

# CONSTITUTIONAL PRIVACY AND HOMOSEXUAL LOVE

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This article addresses the constitutional right to privacy and its application to homosexual love. The argument presented is discussed at much greater length in a forthcoming book, *Toleration and the Constitution*.<sup>1</sup> In the book, I argue that the principle of toleration, embodied in the religion clauses of the first amendment, underlies both the constitutional guarantees of freedom of speech and press in the first amendment and the guarantees of freedom of action associated with the constitutional right to privacy. In this article, I excerpt and summarize a fragment of this larger analytical structure. I will first examine why the constitutional right to privacy is a natural and principled elaboration of our constitutional traditions, and then discuss why it properly applies to consensual homosexuality.<sup>2</sup>

## I

### THE CONSTITUTIONAL RIGHT TO PRIVACY

#### A. *Criticisms of the Constitutional Right to Privacy*

The constitutional right to privacy is probably the most widely criticized recent development in constitutional interpretation. Such criticisms include the following claims: that the right is improperly nontextual and thus noninterpretivist;<sup>3</sup> that it confuses constitutionally protected privacy interests with autonomy interests not protected by the Constitution; and that it confuses valid liberal political argument (properly effectuated through normal democratic processes) with constitutional arguments of principle which are not the proper subject of political bargaining and compromise.<sup>4</sup> None of these arguments is valid as a matter of sound constitutional history, interpretation, or political theory. They all fail to consider seriously the importance of toleration in our constitutional tradition.

First, the constitutional right to privacy is not a nontextual and thus

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1. D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

2. For a critical discussion of *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), see Richards, *Constitutional Legitimacy and Constitutional Privacy*, (forthcoming) 61 N.Y.U. L. REV. — (1986).

3. The argument is simply that the right is not rooted in the text and therefore cannot be regarded as a valid interpretation of the Constitution. For a general discussion of non-interpretivism see R. BERGER, *GOVERNMENT BY JUDICIARY* Ch. 15 (1977).

4. See generally J.H. ELY, *DEMOCRACY AND DISTRUST* (1980); J.H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

noninterpretivist right. The Founders were very concerned that a Bill of Rights would lead to the improper inference that other rights of the person were not constitutionally protected from state power. It was precisely this argument which justified the objections of Hamilton,<sup>5</sup> Wilson,<sup>6</sup> and Madison<sup>7</sup> to the inclusion of a Bill of Rights in the original Constitution. When Madison proposed a Bill of Rights in the first meetings of the House of Representatives, he included the ninth amendment<sup>8</sup> to guard against the potentially unjust consequences of an inference that the rights specified in the Bill of Rights were exclusive.<sup>9</sup> The protection of reserved rights of the people is also incorporated in the due process and privileges and immunities clauses of the fourteenth amendment.<sup>10</sup> Therefore, there is no question that both the text and history of the Constitution contemplate enforceable rights in addition to those enumerated. Even a major critic of the constitutional right to privacy, John Hart Ely, has acknowledged that he objects to the abortion decisions in particular not because of text or history, but because he holds a political theory (namely, utilitarianism) which objects in principle to such a right.<sup>11</sup> To object on this basis, in my judgment, is *not* to take seriously either constitutional text or history.

Second, critics claim that the constitutional right to privacy seeks to protect autonomy interests not otherwise protected by the Constitution. Ely argues that specific provisions of the fourth amendment, particularly the search and seizure prohibitions, do not protect privacy interests as extensive as those protected by the constitutional right to privacy.<sup>12</sup> The right to privacy does include rights not protected by the fourth amendment (abortions, for example, do not usually take place in the privacy of the home), but it is a mistake to think, therefore, that such rights are not constitutionally protected. Privacy, in the sense of information control as protected by the fourth amendment, con-

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5. See THE FEDERALIST No. 84 (A. Hamilton).

6. See 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 434-37, 453-55 (Washington, D.C. 1836).

7. See *id.*, at 620, 626-27.

8. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

9. See B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 167 (1977).

10. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Ely places particular weight on the privileges and immunities clause of the fourteenth amendment. He believes that this clause incorporates the idea of unenumerated fundamental rights from the privileges and immunities clause of Article IV. See J.H. ELY, DEMOCRACY AND DISTRUST 221 (1980). The Supreme Court, of course, has based the inference of unenumerated rights on the due process clause of the fourteenth amendment. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

11. For further discussion of Ely's arguments on this point, see *supra* note 1, at ch. 8; see also *id.* at chs. 1, 10.

12. See J.H. ELY, DEMOCRACY AND DISTRUST 221 n.4 (1980); cf. J.H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928-30 (1973).

stitutes only one aspect of the concept of privacy. Another aspect of privacy is a sphere of private life immune from state intrusion.<sup>13</sup> We must not dismiss protections of this latter sphere as not "privacy." Rather, we should ask the deeper normative questions of whether and to what extent our constitutional traditions—properly understood—protect such a sphere.

### B. *The Interpretive Basis of the Constitutional Right to Privacy*

In fact, many classical constitutional rights specify "zones of privacy"—areas of human life removed from state intrusion. For example, we regard religious belief, practice, and even action (when not violating compelling secular interests) as private matters. We do so not because we associate religion with informational privacy (many religious activities take place in public), but because of our commitment to the right of each person to determine and pursue her ultimate moral aims. Accordingly, religious belief and practice are considered to be outside the scope of the public interest and are protected from attempts to compromise the moral independence expressed in this arena.<sup>14</sup>

For similar reasons, we have traditionally extended constitutional protection to highly personal relationships and activities like marriage.<sup>15</sup> Such intimate personal relationships engender personal resources such as wholeness of emotion, intellect, and self-image. These resources are essential to a life guided by the self-determining moral powers of a free person.<sup>16</sup> Accordingly, the right to form voluntary relationships like marriage has been naturally understood as one of the fundamental rights reserved from state power by the ninth and fourteenth amendments, and is thus a natural interpretive basis of the constitutional right to privacy.<sup>17</sup>

13. See Richards, *Privacy*, in 19 COLLIER'S ENCYCLOPEDIA 393-95 (1986).

14. See RICHARDS, *supra* note 1, at 243-44.

15. There can be little doubt that the natural right to marriage has historically been assumed to be one such basic human right. For example, Hutcheson's widely read and studied works list, among other fundamental rights, "the natural right each one has to enter into the matrimonial relation with any one who consents." F. HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY* 299 (A.M. Kelly ed. 1968). Indeed, there is sufficient historical evidence to establish that this right was thought of as one, nonexclusive example of a more abstract right of voluntary association. Striking evidence of this belief appears in the lectures of John Witherspoon, a form of which James Madison heard and studied while a student at Princeton. Witherspoon, tracking Hutcheson's list of basic human rights, lists a "right to associate, if he so incline, with any person or persons, whom he can persuade (not force)—under this is contained the right to marriage." J. WITHERSPOON, *LECTURES ON MORAL PHILOSOPHY* 123 (J. Scott ed. 1982).

16. See RICHARDS, *supra* note 1, at 243.

17. See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Richards, *Sexual Autonomy and the Constitutional Right to Privacy*, 30 HASTINGS L.J. 957 (1979); Richards, *Unnatural Acts and the Constitutional Right to Privacy*, 45 FORDHAM L. REV. 1281 (1977).

C. *The Constitutional Burden that Must be Met to Justify Abridgement of the Right to Privacy*

As demonstrated above, the existence of the constitutional right to privacy is supported by both text and history. Criminal prohibitions restricting the right of constitutional privacy require a heavy burden of justification.<sup>18</sup> No matter how rooted in intimate family life and sexuality, there would be no constitutional objection to the application of neutral criminal statutes<sup>19</sup> to intrafamilial murders, wife or husband beatings, or child abuse. Nor should there be any objection to rape laws if applicable to married and unmarried sexual intimacies. In these cases, the constitutional burden of justification is met: countervailing rights of persons justify coercive interference into intimate relations.<sup>20</sup>

On the other hand, the coercive prohibition of the right of intimate association cannot satisfy the constitutionally required burden of justification.<sup>21</sup> In *Griswold v. Connecticut*,<sup>22</sup> for example, the state prohibition of the use of contraceptives in marriage limited the basic right of married couples to regulate their sexual lives and their procreative consequences. Such state prohibitions could not satisfy the constitutional burden of protecting the rights of other persons. On the contrary, contraception advances legitimate state purposes of population control. In addition, such prohibitions do not protect the individual from self-destructive harms to self. In fact, contraceptive use in marriage has secured to couples the dignity of a deepened freedom and rationality of sexual expression in their intimate personal lives, as well as greater control over their reproductive histories. Perhaps for the first time in human history, women can have personally expressive sexual lives and relationships, unburdened by self-conceptions of a mandatory procreative function and duty.

In sum, the choice to use contraceptives represents a key exercise of constructive moral powers in personal relationships. Any residual justification of laws prohibiting contraception appears grounded in either of the following beliefs: that sex and procreation are necessarily linked<sup>23</sup> or that sex without procreation is a kind of homicide.<sup>24</sup> But neither justification can satisfy the

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18. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (use of contraceptives by the unmarried); *Stanley v. Georgia*, 394 U.S. 557 (1969) (obscene materials used in home); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion services).

19. A neutral criminal statute protects "neutral" goods - goods that are seen as fundamental to life by people of widely different backgrounds. A neutral good by definition is not the subject of significant ideological disagreement. See RICHARDS, *supra* note 1, at 84, 242-47, 258-61.

20. See RICHARDS, *supra* note 1, at 237-42, 244-47, 253, 259-61, 272-75.

21. See *supra* note 18.

22. 381 U.S. 479 (1965).

23. See AUGUSTINE, *THE CITY OF GOD* 577 (H. Bettenson trans. 1972).

24. St. Thomas elaborates on Augustine's conception of the exclusive legitimacy of procreative sex in a striking way. Of the emission of semen apart from procreation in marriage, he wrote: "[A]fter the sin of homicide whereby a human nature already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is pre-

constitutionally neutral burden<sup>25</sup> required for laws that directly abridge fundamental rights of the person.<sup>26</sup> Rather, the enforcement of such perceptions through criminal prohibitions on the use of contraceptives enlists the state in the support of sectarian conscience in a core area of just moral independence. This usurpation of moral sovereignty is exactly what constitutional neutrality forbids.

The elaboration of the right to constitutional privacy in our law requires a distinction between forms of reflective ethical argument which satisfy the constitutional burden required for its abridgement and other forms of argument which cannot meet this burden. I submit that the relevant and properly neutral ethical principle on which the privacy cases implicitly depend is that individuals should treat other persons as they would want themselves to be treated, *i.e.*, with respect for those liberties essential to a self-governing person and moral agent.<sup>27</sup> This interest in moral independence is one protected by the guarantees of religion and speech, as well as by the constitutional right to privacy. Abridgements of religious liberty and free speech can only be justified where the countervailing interest is protection of neutral goods required by all individuals to live as free persons.<sup>28</sup> Therefore, abridgement of the right to privacy requires a similar justification. Accordingly, the state may justly enforce criminal statutes that, on fair terms to all, protect the interests of adult persons in life, bodily security, and integrity. In addition, such statutes may be justifiably enforced in order to protect persons' interests in security in institutional relationships and claims arising therefrom, as well as the interests of children in appropriate conditions of nurturance and development. Criminal prohibitions on the use of contraceptives, abortion services, or the use of obscene materials in the home cannot meet this burden of justification. Arguments of countervailing rights are either too constitutionally nonneutral, controversial, or speculative.

The constitutional right to privacy developed to protect a fundamental right of intimate association as traditional justifications for coercive infringements of this right ceased to rest on the protection of neutral goods.<sup>29</sup> Indeed, it is precisely because the traditional condemnation is based on philosophical, religious, and ideological commitments that do not now protect broadly acceptable neutral goods that individuals require protection. The constitutional right to privacy enables persons to exercise the just scope of their independent

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cluded." T. AQUINAS, *ON THE TRUTH OF THE CATHOLIC FAITH: SUMMA CONTRA GENTILES* 146 (V. Burke trans. 1956).

25. A constitutionally neutral burden protects "neutral" goods. *See supra* note 19 for explanation of the concept of neutrality.

26. *See* RICHARDS, *supra* note 1, at 237-42, 244-47, 253, 259-61, 272-75.

27. *See generally* J. RAWLS, *A THEORY OF JUSTICE* (1971).

28. *See supra* note 19; *see* RICHARDS, *supra* note 1, at 141-46, chs. 4, 5.

29. In an earlier period when child labor was essential to the survival of a family, the traditional values may, in some respects, have protected goods about which there was little ideological disagreement.

moral judgment in constructing new forms of more satisfying and humane personal relationships.

## II

### CONSTITUTIONAL PRIVACY AND HOMOSEXUAL LOVE

The principle of constitutional privacy, thus understood, applies to consensual homosexuality for two reasons. First, these relationships are a form of the basic right of intimate association. Second, the coercive abridgement of these relationships cannot be justified. I will amplify each point, and then address why the traditional moral grounds for the condemnation of homosexuality are constitutionally suspect.

Criminalization of the forms of sexual expression of homosexual love abridges the basic right of intimate association by prohibiting important ways in which many persons naturally express sexual love for one another.<sup>30</sup> Many careful studies which have followed in the wake of Kinsey's classic studies<sup>31</sup> attest to the continuities in the sexual experience and bonding of heterosexual and homosexual American couples<sup>32</sup>. The attempt to criminally condemn certain forms of sexual expression deprives many persons of their most profound and personal feelings of affection, attachment, and mutual love. Such brutal and callous manipulation of intimate personal life is the same constitutional evil condemned by the Supreme Court in decisions concerning state control of contraception and procreation.<sup>33</sup>

Second, statutes that absolutely forbid oral and anal intercourse cannot satisfy the heavy burden of justification required to abridge the right of intimate association. Coercive laws regulating sexual behavior may, nonetheless, be justified by neutral ethical principles. Thus, respect for the developmental rights of children would require that various rights guaranteed to adults not extend to persons lacking such rational capacities. Nor is there any objection to regulation of obtrusive sexual solicitation or to forcible forms of intercourse of any kind. In addition, forms of sexual expression may be limited by other ethical principles: principles of not killing, harming or inflicting gratuitous cruelty (nonmaleficence); principles of paternalism in narrowly defined circumstances; and principles of fidelity.<sup>34</sup>

Statutes that absolutely forbid oral and anal intercourse are not consistent with these principles. Such statutes are overbroad; they are not limited to

30. See, e.g., A. BELL & M. WEINBERG, *HOMOSEXUALITIES* 106-15 (1978); P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 237-45 (1st ed. 1983).

31. See the classic Kinsey Institute study of sex offenders, P. GEBHARD, ET AL., *SEX OFFENDERS* (1965).

32. For the continuities in the nature of sexual experience, see W.H. MASTERS & V.E. JOHNSON, *HOMOSEXUALITY IN PERSPECTIVE* (1979). For continuities in both sexual experience and bonding, see Blumstein & Schwartz, *supra* note 30.

33. See *supra* note 18.

34. See generally D. RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971).

forcible or public forms of sexual intercourse, or sexual intercourse by or with children, but extend to private, consensual acts between adults.

The argument that such laws prevent homosexual intercourse by or with the underaged fails to meet the required burden. There is no empirical basis on which to conclude that homosexuals as a class commit more sexual offenses with the young than heterosexuals.<sup>35</sup> Nor is there any reliable evidence that legal prohibitions on oral and anal intercourse affect children's sexual orientation. Sexual preference is settled, largely irreversibly,<sup>36</sup> in very early childhood. This preference is established well before laws of this kind have any effect.<sup>37</sup> Even if the aim of determining sexual preference by criminal penalty were legitimate (which I do not concede), that interest could not constitutionally be secured by overbroad statutes which coercively violate the core privacy rights of homosexuals of all ages and that, in any event, ineffectively pursue the state's interest.

The other moral principles discussed above also fail to justify absolute prohibitions on oral and anal sex. Such relations are not generally violent. Thus, prohibitory statutes cannot be justified by moral principles of nonmaleficence. Further, since there is no convincing evidence that such sexual acts cause mental or physical disease,<sup>38</sup> narrowly drawn paternalistic principles are inapplicable.<sup>39</sup> Indeed, if anything, criminalization—in contrast to

35. See generally P. GEBHARD, ET AL., *supra* note 31; M. HOFFMAN, *THE GAY WORLD* 39-92 (1968). In general, seduction of the young appears to be more centered on heterosexual rather than homosexual relations. See BELL & WEINBERG, *supra* note 30, at 230. One recent study summarizes the pertinent empirical literature on sex offenders against children as follows: ". . .these men are much more likely to have a heterosexual history and orientation than a homosexual one. Contrary to public belief, homosexual adult males rarely molest young male children." R.L. GEISER, *HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN* 75 (1979).

36. See W. CHURCHILL, *HOMOSEXUAL BEHAVIOR AMONG MALES* 283-91 (1967); C. A. TRIPP, *THE HOMOSEXUAL MATRIX* 251 (1975); D. J. WEST, *HOMOSEXUALITY* 29-39 (1960).

37. See, e.g., J. MONEY & A. EHRHARDT, *MAN & WOMAN, BOY & GIRL* 153-201 (1972). One study hypothesizes that gender identity and sexual object choice coincide with the development of language, i.e., between 18 and 24 months of age. See Money, Hampson & Hampson, *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97 *BULL. JOHNS HOPKINS HOSP.* 301 (1955); cf. A. BELL, M. WEINBERG & S. HAMMERSMITH, *SEXUAL PREFERENCE* (1981).

38. See REPORT OF THE DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, CMD. 4, No. 247 at 31-33 (1957) (The Wolfenden Report); E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 *J. OF PROJECTIVE TECHNIQUES AND PERSONALITY ASSESSMENT* 18 (1957). Both the American Psychiatric Association and the American Psychological Association no longer regard homosexuality as a manifestation of psychological problems. BLUMSTEIN & SCHWARTZ, *supra* note 30, at 44.

39. For example, any general coercive statutes directed against sexual activity, allegedly to minimize AIDS health risks to the agent, would be grossly overinclusive. Such statutes would condemn many acts not subject to such risks at all and other acts where risks can be reduced by prophylactic measures. Such coercive paternalistic legislation, even if drawn narrowly, would still raise substantial issues of justice since its aims could be more practically and justly achieved by massive public education. Public education properly respects and enhances people's judgment and capacity to decide whether and how they will minimize risks. See Mohr, *AIDS, Gay Life and State Coercion*, 6 *RARITAN* 38-62 (1986).

public education—fosters health risks.<sup>40</sup> Lastly, these statutes do not correspond to any state purpose in enforcing principles of fidelity: the acts often occur in ongoing and longstanding intimate relations which they stabilize and enrich.

A conclusion that these laws fail to satisfy the constitutional burden is consistent with the Court's previous decisions concerning anti-contraception laws. These laws prohibit engaging in nonprocreative sex, but do so even more unwarrantably since these acts represent the exclusive or primary forms of sexual expression of many homosexual men and women. The interest in autonomy in intimate relations is at least as strong as that in reproductive autonomy, and the evidence of harms to the rights of other persons is even more controversial and speculative.

A final moral argument used to justify a general prohibition on oral and anal sex is an appeal to traditional moral principles. The argument was invoked by the district court in *Doe v. Commonwealth's Attorney*<sup>41</sup> as the ultimate ground for the legitimacy of the Virginia sodomy statute, namely, "the promotion of morality and decency."<sup>42</sup>

A form of ethical argument is, indeed, necessary to the legitimacy of the criminal law in the United States. But appeals to "morality and decency" could be invoked against all the privacy decisions. Elaboration of the right to privacy consistent with fundamental principles of our constitutional law suggests that every such appeal is not of equal constitutional weight. In fact, all the privacy decisions reflect deep moral controversy within American society over which aspects of our collective moral traditions can and cannot justly be retained. Our moral practices as a community are not homogeneous. We retain certain basic principles (for example, treating persons as equals), but change lower order conventions which have become inconsistent with the ethical core of our moral and constitutional values. Accordingly, the appeal to "morality and decency" falsely begs the central issue in dispute, supposing precisely the kind of homogeneity in moral values which the history of Western ethics and constitutional privacy belie. It is a valued distinction of Western ethics and law that they have changed based on critical reflection on history and on new empirical and normative perspectives.

I have already proposed the kind of ethical principles to which controversies over proper criminalization appeal, and explained why the criminalization

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40. It is the criminalization of sexual activities which leads to their secretive and clandestine nature, uninformed of possible health risks, and discourages the kind of candid access to medical information and services which might mitigate the health risks in question. See Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1631-33 (1974). Criminalization and larger patterns of discrimination against homosexuals also render difficult the formation of the kinds of stable relationships which would both minimize health risks and humanely deal with health problems when they occur. See R. Mohr, *supra* note 39.

41. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd without opinion* 425 U.S. 901 (1976) (homosexual acts not protected by constitutional right to privacy).

42. *Id.* at 1202.

of acts of sexual expression cannot meet this burden of justification. Why then does hostility to homosexuality enjoy popular support as a rallying cry of neo-conservatives in a way that opposition to contraception and even abortion does not? In order to understand this ugly political fact and the proper attitude to be taken towards it, we must look at the concerns and beliefs that underlie the traditional argument for the criminalization of oral and anal sex.

The traditional moral condemnation of oral and anal sex in our culture may be traced to a number of beliefs: (1) a belief that homosexual forms of sexual expression undermine desirable masculine character traits—for example, courage and self-control;<sup>43</sup> (2) a general conception that sexuality has one proper purpose alone (procreation) and sexual expression disengaged from procreation is shamefully wrong;<sup>44</sup> (3) an empirical belief that prohibitions of homosexual forms of sexual expression combat pestilence, plague, and natural disaster;<sup>45</sup> (4) a theological conception that relevant passages in the Old and New Testaments condemn such acts;<sup>46</sup> (5) various empirical beliefs about the evil consequences to the individual and to society of such acts (*e.g.*, child molestation);<sup>47</sup> and (6) a political belief that such acts constitute a form of willful heresy or treason against the stability of social institutions.<sup>48</sup> All these beliefs are either factually false or based on moral premises (for example, the sexist premise that sex between men degrades one of them into a woman, or the norm of sex as procreative) that we now reject as properly enforceable on society at large. Yet these beliefs persist, and people (including the Supreme Court of the United States<sup>49</sup>) continue to isolate homosexuality from their views about contraception and abortion.

The strength of the traditional beliefs may reflect the simple demographic fact that homosexuality is and will remain a small minority preference, whereas contraception and abortion pervade American social life. People can

43. For the earliest literate statement of this view, see PLATO, *LAWS*, Book VIII, 835d-42a.

44. See *supra* notes 23, 24.

45. See Justinian, *Novellae 77 and 141*, reprinted in D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 73-75 (1955). The issuance of these imperial edicts seems to have been prompted by contemporary earthquakes, floods, and plagues, which Justinian, drawing an analogy to the Sodom and Gomorrah episode, supposed to be caused by homosexual practices. *Id.* at 76-77. Blackstone similarly cites the Sodom and Gomorrah episode, in support of the appropriateness of the death penalty for homosexual acts, indeed suggesting—since God there punished by fire—the special appropriateness of death by burning. 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 216.

46. See *supra* note 45.

47. See MAGNUSON, *ARE GAY RIGHTS RIGHT?* 16-19 (1985).

48. Throughout the Middle Ages, homosexuals were prosecuted as heretics, often being burned at the stake. See D. BAILEY, *supra* note 45, at 135. Thus, "buggery," one of the names for homosexual acts, derives from a corruption of the name of one heretical group alleged to engage in homosexual practices. *Id.* at 141, 148-49. For a modern use of treason in this context, see P. DEVLIN, *THE ENFORCEMENT OF MORALS* 1-25 (1965). For rebuttal, see H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963); Hart, *Social Solidarity and the Enforcement of Morals*, 35 U. CHI. L. REV. 1 (1967).

49. See *supra* notes 2, 41.

understand the latter, but have little experience with the former. Accordingly, they acknowledge and sometimes accept constitutional principles to protect popular forms of nonprocreative heterosexual sex, but fail to see that these principles also apply to less popular forms of nonprocreative homosexual sex.

At a deeper level, this dichotomy reflects the ancient and modern conception that homosexual oral and anal sex are a form of heresy or treason.<sup>50</sup> There is no empirical evidence to justify this belief. Homosexual relations are and will foreseeably remain the preference of small minorities of the population,<sup>51</sup> and homosexuals are as committed to principles of social cooperation and contribution as any other group in society. The very accusation of heresy or treason illustrates an important feature of the traditional moral condemnation in its contemporary form: it rests no longer on widely accepted arguments for the protection of the rights of persons to neutral goods, but appeals to personal, moral, and religious viewpoints about acceptable lifestyles.

The heresy or treason of homosexuals is their rejection of heterosexual family life, a fundamental commitment of most Americans. Thus, homosexuals are the ultimate rebels against basic values. We see the ugly reality of these attitudes when members of the public outrageously equate a homosexual teacher with a homosexual seducer of children,<sup>52</sup> and when they transform the heartrending tragedy of the AIDS crisis into an aggressive attack by homosexuals on them and their children.<sup>53</sup> These imaginative transformations are revealing as they create aggressors out of victims, as they invert moral reality to serve ideological needs under perceived threat from these heretics against the family.

Of course, these perceptions create the thing on which they feed, for they compulsively exile homosexuals from anything resembling family life by denying them child custody<sup>54</sup> or the legal protections of marriage<sup>55</sup> or the anti-discrimination protections essential to a secure personal life.<sup>56</sup> But, that is the vicious circularity of the neoconservative ideology I am describing. And that

50. *See supra* note 48.

51. Kinsey states that four percent of males are exclusively homosexual throughout their lives. A. KINSEY, ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 650-51 (1948). This estimate is confirmed by comparable European studies. *See* Gebhard, *Incidence of Overt Homosexuality in the United States and Western Europe*, in NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY 22-29 (J. Livingood ed. 1972). Although the incidence of male homosexuality in Western Europe and the United States is comparable, many of the European countries do not apply the criminal penalty to consensual adult sex acts of the kind discussed here. *See* W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 293 (1973).

52. *See, e.g.*, Bd. of Educ. of Oklahoma City v. Nat'l. Gay Task Force, 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 105 S.Ct. 1858 (1985).

53. *See, e.g.*, *Afraid*, NEW REPUBLIC 7-10 (Oct. 14, 1985); *The Aids Conflict*, NEWSWEEK 18-24 (Sept. 23, 1985).

54. *See, e.g.*, M.J.P. v. J.G.P., 640 P.2d 966 (Okla. 1982); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981).

55. *See, e.g.*, *Adams v. Howerton*, 486 F.Supp. 1119 (C.D.Cal. 1980).

56. *See supra* note 52 at 1273.

is precisely why homosexuals as a group so clearly require protection by the constitutional right to privacy.

Since the traditional moral condemnation of homosexuality must now abandon certain of its essential grounds (beliefs in harm, for example), the tradition is necessarily deprived of its constitutional legitimacy. Consequently, it can no longer serve as the basis of coercive sanctions. Enforcement of traditional attitudes on society at large is, as I have suggested, the functional equivalent of a heresy prosecution:<sup>57</sup> the grounds for prohibition are highly personal, ideological and/or political. The continuing force of the prohibitions rests on fears and misunderstandings directed at the alien way of life of a small and traditionally condemned minority. Constitutional principles of toleration forbid heresy prosecutions,<sup>58</sup> sharply circumscribe treason prosecutions,<sup>59</sup> and should prohibit criminal statutes which today have the same political force.

Homosexuality is today essentially a form of political, social, and moral dissent on a par with the best American traditions of dissent and even subversive advocacy. For this reason, traditional liberal principles must protect this way of life from the worst American impulses of repressive nativism. Those that support criminalization find today in homosexuality what they found before in the family planning of Sanger, the atheism of Darwin, the socialism of Debs, or the Marxist advocacy of the American Communist Party.

Homosexuals have a basic right of moral independence to construct their own conceptions both of personal relationships and of community. Hopefully, those conceptions will enrich the social imagination of us all as homosexual couples show us that love is not gender defined, and that the relationships of neither men nor women must be rigidly locked into competitive hostility. Homosexual love may yet teach us deep truths about the meaning of love in a responsibly lived life. It may teach us, for example, how people, in search of love against the worst odds of traditional condemnation and social misunderstanding, imaginatively and often courageously create a mix of love and work that fulfills them and serves society.

For me, the criminalization of homosexuality is, at bottom, a grievous harm to the spiritual lives of people who deserve more from their constitutional traditions than unjust contempt. Constitutional privacy affords the remedy for this wrong. It is time that this remedy was given.

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57. The English legal scholar, Tony Honore, observed of the contemporary status of the homosexual: "It is not primarily a matter of breaking rules but of dissenting attitudes. It resembles political or religious dissent, being an atheist in Catholic Ireland or a dissident in Soviet Russia." TONY HONORE, *SEX LAW* 89 (1978).

58. "Heresy trials are foreign to our Constitution." *United States v. Ballard*, 322 U.S. 78, 86 (1944).

59. *See* U.S. CONST. art. III, § 3.

