

legalized same-sex marriage in Hawaii, the United States Congress enacted the 1996 Defense of Marriage Act. This act specifies that no state is required to recognize the same-sex marriages of another state and also declares that, for purposes of federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife." In a subsequent development, Vermont became the first American state to make "civil unions" available to same-sex couples. This result was achieved through legislative action that emerged in response to a 1999 Vermont Supreme Court ruling. The basic idea of civil unions is that same-sex couples can be granted access to the many legal benefits of marriage without being granted access to "marriage" itself. Only in 2004 did an American state formally legalize same-sex marriage; that state was Massachusetts.

At issue in the case of *Goodridge v. Department of Public Health* (2003) was whether the Massachusetts ban on same-sex marriage was consistent with the Massachusetts Constitution. In a four-to-three decision, the Massachusetts Supreme Judicial Court ruled that the ban was unconstitutional because it violated both the *equal protection* and *due process* provisions of the Massachusetts Constitution. As a result of this ruling, same-sex marriage became legally available in Massachusetts in March 2004. A substantial excerpt from the majority opinion of Chief Justice Margaret H. Marshall is reprinted in this chapter, as is the dissenting opinion of Justice Martha B. Sosman.

At present, same-sex marriage has been legalized in the Netherlands, Belgium, Spain, and Canada. In the United States, Connecticut has followed the lead of Vermont in recognizing civil unions for same-sex couples, but no other state has joined Massachusetts in recognizing same-sex marriages. Further, at least seventeen states to date have amended their constitutions to incorporate bans on same-sex marriage, and debate is expected to continue about the proposed Federal Marriage Amendment, calculated to ban same-sex marriage throughout the country.

Thomas A. Mappes

Morality and Human Sexuality

Vincent C. Punzo

Punzo begins by arguing that there is a morally significant difference between sexual intercourse and other types of human activity. Then, emphasizing the historical aspect of the human self, he constructs an argument against premarital sexual intercourse. Marriage, in his view, is constituted by the mutual and total commitment of a man and a woman. Apart from this framework of commitment,

he argues, sexual unions are "morally deficient because they lack existential integrity." Although Punzo is essentially a proponent of conventional sexual morality, he understands marriage in such a way that he does not condemn "preceremonial" intercourse. He insists that the commitment constitutive of marriage can exist prior to and apart from any legal or ceremonial formalities.

If one sees man's moral task as being simply that of not harming anyone, that is if one sees this task in purely negative terms, he will certainly not accept the argument to be presented in the following section. However, if one accepts the notion of the morality of aspiration, if one accepts the view that man's moral task involves the positive attempt to live up to what is best in man, to give reality to what he sees to be the perfection of himself as a human subject, the argument may be acceptable.

SEXUALITY AND THE HUMAN SUBJECT

[Prior discussion] has left us with the question as to whether sexual intercourse is a type of activity that is similar to choosing a dinner from a menu. This question is of utmost significance in that one's view of the morality of premarital intercourse seems to depend on the significance that one gives to the sexual encounter in human life. Those such as [John] Wilson and [Eustace] Chesser who see nothing immoral about the premarital character of sexual intercourse seem to see sexual intercourse as being no different from myriad of other purely aesthetic matters. This point is seen in Chesser's questioning of the reason for demanding permanence in the relationship of sexual partners when we do not see such permanence as being important to other human relationships.¹ It is also seen in his asking why we raise a moral issue about premarital coition when two people may engage in it, with the resulting social and psychological consequences being no different than if they had gone to a movie.²

Wilson most explicitly makes a case for the view that sexual intercourse does not differ significantly from other human activities. He holds that people think that there is a logical difference between the question "Will you engage in sexual intercourse with me?" and the question, "Will you play tennis with me?" only because they are influenced by the acquisitive character of contemporary society.³ Granted that the two questions may be identical from the purely formal perspective of logic, the ethicist must move beyond this perspective to a consideration of their content. Men and women find themselves involved in many different relationships: for example, as buyer-seller, employer-employee, teacher-student, lawyer-client, and partners or competitors in certain games such as tennis or bridge. Is there any morally significant difference between these relationships and sexual intercourse? We cannot examine all the possible relationships into which a man and woman can enter, but we will consider the employer-employee relationship in order to get some perspective on the distinctive character of the sexual relationship.

A man pays a woman to act as his secretary. What rights does he have over her in such a situation? The woman agrees to work a certain number of hours during the day taking dictation, typing letters, filing reports, arranging appointments and

flight schedules, and greeting clients and competitors. In short, we can say that the man has rights to certain of the woman's services or skills. The use of the word "services" may lead some to conclude that this relationship is not significantly different from the relationship between a prostitute and her client in that the prostitute also offers her "services."

It is true that we sometimes speak euphemistically of a prostitute offering her services to a man for a sum of money, but if we are serious about our quest for the difference between the sexual encounter and other types of human relationships, it is necessary to drop euphemisms and face the issue directly. The man and woman who engage in sexual intercourse are giving their bodies, the most intimate physical expression of themselves, over to the other. Unlike the man who plays tennis with a woman, the man who has sexual relations with her has literally entered her. A man and woman engaging in sexual intercourse have united themselves as intimately and as totally as is physically possible for two human beings. Their union is not simply a union of organs, but is as intimate and as total a physical union of two selves as is possible of achievement. Granted the character of this union, it seems strange to imply that there is no need for a man and a woman to give any more thought to the question of whether they should engage in sexual intercourse than to the question of whether they should play tennis.

In opposition to Wilson, I think that it is the acquisitive character of our society that has blinded us to the distinction between the two activities. Wilson's and Chesser's positions seem to imply that exactly the same moral considerations ought to apply to a situation in which a housewife is bartering with a butcher for a few pounds of pork chops and the situation in which two human beings are deciding whether sexual intercourse ought to be an ingredient of their relationship. So long as the butcher does not put his thumb on the scale in the weighing process, so long as he is truthful in stating that the meat is actually pork, so long as the woman pays the proper amount with the proper currency, the trade is perfectly moral. Reflecting on sexual intercourse from the same sort of economic perspective, one can say that so long as the sexual partners are truthful in reporting their freedom from contagious venereal diseases and so long as they are truthful in reporting that they are interested in the activity for the mere pleasure of it or to try out their sexual techniques, there is nothing immoral about such activity. That in the one case pork chops are being exchanged for money whereas in the other the decision concerns the most complete and intimate merging of one's self with another makes no difference to the moral evaluation of the respective cases.

It is not surprising that such a reductionistic outlook should pervade our thinking on sexual matters, since in our society sexuality is used to sell everything from shave cream to underarm deodorants, to soap, to mouthwash, to cigarettes, and to automobiles. Sexuality has come to play so large a role in our commercial lives that it is not surprising that our sexuality should itself come to be treated as a commodity governed by the same moral rules that govern any other economic transaction.

Once sexuality is taken out of this commercial framework, once the character of the sexual encounter is faced directly and squarely, we will come to see that Doctor Mary Calderone has brought out the type of questions that ought to be asked by those contemplating the introduction of sexual intercourse into their

relationships: "How many times, and how casually, are you willing to invest a portion of your total self, and to be the custodian of a like investment from the other person, without the sureness of knowing that these investments are being made for keeps?"⁴ These questions come out of the recognition that the sexual encounter is a definitive experience, one in which the physical intimacy and merging involves also a merging of the non-physical dimensions of the partners. With these questions, man moves beyond the negative concern with avoiding his or another's physical and psychological harm to the question of what he is making of himself and what he is contributing to the existential formation of his partner as a human subject.

If we are to make a start toward responding to Calderone's questions we must cease talking about human selfhood in abstraction. The human self is an historical as well as a physical being. He is a being who is capable of making at least a portion of his past an object of his consciousness and thus is able to make this past play a conscious role in his present and in his looking toward the future. He is also a being who looks to the future, who faces tomorrow with plans, ideals, hopes, and fears. The very being of a human self involves his past and his movement toward the future. Moreover, the human self is not completely shut off in his own past and future. Men and women are capable of consciously and purposively uniting themselves in a common career and venture. They can commit themselves to sharing the future with another, sharing it in all its aspects—in its fortunes and misfortunes, in its times of happiness and times of tragedy. Within the lives of those who have so committed themselves to each other, sexual intercourse is a way of asserting and confirming the fullness and totality of their mutual commitment.

Unlike those who have made such a commitment and who come together in the sexual act in the fullness of their selfhood, those who engage in premarital sexual unions and who have made no such commitment act as though they can amputate their bodily existence and the most intimate physical expression of their selfhood from their existence as historical beings. Granting that there may be honesty on the verbal level in that two people engaging in premarital intercourse openly state that they are interested only in the pleasure of the activity, the fact remains that such unions are morally deficient because they lack existential integrity in that there is a total merging and union on a physical level, on the one hand, and a conscious decision not to unite any other dimension of themselves, on the other hand. Their sexual union thus involves a "depersonalization" of their bodily existence, an attempt to cut off the most intimate physical expression of their respective selves from their very selfhood. The mutual agreement of premarital sex partners is an agreement to merge with the other not as a self, but as a body which one takes unto oneself, which one possesses in a most intimate and total fashion for one's own pleasure or designs, allowing the other to treat oneself in the same way. It may be true that no physical or psychological harm may result from such unions, but such partners have failed to existentially incorporate human sexuality, which is at the very least the most intimate physical expression of the human self, into the character of this selfhood.

In so far as premarital sexual unions separate the intimate and total physical union that is sexual intercourse from any commitment to the self in his historicity,

human sexuality, and consequently the human body, have been fashioned into external things or objects to be handed over totally to someone else, whenever one feels that he can get possession of another's body, which he can use for his own purposes.⁵ The human body has thus been treated no differently from the pork chops spoken of previously or from any other object or commodity, which human beings exchange and haggle over in their day-to-day transactions. One hesitates to use the word that might be used to capture the moral value that has been sacrificed in premarital unions because in our day the word has taken on a completely negative meaning at best, and, at worst, it has become a word used by "sophisticates" to mock or deride certain attitudes toward human sexuality. However, because the word "chastity" has been thus abused is no reason to leave it in the hands of those who have misrepresented the human value to which it gives expression.

The chaste person has often been described as one intent on denying his sexuality. The value of chastity as conceived in this section is in direct opposition to this description. It is the unchaste person who is separating himself from his sexuality, who is willing to exchange human bodies as one would exchange money for tickets to a baseball game—honestly and with no commitment of self to self. Against this alienation of one's sexuality from one's self, an alienation that makes one's sexuality an object, which is to be given to another in exchange for his objectified sexuality, chastity affirms the integrity of the self in his bodily and historical existence. The sexuality of man is seen as an integral part of his subjectivity. Hence, the chaste man rejects depersonalized sexual relations as a reduction of man in his most intimate physical being to the status of an object or pure instrument for another. He asserts that man is a subject and end in himself, not in some trans-temporal, nonphysical world, but in the historical-physical world in which he carries on his moral task and where he finds his fellow man. He will not freely make of himself in his bodily existence a thing to be handed over to another's possession, nor will he ask that another treat his own body in this way. The total physical intimacy of sexual intercourse will be an expression of total union with the other self on all levels of their beings. Seen from this perspective, chastity is one aspect of man's attempt to attain existential integrity, to accept his body as a dimension of his total personality.

In concluding this section, it should be noted that I have tried to make a case against the morality of premarital sexual intercourse even in those cases in which the partners are completely honest with each other. There is reason to question whether the complete honesty, to which those who see nothing immoral in such unions refer, is as a matter of fact actually found very often among premarital sex partners. We may well have been dealing with textbook cases which present these unions in their best light. One may be pardoned for wondering whether sexual intercourse often occurs under the following conditions: "Hello, my name is Josiah. I am interested in having a sexual experience with you. I can assure you that I am good at it and that I have no communicable disease. If it sounds good to you and if you have taken the proper contraceptive precautions, we might have a go at it. Of course, I want to make it clear to you that I am interested only in the sexual experience and that I have no intention of making any long-range commitment to you."

If those, who defend the morality of premarital sexual unions so long as they are honestly entered into, think that I have misrepresented what they mean by honesty, then they must specify what they mean by an honest premarital union. . . .

MARRIAGE AS A TOTAL HUMAN COMMITMENT

The preceding argument against the morality of premarital sexual unions was not based on the view that the moral character of marriage rests on a legal certificate or on a legal or religious ceremony. The argument was not directed against "preceremonial" intercourse, but against premarital intercourse. Morally speaking, a man and woman are married when they make the mutual and total commitment to share the problems and prospects of their historical existence in the world. . . .

. . . A total commitment to another means a commitment to him in his historical existence. Such a commitment is not simply a matter of words or of feelings, however strong. It involves a full existential sharing on the part of two beings of the burdens, opportunities, and challenges of their historical existence.

Granted the importance that the character of their commitment to each other plays in determining the moral quality of a couple's sexual encounter, it is clear that there may be nothing immoral in the behavior of couples who engage in sexual intercourse before participating in the marriage ceremony. For example, it is foolish to say that two people who are totally committed to each other and who have made all the arrangements to live this commitment are immoral if they engage in sexual intercourse the night before the marriage ceremony. Admittedly this position can be abused by those who have made a purely verbal commitment, a commitment, which will be carried out in some vague and ill-defined future. At some time or other, they will unite their two lives totally by setting up house together and by actually undertaking the task of meeting the economic, social, legal, medical responsibilities that are involved in living this commitment. Apart from the reference to a vague and amorphous future time when they will share the full responsibility for each other, their commitment presently realizes itself in going to dances, sharing a box of popcorn at Saturday night movies, and sharing their bodies whenever they can do so without taking too great a risk of having the girl become pregnant.

Having acknowledged that the position advanced in this section can be abused by those who would use the word "commitment" to rationalize what is an interest only in the body of the other person, it must be pointed out that neither the ethicist nor any other human being can tell two people whether they actually have made the commitment that is marriage or are mistaking a "warm glow" for such a commitment. There comes a time when this issue falls out of the area of moral philosophy and into the area of practical wisdom. . . .

The characterization of marriage as a total commitment between two human beings may lead some to conclude that the marriage ceremony is a wholly superfluous affair. It must be admitted that people may be morally married without having engaged in a marriage ceremony. However, to conclude from this point that the ceremony is totally meaningless is to lose sight of the social character of human beings. The couple contemplating marriage do not exist in a vacuum, although there may be times when they think they do. Their existences reach out beyond their

to include other human beings. By making their commitment a matter of public record, by solemnly expressing it before the law and in the presence of their respective families and friends and, if they are religious people, in the presence of and one of his ministers, they sink the roots of their commitment more deeply and extensively in the world in which they live, thus taking steps to provide for the growth of their commitment to each other. The public expression of this commitment makes it more fully and more explicitly a part of a couple's lives and the world in which they live. . . .

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Ernest Chesser, *Unmarried Love* (New York: Pocket Books, 1965), p. 29.

Id., pp. 35-36, see also p. 66.

John Wilson, *Logic and Sexual Morality* (Baltimore, Md.: Penguin Books, 1965). See footnote 1, p. 67.

Henry Steichen Calderone, "The Case for Chastity," *Sex in America*, ed. by Henry Anatole Swinwald (New York: Bantam Books, 1964), p. 147.

The psychoanalyst Rollo May makes an excellent point in calling attention to the tendency in contemporary society to exploit the human body as if it were only a machine. Rollo May, "The New Puritanism," *Sex in America*, pp. 161-164.

QUESTIONS

Should the idea of existential integrity be developed in such a way as to provide a justification for the sex with love approach instead of conventional sexual morality?

Ernest Chesser says that no one is capable of telling "two people whether they actually have made a commitment that is marriage or are mistaking a 'warm glow' for such a commitment."

What factors should a couple consider in attempting to resolve this question?

Sexual Morality and the Concept of Using Another Person

Thomas A. Mappes

Adopting a liberal approach to sexual morality, Mappes attempts to determine the conditions under which someone would be guilty of *sexually* using another person. On his view, the morally significant sense of "using another person" is best understood in reference to the notion of voluntary informed consent. Accordingly, the central thesis is that one person (A) is guilty of sexually using another person (B) and only if A intentionally acts in a way that violates the requirement that sexual interaction with A be based on B's voluntary informed consent."