HOMOSEXUALITY AND THE CONSTITUTIONAL RIGHT TO PRIVACY†

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I would like to begin our panel by making a few background remarks on the nature of the setback in *Doe v. Commonwealth's Attorney*,[1] putting this case in the larger perspective of the constitutional right to privacy and the general perspective of the agenda of political reforms that have been associated since the Enlightenment[2] with liberalism.[3]

Litigation centering on the unconstitutionality of sodomy and unnatural acts statutes has focussed on a number of alternative arguments,[4] including (1) the establishment of religion clause of the first amendment, (2) the cruel and unusual punishment prohibition of the eighth amendment, (3) due process vagueness under the fifth and fourteenth amendments and *ex post facto* clauses of the U.S. Constitution, and (4) the constitutional right to privacy. On the merits, the strongest of these constitutional arguments appears to be the establishment of religion argument and the constitutional right to privacy. I say this not because I regard the cruel and unusual punishment and vagueness arguments as frivolous, but because they do not appear to afford the strongest possible constitutional arguments against the criminalization of homosexual relations between or among consenting adults. As regards cruel and unusual punishment, the suggestion was early made that, on the authority of *Robinson v. California*[5] and *Powell v. Texas*,[6] the criminalization of homosexuality was unconstitutional for the same reason that criminalizing having a common cold

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† The themes of this paper have been developed by the author at greater length in Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977) and Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979). *See also* D. RICHARDS, THE MORAL CRITICISM OF LAW ch. III (1977); Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979).

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1. 425 U.S. 901 (1976), *aff'g without opinion* 403 F. Supp. 1199 (E.D. Va. 1975) [three-judge court].

2. D. DIDEROT, *D'Alembert's Dream & Sequel to the Conversation*, in RAMEAU'S NEPHEW AND OTHER WORKS 166-75 (J. Barzun & R. H. Bowen trans. 1956).

3. *See generally*, J.S. MILL, ON LIBERTY (1871); Richards, *Human Rights and Moral Ideals: An Essay in the Moral Theory of Liberalism*, SOC. THEORY AND PRAC. (forthcoming).

4. *See generally*, W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION (1973); Note, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553 (1976).

5. 370 U.S. 660 (1962).

6. 392 U.S. 514 (1968).

would be unconstitutional, namely, on the ground that people are not morally culpable for involuntary states, including diseases, which they happen to suffer. This argument has understandably not been pursued because it makes a false analogy between homosexuality and disease which is indefensible in principle and which, if accepted, opens homosexuals to alternative forms of civil commitment (as for insanity, or having a contagious disease) which may be more deplorably violative of due process rights than criminal penalties which, at least, are subject to due process guarantees of proof and proportionality limits as to level of punishment. Other cruel and unusual punishment arguments may have validity to the extent, by comparison of levels of punishment with other forms of crime, they show levels of punishment for homosexuality to be constitutionally disproportionate,[7] but these arguments would still allow some level of punishment for homosexuality, which is objectionable. Finally, vagueness arguments may be usefully employed against some forms of "unnatural acts" statutes which do not have any clear background case law defining the scope of the vague concept of unnatural acts, but they may not be employed against statutes, like that which we have in New York State, which quite precisely define the forbidden forms of sexual conduct, indeed describe the conduct in quite lascivious detail.[8]

The arguments which appear strong and convincing on the merits against the constitutionality of anti-homosexuality laws are establishment of religion and privacy. The argument, premised on the first amendment prohibition of the establishment of religion, argues that historically the prohibitions on homosexuality rest on purely religious premises which cannot be justified by secular arguments about empirical effects on substantive human interests for there are no such effects. Indeed, to the contrary, the criminal prohibitions of homosexuality frustrate deep and substantial human interests for no good secular reason. Louis Henkin of Columbia Law School, for example, who is himself a devout and scholarly Jew and student of Jewish law, has argued that, whatever one's religious views about homosexuality, one is, as a civil libertarian committed to the values of the first amendment, debarred from allowing religious views alone to be the basis for criminal penalties against homosexuals,[9] for the same reason that in *Epperson v. Arkansas*[10] the Supreme Court forbade Bible Belt Baptists from forbidding the teaching of Darwin in Tennessee schools, *viz.*, that the Baptist theory of Creation and rejection of Darwinism was a solely religious view which could not constitutionally be enforced on citizens at large. I believe the anti-establishment argument to be quite powerful, but it has not been generally accepted either because people argue that it is not clear that the moral prohibition of homosexuality is completely religiously based[11] or because they refuse to accept that religious groups are constitutionally debarred from urging

7. *See* Note, *supra* note 4, at 567-72.

8. *See* N.Y. PENAL LAW §§ 130.00(2), 130.38 (McKinney 1975). *But see* Editor's Note, *infra* at 316.

9. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

10. 393 U.S. 97 (1968).

11. For example, Plato's arguments about the unnaturalness of homosexuality are not specifically religious. *See* Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1293-94 (1977).

their moral views through the democratic political process.[12] In order to rebut these views, we need a sounder and more profound historical analysis of the origins of hostility to homosexuality and a deeper moral theory of the values that may permissibly be enforced through the criminal law compatibly with due process requirements of rationality.[13]

The center of litigation relating to the constitutionality of anti-sodomy statutes has been the constitutional right to privacy. The right to privacy, as an independent constitutional right, was inferred in 1965 in *Griswold v. Connecticut*[14] in which Justice Douglas, speaking for the Court, inferred a constitutional right to privacy of a married couple to use contraceptives from the "penumbra" of the first, third, fourth, fifth, and ninth amendments to the Constitution. In later cases, the constitutional right to privacy was invoked to invalidate the prohibition of the sale and use of contraceptives by unmarried couples,[15] the use of pornography in the privacy of one's home,[16] and, most recently, the right of women to have an abortion during the first and second trimesters of pregnancy.[17] These cases rest, I believe, on a general repudiation, as a defensible model of natural or proper sexual function, of the procreational model of sexual conduct, according to which sexual conduct must be conducted with the intention and probability of procreation. Since this model of sexual conduct is no longer defensible, the associated requirements that sex be conducted procreationally were regarded as indefensible since they rested on no good moral argument based on the legitimate interests of the person or any sound paternalistic argument to the effect that so conducting one's sexual life was necessarily in the agent's interests. Once such moral and paternalistic arguments were regarded as suspect, new areas of personal autonomy and life choice were opened to persons, including the right to determine whether or to what extent procreation and children will play a role in one's life plan. The right to an abortion, for example, secures to women the unqualified right to determine the basic choice of identity and orientation, including the right to undertake procreation and child rearing as a free and rational choice—unencumbered by the oppressive stereotypes of women's proper role and nature which distort and disfigure women's conception of their autonomous capacities to determine with dignity the nature of their own life in accord with independent, informed, and free judgment.

In *Doe v. Commonwealth's Attorney*,[18] the Supreme Court indefensibly and incoherently refused to extend the arguments for the constitutional right to

12. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 928 (1978).

13. *See* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979). *See also* Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979).

14. 381 U.S. 479 (1965).

15. Eisenstadt v. Baird, 405 U.S. 438 (1972).

16. Stanley v. Georgia, 364 U.S. 557 (1969).

17. Roe v. Wade, 410 U.S. 113 (1973).

18. 425 U.S. 901 (1976), *aff'g without opinion* 403 F. Supp. 1199 (E.D. Va. 1975) [three-judge court].

privacy to consensual adult homosexuality. In that case, the Supreme Court summarily affirmed a lower court opinion which excluded homosexuality from the right to privacy on a false reading of the right to privacy cases as extending only to married couples, when both the contraception and abortion decisions extended the right to unmarried people, and erroneously allowed the state to enforce avowedly Biblical prohibitions against acts not clearly immoral in themselves on the basis of possible immoral consequences, invoking, in a remarkable *non sequitur*, a case of heterosexual sodomy involving a married couple, a third party, and the couple's children.[19] The shabby reasoning of the lower court, affirmed in *Doe*, illustrates the irrational and unprincipled extremes to which courts are driven in order to defend what is, in fact, indefensible—the failure to extend the constitutional right to privacy to consensual adult homosexual relations.

There is no principled way to defend the earlier right to privacy cases and not extend the right to homosexuality, other than the circular and question-begging assumption that homosexuality, as such, is intrinsically immoral and unnatural, when, in fact, it is a form of non-procreational sexual conduct, not in principle different from other forms of non-procreational sex, which must be liberated from the indefensible procreational model of sexual conduct. The difference between homosexuality and contraception, pornography in the home, and abortion is not constitutional or moral principle, but *popularity*: namely, that the non-procreational model in the other areas is supported by substantial popular sentiment, whereas homosexuality is still the settled object of widespread social hostility and opprobrium. It is the supreme paradox that the constitutional right to privacy has been applied to areas where there is either majoritarian consensus (contraception) or at least substantial popular support (abortion) and not applied to the protection of an oppressed minority, the settled object of unjustified social hate, that is paramountly entitled to the protection of the countermajoritarian rights of the constitutional design.

If a decision like *Doe* cannot be justified, it must be fought tooth and nail. It must be limited, to the extent possible, to its facts. It must not be allowed to affect other federal constitutional arguments (for example, employment and housing, [anti-discrimination] arguments that may still be available). And, of course, it must not be allowed to stop litigators from law that may be available. Movements in the state courts can, in time, influence the direction of Supreme Court adjudication (see, for example, the period from *Wolf*[20] to *Mapp*[21]), and we should press these litigations accordingly, as well as whatever legislative lobbying may be possible.

We should, however, keep our general perspective on a set-back like *Doe*, a perspective which may take two desirable forms. First, let us remind ourselves that the fight for gay rights is, historically, part of the larger political objective and agenda of liberalism since the Enlightenment:[22] the view that per-

19. *See* Louisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976) (*en banc*), *cert. denied sub nom.* Louisi v. Zahradnick, 429 U.S. 977 (1976).

20. Wolf v. Colorado, 338 U.S. 25 (1949).

21. Mapp v. Ohio, 367 U.S. 25 (1961).

22. *See* note 3 *supra*.

sons, as such, are entitled to define their own systems of ends as free and rational beings, and that legitimate state power must be exercised in conformity with principles that respect the fundamental right of persons to equal concern and respect for their dignity and personhood. This political theory, expressed in Rousseau[23] and Kant,[24] and brilliantly defended in John Stuart Mill's *On Liberty*,[25] seeks to so guarantee human rights that people develop the dignified self-respect to choose their own lives on terms fair to all. The constitutional right to privacy rests upon and expresses this point of view, which is fundamental to the whole idea of liberalism and constitutional democracy, and which has, accordingly, been developed by the Supreme Court as part of its moral task to explicate the political theory of constitutionalism.[26] The argument to extend this right to consensual adult homosexuality, accordingly, must be seen as part of the implementation of the deepest values of our Constitution. In so doing, we must as lawyers be prepared to bring to bear the best contemporary knowledge of anthropology, sexology, psychoanalysis, sociology, etc., which disclose the nature of homosexuality as one natural expression of sexual propensities which may be pursued in a life of decency, self-respect, personal integrity, and social service. Our task, accordingly, is made difficult by the need to explain and do moral archeology in analyzing the fallacies in the traditional condemnation of homosexuality and the reasons why, accordingly, the liberal right of equal concern and respect must be extended to homosexuality.

Second, we in the United States should remind ourselves of the course of decriminalization of homosexuality in other comparable countries, in particular, Great Britain, which shares our legal heritage. In Great Britain, the contemporary battle to decriminalize homosexuality and prostitution took the form of a debate over the decriminalization recommendations of the Wolfenden Report. These recommendations were argued in England in terms of the political theory of liberalism. H.L.A. Hart, England's best legal philosopher, defended that theory, in terms reminiscent of Mill,[27] against Lord Devlin,[28] who was roughly the equivalent in England, both in judicial power and conservatism, of our Chief Justice Burger. We in the United States must, I believe, be prepared to fight the battle at a similar level of intellectual depth combined with political wisdom and the intransigence of rights.

At bottom, the argument against the anti-sodomy laws is an argument for our rights. The only way that such argument can succeed, as it did in England with the 1967 repeal,[29] is by a coalition of articulate assertions of rights by the people who suffer the injustice, with others (for example, heterosexuals like

23. *See* J. ROUSSEAU, THE SOCIAL CONTRACT, in THE SOCIAL CONTRACT AND DISCOURSES (G. Cole trans. 1930).

24. *See* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans. 1959); I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (J. Ladd trans. 1965); I. KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE (J. Ellington trans. 1964).

25. *See* J.S. MILL, ON LIBERTY (1871).

26. *See* note 4 *supra*.

27. *See* H.L.A. Hart, *Immorality and Treason*, 62 LISTENER 162-63 (July 30, 1959); H.L.A. HART, LAW, LIBERTY AND MORALITY (1962).

28. P. DEVLIN, THE ENFORCEMENT OF MORALS (1962).

29. Sexual Offences Act, ch. 60 (1967).

Hart) who share a common political theory which they come to see as crucially implicating the rights in question. The great enemy of homosexual rights is, I believe, the idea of homosexuality as *crimen innominandum* (the unspeakable crime, in St. Thomas Aquinas,[30] and in Blackstone[31]) — the idea that homosexuality is so satanic that we cannot speak of it. The conspiracy of silence about homosexuality, current even among decent and humane people, reflects this underlying tradition, which disables homosexuals and heterosexuals from speaking or thinking articulately and without stereotypes about the continuities and convergences between these disparate styles of sexuality. We must learn to speak and think about these matters with precision, with respect for evidence, with a sense of the reality of feeling which mark both homosexuality and heterosexuality as basic variants on the great theme of human love. But, we must speak of these things forthrightly and publicly, not in order to display in public the recesses of our private selves which should remain always the stuff of our private lives, but in order to make decently possible for homosexuals what heterosexuals have always had and of which they have difficulty in imagining the absence, namely, the realistic possibility of a personal life of dignity and self-respect without fear of irrational prejudice. Part of the organon of such self-respect for homosexuals is, I believe, the honest and courageous assertion of one's rights, for only by taking such risks do we achieve a secure sense of what rights mean: the capacity to become independent, to be oneself, and to realize one's dignity in making a life of work and love that one can call one's own. Accordingly, the battle for rights, as always, must paramountly be fought by the oppressed, whose liberation is the growth of personhood which the assertion of rights facilitates. With this will come gains as well for heterosexuals. The battle for gay rights must enable us to come to question self-critically the degree to which in our culture love is illegitimately defined as a necessary truth of gender difference. If we can free ourselves from this dogma, we may unlock the prisons of gender which shackle people of the same gender to competition and hostility, and parties of opposite gender to love. Both responses are, I believe, impoverishments of the range and complexity of human emotional response and need, which are functions not of gender but of the person. The battle for gay rights, accordingly, is not only the battle of liberalism but the battle of all persons, men and women, heterosexual and homosexual, to be treated as persons, to be guaranteed the dignified conditions of personal integrity which, as one claims one's rights, one extends on fair terms to all.

EDITOR'S NOTE: *As this article went to press, the New York Supreme Court, Appellate Division, in* State v. Onofre, N.Y.L.J., Jan. 29, 1980, at 4, col. 1 (App. Div. 4th Dep't. 1980), *reversed the conviction of a man charged with consensual sodomy under* N.Y. PENAL LAW § 130.38 (McKinney 1975). *Citing Professor Richards, a unanimous five-judge panel declared the section unconstitutional "insofar as it prohibits voluntary sexual conduct between consenting adults in private."*

30. T. AQUINAS, SUMMA THEOLOGICA II-II, Q CLIV, I, II, and XII.
31. 4 W. BLACKSTONE, COMMENTARIES *215.