same relationship to personal integrity as does the classical ideas of the ordering of the soul through its rational hierarchicalization. Consummation unites, but without the simultaneity and equality that the concept of personal integrity demands. Indeed consummation merely moves the hierarchicalizing principle to the other extreme: from reason to an exclusive and singular moment of physical unity that can be found, it implies, in no other moment of physical interaction.

So, the personal integrity ideal is similar to, but a weaker version of, the consummation argument, in that personal integrity only says that marriage can be marriage only when it takes a physical form (the translation of the good to the moral and the moral a practical project) and this physical form corresponds to the demands of our biological reality or facticity. The 'good' of the facticity (which is simply that the facticity remains or is acted upon as it is and not treated as it is not) and the 'good' of the moral project (the undergirding basic good) are treated as separate but unifiable in action. Their unity, however, does not transform either of the 'goods' of facticity or the morality in the way that, e.g., the idea of consummation changes in *kind* the marriage so that marriage is now actualized and once actualized does not need to be re-actualized but must be renewed.

Now, marriage can be morally transformative of sexual acts if sexual acts (of a particular sort) are the only way in which marriage can attain to the moment of personal integrity. Any moral concepts that implicate our facticity in a way incongruent with facticity's demands, or any attempt to rationally actualize our facticity in a way incongruent with the demands of the moral concepts will fail to meet the demands of personal integrity and therefore to be a successful negotiation of the good to the

72 G.W.F. Hegel, *Natural Law: The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law*. T.M. Knox (trans.), USA: University of Pennsylvania Press, 1975, pp. 102–106.

moral. In this way, then, the concept of personal integrity seems as if it could forge this mutual and exclusive link between marriage and sex.

## 2. *Personal Integrity & Moral Transformation*

Although the concept of personal integrity falls between the one-sided extremes of classical hierarchical order through reason and consummation's emphasis on the power of biological facticity, does personal integrity's attempt to accommodate biological facticity itself go too far in light of the moral logic of new natural law theorizing? In other words, does any accommodation with our biological reality contradict the three-fold power of moral transformation that we have shown are at the heart of the new natural law?

We will recall there, that the power of moral transformation removed the power of facticity to determine either the content or the boundaries of the moral terrain. Our mere givenness was not morally determinative. In this sense, the idea of personal integrity could be seen to stand in tension with the idea of moral transformation because it *does* posit a limit that the moral concept cannot take up or transform—a limit given by the physical facticity of our existence. Yet, the idea of personal integrity does not make any attempt to give moral content or to resist moral content—i.e., it does not try to have facticity intrude on the domain of the moral. Personal integrity merely says that if the moral is to find its actualization in action, it cannot invent a physical reality that is not present, even as it can transform what facticity is present and give the latter meaning, as with our lame individual who wishes to race, whose ability to race is determined on the one hand by his physical facticity and, more importantly, by the particular institutionalization of the basic good, play, or health through and as which his desire finds its completion.

We will also notice however that there is no perfect symmetry here. What is possible for the physical facticity—i.e., that the fact of having legs that are capable of functioning in some empirically normal way or engaging in reproductive-like acts at the right time and with the right person can help secure or produce the equivalent of a missing moral institution such as the institution of the foot race or the institution of a family—is not possible for the moral institution—i.e., the institution cannot create legs where there are none, it cannot make children where there are none—although it can create new forms of play (say, wheelchair races) and provide for the distribution of children (say, adoption).

So, the idea of physical integrity does not say what basic good ought to be present—in my actions, it only says that when those goods become moral projects, these projects must not impose meaning that cannot be lived or that in the (attempted) living of it impose some irreparable damage to the physical condition of my existence. If it does impose meaning that cannot be lived—i.e., imposes a meaning that is not there for myself as a rational and physical being—then I am dis-integrated and my experience of the moral concept is illusory. What I think I am doing and deciding, I am not really doing and deciding. I am living a falsehood, something which is not moral even if what I am intending is a basic value or even if what I am intending occurs within the moral articulation—the moral institution—of a basic value. In this way, as a moment of praxis, the idea of personal integrity, in itself, does not violate the idea of moral transformation, does not fall into the problem of consummation, because it does not attempt to speak to the moral content which gives the facticity meaning. To

put it another way, in itself, the idea of personal integrity speaks only to the limits that morality can take, not what is or is not a valid moral project.

### 3. *How Personal Integrity Binds Sex to Marriage*

If the idea of personal integrity cannot touch upon the moral content, how is it possible for the idea of personal integrity to establish, as the new natural law theorists wish, that audacious, necessary, and exclusive link between sex and marriage? Now, such a necessary link is only possible if the facticity itself directly bears upon one basic value regardless of what we think about or intend in our use of, or expression of, our facticity.

Facticity cannot contain meaning, but it can bear upon meaning in two indirect ways. It can be given meaning by a basic value through the process of moral transformation. And, after having been so transformed, that facticity (no longer, of course, pure facticity but a moral—i.e., practical—moment) is then bound up with meaning in a way that is not simply redefinable. For the new natural law theorists, the preeminent example is sexual relations within marriage. Within marriage, sex outside of marriage is damaging to that marriage—even if we think that pre-marital sex is not in itself immoral. A change in the moral institutions which give that facticity meaning is therefore a severance of the link between the facticity and its meaning. For example, to become divorced is to then, in the minimal view that we are using for the moment, free the facticity of sex from the moral boundaries that marriage has given it. The second, indirect way is for the facticity to bear upon the very possibility of receiving meaning and therefore sustaining the possibility of morality whatsoever. In this case, to ignore the facticity and its consequences would destroy the possibility of moral action for oneself or another. In this sense, our physical facticity bears upon the basic value of life or, perhaps, can bear upon the value, because it sets the terms of what constitutes ‘bodily (including cerebral) health, and freedom from that pain which betokens organic malfunctioning or injury’.<sup>73</sup> Here, then, our physical facticity not only sustains that condition of vitality ‘which puts a human being in good shape for self-determination’ (i.e., the translation of the good into the moral), but also links it to a basic value (life) without falling into the received natural law problem of assuming the value penetrates the fact and therefore is simply read out of the fact.<sup>74</sup> All that is read out of the fact is the parameters past which we have ‘organic malfunctioning or injury’.

In implicating the basic value of life, Finnis includes sexual reproduction—the ‘transmission of life by procreation of children’.<sup>75</sup> At the level of individual psychology Finnis indicates that we ought to distinguish ‘the urge to copulate from both the urge to self-preservation and the maternal or paternal instincts’. But, at the level of moral reasoning where our object of analysis is intelligible goods, both these urges become comprehensible as potentially moral through their participation in a single good, that of life. Here, then, Finnis’ account of natural law does not draw any necessary linkage between sex and marriage. Indeed, Finnis goes further by conceptually separating out the moral responsibilities associated with procreation of children from their education.

73 Finnis, *Natural Law*, p. 86. <Confirm correctness of wording.>

74 Finnis, *Natural Law*, p. 86.

75 Finnis, *Natural Law*, p. 86.

We can distinguish the desire and decision to have a child, simply for the sake of bearing a child, from the desire and decision to cherish and to educate the child. The former desire and decision is a pursuit of the good of life, in this case life-in-its-transmission; the latter desires and decisions are aspects of the pursuit of the distinct basic value of sociability (or friendship) and truth (truth-in-its-communication), running alongside the continued pursuit of the value of life that is involved in simply keeping the child alive and well until it can fend for itself.<sup>76</sup>

Just as we could not include two-in-one-flesh communion within the definition of marriage because it implicitly replaced the good of marriage with the structure of our facticity, Finnis shows how the movement from the facticity of human reproduction to the moral institution of marriage is in no way implied by that facticity. We will notice in Finnis' account that there is nothing about the facticity of sexual reproduction that itself demands or requires that we pursue our sexual activity as reproductive activity. What it does say, though, is that when we do choose to engage in activity that can be procreative, that this activity becomes moral only when it is pursued for the sake of life or friendship. In this procreative case, then, the idea of personal integrity demands that: first, our intentions are oriented to the basic value of life or that sort of open-ended friendship of marriage; and, second that we engage in those physical acts which can in fact lead to procreation. Since these two conditions only apply (given the logic of Finnis' account) once we have already made the decision to engage in procreative sexual activity, these two conditions are merely ways of determining whether our actions and decision-making correspond to: the particular requirement(s) of practical reason at play; the relevant requirements to avoid 'organic malfunctioning or injury' given by our physical facticity; and, finally, correspond to the demands of personal integrity that both be satisfied simultaneously.

To desire to engage in potentially procreative acts without being committed to one of the basic values that the facticity of the act implicates, for Finnis, is to lose both the basic values which can make the act rationally comprehensible and it is therefore to dis-integrate one's rational and physical existence. One, then, either (perhaps unwittingly) uses reason for the sake of the physical body (if, e.g., the 'reason' for action was simply the presence of the physical urge) or uses the body for the sake of reason (e.g., to engage in reproductive acts when doing so would be injurious to the person because of an illness). In this sense, the idea of personal integrity provides a standard which encompasses and synthesizes the objective requirements. It asks not about what the individuals intend or what they think they are doing, but whether they are objectively successful—not in producing the intended result (say, becoming pregnant), but in having successfully translated a good into action in the world in which facticity can non-instrumentally participate.

In Finnis' linking of sex to basic values, the idea of personal integrity serves a moral function similar to that of the institution of marriage: only *after* having committed oneself to a particular course of action—say marriage, say potentially procreative sex—does personal integrity have any play in morally organizing and evaluating our action. Personal integrity with regard to procreative sex only operates once the decision to procreative sex has occurred. It prevents 'organic malfunctioning and injury', not because the latter is immoral in itself (as if the good was present in facticity) but because of the necessary link the idea of personal integrity forges *between* physical facticity and a basic value.

76 Finnis, *Natural Law*, p. 87.

Insofar as we are married, the new natural law is correct that reproductive-like sex acts—because they aim at the form of complete unity, at the level of biology, which the complete friendship of marriage also aims at, at the level of reason—are moments of personal integration. But the concept of marriage, no less than that of personal integrity, cannot pick out what modalities of our biological facticity are relevant, particularly that the biological unity through genital union is the single, exclusive central case of all our possible biological attributes or even that of our genitals. Instead, both can demand only that what modalities we choose to deploy (here we can think of the very wide range of sexual acts that are not and cannot be procreative) is harmful neither to the rational unity at which we aim through the institution of marriage, nor the biological functioning of the sexual capacities and attributes we choose to deploy. So, if having a child would, at this point in time, destroy the moral project of marriage in which the spouses are necessarily mutually engaged (say, for one of the reasons that Finnis himself identifies) or cause biological injury (say, due to illness of injury) then reproductive like sex would violative of personal integrity in a way that is both demanded by the logic of the new natural law moral theorizing, but opposed to the conclusions that the new natural law theorists themselves draw.<sup>77</sup>

### C. Argument from the Moral Will: The Problem of Conditional Willing

Arguments from personal integrity are not exhaustive of all non-biological attempts to link sex to marriage. The new natural law develops another set of arguments from the nature of the moral will. Unlike arguments from personal integrity which require a specific commitment to be actualized (and therefore are ‘minimal’ because the concrete requirements for personal integrity in one project may not be the same in another), the arguments from the conditional will are what we can call ‘maximal’ because they attempt to apply to all individuals regardless of the state of their commitment to any moral project whatsoever.

#### 1. *Personal Integrity, Sex, and Marriage*

The purpose of Finnis’ argument is to show not just that the ‘approval of homosexual and other non-marital sex acts is not simply non-marital, in the sense of being utterly incapable of actualizing the human good of marriage, but actually “contrary to” or “violative of” that good’.<sup>78</sup> Now, in our discussion of the consummation of marriage we have already dealt with the question of whether, within the logic of the new natural law position, one can coherently speak of sexual acts, of whatever sort, of ‘actualizing the human good of marriage’. And we have found that we cannot so speak because to do so is to place a good in the facticity of human sexual reproduction in a way that violates the foundational features of the new natural law position, in which a rational good is successively transformative of the normative status of facticity. In any case, such a criticism is not fatal in any way to the two other points that Finnis’ argument is making.

77 The new natural law emphasis on natural family planning is an implicit acknowledgment that the deployment of biological unity must be made congruent with the larger demands of the moral project. <Give examples from Grisez and from Joseph Boyle, ‘Human Action, Natural Rhythms, and Contraception: A Response to Noonan’, *American Journal of Jurisprudence*, vol. 26, 1981: 32–37.>

78 Finnis, ‘Good of Marriage’, p. 100.



First, that sexual acts participate in the good of marriage not only to varying degrees—in the sense not that one sexual act itself, in its facticity, is congruent with what marriage is (which could be the case if it were permissible to include one-flesh communion in the definition of marriage, which we have shown it is not), but because acts can be articulations of the structural requirements of the basic value's conceptual, intentional, and institutional forms (i.e., the three shapes the good takes in each of the moments of moral transformation). *Within* the institution of marriage, it is crucial to be attentive to this possibility of degrees of facticity's participation—and even the possibility of non-participation—as in the idea of marital rape, for example, where the institutional fact of being married and of genital union do not mean that the act is the articulation of the moral project of marriage: the spouse would not be acting as a friend, his intent is outside of the moral requirements of marriage.<sup>79</sup>

So, the possibilities of participation/non-participation not only are given by the practical reasoning of the spouses (i.e., what they intend to do). But to this account which fits with the demands of the new natural law theorizing Finnis wants to further add that the facticity of the act itself matters: the very biological structure—the empirical description of what goes where and who does what—also determines the parameters of participation/non-participation in the good of marriage. What Finnis wants to show, in a way that the arguments from personal integrity cannot, is that some sexual acts are dis-integrating regardless of how much the particular act is thought or intended by the participants to be the articulation and actualization of the experience of the good of marriage.

The second part of Finnis' statement, and the one we will explore here, concentrates on this maximal claim. Finnis' approach is an interesting one. Instead of needing to show that the facticity of what he considers non-marital acts (i.e., non-reproductive-like acts in or not of marriage, reproductive-like acts outside of marriage) are incompatible with all possible basic values, Finnis attempts to show that non-marital acts are harmful (contrary to and violative of) the good of marriage. Marriage need not be the supreme good in order for harm to it, whether it occurs inside of marriage or outside of it, to make non-marital acts, immoral simply. For the new natural law position, as part of the requirements of practical reasonableness, states that actions and decision-making cannot be rationally comprehensible if they are 'directly and immediately damaging [to] a basic good in some aspect or participation' even if such actions or decision-making, 'indirectly, *via* the mediation of expected consequence, is to promote either the good in some other aspect or participation, or some other basic good(s)'.<sup>80</sup> Thus, if Finnis is able to show that some kinds of sexual acts are 'directly and

79 We see this search for some limit beyond which marital intercourse loses its moral quality even in Moses Maimonides who acknowledges that 'Since a man's wife is permitted to him, he may act with her in any manner whatsoever. He may have intercourse with her whenever he so desires, and kiss any organ of her body he wishes, and he may have intercourse with her naturally or unnaturally, provided that he does not expend semen to no purpose. Nevertheless, it is an attribute of piety that a man should not act in this matter with levity and that he should sanctify himself at the time of intercourse[ . . . ]' (Moses Maimonides, 'Laws Concerning Forbidden Intercourse', *Sex Ethics*, pp. 101–102). Elsewhere in the same work, Maimonides states that with regard to marital intercourse, 'And she should not be sleeping, and he should not coerce her if she is not willing [ . . . ]. Rather (sexual intercourse should be carried out), with the consent of both, and while both are happy' (Maimonides, 'Laws of Temperaments', *Sex Ethics*, p. 65).

80 Finnis, *Natural Law*, p. 120.

immediately damaging' to the good of marriage alone, then that is sufficient for the new natural law to exclude such acts as immoral. And it is this conclusion that Finnis wants to reach, for he believes

that choices of non-marital sex violate the good of marriage [ . . . ] [because] by such choices one [in the words of Grisez] 'damages the body's capacity for the marital act as an act of self-giving which constitutes a communion of bodily persons.' It is this damage which makes such acts violative of the good of marriage.<sup>81</sup>

What, then, are the grounds for this conclusion?

## 2. *The Problem of Damage*

Now, the 'damage' that Finnis refers to 'is not, of course, a matter of physiological damage. Rather it is damage to the person as an integrated, acting being; it consists principally in that disposition of the will which is initiated by the choice to engage in an act of one or other of the kinds in question'.<sup>82</sup> This sort of damage, although it 'can essentially be eliminated by repentance'<sup>83</sup> is disabling in just the way that a physical injury is disabling because the damage to the capacity for willing presents the individual from engaging in those acts 'which would really express, actualize, foster, and enable one as a spouse to experience the good of marriage and one's own commitment (self-giving) in marriage'.<sup>84</sup> At the same time, this disability is more intense, more disabling, than physical disability because it prevents one from taking advantage of the compensatory and morally transformational power of the institutional articulation of basic values. If one cannot become oriented to demands of the good present in the basic value (say friendship), its moral project (say, marriage), or its institutional presence (say, the actual social, political, and/or religious institution and the enforcement of that institution), then one now suffers three disabilities: first, a will that no longer can be congruent with the demands of reason and therefore a will that is unable to be what it is; second, loss of access to the rational actualization of one's physiological capacities; and, third, as a result of the latter two, the absence of personal integrity. These three disabilities are intensified by their source: that these conditions arise through my own will and therefore are in an important way, self-generating.

For Finnis, this self-generated disability of the will emerges as soon as we begin thinking of the conditions around sexual acts as conditional. That is: particularly that there are certain circumstances in which, for certain individuals, the demands of the good of marriage do not hold moral sway and therefore the act is not immoral in the way it would be if the demands of the moral practical principle of marriage did hold sway. Finnis calls 'such a conditional willingness to engage in extra- (i.e., non-) marital sex acts *consent* to nonmarital sex'.<sup>85</sup>

We consent to nonmarital sex, for Finnis, not just in the straight-forward case if we ourselves as a spouse make the decision to have non-marital sex—the example Finnis gives of the (presumably male and heterosexual) will that says 'I am so keen on having sex now that if an attractive woman were

81 Finnis, 'Good of Marriage', p. 119; Grisez, *Christian Life*, p. 650.

82 Finnis, 'Good of Marriage', p. 119.

83 Finnis, 'Good of Marriage', p. 119.

84 Finnis, 'Good of Marriage', p. 119.

85 Finnis, 'Good of Marriage', p. 120.

available (and my wife were not here), I would have sex with her, right now',<sup>86</sup> but also in the *prima facie* more obscure example of the will that says 'While I'm married I'm not going to have extramarital sex. But I think it's OK for unmarried people to get sexual satisfaction in any way they like, consistent with being fair to others . . .'.<sup>87</sup> The idea of conditionality—that the (absolute) principles of practical reasoning are, at least in part, must be integrated or translated into the empirical situation, the horizons of facticity, in which one must act and describe—is itself not problematic. The absolute value of the basic goods, as we already know of the new natural law, cannot be directly applied to our lives. There is no duty which they invoke, nor one that ought to be (and can be) done in every circumstance in contrast to, e.g., Kant's deontological ethics adumbrated in his *Groundwork for the Metaphysics of Morals* and his famous denial of the tension between theoretical reason and practical reason.<sup>88</sup>

So, the conditionality that Finnis highlights as problematic is not conditionality simply, but a conditionality relative to a situation in which the moral horizons of my actions have *already* been fixed by a moral project—in this case, the open-ended project of friendship which the new natural law calls marriage. Here conditional willing is morally problematic because it is the deliberate substitution of an action that ought to be structured by the demands of one practical principle and its project (e.g., friendship and marriage) for an action that is instead structured by subjective preference. The problem of conditionality thus, for Finnis, is really the problem of subjectivity: if subjectivity is taken to be the foundation of moral theory, then there is no moral foundation at all because subjectivity provides itself with no boundary that it cannot transgress and in that transgression create another ground.

In the two examples above there is a commitment to marriage. In the first, I will only have sex with the beautiful women if 'my wife were not here'. In the second, I will not violate the demands of marriage in *my own* actions and decision-making. However, as soon as this commitment is qualified (made conditional instead of absolute)—in one case by the intensity of my desire and the availability of my wife; the other by the relation of myself to the institution of marriage—then, for Finnis, my commitment to marriage has not been transformative for me. The institution of marriage to which I have committed myself has not transformed the basis of action from the state it was in prior to my commitment to one in which marriage itself structures my actions and decision-making. We see the absence or failure of this moral transformation that Finnis wants to point to in both examples in the way I step out of the demands of marriage. The demands of marriage become there merely one way of acting for me among all the ways of acting for me. My commitment to marriage is founded on my

86 Finnis, 'Good of Marriage', p. 121.

87 Finnis, 'Good of Marriage', p. 122.

88 Kant, <Theory and Practice>, p. <x>. In this way, <Weinrib's> critique of new natural law as an deontological ethic seems to miss the difference between duties that are present only *after* a moral project has been set underway as a the result of a valid act of prudential judgement, and the moral demands of the categorical imperative which is simply the direct application of these principles to the will I happen to have, regardless of what that will is. That is: Weinrib conflates Aristotelian *phronēsis* with Kantian practical reason in his characterization of the new natural law. For a discussion of the difference, see. Ronald Beiner, *Political Judgement*, <x>.

subjective commitment. Once I acknowledge that it is morally permissible to step out of marriage's demands, my remaining in it is a matter of choice—it is conditional on my will.<sup>89</sup>

Although marriage is a rational end of action, including sexual action this conditional willing that allows for the possibility that non-marital sex has value (at least in some circumstances), and therefore is *also* a good to be pursued, displaces this originary rationality for Finnis. The choice to have sex within marriage, now

is based on preferences which, not being required (or reasonably regarded as required) by reason, may be changed by choice. Where one has some interest in behaviour of some kind (e.g., behavior inducing orgasmic sexual satisfaction), then, even if one's interest is at present trumped by some countervailing interest, one is conditionally willing to engage in acts involving that behavior unless one regards those kinds of acts as excluded by reason (i.e., as immoral).<sup>90</sup>

So, for those who have committed themselves to the moral project of marriage, as in Finnis' examples, those who think that non-marital sex has (some) value are committing themselves to a position that is harmful to their own moral project. It is harmful to that end which gives moral meaning to—because it morally transforms—their actions and decision making, especially the decision about what foundation makes sexual relations moral. In Finnis' words, this 'conditional willingness [ . . . ] incapacitates one from willing sexual intercourse with one's spouse as genuinely marital intercourse' because we have both introduced non-rational reasons for acting (i.e., reason to which marriage as an end does not apply) and because when one does engage in sexual intercourse with one's spouse, one can never be sure if one was undertaking this decision and action out of reason or out of caprice.<sup>91</sup>

The mere possibility of the non-rationality of actions (i.e., that the action and decision making is founded on subjectivity and not reason) produces, for Finnis, the actual dis-integration of the individual: reason and physicality are not each, simultaneously satisfied. In this position, therefore non-marital sex in general, no less than homosexual sex, 'harms the personality of its participants by its dis-integrative manipulation of different parts of their one personal reality'.<sup>92</sup> Because, as Kant also saw, there is no way to determine what one's motivating end in fact is, once the possibility of a non-rational end is present, reason can never be satisfied on its own terms. We are left with the question: 'Is reason being used instrumentally to provide ways for the orgasmic satisfaction of the body (e.g., by providing instrumental reasons for structuring one's actions around something other than the moral project of marriage) or is reason, through marriage, providing the principle of action?' In harming my capacity to pursue the rational aim of marriage, I simultaneously harm my personal integrity. For this reason, Finnis says that "Thus one's conscience's complete exclusion of nonmarital sex acts from the

89 We see the same sort of argument formulated in the thought of Thomas Hobbes. Once we have committed ourselves to setting up a sovereign, then the transference of our power to him through our mutual covenant requires that we do not leave ourselves or think that we have left ourselves any criteria for determining the validity of our commitments thereby making those commitments conditional (Hobbes, *Leviathan*, Pt. II, chs. 18 and 29).

90 Finnis, 'Good of Marriage', p. 123 n. 106.

91 This problem was also a crucial one for Kant, since like the new natural law theorists, the morality of the will depends on the quality of the will. At the level of the will it is an insoluble problem from him: '<one can never know is some impure motive has crept in>'. The solution instead is for the will to have the *form* of a pure will, e.g., to act '<as if one law was also a law of nature>' (Kant, GMM, <x>).

92 Finnis, 'Sexual Orientation', p. 1069.

range of acceptable and valuable human options is existentially, if not logically, a precondition for the truly marital character of one's intercourse as and with a spouse'.<sup>93</sup>

There are public policy implications that flow from this identification of the harm posed to one's capacity for the good of marriage. For insofar as the basic good of friendship in its fullest, open-ended articulation as marriage is one of those 'human goods that can be secured only through the institutions of human law, and [whose] requirements or practical reasonableness [ . . . ] only those institutions can satisfy',<sup>94</sup> this *personal project* that involves 'one's conscience's complete exclusion of nonmarital sex acts' as moral possibilities must be transformed into an *institutional project*. To secure the good of marriage means also, for Finnis, to exclude those things that directly harm that good. Now, the inability to make this basic good (or, indeed, any basic good) one's structuring foundation for the possibility of action and decision-making is a direct harm. Moreover, an exclusion of this good is, in Finnis' formulation of it, irrational and an indirect harm. For marriage is the result of the pursuit of a basic good and so it must not be excluded, in the sense of not promoted, by the state. For the state is that complete community whose goal is

to secure the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour facilitate, and foster the realization by each individual of his or her personal development. [ . . . ]

Such an ensemble of conditions includes some co-ordination (at least the negative co-ordination of establishing restraints against interference) of any and every life-plan and any and every form of association.<sup>95</sup>

### 3. *Conditional Willing as the Problem of Perspectivalism or of Marriage Alone?*

By phrasing the argument in terms of what is morally comprehensible within the demands of marriage, Finnis makes two moves that are helpful to our exploration of the role that personal integrity plays in linking sex to marriage, and he makes one which is obscuring or distorting of such an exploration.

So, we have then two different moves at work in Finnis's argument. First, the implicit centrality of marriage as the definitive moral category in the argument indicates both a requirement of the new natural law theorizing and the intellectual honesty of Finnis' account: a moral project, such as marriage, introduces the structural existence of a weak form of perspectivalism into the new natural law's ethical theorizing. Our substantial moral obligations—those obligations that ought to structure our actions and decision-making (and do, when we are moral)—emerge only from the adoption of moral projects. To be married situates one within a horizon of duty that one does not possess outside of marriage. Second, above this perspectivalism, there are universal or categorical obligations (e.g., as do not harm basic principles, and other requirements of practical reasonableness that always to the process of translating basic goods to our lived moral projects), just as there is shape of harm common to *all* moral projects because it destroys the possibility of any moral project whatsoever.

The obscuring move Finnis makes in his argument is to conflate the problems that emerge from perspectivalism in general—i.e., problems that unhinge all moral projects—with problems that

93 Finnis, 'Good of Marriage', p. 123.

94 Finnis, *Natural Law*, p. 3.

95 Finnis, *Natural Law*, pp. 147–148.

emerge only from within the demands of a specific moral project—i.e., problems that unhinge marriage alone. Marriage establishes moral boundaries on our sexual conduct, at least, for those that have committed, or have a desire to commit, themselves to this moral project. To doubt that these boundaries apply to me (in the minimal sense that I can think its boundaries as invalid for myself or for others) in such or such a condition is to say that the moral project of marriage is not foundational, but my subjectivity is (that which chooses whether the boundaries pertain or not), is to unhinge the moral project of marriage for myself and my spouse.

Now this instance of the categorical problem which becomes visible to us when viewed through the perspective of the moral project of marriage has two sorts of solutions. One is the particular solution that *marriage* demands. The other is the universal solution that the requirements of practical reasonableness (i.e., the requirements for having any project whatsoever) demands. Finnis conflates these two solutions by presenting what is the particular solution (the total personal and political exclusion of non-marital sex) as if it were simply the universal solution. There is a universal solution which Finnis does not mention, but, which the intellectual integrity of his presentation allows us to formulate. Borrowing Kant's <universal law formulation of his> categorical imperative, a proper universal solution could take the following shape: 'act in such a way that one's rational, affective, and biological modalities of self are integrated through action and decision-making that is animated by the demands of a moral project'. Now, Finnis is correct in his conflation if there is (as he implicitly assumes there to be) only the moral project of marriage that can make having sexual activity in general and genital union in particular rational and therefore potentially moral and therefore potentially an instance of our personal integrity. If there was no such project, then the solution that pertains *within* the moral project of marriage also becomes the universal solution. For the new natural law, this means that not only such non-marital no less than extra-marital sex discouraged or at least not actively promoted (say through removal of public restrictions on contraceptives, etc.) but that sexual relations that can never involve the single form that the new natural law takes to meet the demands of marriage—genital union—must also not be permitted: thus the new natural law proscriptions around masturbation and 'sodomy'.<sup>96</sup> In this account, to do so is to harm the only possibility of making sexual relations moral.

If there is a moral project that can make sense of sexual relations then this difference between the universal problem and the moral perspectivalism necessarily present in the idea of moral projects becomes important when it comes to classifying the type of harm done by non-marital (*not* extra-marital) sex. The direct harm that Finnis says non-marital sex does to the capacity of the will would now have to become—except in one situation—an indirect harm. Direct harm is possible only when a good is being damaged, made unattainable. But when acts or decision-making are so animated that other basic goods and their attendant moral projects are not simultaneously pursuable, then the harm becomes indirect. For in this latter case what the act or decision-making aimed at was a good within its own requirements—requirements which, because of the limitations of the human situation, cannot be met without forsaking the pursuit of other basic values and the satisfaction of the moral requirements of the projects that flow from them. So, the harm that actions and decision-making within, and

96 <Lee & George definition of sodomy here.>

in conformity with, one moral project can cause another constitutes an indirect harm. And indirect harm is acknowledged to be, within the new natural law, a fact of human existence that does not impede the morality of our existence, even as we ought nonetheless to attempt to have moral projects that integrate as fully as possible the different basic values.

On the issue of marriage and sexual relations we see this unproblematic nature of the perspectivalism of marriage exemplified in Grisez's advice to a young scholar contemplating whether to pursue a life of scholarship and/or a life in the Catholic priesthood:

Appropriate commitment to the ordained priesthood plainly does not absolutely exclude certain other major commitments, such as a serious commitment to scholarship [ . . . ]. However, a priest is not free to pursue his scholarly career just as he pleases, since the priesthood carries with it a sacred duty of obedience [ . . . ]. Moreover, a man's commitment to the ordained priesthood should be primary and his other commitments not only should be coordinated with it but subordinated to it [ . . . ]. A sign of the primacy the commitment to the ordained priesthood should have in a man's life is that the Church generally forbids the ordination of men who lack the gift of celibacy [ . . . ]. Though the Church does not regard the ordination of married men as impossible, she considers priestly celibacy fitting partly because it frees men from the duties of marriage and family life so that they can prefer priestly service to everything else [ . . . ].<sup>97</sup>

The priesthood's practical rejection of the 'duties of marriage and family life' is not, of course, a theoretical one, since the priesthood—the pursuit of the basic value of religion, one presumes—does not make the unity of the moral projects of the priesthood and marriage 'impossible'. Yet its practical rejection is a harm to marriage. Indeed it makes marriage a good that is near impossible to pursue. Nonetheless, this harm is only indirect since the harm is done incidental to the pursuit of another moral project.

One potentially relevant difference between the priesthood's practical exclusion of the duties of marriage and family and the possibility that we are exploring here is that the priesthood does not attempt to transform the value or meaning that marriage gives to sexual relations. In other words, the moral projects of priesthood carves out a new moral terrain that, while able to coordinate some other projects (e.g., scholarship) is practically unable to do so with others (e.g., marriage). Even integrated with other moral projects, Grisez's comments let us see that the possibility of moral transformation is present. Scholarship in priesthood will have different boundaries than scholarship simply. There is a moral perspectivalism which is hierarchicalizing and transforming of activities present in the other projects—but not radically so: scholarship remains scholarship; marriage remains marriage.

So, the new natural law's arguments from the conditional will are intended to bind sex in general and reproductive-type sex in particular to marriage exclusively thereby making any attempt to will the moral licitness of sexual relations outside of the reproductive-type within marriage destructive of the very conditions of moral action or practical reasonableness whatsoever. The failure of this argument to achieve on its own terms this purpose does not require us to reject the new natural law moral theorizing, no more than did the failure of the idea of personal integrity or that of consummation. What they do require us to do is reject the conclusions.

97 Germain Grisez, *The Way of the Lord Jesus, vol. 3: Difficult Moral Questions*. Quincy, IL: Franciscan Press, 1997, p. 30. Hereafter, *Moral Questions*.

Let us now turn to the final part of our examination and reconstruct the sexual ethics implied by this new natural law theory.

#### IV. A Reconstruction of the True Shape of a New Natural Law Sexual Ethic

We have seen the failure of the three arguments that attempt to exclusively bind sex to marriage in a manner that is able to set the moral boundaries of sex to genital union's biological unity achievable only through reproductive-type sexual activity. Yet these failures need not, by themselves, force us beyond the new natural law. For they point the way to resources for the construction of a new sexual ethic, one more faithful to its foundational moral logic (the three-fold process of moral transformation), better able to comprehend and ground the progressivist direction of Western sexual regime, and yet, which can meet the demands of the boundary problem raised with alarm by conservative thinkers and acknowledged by liberal ones. We can reconstruct this new structural ethic by moving back through these failures to recollect and integrate the moral moments that they point out.

The failure of arguments from the conditional will now place on the horizon of the new natural law's own practical inquiry the question of what other moral projects, alongside that of marriage, might make rational sense of the exercise of our sexual capacities and attributes. That is, this failure causes the new natural law to take its own insight seriously that the 'assemblage of reminders' of human culture might point to a variety of moral projects (provisionally one might begin with: erotic games, theatre, medical) and underpinning basic values (play, aesthetics, life) that, unlike priesthood to marriage, incorporates in alternate ways these features of our biological facticity. Second, even if the basic value of friendship turned out to be the *only* good that rationally illuminates such an exercise, and, furthermore, even if the moral project of marriage turned out to be the lived project *most* completing of that good, the requirements of personal integrity demand that we simply calibrate our sexual attributes and capacities to fit with their *true* nature—i.e., our second nature, the modality of the friendship that we share-with another.

So, the new natural law theorists may be quite correct that there is no way to make morally licit uncontracepted genital union for non-married couples because of the special and unique congruence that genital union has with the complete and open-ended friendship of marriage. But, this does not mean that contracepted sex, or sexual acts that are incapable of this profound union (acts that the new natural law would call sodomitical or essentially masturbatory)<sup>98</sup> would be, in all cases, immoral. Indeed, a moral project animated by that friendship we colloquially call 'boy friend' or 'girl friend' might be just such an instance where the contracepted sexual activity becomes moral, and uncontracepted genital union, not. For, in these instances, contraception would be a moment of the institutional transformation of merely given nature. Just as the institution of marriage transforms the moral significance of the biological facticity of human sexual capacity, so too can contraception. In this sense, we can see contraception as the object moment that gives our biological nature its proper nature—but only insofar as contracepted sex is guided by a basic value through some moral project, like the moral project of 'boyfriend' or 'girl friend'.

98 <Lee & George, 'What Sex Can Be', p. <x>>



Here, the new natural law with the deep importance and necessity it gives to practical reasoning, receives a truly adequate place within a sexual ethic in a way it does not within the narrow and exclusive conclusions the natural law theorists themselves derive from the logic of the new natural law's moral reasoning. This new, expansive sexual ethic pointed to by their failure to sustain the narrow conclusions, demands then not simply the mechanical application of a rule—if married: genital union is the only morally licit sexual relation; if not: no sexual relations that intend to end in male ejaculation—but instead the searching reflection on the basic value and its practical modality at play in their relationship. What is this relationship animated by? And, how can the actualization of our sexual capacities and attributes be made congruent with the single true source of our moral nature? Note here, that in this new, expansive new natural law sexual ethic, individuals are not simply free to impute or create meaning. The demands of the three-fold moral transformation still apply: a basic good must be grasped, the good must be translated into a project, and the affective and biological dimensions must be accommodated in a way that does not lead to emotional deformity (as in an abusive or otherwise pathological relationship) or to 'organic malfunctioning'. The moment of *phronēsis*, of practical reasoning in moral translation is preserved in this new account—but now as an *on-going* state of affairs. Unlike the new natural law theorists account of marriage, the act of being married does not end the moral judgement.

Note also that this new, expansive sexual ethic does not displace the special place of marriage or genital union or procreation within it. At the same time, though, we have seen how the logic of moral transformation present within the new natural law does not allow biological facticity to dictate the contours of the moral relation of activity or decision-making (except, of course, in the sense of 'organic malfunction'). The inability of the biology to *rise to* the demands of the moral project in this way presents the obverse of the problem of our sexual capacities's exercise (say as uncontracepted genital union) in a way that is *more than* the moral project demands (say in a non-marital relation). Whereas the latter problem is solved by the modification of the type of acts engaged in to bring them in line with the relevant moral project, the former problem cannot be so solved. Setting aside problems that might be medically corrected (some erectile dysfunction; some problems with ovulation), we are left with a class of cases, particularly known, irremediable sterility and same-sex relations, that are for the new natural law thinkers unsolvable and in this unsolvability they show the moral unfittedness of these relations for the moral project of marriage (and therefore of the possibility of any moral sexual relations whatsoever).

Now, however, with the proper potentialities of the new natural law moral theorizing brought out, we can see that these narrow, exclusive conclusions do not apply. First, for those uninterested in taking up the demands of the moral project of marriage, sexual relations of a non-reproductive-type are potentially appropriate, so the horizon of possibility marked out by the biological facticity of the sterile or same-sex couple corresponds with the moral horizon of the project (assuming, of course, the moral project is still animated by friendship). Second, for those interested in pursuing the good of marriage, biology cannot trump the a moral projects's power to transform the meaning of that biological facticity. That is: the new natural law's moral logic requires letting loose its transformative power to all who are willing and capable of absolutely (not conditionally) conforming to its demands. In this case, if our biological facticity is not to trump the basic value's, the moral project's, the moral institution's power of transformation, then biological conformity only need be as best the biology

allows. So, while, for the same-sex couples, no biological union of the sort different-sex couples are capable is possible, the new natural law moral theorizing has seen that the actuality of the marriage is contained in the institution (as an articulation of the underlying moral project and basic value), not in the biology. *Without* the institution of marriage, the failure of biological union would make the relationship ‘illusory’, but with it, the institution both sustains the union across time in a way that neither the individual’s or couple’s rational, affective, or biological attempts can.

Moreover, the new natural law’s moral resources allow us to see the way in which the institution compensates. It can grant, both for infertile different-sex couples and for same-sex couples, the *results* of reproductive-type acts: it can facilitate this adoption in various ways (e.g., granting rights of adoption, etc.). In this sense, the resources of the new natural law allows us to reclaim the Aristotelian insight that ‘[i]n general, in some cases, art completes what nature cannot carry out to an end.’<sup>99</sup> Here Stephen Macedo is correct when he similarly observes: ‘If the presence of nonworking equipment of the “right” sort is a crucial distinguishing feature of the permissible sexual relations, artifice might supply what nature has not’; but he goes wrong when he adds, ‘One gay male might have a partial sex-change operation, having his penis removed and a vagina installed.’<sup>100</sup> If he is serious, Macedo makes the same error is understanding the potentialities of the new natural law sexual ethic as the new natural law theorists themselves do. The ‘artifice’ or ‘art’ that properly compensates for the nature is the institutional articulation of the moral project. This ‘artifice’ is the transformative power of the second nature that animates new natural law moral theory.

So, the value of the new natural law is not that it merely points out the boundary problems that both the conservative and progressivist thinkers identify as crucial to any sexual ethic, but that its properly reconstructed sexual ethic shows the proper scope of those boundaries. They remain, as the conservative thinkers see, as something not subject to the subjective imputation of meaning—they are not plastic. And, yet, when the power of moral transformation and the true requirements of personal integrity and conditional willing are uncovered as we have done here, we see that the horizon of morally licit sexual acts marked out by the logic of the new natural law—but not its theorists—is simultaneously compatible, and indeed affirms, central features of the progressivist sexual ethics: the potential morality of contraception, the variety of sexual relations, the moral legitimacy of same-sex marriage with rights of adoption, along with the place of individuals to exercise that moment of practical reason that makes life both an instance of self-determination *and* of moral boundaries.

99 Aristotle, *Physics*, Bk. B.8, 199a15–20.

100 Macedo, ‘Conservative Mind’, p. 280.