



1-1-2012

A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics

Paul J. Weithman

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Paul J. Weithman, *A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75 (1995).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol9/iss1/4>

This Speech is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

A PROPOS OF PROFESSOR PERRY: A PLEA FOR PHILOSOPHY IN SEXUAL ETHICS

PAUL J. WEITHMAN*

I want men and women to be able to think sex, fully, completely, honestly and cleanly The mind has to catch up, in sex: indeed, in all the physical acts. Mentally, we lag behind in our sexual thought, in a dimness, a lurking, grovelling fear which belongs to our raw, somewhat bestial ancestors. In this one respect, sexual and physical, we have left the mind unevolved. Now we have to catch up, and make a balance between the consciousness of the body's sensations and experiences, and these sensations and experiences themselves.¹

In *Law, Morality and "Sexual Orientation,"* John Finnis argues that orgasmic sexual activity between two people of the same sex is always morally wrong.² Like Michael Perry, I disagree with Finnis' thesis. There are, however, more and less compelling arguments against that thesis. More to present purposes, there are more and less compelling ways to show that the arguments Finnis offers for his thesis fail to establish it. While I agree with Professor Perry that Professor Finnis' thesis is false, I do not think that his reply to Professor Finnis takes adequate account of the strength and nuance of Finnis' position. I therefore do not think that his criticisms of Finnis' argument have the force they should. I begin by indicating briefly what I take two of the strengths of Finnis' arguments to be.

I.

Philosophical reflection on sexual ethics has historically been dominated by two problems. The first of these we might

* Department of Philosophy, University of Notre Dame.

1. D.H. LAWRENCE, *A Propos of "Lady Chatterly's Lover"*, in PHOENIX II 487, 489-90 (1968).

2. John Finnis *Law, Morality and "Sexual Orientation"* 69 NOTRE DAME L. REV. 1049, 1055 (1994) [hereinafter Finnis, L. REV.], reprinted in 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11 (1995) [hereinafter Finnis, J.L. ETHICS & PUB. POL'Y]. It is important to note what Finnis does not say: he does not say that those who engage in sexual activity are in mortal sin or even that they are blameworthy. Whether they are so are, as Finnis correctly assumes, separate questions.

call the "problem of disorder." This problem arises, it is said, because sexual impulses are unruly passions which need somehow to be controlled by reason. When uncontrolled, these passions are thought to bring disorder and, in the worst cases, disintegration both to individual human agents and to the various communities to which they belong. The second problem we might call the "problem of degradation," a problem which arises because sexual impulses can motivate the exploitation or degradation of both the agent and his sexual partners. While various philosophers may have been more concerned with one problem or the other, no philosopher has to my knowledge focused exclusively on either one of them. Rather, the goal of philosophical treatments of sexual ethics has been to show how human beings might avoid them both. Finnis' concern with these traditional problems is clear. One of the strengths of his argument, however, is that it calls attention to a third problem relevant to the philosophical treatment of sexual ethics, but largely ignored by it.

Professor Finnis argues that homosexual couples cannot "actualize and experience" the common good of their relationship by orgasmic sexual activity. Neither, Finnis argues, can heterosexual married couples who use contraception. He insists that homosexual and heterosexual couples who believe otherwise are mistaken "whatever the generous hopes and dreams and thoughts of *giving* with which [they] may surround their sexual acts. . . ."³ The "attempt to express affection by orgasmic non-marital sex [is] the pursuit of an illusion."⁴ In defending these claims, Finnis implicitly draws attention to the fact that our capacity for judging our own and others' sexual activities and experiences can be clouded by fantasy, illusion and self-deception. While some romantic and sexual fantasies and illusions may be harmless or even beneficial, there can also be moral failure and tragedy associated with acting episodically upon, building a solitary life upon, or building relationships upon, fantasy and illusion. The many moral problems posed by sexual fantasy and illusion are problems that philosophical reflection on human sexuality has largely ignored. Whatever the demerits of Finnis' conclusions about non-marital sexual intimacy, it is a merit of his arguments that they presuppose the centrality of, and draw attention to this larger set of problems.

3. Finnis, L. REV., *supra* note 2, at 1067 (emphasis in original); Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 29 (emphasis in original).

4. Finnis, L. REV., *supra* note 2, at 1065; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 28.

Another merit of Finnis' arguments is the sophistication with which they avoid some of the defects characteristic of arguments earlier in the natural law tradition. Seeing this requires seeing how Finnis argues for the thesis that orgasmic sexual activity between two people of the same sex is always wrong.

Finnis' argument is to be found in the paragraph running from pages 1066-67, the paragraph that Perry refers to as paragraph 6.⁵ The argument is very compressed, with a number of suppressed premises. But I believe the structure of the paragraph's second half clearly shows that Finnis relies on the following line of reasoning:

- (1) "[T]he common good of friends who are not and cannot be married (for example man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit."
- (2) Therefore "the activation of one or even each of their reproductive organs cannot be an actualizing and experiencing of the *marital* good."
- (3) So there is no "*common good* that could be actualized and experienced *by and in this bodily union*."
- (4) So orgasmic homosexual activity can "do no more than provide each partner with an individual gratification."
- (5) Therefore "that conduct involves partners in treating their bodies as instruments to be used in the service of their consciously experiencing selves."
- (6) So "their choice to engage in such conduct thus disintegrates each them precisely as acting persons."
- (7) Therefore engaging in orgasmic homosexual activity is always wrong.

Since Finnis thinks (4) follows from (3) and (2), his argument for (4) must depend upon the claim that homosexual couples who engage in orgasmic sexual activity cannot actualize and experience the common good of *marriage*. This claim, in turn, depends upon Finnis' argument that that good is actualized by the voluntary and uncontracepted "union of the reproductive

5. The argument of that paragraph is, as Finnis acknowledges, a recapitulation of an argument found in what Finnis calls "the new second volume of [Germain] Grisez's great work on moral theology." Finnis, L. REV., *supra* note 2, at 1063; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 25. The acknowledgement of the debt to Grisez for the argument running from pp. 1066-67 is found at Finnis, L. REV., *supra* note 2, at 1067, n.47; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 29, n.47; the reference is to GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 634-39, 648-54, 662-64 (1993).

organs of husband and wife." That argument is summarized in the first half of the paragraph, and ends with the phrase "that act of genital union."

The argument, if laid out in detail, would be long and complicated. The most charitable reconstruction of the argument⁶ would, I believe, show that it depends upon these claims:

(8) "[R]eproduction is one function."⁷

(9) The voluntary and uncontracepted "union of the[ir] reproductive organs"⁸ is the way husband and wife typically or naturally unite to perform the function of reproduction.

(10) Groups (including pairs) constitute "units" or single "realities" of the sort that has a given function if they are united in the way that groups or units typically or naturally unite to perform that function.

(11) Common goods can be actualized and experienced only by groups (including pairs) which constitute "units" or single "realities."

The argument that the common good of marriage is realized by the voluntary and uncontracepted sexual union of husband and wife therefore depends crucially upon the notion, mentioned in (1), of a "biological (and therefore personal) unit." It is because spouses, in their sexual union, constitute a unit of the sort that has the function of reproduction that they can actualize and experience the common good of marriage. And, Finnis thinks, it is because homosexual couples cannot constitute such a unit, even by intimate sexual union, that they cannot actualize and experience the common good of marriage. From this Finnis thinks (4), and ultimately the wrongness of orgasmic homosexual conduct, follow.

How do Finnis' arguments constitute an advance over earlier natural law arguments for similar conclusions? Neither the argument of the first half of the paragraph, nor that of the second, depends as Finnis says upon "any norm of the form 'respect natural facts or natural functions.'"⁹ Nor does either argument depend upon claims about the natural purposes or teleology of the reproductive organs, purposes which would be frustrated by contracepted or homosexual sexual unions.¹⁰ Earlier natural law

6. I provide such a reconstruction in the appendix to this article.

7. Finnis, L. REV., *supra* note 2, at 1066; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 28.

8. Finnis, L. REV., *supra* note 2, at 1066; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 28.

9. Finnis, L. REV., *supra* note 2, at 1068; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 31.

10. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHT 48, 55 (1980).

arguments which appeal to these claims suffer from their implausibility. More specifically, Finnis thinks, it is always an open question whether or why natural functions should be respected. To assume that the question is closed, as Finnis thinks earlier natural law thinkers did, is to commit a version of the naturalistic fallacy. Finnis' argument against homosexuality, by contrast, depends upon a claim not made explicit in the paragraph under consideration. That claim is that human beings must never choose to act against the good realized by the "biological (hence personal) units" constituted by voluntary, uncontracepted, heterosexual union. Unlike natural functions, goods are worthy of respect and Finnis' claim that it is at least *prima facie* unreasonable to choose to act against them is plausible. Finnis may, as I believe he is, be wrong to conclude that homosexual unions cannot actualize common goods. But because his arguments do not depend upon the naturalistic fallacy, they mark an advance in natural law thinking about human sexuality.

II.

Perry's criticism of Finnis presupposes that "Finnis falsely believes that even in the context of a homosexual friendship that is a lifelong, monogamous relationship of faithful love, homosexual conduct 'can [never] do [any] more than provide each partner with an individual gratification.'" It also depends upon Finnis' "forthrightly acknowledg[ing], in his essay, that his point is not confined to homosexual conduct, but applies to heterosexual conduct that is, in Finnis' words, 'deliberately contracepted.'"¹¹

Perry's criticism of Finnis seems to be that these two claims are false: both orgasmic homosexual activity and deliberately contracepted orgasmic heterosexual activity, he claims, can enable the couples in question to actualize and experience the common goods of their relationships. Perry writes:

Interpersonal sexual conduct, whether heterosexual or homosexual, can be a way of affirming and serving both the sexual and the emotional wellbeing of one's lover; as such, sexual conduct can both express, in a bodily (embodied) way, one's love for one's lover; indeed, at its best such conduct can be a generative matrix of the emotional strength one needs to live well. . . . Sexual conduct can be

11. Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 41, 51 (1995) (quoting Finnis, L. REV., *supra* note 2, at 1065-66; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 28).

all this (and more) even if it is not meant to be—indeed *even if it is meant not to be*—procreative.¹²

Perry's criticism thus depends upon his claim that Finnis' theses are contradicted by what he calls the "real-world experience" of those who engage in the sexual practices in question. Thus he says that

[o]ne who, on the basis of his or her real-world experience—indeed, perhaps on the basis of his or her experience in marriage—disagrees with Finnis' point as applied to 'deliberately contracepted' heterosexual conduct has good reason to be skeptical that Finnis' point as applied to homosexual conduct has any firmer grounding in real-world experience.¹³

A few paragraphs later, he remarks that "[t]he reality apprehended by many married couples who practice contraception, and by many homosexual couples, is directly contrary to the reality postulated by John Finnis"¹⁴

The fact that Finnis' theses seem to be contradicted by the experience of "many married couples who practice contraception, and many homosexual couples" does not itself show that Finnis' theses are incorrect. Of course, it would show that Finnis' theses are incorrect if it were conjoined with a sound argument for the conclusion that the experiences of these couples are veridical.

Does Perry provide such an argument? He says "Finnis is reduced to claiming that the reality apprehended by many married couples who practice contraception and by many homosexual couples, unlike the reality asserted by him, is illusory."¹⁵ The word 'reduced' in this sentence suggests that Perry's argument for the veridicality of such experiences and against Finnis is to be understood as a short *reductio ad absurdum*:

(12) Suppose such experiences are not veridical.

(13) Then the experiences of the homosexual and deliberately contracepting heterosexual couples in question would be illusory.

(14) It is impossible, or highly improbable, that the experiences of so many couples can be illusory.

(15) Therefore such experiences are or have a high probability of being veridical.

12. Perry, *supra* note 11, at 51-52 (emphasis in original).

13. *Id.* at 52.

14. *Id.* at 59.

15. *Id.*

(16) Therefore (12) is false, or has a high probability of being false.

(17) Therefore Finnis' theses are false, or have a high probability of being false.

The crucial premise in this argument is premise (14), a premise for which Perry seems to offer no explicit defense. Of course, if Perry simply asserts (14) without defense, that would be tantamount simply to asserting that (12) is false and that Finnis is wrong. That, in turn, would be to beg the question at issue. So perhaps Perry should be interpreted as saying that such experiences, or some significant subset of them, enjoy a presumption in their favor, as do some of the judgments based upon them. At least some of the judgments rendered by homosexual and contracepting couples on the basis of these experiences seem to be rendered under optimal or nearly optimal conditions by reasonable people whose judgments on other matters are worthy of credence. There is, moreover, widespread consensus on such judgments, consensus that includes "millions of Christian married couples."¹⁶ In addition, Perry may think that reasonable individuals are uniquely and specially qualified to judge of their own experiences of satisfaction and well being.¹⁷ Finally, intuitions may support the judgments of some couples that, because of their circumstances, contracepted or heterosexual sex is best for them. Anyone who, like Finnis, wants to deny (14) therefore, Perry might say, bears a preponderous burden of proof. The onus is on Finnis, Perry might conclude, to show that (14) is false rather than on Perry to defend it.

How might Finnis attempt to shoulder this burden? Note first what Finnis does *not* claim. He is not arguing for the thesis that all who engage in contracepted or homosexual sex are morally blameworthy. He claims instead that all who engage in such activity are doing something that is morally defective, for which

16. *Id.* In an earlier version of this comment I interpreted Perry's argument differently. I took the reference to "*many* married couples" and "*millions* of Christian married couples" later in the same paragraph to imply that the number of people who render such judgments testify to the veridicality of experiences on which such judgments are based. *Id.* That is, I took it that the number of people who render such judgments was intended to support the claim expressed in (14) rather than the quite different claim that (14) enjoys a presumption which Perry's critics are obliged to rebut. I therefore misunderstood how Professor Perry thinks consensus bears on his argument against Finnis. See *id.*, at 56, n.39. Of course, this paragraph's suggestion that Perry thinks Finnis bears the burden of proof may be similarly mistaken since I cannot find support for it in Perry's text. I simply put it forward as a conjecture about how he might be understood.

17. I owe this suggestion to John Howard Yoder.

they may or may not be culpable. This is compatible with the claims that, because of circumstances, the best that some couples can do is to engage in an activity that is morally defective and that, because of circumstance, they do so non-culpably. Therefore, Finnis' claim is compatible with, hence not contradicted by, a couple's sound judgment that, in light of circumstance, contracepted or homosexual sex is best for them. Whatever intuitive support such a judgment enjoys does not weigh against Finnis' position and he is not, therefore, in the position of having to discount those judgments. The judgments that he must regard as erroneous or illusory are judgments that, because of circumstance, homosexual or contracepted sex is objectively good for, or not objectively illicit for, the couple in question. It is these judgments, perhaps, that Perry thinks enjoy a presumption in their favor. But how strong is that presumption?

Finnis, I suggested earlier, implicitly points to a large set of moral problems concerned with the role of fantasy and illusion in human sexuality. Among those problems, Finnis would claim, are those posed by the fact that some fantasies, illusions and misconceptions about the value of various forms of human sexuality can be very widely held. Since these fantasies, illusions and misconceptions can cloud the judgment of those who hold them, and since it is possible many people hold them, then it seems possible that the judgments of large numbers of people can be clouded by them.

Anyone who wants to maintain that this is not a live possibility should recall that claims about widespread sexual illusion and misunderstanding are the stock in trade of would-be sexual reformers. Consider, for example, Bertrand Russell's contentions in *Marriage and Morals*. There Russell claimed that Christian sexual mores are both false and so deeply held that they exercise effects on intellect and judgment of which agents are unaware, including judgments about the pleasure and value of their own sexual experience.¹⁸ He wrote that

the whole system of Christian ethics, both in the Catholic and Protestant forms, requires to be re-examined, as far as possible without the preconceptions to which a Christian education predisposes most of us. Emphatic and reiterated assertion, especially during childhood, produces in most people a belief *so firm as to have a hold even over the unconscious*, and many of us who imagine that our attitude

18. Thus he seems to have thought that accepting Christian sexual mores led people to judgments which are at odds with what he called "biological facts." BERTRAND RUSSELL, *MARRIAGE AND MORALS* 43 (1948).

towards orthodoxy is quite emancipated are still, in fact, *subconsciously controlled* by its teachings.¹⁹

As this passage suggests, Russell thought those mores were very widely held in the western world of his day. It seems, therefore, that Russell put forward an argument for liberalizing sexual mores that presupposes just the sort of widespread sexual misconceptions and illusions that Perry claims are improbable. Perry thinks it absurd of Finnis to hold that sexually active homosexual couples and deliberately contracepting heterosexual couples are deluded. Russell, however, anticipated such an objection and argued for just the opposite conclusion:

The fact that an opinion has been widely held is no evidence whatever that it is not utterly absurd; indeed, in view of the silliness of the majority of mankind, a widespread belief is more likely to be foolish than sensible.²⁰

D.H. Lawrence seems also to have thought that the England of his day was in the grip of widespread sexual delusions and misconceptions. In *A Propos of "Lady Chatterly's Lover"* Lawrence gives a different and far more subtle description of these illusions and their consequences than does Russell in *Marriage and Morals*. For present purposes, however, the differences are irrelevant. Like Russell, and unlike Perry, Lawrence takes very seriously the possibility that large numbers of people are in the grip of illusions and fantasies of which they are unaware and which significantly color their sexual experiences and judgments.²¹ Moreover, Russell, Lawrence and Finnis are at one in pointing to the consequences of living sexual lives of illusion: the alienation of mind or self from body and, in effect, the "disintegration" of the agent as an acting person.²²

I do not adduce Russell and Lawrence to prove that sexual delusions and misconceptions are in fact widespread. I intro-

19. RUSSELL, *supra* note 18, at 49-50 (emphasis added).

20. RUSSELL, *supra* note 18, at 50.

21. See also LAWRENCE, *supra* note 1, at 492-93.

22. Lawrence says that "[l]ife is only bearable when the mind and body are in harmony, and there is a natural balance between them, and each has a natural respect for the other. And it is obvious that there is no balance and no harmony now. The body is at the best the tool of the mind, at the worst, the toy." LAWRENCE, *supra* note 1, at 492. A few pages later he concludes "[t]he disintegrative effect of modern sex-activity is undeniable." LAWRENCE, *supra* note 1, at 508.

Russell says that "the older morality has been allowed to poison love, filling it with gloom, fear, mutual misunderstanding, remorse and nervous strain, separating into two regions the bodily impulse of sex and the spiritual impulse of ideal love. . . ." RUSSELL, *supra* note 18, at 223 (emphasis added).

duce them merely to buttress my suggestion that such delusions are live possibilities. For the suggestions of Russell and Lawrence that sexual illusion is widespread do not seem to me obviously absurd or impossible. If Perry agrees and recognizes the possibility that Lawrence and Russell were correct, then he must recognize the possibility that Finnis could be. If Perry recognizes the possibility that large numbers of people were in the grip of a sexually conservative illusion (as Russell and Lawrence alleged), then he must recognize the possibility that large numbers of people are in the grip of sexually liberal one (as Finnis alleges). Or at least, he must do so unless he can argue for some relevant difference between the possibility of conservative and the possibility of liberal sexual illusions. Perry has, however, provided no such argument.

Even the possibility of widespread sexual illusion may not itself rebut the presumption Perry alleges in favor of the experiences and judgments on which his *reductio* depends. But recall that Finnis has, in support of his claims about sexual illusion, both a highly developed natural law theory and an explanation of how the illusion he alleges came to be widespread. Finnis' natural law theory was laid out in great detail in his book *Natural Law and Natural Rights*²³ and has been developed by Finnis and his collaborator Germain Grisez in subsequent work. Among the central features of that view are accounts of practical reasoning and of the "basic goods" pursuit of which renders human action intelligible. A plausible reconstruction of Finnis' argument for the illicitness of orgasmic homosexual conduct would show that the argument depends at crucial points upon this theory. Finnis' explanation of widespread delusion would appeal, I believe, to the operation of a number of forces which shape what Finnis calls "the *public realm or environment*."²⁴ These forces can, Finnis

23. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

24. Finnis, L. REV., *supra* note 2, at 1053 (emphasis in original); Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 14 (emphasis in original). Perry writes:

In Finnis' view, no doubt, it is an illusion aided and abetted for the Christian couples by all those ministers and priests and theologians who do not submit to the position that Finnis defends. Finnis may want to reflect on the significance of the fact that only *one-quarter* of all American Catholic priests accept the Church's official teachings on contraception—and only *a little more than half* of them (56%) accept the Church's position on homosexual conduct. Are all those dissenting priests—many of whom daily minister to married couples or to homosexual couples or to both—in the grip of an 'illusion,' too?

Perry, *supra* note 11, at 59. Not only would Finnis answer in the affirmative, but he would, I believe, follow the Papal encyclical VERITATIS SPLENDOR in arguing

would argue, foster (false) moral beliefs supportive of orgasmic homosexual activity. Indeed this is among the reasons that Finnis thinks it important for the state to discourage such activity.

Finnis offers an argument against the licitness of homosexual activity which is backed by a powerful and highly developed philosophical theory. Finnis' argument and the supporting theory imply that sexual illusion is widespread. They therefore imply that the judgments of large numbers of people are in error, and Finnis has at his disposal an explanation of the error's propagation. In the face of this, it is insufficient simply to point out, as Perry seems to, that some of the allegedly erroneous judgments enjoy an unspecified presumption of truth and some of the allegedly illusory experiences on which they are based enjoy an unspecified presumption of veridicality. Much more needs to be said about the source, nature and strength of those presumptions before Perry can plausibly adduce as decisive against Finnis' claims precisely the experiences which Finnis himself explicitly argues are illusory. I conclude, therefore, that Perry accepts (14) too readily and that his criticism of Finnis stands in need of much greater argumentative support than he provides.

III.

The passage with which I opened this comment is drawn from an essay in which D.H. Lawrence explains why he wrote *Lady Chatterly's Lover*. In that essay, Lawrence intimates that creative intellectual work on human sexuality, work which challenges widely accepted sexual norms, can be a valuable corrective to the judgments of the majority and can facilitate clarity of thought. Lawrence embodied his intellectual work in his literary essays, in his poetry, in his short stories and in novels like *Lady Chatterly's Lover*. The first of the passages I quoted from Russell's *Marriage and Morals* shows that Bertrand Russell thought that the sexual ethic widely accepted in his day needed to be re-examined without pre-conceptions. He thought philosophers like himself had a responsibility to conduct that examination: like Lawrence, Russell thought it the task of intellectuals to foster clear thinking about human sexuality.

Perry criticizes Finnis for doing sexual ethics "*a priori*" and says of his arguments that they are "(inappropriately) abstract."²⁵ Yet Finnis is, I believe, doing just what Russell and Lawrence rec-

that theological dissent is itself among the mechanisms by which sexual illusions are propagated among people of good will. See JOHN PAUL II, VERITATIS SPLENDOR 132-34 (1990).

25. Perry, *supra* note 11, at 52.

commended and just what they did themselves: creative intellectual work on human sexuality which challenges sexual mores widely held in their culture. The need for such intellectual work is apparent once we recognize that the "real world experience" to which Perry appeals. Human beings' experience of their own sexuality and sexual activity is a cognitive experience. It essentially involves the application of concepts, the passage of judgments on, and the formation of beliefs on the satisfaction, joy, pleasure or affection of the activity. The passage of these judgments and the formation of these beliefs involve appeals to norms, expectations and ideals about human sexuality. These norms, ideals and expectations are, in turn, subject to assessment for their cogency and intellectual defensibility. Thus popular judgments about human sexuality need always to be checked against the best intellectual work on the subject. Since some of this intellectual work is philosophical, widely held judgments about human sexuality must be checked against the best available philosophical arguments. Other of this work is in history, anthropology, literary criticism and gender-studies; these disciplines too are relevant to the critical assessment of sexuality and "real world experience."

As I mentioned earlier, the second of the merits of Finnis' position is that it marks a significant advance within natural law theory. His arguments deserve to be seriously and carefully assessed, and their premises stated as clearly as possible. This brings us to the crucial questions about Finnis' paper. Just how strong are the philosophical arguments Finnis provides? How strong are the premises on which a charitable reconstruction of his argument shows him to rely? Are the inferences he makes valid inferences?

My object in this essay is to comment on Perry's paper and not on Finnis'; anything like an adequate assessment of Finnis' arguments would therefore exceed my limited scope.²⁶ I want to conclude by raising questions about Finnis' arguments for the moral wrongness of homosexuality, questions that merit further exploration.

First, Finnis' argument depends crucially upon the claim that two persons of the same sex cannot be constituted as a biological unit by the "activation" of their sexual organs.²⁷ This

26. I give Professor Finnis' arguments closer attention in my contribution to *LAWS AND NATURE* (Martha Nussbaum & David Estlund eds., forthcoming 1995).

27. Finnis thinks that "activation" of human sex organs in a heterosexual union is a necessary condition for the constitution of a biological unit. He does not, however, think it sufficient. He would argue, I believe, that a biological

claim depends, I believe, upon the further claims that biological units have functions and that there is no biological function performed by a homosexual union. But from the fact that a homosexual coupling does not constitute a *biological* unit or perform a *biological* function, it surely does not follow that this coupling does not constitute a unit of any kind or that it performs no function at all. Whether or not it does depends upon what Finnis means by "function," a notion he leaves unexplained. Why couldn't a homosexual coupling constitute two people as a *social* unit, the function or characteristic activity of which is to promote their friendship and love through special acts of physical intimacy and tenderness?

Perhaps Finnis would reply that this suggestion grants him his point. For suppose that orgasmic acts of tenderness and intimacy do help to actualize and experience the good of friendship in a homosexual relationship, as giving an especially pleasing gift to another might enable the giver and recipient to actualize and experience their friendship. Still, Finnis might say, the sexual pleasure of orgasmic homosexual activity itself is, on this suggestion, a good experienced by one or the other of the partners, just as the pleasure of receiving a gift is a pleasure experienced only by the recipient, regardless of the commonality of the experiences that follow. But to grant that sexual pleasure is individual in this way, Finnis might say, is to grant his point.

The problem with this reply is that Finnis needs a stronger claim if his argument that orgasmic sexual acts are always wrong is to succeed. He needs, not just the claim that the sexual pleasure of such acts is private rather than common, but:

(4) orgasmic homosexual activity can "*do no more than provide each partner with an individual gratification.*"²⁸

My suggestion may presuppose that orgasmic homosexual activity "provide[s] each partner with an individual gratification," but it also presupposes that such activity does much more. It presupposes that the mutual gratification of orgasmic homosexual activity provides the occasion of, and thus serves the function of, promoting emotional intimacy.

Second, as noted above, Finnis deploys against orgasmic homosexual activity an argument that he thinks applies to all

unit of the sort which has the function of human reproduction is characterized, not only by its biological states, but also by its intentional ones; if is for this reason that I included the word 'voluntary' in (9). What exactly those intentional states are remains to be specified.

28. Finnis, L. REV., *supra* note 2, at 1066; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 29 (emphasis added).

deliberately non-procreative sex. Perry, in arguing against Finnis, argues that both deliberately contracepted heterosexual activity and orgasmic homosexual activity can be morally acceptable. Perry's strategy suggests that Finnis and Perry share a presupposition: that the same moral considerations are relevant to determining the licitness of these two kinds of sexual activity. But why suppose that? Why not think that very different moral considerations are relevant to the questions of whether to engage in orgasmic homosexual activity and whether to engage in heterosexual sex in a way designed to prevent conception? These certainly seem like very different questions.

My conjecture is that Finnis accepts this presupposition because he believes that all orgasmic sexual activity, whether contracepted or not, whether homosexual or heterosexual, constitutes a single kind of activity which can properly be understood in only one way. That is, Finnis would argue that orgasmic sexual activity can be understood as intelligible only if there is one good, one kind of sexual intimacy, which everyone engaging in orgasmic sexual activity wants to actualize and experience. That good is realized, Finnis argues, in voluntary, uncontracepted heterosexual sex which takes place in the context of marriage. Other kinds of sexual activity, including homosexual activity, are, he might think, imitations of this single paradigm of sex and attempts to realize this single good. This latter claim may seem compelling to those whose paradigm of homosexual activity is penetrative male homosexual activity.²⁹ Perhaps penetrative male homosexual sex seems sufficiently like uncontracepted penetrative heterosexual activity to license the supposition that the former is a witting or unwitting imitation of the latter.

One of the problems with this line of thought, however, is that it ignores the diversity of sexual experiences, prominently including the experiences of homosexual women. My concluding suggestion that those who think Finnis' conclusions about orgasmic homosexual activity incorrect should refuse to assimilate it to deliberately contracepted heterosexual sex. Instead, they should distinguish various kinds of loving sexual activity. Perhaps they will find different social and biological units, and different functions, goods and characteristic activities, associated with each. If so, then they may also make some progress in arguing that homosexual sex in the context of a loving and committed life-long relationship can fully realize some of those goods.

29. This is clearly Grisez's model. In considering the morality of same-sex relations, he eschews the noun "homosexual" in favor of the word "sodomite". See, e.g., GRISEZ, *supra* note 5, at 653.

APPENDIX

A RECONSTRUCTION OF FINNIS' RATIONALE³⁰

(1) Groups united and acting in the way groups typically or naturally unite and act to perform a function thereby constitute one reality of the sort which has that function. TACIT ASSUMPTION

(2) "Reproduction is one function." EXPLICIT ASSUMPTION

(3) So groups united and acting in the way groups typically or naturally unite and act to perform the function of reproduction constitute one reality of the sort which has that function. FROM

(1) AND (2)

(4) The voluntary and uncontracepted union of their reproductive organs is the way husband and wife typically or naturally unite and act to perform the function of reproduction. TACIT ASSUMPTION

(5) So a husband and wife whose reproductive organs are voluntarily and uncontraceptively united are one reality of the sort which has the function of reproduction: "in respect of that function, the spouses are indeed one reality." FROM (3) AND (4)

(6) Human reproduction is a biological function. TACIT ASSUMPTION

(7) Whatever is one reality with a biological function is one biological reality. TACIT ASSUMPTION

(8) So husband and wife whose reproductive organs are voluntarily and uncontraceptively united are one biological reality. FROM (5),(6) AND (7)

(9) Whenever two things are united in one biological reality, they are really united biologically; the union makes of them a "biological unit."³¹ TACIT ASSUMPTION

(10) So "the union of the reproductive organs of husband and wife really unites them biologically;" the union makes of them a biological unit of the sort which has the function of reproduction. FROM (8) AND (9)

(11) The biological reality of the human person is logically inseparable from her personal reality. TACIT ASSUMPTION

(12) Human beings united in a biological unit are thereby united in a "personal reality" which has among its functions the functions of the biological unit. FROM (11)

30. FINNIS, L. REV., *supra* note 2, at 1066; FINNIS, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 28-29 (first half of what Perry refers to as Paragraph 6 unless hereinafter noted).

31. Grisez uses the term "organic unit." GRISEZ, *supra* note 5, at 570.

(13) So human beings united in a biological unit which has the function of human reproduction are thereby united in a "personal reality" which has among its functions the function of reproduction. FROM (12)

(14) The functions of personal realities, realities constituted by human persons, are fulfilled in distinctively human ways: ways that engage their reason, will and social capacities. TACIT ASSUMPTION

(15) So the functions of personal realities with the function of reproduction are fulfilled in distinctively human ways: ways that engage their reason, will and social capacities. FROM (2) AND (14)

(16) Procreation fulfills the function of reproduction in distinctively human ways if and only if accompanied by friendship. TACIT ASSUMPTION

(17) So parenthood and friendship together fulfill the function of human reproduction. FROM (16)

(18) The fulfillment of a biological function can be actualized and experienced by normal units of the sort which have that function, when they act in the way such units typically or naturally act to perform that function. TACIT ASSUMPTION

(19) So the fulfillment of the function of human reproduction can be actualized and experienced by normal personal units of the sort which have the function of human reproduction, when they act in the way such units typically or naturally act to perform that function. FROM (6) AND (18)

(20) So parenthood and friendship can be actualized and experienced by normal personal units of the sort which have the function of human reproduction, when they act in the way such units typically or naturally act to perform that function. FROM (17) AND (19)

(21) So parenthood and friendship can be actualized and experienced by normal personal units of the sort which have the function of human reproduction, when their reproductive organs are voluntarily and uncontraceptively united. FROM (4) AND (20)

(22) So spouses' "sexual union therefore can *actualize* and allow them to *experience*" parenthood and friendship. FROM (10), (13) AND (21)

(23) Marriage is "the real giving to each other of two people in biological, affective and volitional union in mutual commitment which is open-ended and exclusive."³² EXPLICIT ASSUMPTION

(24) Two people really give to each other in biological union only if they are "really unite[d] biologically" by their sexual union. TACIT ASSUMPTION

(25) So being married entails that the two people are "really unite[d] biologically" by their sexual union. FROM (23) AND (24)

(26) Two people are "really unite[d] biologically" by their sexual union only if they thereby constitute a biological unit of the sort which has the function of reproduction. TACIT ASSUMPTION

(27) So being married entails that a husband and wife constitute by their sexual union a biological unit of the sort which has the function of reproduction. FROM (10) AND (26)

(28) So being married entails that a husband and wife constitute by their sexual union a personal unit of the sort which has the function of reproduction. FROM (13) AND (27)

(29) If being married entails that a husband and wife are continuously or episodically a unit of some sort, then the end or good of marriage includes the end or good of units of that sort.³³ TACIT ASSUMPTION

(30) So the end or good of marriage includes the end or good of units which have the function of reproduction. FROM (28) AND (29)

(31) The end or good of some unit of the sort which has a given function includes actualizing and experiencing the fulfillment of that function. TACIT ASSUMPTION

(32) So the end or good of a personal unit of the sort which has the function of reproduction includes actualizing and experiencing the fulfillment of the function of reproduction. FROM (2) AND (31)

(33) So the end or good of a personal unit of the sort which has the function of reproduction includes actualizing and experiencing parenthood and friendship. FROM (17) AND (32)

(34) So the ends or goods of marriage include actualizing and experiencing parenthood and friendship. FROM (30) AND (33)

32. FINNIS, L. REV., *supra* note 2, at 1067; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 29-30.

33. Cf. FINNIS, L. REV., *supra* note 2, at 1067; Finnis, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 30. (remark about "actualizing the all-level unity of marriage").

(35) Actualizing and experiencing the fulfillment of the function of a unit is or is part of the unit's intrinsic fulfillment or perfection. TACIT ASSUMPTION

(36) So actualizing and experiencing the fulfillment of the function of human reproduction is part of the intrinsic fulfillment or perfection of the personal unit whose function is human reproduction. FROM (35)

(37) So actualizing and experiencing "parenthood and [friendship] are [or are parts of] the intrinsic fulfillment"³⁴ or perfection of the personal unit whose function is human reproduction. FROM (17) AND (36)

(38) If being married entails that a husband and wife episodically constitute a personal unit of the sort which has the function of human reproduction, then the intrinsic good of that unit is an intrinsic good of marriage. TACIT ASSUMPTION

(39) So the intrinsic fulfillment or perfection of the personal unit the function of which is human reproduction is an intrinsic fulfillment or perfection of marriage. FROM (28) AND (38)

(40) So actualizing and experiencing parenthood and friendship are or are parts of the intrinsic fulfillment or perfection of marriage. FROM (37) AND (39)

(41) The goods of marriage are common goods actualized and experienced by husband and wife. FROM (16) AND (34)

(42) So parenthood and friendship are among the common ends or common goods actualized and experienced by husband and wife. FROM (34) AND (41)

(43) The fulfillment of human reproduction is a good actualized and experienced by intelligent creatures. FROM (15)

(44) So parenthood and friendship are an intelligible good. FROM (17) AND (43)

(45) So the actualization and experience of parenthood and friendship are a common and intelligible good which is an intrinsic fulfillment or perfection of marriage. FROM (40), (42) AND (44)

(46) Spouses' "sexual union therefore can *actualize* and allow them to *experience* their *real common good* — their marriage with the two goods, parenthood and friendship which (leaving aside the order of grace) are the parts of its wholeness as an intelligible common good." FROM (22) AND (45)

34. FINNIS, L. REV., *supra* note 2, at 1065; FINNIS, J.L. ETHICS & PUB. POL'Y, *supra* note 2, at 27.