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Cover Page Footnote

Member of the New York Bar. Associate Professor of Law, Fordham University School of Law. Professor Richards received an A.B. from Harvard College, a D.Phil. From Oxford University, and a J.D. from Harvard Law School. The author thanks Diana R. Lewis, second year student at Fordham University School of Law, for her fine research assistance in writing this paper, and acknowledges deep gratitude to the gracious, generous, and stimulating assistance of Donald Levy, of the Brooklyn College Philosophy Department, who actively assisted his research and helped the author to develop the themes of this paper, including, in crucial part, Donald Levy's own contributions to the theory of the unnatural.

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UNNATURAL ACTS AND THE CONSTITUTIONAL RIGHT TO PRIVACY: A MORAL THEORY

DAVID A. J. RICHARDS*

THE relationship of moral and legal ideas in constitutional law is currently undergoing a striking and suggestive theoretical re-examination. In contradistinction to Learned Hand's influential legal positivist indictment of the use of "natural law" in constitutional interpretation,1 recent commentary urges "the strength of our natural law inheritance in constitutional adjudication [which it is] unwise as well as hopeless to resist."2 This re-examination of natural law thinking could point the way toward a needed "fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place, [and without which] [c]onsitutional law can make no genuine advance."3 Obviously, the relationship between morality and constitutional law is not exact.4 Nonetheless, a number of provisions of the Constitution presuppose strong moral ideas, the analysis of which fundamentally clarifies constitutional interpretation.5

This Article will attempt to show how moral theory may elucidate constitutional adjudication by focusing on the question of whether the private performance of "unnatural" sexual acts by consenting adults is protected by the constitutional right to privacy—an issue strikingly

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1. See L. Hand, The Bill of Rights 1-3 (1958) [hereinafter cited as Hand] which eschews the usefulness of moral ideas in understanding constitutional law and adopts instead the interpretation of the will of the constitutional founders. Cf. id. at 73 (Hand's indictment of the role of the Court as "Platonic Guardians").

2. A. Cox, The Role of the Supreme Court in American Government 113 (1976)


5. See id. at 32 nn. 1-4; Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974) [hereinafter cited as Free Speech]. These themes are developed in more extensive form in Richards, The Moral Criticism of Law 25-103 (1977) [hereinafter cited as Moral Criticism]. This Article is a development and elaboration of a shorter and more summary discussion appearing in Moral Criticism, supra.
raised by the Supreme Court’s recent summary affirmance in *Doe v. Commonwealth’s Attorney for City of Richmond*. This decision dramatically raises the question of the relationship between moral ideas and constitutional adjudication, for it concerns the implications of, and limits upon, the constitutional right to privacy—a right alleged from its inception to rest on the moral conceptions of natural law.

Morally informed constitutional provisions have not always been applied uniformly and consistently with their underlying moral principles. For example, the first amendment clearly rests on the substantive moral idea that all men are endowed by their Creator with certain basic human rights. This idea was familiar to educated men at the time of the Constitution’s promulgation and is generally regarded as being among the fundamental moral assumptions of the founding fathers. The Constitution did not, however, consistently extend these basic rights to all persons. For example, the institution of slavery was nowhere condemned, but was rather impliedly endorsed. This flaw in the constitutional charter of basic moral rights was resolved only by the Civil War and the constitutional amendments which followed in its wake.

Of these amendments, the due process and equal protection clauses of the fourteenth amendment have been especially fertile sources for the enlargement of constitutional rights. The equal protection clause, for example, has been interpreted to require forms of equal treatment well beyond the original intent to abolish slavery and


7. Thus, Justice Black complained in his dissent from *Griswold v. Connecticut* that the majority opinion was “natural justice” in disguise. 381 U.S. 479, 511-12 (1965) (Black, J., dissenting). See Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 Wis. L. Rev. 979, 982 (referring to Douglas’ opinion as an exercise in “modified ‘natural law’”).


9. Three clauses in the Constitution refer to slaves in a way that contemplates the continued existence of the institution of slavery, though in each case a circumlocution is used, not the word “slave” or a variant thereof. The Slave Trade Clause provides: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” U.S. Const. art. I, § 9, cl. 1. See also id. art. I, § 2, cl. 3 (“three-fifths of all other Persons”) and art. I, § 2, cl. 3 (“Person held to Service or Labour”).

10. Id. amend. XIII (adopted 1865); id. amend. XIV (adopted 1868); id. amend. XV (adopted 1870).
concomitant state practices.\textsuperscript{11} The due process clause has been interpreted to require not only the application of many of the original amendments comprising the Bill of Rights to the states, but has also been viewed as a means of protecting basic liberties not expressly articulated in the Bill of Rights.\textsuperscript{12}

This gradual expansion of constitutionally protected moral rights, whether by amendment or judicial decision, typically rests on constitutional provisions strikingly general in form (e.g., "freedom of speech or of the press"); "due process of law"; "equal protection of the law") and often lacking any convincing legal history regarding the intended application of the provision. A consensus, to the extent one existed when these clauses were drafted, was reached on the generalities of a political compromise which concealed future divergences in interpretation of these moral rights.\textsuperscript{13} Even when circumstances at that time strongly suggest that a certain interpretation of a constitutional provision was not contemplated, such legal history has not been found determinative by the Supreme Court.\textsuperscript{14}

The Supreme Court has the germinal role in the development of constitutional doctrine. Given the generality of constitutional provisions bearing on basic rights, the typically ambiguous legal history,

\textsuperscript{11} An excellent account of this development is presented in Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). See J. James, The Framing of the Fourteenth Amendment (1956); H. Flack, The Adoption of the Fourteenth Amendment 210-77 (1908); J. tenBroek, Equal Under Law (1956); Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 Colum. L. Rev. 131 (1950).

\textsuperscript{12} See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married couples to use contraceptives); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right to educate a child in a school of the parents' choice); Meyer v. Nebraska, 262 U.S. 390 (1923) (the right of a child to study a foreign language).

\textsuperscript{13} The legal history of free speech, for example, in England and America prior to the adoption of the first amendment obviously renders doubtful any consensus on the specific application of the amendment. See generally L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960) [hereinafter cited as Levy].

\textsuperscript{14} For example, the adopters of the fourteenth amendment quite clearly did not contemplate that the amendment would abolish segregation. See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955). Yet, the Court in Brown v. Board of Educ., 347 U.S. 483, 489 (1954) expressly put such history aside in reaching its decision.

Similarly, the existence at the time of the adoption of the first amendment of laws, such as those against seditious libel, has never been supposed to conclude the question of the constitutionality of such laws. For a discussion of the crime of seditious libel at common law, see Levy, supra note 13. For the view that seditious libel was abolished by the first amendment, see Beauharnais v. Illinois, 343 U.S. 250, 272 (1952) (Black, J., dissenting); Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). See also Bridges v. California, 314 U.S. 252, 264-65 (1941); Grosjean v. American Press Co., 297 U.S. 233, 248-49 (1936) (first amendment prohibits taxes that restrict newspaper circulation, although such taxes were employed in England and America at the time of that amendment's adoption).
and the ultimately independent Supreme Court decisional authority for the development of constitutional doctrine, the idea that shared fundamental moral values underlie these basic rights may explain both the function of constitutional adjudication in this area as a limitation on majoritarian power and the progressive evolution of specific constitutional rights.¹⁵ This underlying philosophy is known as contractarian moral theory and its importance to a thorough understanding of constitutional rights can hardly be overestimated. Whatever its adequacy as a general moral theory, failure to take seriously the contribution of contractarian thought to constitutional law is a failure to appreciate the significance of contractarian ideas in the minds of those who established the constitutional order.¹⁶

The use of contractarian theory in understanding constitutional law has been superficially analogized to the attempt to incorporate ideological economic views into constitutional mandates.¹⁷ But contractarian theory does not beckon as a theoretical desideratum extraneous to the constitutional order; it is at its foundation. When the founding fathers adopted a Bill of Rights intended to render certain rights immune from abridgement by legislative majorities, they echoed a contractarian line of thought familiar to them in the work of Locke and developed as well by other philosophers.¹⁸ Later amendments to the Constitution, notably the fourteenth amendment, represent a natural extension of this general contractarian conception. Most constitutional theorists acknowledge the influence of contractarian thought but this acknowledgement is often followed by either frank disavowal of such ideas¹⁹ or the invocation of explanatory theories lacking the focal historic sig-

¹⁵. This proposition is a variation on a theme elsewhere defended. See sources cited in note 5 supra.


¹⁷. "The Fourteenth Amendment, as Holmes has said, does 'not enact Mr. Herbert Spencer's Social Statics.' Nor does it enact Mr. John Rawls's A Theory of Justice." Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 279-80, 285 (1973) [hereinafter cited as Wellington].

¹⁸. See notes 8 & 16 supra.

¹⁹. See, e.g., Hand, supra note 1, at 1-3, 33-34.
significance of contractarian theory. The consequence has been constitutional theories which either sharply limit judicial review on constitutional grounds or skeptically undermine in principle the very idea of judicial review of majoritarian laws or policies. Having dissolved in cynical acid the moral ideas intrinsic to the constitutional order, unsurprisingly the theorists find that order difficult to justify or defend. Contractarian theory remedies these defects. By building on the moral conceptions historically underlying the constitutional order, this theory takes moral ideas seriously in a way in which other constitutional theories do not. Perhaps contractarian theory is not the final word as a comprehensive moral theory. Nonetheless, it is unquestionably the moral foundation of the Constitution and, as such, requires the most serious and sustained consideration.

The examination of the constitutional right to privacy in its application to “unnatural” sex acts is an important test for the adequacy of this contractarian approach. From its inception, the constitutional right to privacy, whether derived as an implication of various amendments in the Bill of Rights, as a substantive right required by due process of law, or as a right reserved to the people by the ninth amendment, has been supposed to rest on moral ideas. Yet, the explanation of these moral ideas and their relationship to constitutional rights has been notoriously undeveloped, resulting in the not uncommon misapprehension that the right to privacy cases rest on legislative policy, not underlying moral principles. The summary affirmance in

21. See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893) [hereinafter cited as Thayer].
22. Hand, supra note 1. Cf. A. Bickel, The Supreme Court and the Idea of Progress (1970) in which a value skepticism similar to Hand's leads to a critique of the idea of moral reform through constitutional adjudication. Moral reflection and reform in the light of principles is to be replaced by unconscious moral historicism. See id. at 174-75. These ideas represent a significant retreat from his earlier work. See A. Bickel, The Least Dangerous Branch (1962) [hereinafter cited as Least Dangerous].
24. For an attempt to develop it into a general moral theory, see Richards, A Theory of Reasons for Action (1971) [hereinafter cited as Action].
25. Thus, Justice Douglas inferred the constitutional right to privacy as being in the "penumbra" formed by emanations of specific constitutional guarantees. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
\textit{Doe}, which could be read as excluding "unnatural" sex acts from the scope of the right to privacy, may give compelling force to this misconception. Without delivering any opinion, the Court may have summarily limited the right to privacy in a way that suggests fiat, not articulated principle. It is important to know whether the Court's view is fundamentally consistent with the moral theory underlying the right to privacy.

This examination of the moral underpinnings of the constitutional right to privacy also bears on broader issues in criminal law theory and practice regarding the decriminalization of so-called victimless crimes.\textsuperscript{29} It has been convincingly argued that the employment of law enforcement resources in the pursuit of victimless crimes is wasteful given the special costs of enforcement in this area and the marginal gains in conformity to law.\textsuperscript{30} The argument is made that these resources could be more effectively employed against more serious crimes (\textit{i.e.}, crimes of violence). These arguments, while undoubtedly significant, and perhaps decisive, depend on the premise that some of these acts are either less worthy of punishment than other offenses or not properly punishable at all. But little significant theoretical attention has been given to the question of whether these acts, or certain of them, may not be properly punishable.\textsuperscript{31} At bottom, the argument probably depends for its force on a moral analysis of why it may be affirmatively wrong to use the criminal law to punish at least certain of these acts. At this point, there is a useful convergence between the theoretical aims of constitutional and criminal law theory. If we can articulate the moral argument against the use of the criminal law to punish certain of these acts (\textit{e.g.}, private consensual sex acts between adults), we may at the same time have explained and clarified the constitutional considerations which should immunize these acts from criminal penalty.\textsuperscript{32}


\textsuperscript{30} See sources cited in note 29 supra.


\textsuperscript{32} If this can be accomplished, it may then be possible to assess whether or to what extent
We shall examine, then, the constitutional right to privacy in its application to "unnatural" sex acts as part of the general problem in moral theory of the just employment of the criminal law. Put differently, we are inquiring into the proper scope of the police power, the traditional ground upon which the substantive criminal law has been predicated. In particular, we focus here on the uncritical invocation of the concept of the unnatural as a proper ground for the exercise of the police power in prohibiting certain private, consensual sex acts. A necessary preliminary step, however, is to examine the very notion of the unnatural.

I. THE CONCEPT OF THE UNNATURAL

In giving an account of the unnatural, one wishes to clarify the concept itself, point out its connections to related ideas, and shed some light on the emotionally charged attitudes which the notion of "unnatural acts" often evokes in our society. Initially, we will describe some general marks of the unnatural. Then, a fuller explication of the notion will be proposed and, finally, its application to sexual deviance will be examined.

1. The Marks of the Unnatural

The word "unnatural" derives as an adjectival negative of the Latin natura, meaning "sort," "kind," "quality," or "character." Natura, and by implication the English word "nature," and related forms, were in turn shaped by the Greek phusis, meaning "kind," "character," or "description." Aristotle, for example, defined phusis thus: "[W]hat each thing is when its growth is complete." But, just as the involuntary is not equivalent to the not voluntary, the unnatural is not equivalent to the not natural. We would say of many things that they were not natural without supposing that they were therefore unnatural. A coroner thus certifies that the death of a person in an unfortunate automobile accident is not from natural

similar considerations apply to other victimless crimes. Surely, there are significant differences between adult consensual sex acts in private and commercialized prostitution and narcotics peddling. No significant advance will be made, in either criminal law theory or practice, until the differences and similarities are carefully and systematically scrutinized in the light of both moral theory and empirical evidence.

33. For an account of criteria of theoretical adequacy, see Action, supra note 24, at 3-10.
34. See C. S. Lewis, Studies in Words 24-74 (1960).
35. See id. at 33-42.
36. Aristotle, Politics 1252b.
37. See Aristotle, Nicomachean Ethics, Book III, 1109b-1111b [hereinafter cited as Nicomachean].
A man may not speak naturally (he is, say, tired or emotionally overwrought), but we may be very clear that he is not speaking unnaturally (as we might suppose if we heard schizophrenic word salads). The unnatural is clearly at least not natural; but it is also much more.

A careful reading of the several dictionary definitions of "unnatural" reveals this core meaning: "[N]ot determined by or consistent with a normal course of events . . . ARTIFICIAL . . . STRANGE . . . not innately characteristic of the nature of man . . . not being in accordance with normal feelings or behavior: PERVERSE, ABNORMAL." The suggestion is that the unnatural involves a tampering with that which, left alone, achieves a certain characteristic form.

In general, action is characterized as unnatural only when it represents a departure to that which is thought to be worse. When people widely believed in miraculous cures, they regarded them as not natural, but not unnatural, since these inexplicably miraculous events supplied a human good—that of relieving suffering. Supernatural grace, for those who believe in it, is not natural, but not unnatural either. The supernaturally evil is alone the unnatural—the satanic, or demonic.

"Unnatural" clearly is not only significantly applied to questions of the morality of human acts. We speak, for example, of an unnatural tone of voice, or an unnatural use of words, as well as of unnatural rock formations or trees or sunsets. Nonetheless, the term "unnatural" is often used to characterize some feature of the immorality of human acts.

Some examples of human actions which have traditionally been considered unnatural are violent acts toward members of one's immediate family (e.g., patricide, matricide and childbeating), regicide, incestuous acts, and sexual acts other than heterosexual copulation. Thus, in Hamlet, for example, the king's ghost says that while all murder is "most foul," his own murder was "strange and unnatural."

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38. The notion of an unnatural death suggests a special kind of death not from natural causes, for example, a son murdering his mother. Such examples are common in Shakespeare. See notes 40 & 41 infra and accompanying text.


40. W. Shakespeare, Hamlet, act I, scene v (regicide, fratricide); note also Hamlet's remark when he contemplates the possibility of killing his mother: "Let me be cruel, not unnatural: I will speak daggers to her, but use none . . . ." Id., act III, scene ii. See also the Orestes legend and the Greek tragedies built thereupon: Agamemnon-Iphigenia (father kills daughter); Clytemnestra-Agamemnon (wife kills husband); Orestes-Clytemnestra (son kills mother). Similarly, a treacherous man, like Edmund in King Lear, may do one good deed which is a departure from his supposed nature. Because the departure from Edmund's nature is good, we feel no temptation to
In similar spirit, Lady Macbeth, girding herself for murder, must ward off the "compunctious visitings of nature."\textsuperscript{41} As a matter of methodology, one may, of course, deny that this notion of the "unnatural" is either sensibly coherent,\textsuperscript{42} or reflects defensible modern scientific ideas.\textsuperscript{43} However, rather than questioning the intelligibility or acceptability of the idea of the unnatural itself, we shall attempt to show that the notion has a certain determinate content.

2. An Explication of the Unnatural

The term "unnatural" is an incomplete one, depending for its sense on the kind of things to which it is being applied (for example, persons, acts, events, etc.). The idea underlying the expression is intrinsically theoretical. The particular sense in which the term unnatural is meant derives from notions of the proper functioning of the kind of thing to which it is to be applied. Thus, in ordinary life we develop theories of how things operate and function, on the basis of which we make predictions and develop expectations. The unnatural, as a concept, expresses the idea that the operation of a thing, as explained by the theory we have of how that kind of thing operates, has gone awry—has been impaired, frustrated or corrupted—so that we have difficulty even in understanding how a thing of that kind can operate in this way.

Thus, since we have such theories of natural events, we apply the term unnatural to such events when they deviate from the theory in an impairing way (for example, unnaturally cold weather). As applied to human beings and their acts, the unnatural necessarily rests on a theoretical conception of proper human functioning, deviation from which impairs, frustrates, corrupts, or degrades. Thus, the unnatural, as applied to human acts, is not the same idea as the irregular or statistically abnormal. If an unnatural act like matricide were practiced more regularly, we would nonetheless regard it as unnatural so long as we regarded it as a deviation from proper human functioning.\textsuperscript{44} Through this notion of a uniquely human nature, man is

\textsuperscript{41} W. Shakespeare, Macbeth, act I, scene v (regicide).
\textsuperscript{42} See sources cited in note 42 supra. See also M. Hoffman, The Gay World ch. 6 (1968) [hereinafter cited as Hoffman].
\textsuperscript{44} The unnatural, resting on notions of characteristic human functioning, has many similari-
distinguished from other creatures. Certain experiences—for example, abiding personal affection and commitment—are seen as both unique to man and central to full self-realization. On this view, human beings act unnaturally when they act in ways which deprive themselves or others of such experiences—for example, when a parent willfully deprives his child of affection. Such an action stretches the notion of human nature to the breaking point and appears to be inexplicable.

To the extent that differing theories of human nature may identify different human capacities, propensities and ends as central, slightly differing conceptions of the unnatural will result. Shakespeare, for example, clearly believed that rule by an anointed hereditary monarch was a primary human good without which society could not achieve minimal conditions of order. So supposing, Shakespeare understandably regarded usurpation of the hereditary monarch's power and,
of course, regicide as unnatural, for such acts frustrate human purposes and terminate the minimal conditions that make life in society possible. Other theories of human nature, not identifying monarchy as a primary human good, would not regard comparable acts as unnatural, however otherwise immoral or undesirable.

In general, theories of human nature typically do not regard immoral acts as necessarily unnatural, for many forms of immorality are all too characteristically human. In murdering, for example, people often act on quite understandable human motives of jealousy, anger, venality, and the like. Such murders are morally wrong, but not unnatural; while the ends achieved by the murders do not morally justify the means chosen, we can understand how humans come to make such trade-offs. Only those murders are judged unnatural which achieve ends which are insignificant compared to the human goods sacrificed. Thus, intrafamilial murders are commonly regarded as unnatural on the ground that such murders inexplicably sacrifice the primary human good of warm familial attachments for inhumanly paltry reasons. Theft, similarly, is morally wrong, but unnatural only in a case such as a robbery committed by a millionaire simply "for kicks." Traditionally, the performance of such acts was thought by simple people of good will to distinguish the human from the inhuman and either degrade the perpetrator into an animal or elevate him into a god. If one supposed that the only proper purpose of human sexuality is procreation it would follow that while fornication may be immoral it is not unnatural since the procreative purpose is not violated, whereas bestiality and homosexuality are both immoral and unnatural.

Perversion is a subcategory of the unnatural in that a defining mark of the perverted is the employment of human functions in such a way as intentionally to deprive oneself or others of the capacity to use those

47. Of the mere deed of a subject's judging his king, Shakespeare wrote: "O, forfend it, God, that in a Christian climate, souls refin'd should show so heinous, black, obscene a deed!" W. Shakespeare, Richard II, act IV, scene i.
48. See notes 39-43 supra and accompanying text.
49. See, for example, Shakespeare's pervasive animal imagery in King Lear in his description of the "unnatural hags," Goneril and Regan. W. Shakespeare, King Lear, act II, scene iv. Note also Kant's attempt to view the choice between good and evil as a choice among several natures—the demonic, the animal and the human. I. Kant, Religion Within the Limits of Reason Alone 15-49 (T. Greene & H. Hudson trans. 1960).
50. Note the conclusion of Euripides' Medea. After the unnatural murder of her two children, she appears to Jason as a kind of divinity. Jason refers to her as "A monster, not a woman," Euripides, Four Tragedies 104 (D. Grene & R. Lattimore eds. 1955), and "Woman, this monster, murderess of children." Id. at 108.
51. See notes 68-72 infra and accompanying text.
functions to secure greater rational pleasure or satisfaction. Further, perversions involve unnatural employment of function for the motive of pleasure—taking pleasure in acting unnaturally. Perverted acts are distinguishable from both heterosexual sodomitical acts and from homosexual acts in that they cannot involve the expression of love between consenting partners. For example, forms of exclusive sexual fetishism are sexual perversions because in such cases a person takes pleasure in forms of sexuality which cut him off from more satisfying forms of human and sexual intercourse.

3. The Unnatural and Sexual Deviance

Homosexuality, one significant form of sexual deviance, may be defined as sexual intercourse between partners of the same sex, divid-


53. See Levy, Unnatural Acts and Sexual Perversions 2, 3, 10, 11 (on file at Fordham Law Review); Solomon, Sexual Paradigms, 71 J. Philosophy 336 (1974). But see R. Stoller, Perversion: The Erotic Form of Hatred 195-206 (1975), where a psychoanalyst suggests that the homosexual lifestyle is essentially perverted in that it involves the willful rejection of heterosexual family life. “Every child knows that he is the product of an inevitably heterosexual act that is intimate, exciting, mysterious, astonishing, profound, dangerous, forbidden, and terribly desirable; and every family—even those whose failure produces severe disorder in the child immersed in it—unendingly blankets its offspring with messages that the ideal would be a heterosexual family. . . . This is so not because it is ordained so by heaven, biology, or economic theory but because almost all members of our society accept it somewhere within themselves as the ideal that haunts them.” Id. at 204.

This notion appears to be a somewhat romanticized restatement of the now largely repudiated view in psychiatry that homosexuality is a form of disease. See note 242 infra. It is surely dogmatic to suppose that children always perceive heterosexual family life in this favorable way. Indeed, if there is any truth in the psychoanalytic model of the etiology of homosexuality as involving a domineering, controlling mother and a detached father, it is implausible that homosexuals would always perceive their past family experience as ideal, or even desirable. See note 245 infra. Marriage may be heaven, but it is surely sometimes also hell. See, e.g., R. Laing & A. Esterson, Sanity, Madness and the Family (1964).

54. The perverted should be distinguished from the merely perverse. Perverse acts, like perverted acts, involve the taking of pleasure in forms of evil, but the evil is not of an unnatural kind or degree. One’s host may wreck a social evening by bringing up business matters of the previous day known to be annoying to you; his pleasure in doing so makes him a bad host and a perverse person, but hardly perverted.

55. Sexual deviance also includes forms of heterosexual sex, such as heterosexual fellatio, cunnilingus and sodomy. Statutes also condemn both heterosexual and homosexual forms of
ing into its female form (lesbianism) and its male form. Homosexuality must be distinguished from pederasty or pedophilia. Pederasty is sexual intercourse between an older man and a young boy. Homosexuality is not so limited, however. In general, it occurs between same-sexed partners, both above the age of majority. \(^5\)

As has been noted, homosexuality has traditionally been considered to be an "unnatural act." \(^5\) It will be argued, however, that there is no necessary conceptual connection between homosexuality and the unnatural—that sexual relations between same-sexed partners is not necessarily a damaging impairment of proper function. \(^5\) But first it will be necessary to examine how homosexuality came historically to be regarded as unnatural.

The earliest literate explanation of the association of the unnatural and sexual deviance appears in Plato’s *Laws*. \(^5\) Plato argued that male homosexual acts are unnatural on two grounds. First, such acts undermine the development of desirable masculine character traits—for example, courage and self-control. This idea probably rested on the assumption that homosexual acts degrade men to the status of

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56. See note 281 infra. In addition, homosexuality must be distinguished from transsexualism and transvestism. Transsexuals literally suppose themselves to be of the opposite gender, a male in a female body, or conversely. See J. Money & P. Tucker, *Sexual Signatures* 31-35 (1975). Homosexuals in general are not confused about their gender; they may, for example, insistently affirm that they are men or women, as the case may be. See note 251 infra and accompanying text. Definitionally, they are homosexuals because of their preference for intercourse with partners of the same sex. Finally, transvestites prefer to dress and act like members of the opposite gender. J. Money & P. Tucker, *Sexual Signatures* 25-31 (1975). Many of them are not homosexuals; and homosexuals are not in general transvestites.

57. See notes 39-43 supra and accompanying text.

58. See notes 154-59 infra and accompanying text.

59. See Plato, *Laws*, Book VIII 833d-842a, which gives crucial significance to whether homo- sexuality has been acquired through no fault of the homosexual. See also Nicomachean, supra note 37, at Book VII, 1148b-1149a. Plato’s view of the unnaturalness of homosexual acts in the Laws is not a departure from the views of the earlier dialogues, which imply or state such a view. See G. Vlastos, *The Individual as an Object of Love in Plato*, in *Platonic Studies* 27-28 (1973) [hereinafter cited as Vlastos].
women. Second, Plato argued that male sexuality has one proper form or nature, namely, procreation within marriage, and that homosexuality is unnatural because it is sterile. This latter thought rests on the pervasive Greek conception that everything in the physical world has a precisely defined proper function. Thus, for example, Aristotle argued that usury is unnatural and violative of the proper function of money.

The idea that homosexuality involves the degradation of a man to the status of a woman is at least strongly suggested by the seeming prohibitions on male homosexuality in the Old Testament and by St.

60. That is, it would be self-degradation for men to allow themselves to make love to, or to be made love to by, a man, which is the proper role of a woman. This conception is also implicit in the idea, pervasive in the ancient Greek and Roman worlds, that while homosexuality per se was not wrong, to allow oneself to be the passive partner (i.e., the woman) was shameful and degrading. The aggressively bisexual Julius Caesar, thus, was criticized not for his homosexual connections, but for permitting himself at one time to be the passive partner. See Catullus 57 where Caesar is insulted by being called "morbosus," i.e., passive (equivalent to the Greek "pathicus"). Catullus himself indulged in homosexual activities. See T. Vanggaard, Phallos 87-99 (1972). See also note 250 infra. The ancient Greek conception that women are degraded is well-known. Aristotle believed that women had a nature better than a slave but inferior to a man. Aristotle, Politics 1259a-b. Plato, in contrast, was remarkable among Greek thinkers for his readiness to concede equality to women. See Republic, Book V, 453a-457d. Plato's views did not, however, extend to his notion of roles in sexual intercourse, where he followed the conventional view. See note 59 supra. See also Thucydides 2.45.2. In Pericles' famous funeral oration he addresses the women of Athens briefly: "Your great glory is not to be inferior to what god has made you, and the greatest glory of a woman is to be least talked about by men, whether they are praising you or criticizing you."

Indeed, theorists as disparate as Plato and Kant supposed that sexual deviance degraded human beings even below animals, since animals were supposed not to be sexually deviant. Thus, Kant argues that homosexuality is unnatural in that it "degrades mankind below the level of animals, for no animal turns in this way from its own species." I. Kant, Lectures on Ethics 170 (L. Infield trans. 1963). Cf. Vlastos, supra note 59.


62. "Thou shalt not lie with mankind, as with womankind: it is abomination." Leviticus 18:22. "If a man also lie with mankind as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be upon them." Id. 20:13. See also the Sodom and Gomorrah episode. Genesis 19. This episode, traditionally taken to show that homosexuality is contrary to God's will in that He punished those cities by fire and brimstone, is apparently not about homosexuality at all, however. See D. Bailey, Homosexuality and the Western Christian Tradition 1-28 (1955) [hereinafter cited as Bailey]; J. McNeill, The Church and the Homosexual 42-50 (1976). Even the seemingly clear Leviticus prohibitions have been analyzed by scholars as not being about homosexuality per se. See, e.g., S. Driver, Deuteronomy 264 (1896); McNeill, supra at 56-60; N. Snaith, The Century Bible, Leviticus and Numbers 126 n.22 (1967). Others scholars, however, disagree about this latter prohibition. See Bailey, supra at 30 Even Catholic theologians have argued that these prohibitions do not attack or condemn exclusive homosexuals: "[The Scriptures'] aim is not to pillory the fact that some people experience this perversion inculpably. They denounce a homosexuality which had become the
Paul's statement of these prohibitions in the context of rigidly defined sex roles. The early Christian Church absorbed the Platonic-Aristotelian notion that homosexual acts are unnatural. The church's view was further grounded on a probable misinterpretation of the Old Testament prohibitions, perhaps caused by the influence of the Pauline prohibitions. These homosexuality prohibitions, when enacted into Roman law by the early Christian emperors, were interpreted not merely as prohibiting the unnatural for Plato's reasons, but also as combating pestilence, plague, and natural disaster. Justinian, for example, based on a probable misinterpretation of the Sodom and Gomorrah legend, supposed that the existence of homosexual acts was, in fact, causally responsible for the recent occurrences of floods, earthquakes, and plagues. Consequently, Justinian prohibited homosexual acts on pain of death or torture or both.

Finally, the Christian interpretation of the unnaturalness of homosexuality was consolidated and given theoretical statement by St. Thomas's reformulation of St. Augustine's view that the only proper "genital commotion" is that aimed toward the reproduction of the species in marriage. Since sexual drives operate quite independently prevalent fashion and had spread to many who were really quite capable of normal sexual sentiments. Lack of frank discussion has allowed a number of opinions to be formed about homosexuals which are unjust when applied generally, because those who have such inclinations in fact are often hard-working and honourable people." A New Catechism 384-85 (K. Smith trans. 1967), cited in In re Labady, 326 F. Supp. 924, 930 (S.D.N.Y. 1971). Cf. Bailey, supra at x-xii (similar distinction between the invert and pervert).

63. See, e.g., Romans 1:26, 27; 1 Corinthians 6:9, 10; 1 Corinthians 11:14, 15. For an interpretation that these passages are not about homosexuality per se, see J. McNeill, The Church and the Homosexual 37-66 (1976).

64. See note 62 supra.


66. See Justinian, Novellae 77 and 141, reprinted in Bailey, supra note 62, at 73-75. 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. For a description of some tortures inflicted upon homosexuals, see id. at 78-79. 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 *216.


68. See Augustine, 1 The City of God 470-72 (M. Dods trans. 1950). St. Thomas is in accord with Augustine's view. Of the emission of semen apart from procreation in marriage, he wrote: "[A]fter the sin of homocide 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 precluded." 3 T.
of the will (let alone the will to reproduce), sexuality was a natural object of continuing shame to St. Augustine. It follows from this view that certain rigidly defined kinds of "natural" intercourse in conventional marriage are moral; extramarital and of course homosexual intercourse are forbidden. Building on these Augustinian foundations, St. Thomas argued that, even granting that homosexual acts between consenting adults harm no one, it is still unnatural and immoral, for it is an offense to God himself who has ordained procreation as the only legitimate use of sexuality. St. Thomas thus takes the Platonic view—namely, that human sexuality has a distinct purpose—and gives it a theological interpretation. Homosexuality is unnatural not primarily because it degrades proper human function, but because it violates divine law which sanctions that function.

On the basis of such views, there arose the conviction that homosexuality was a heresy, a clear and flagrant violation of express divine command. Accordingly, throughout the Middle Ages, homosexuals were prosecuted as heretics, often being burned at the stake. With the association of religious and secular law, one can further understand the association, even in contemporary literature, of homosexuality and


69. The fact that sexual desire is not a proper object of the will, and that a main feature of certain kinds of inadequate sexual function is the very attempt to will it, are a main theme of the therapy of Masters and Johnson. See W. Masters & V. Johnson, Human Sexual Inadequacy 198-99, 202-03 (1970). The conception, thus, of certain religious traditions (namely, that "proper" sexual experience must be accompanied by certain kinds of wills and intentions) may account for the association of defective sexual function with rigid religious sexual conceptions. See generally id. at 10, 24, 70, 117-20, 133, 135, 139, 144, 175-76, 177-79, 189, 213, 253-56.

70. "This lust, of which we at present speak, is the more shameful on this account, because the soul is therein neither master of itself, so as not to lust at all, nor of the body, so as to keep the members under control of the will; for if it were thus ruled, there would be no shame." Augustine, 2 The City of God 40 (M. Dods trans. 1948). Cf. note 69 supra.

71. One prominent account of the Catholic view notes that Catholic canon law "holds, as a basic and cardinal fact, that complete sexual activity and pleasure is licit and moral only in a naturally completed act in valid marriage. All acts which, of their psychological and physical nature, are designed to be preparatory to the complete act, take their licitness and their morality from the complete act. If, therefore, they are entirely divorced from the complete act, they are distorted, warped, meaningless, and hence immoral." Gardiner, Moral Principles Towards a Definition of the Obscene, 20 Law & Contemp. Prob. 560, 564 (1955). Cf. T. Bouscaren. A. Ellis & F. Korth, Canon Law 930 (1963); H. Gardiner, Catholic Viewpoint on Censorship 62-67 (1958). For a critique, see R. Haney, Comstockery in America 88-96 (1960).

72. Summa Theologica II-II, Q. cliv. I, II, and XII.

73. See Bailey, supra note 62, at 135. See generally S. Runciman, The Medieval Manichee (1947). 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. See Bailey, supra note 62, at 141, 148-49.
treason.74 Homosexuality was perceived as undermining the foundations of the state because it was a defiance of the divine law, which was conceived to be the basis of the state.

This religious condemnation of sexual deviance strongly influenced the Anglo-American secular prohibitions. Thus, during the Middle Ages in England, homosexuality was, along with heresy, blasphemy, witchcraft, adultery, and the like, within the jurisdiction of the ecclesiastical courts.75 The first English statute forbidding homosexual acts76 was not enacted until the English Reformation when Henry VIII transferred powers of the ecclesiastical courts to the king’s courts.77 When Henry’s statute was revived under Elizabeth I, the new statute, confirming the religious grounds of its legitimacy, recited that the law was made necessary to combat the prevalence of the “horrible and detestable vice of buggery, aforesaid, to the high displeasure of Almighty God.”78 Blackstone refused, following St. Thomas, even to mention sexual deviance, referring to it as “the infamous crime against nature, committed either with man or beast . . . the very mention of which is a disgrace to human nature,”79 citing Old Testament prohibitions and the Sodom and Gomorrah legend for the appropriateness of capital punishment (preferably, it seems, by burning).80

The very Blackstonian language of condemnation was imitated in American colonial statutes and continues to be used in statutes of some American states.81 However, because of constitutional objections to the vagueness of the term “unnatural” in criminal statutes,82 the prohibitions are often described with a specificity which Blackstone

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74. See generally P. Devlin, The Enforcement of Morals 9-13 (1965) [hereinafter cited as Devlin].
75. See W. Barnett, Sexual Freedom and the Constitution 80-81 (1973) [hereinafter cited as Barnett].
76. 25 Hen. 8, c. 6 (1533) (repealed by 9 Geo. 4, c. 31 (1828)).
77. Barnett, supra note 75, at 80.
78. 5 Eliz. 1, c. 17 (1562). See Barnett, supra note 75, at 81.
79. 4 W. Blackstone, Commentaries *215.
80. Id. at *216. Blackstone’s invocation of Old Testament texts in support of the intrinsic evil of homosexuality is echoed in later American judicial opinions. See, e.g., Dawson v. Vance. 329 F. Supp. 1320 (S.D. Tex. 1971), which cites the Sodom and Gomorrah episode at Genesis 19 in support of the proposition that the “practice is inherently inimical to the general integrity of the human person.” Id. at 1322. See Doe v. Commonwealth’s Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff’d without opinion, 425 U.S. 901 (1976), which points out that sodomy statutes have an “ancestry going back to Judaic and Christian law.” Id. at 1202.
82. See, e.g., Harris v. State, 457 P.2d 638 (Alas. 1969); Franklin v. State, 257 So. 2d 21 (Fla. 1971); State v. Sharpe, 1 Ohio App. 2d 425, 205 N.E.2d 113 (Ct. App. 1965). The Supreme Court has now, however, laid these arguments to rest, at least as a matter of federal constitutional law. Rose v. Locke, 423 U.S. 48 (1975).
would have found shocking. Whatever the form of the law, the laws of thirty-two states and the District of Columbia impose criminal penalties on consenting adults who engage in private homosexual activity. Most of these statutes prohibit sodomy which includes oral and anal intercourse between heterosexuals and sexual acts with minors. Four states expressly limit their prohibition of consensual sodomy to homosexual acts.

II. CONTRACTARIAN MORAL THEORY AND THE CONSTITUTIONAL RIGHT TO PRIVACY

Having attempted to clarify the notion of the unnatural which underlies laws prohibiting homosexual acts, we must now develop the thought that contractarian moral theory illuminates the moral basis and proper interpretation of the constitutional right to privacy. We begin with a brief sketch of the development of the constitutional right to privacy. Then we will focus on the moral principles centrally relevant to the analysis of this problem (namely, the principles of justice) and the clarification that these principles bring to the constitutional right to privacy.

1. Present Form of the Constitutional Right to Privacy

The concept of privacy, as an independent legal right, was first formulated in a famous law review article by Warren and Brandeis. It was there suggested that the mere intrusion upon certain personal matters—in itself not compensable under then-existing law—should be regarded as an independent tort. Since then, the “right of privacy” has been successfully invoked in a wide range of tort cases. Dean Prosser in 1960 examined three hundred such cases in an attempt to discover exactly what interest was being protected. He concluded that no single thing was common to every loss of privacy. But he did note four characteristics, at least one of which was present in each case, namely:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.\footnote{88}

Subsequent commentary has sought to reduce Prosser's disparate list to one unifying theme: privacy as the capacity to control information about oneself or one's experiences.\footnote{89}

In constitutional law, privacy is a notion of more recent vintage. At least prior to 1965, privacy in constitutional law was not regarded as an independent constitutional right. The word "privacy" nowhere appears in the Constitution. At most, privacy was viewed as an interest protected in certain limited respects by various specific constitutional provisions—for example, the third amendment prohibition of quartering soldiers in the home, the fourth amendment guarantee against unreasonable searches and seizures and the fifth amendment protection against self-incrimination.

The idea of an independent constitutional right to privacy was introduced in 1965 in \textit{Griswold v. Connecticut}.\footnote{90} There the Supreme Court invalidated a Connecticut statute forbidding the use of contraceptives as applied to a married couple on the ground that it violated a constitutional right to privacy protecting the marital relationship. Justice Douglas, writing for himself and Justice Clark, found that an independent right to privacy could be inferred from a number of constitutional provisions.\footnote{91} Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, also found a fundamental right to marital privacy, inferrable chiefly from the ninth amendment.\footnote{92} Only Justices Harlan and White, who concurred in the judgment, would find the statute to be violative of the fourteenth amendment's substantive due process guarantees in that it had no rational relation to any proper state purpose.\footnote{93}

In 1969 in \textit{Stanley v. Georgia},\footnote{94} the Court held unconstitutional a

\textit{90.} 381 U.S. 479 (1965).
\textit{91.} Id. at 484-86.
\textit{92.} Id. at 486-99.
\textit{93.} Id. at 499-502 (Harlan, J., concurring); id. at 502-07 (White, J., concurring).
\textit{94.} 394 U.S. 557 (1969).}
state statute criminally punishing the mere private possession of obscene materials. After mentioning the defendant's first amendment right to receive information, the Court, citing *Griswold*, invoked the constitutional right to privacy: "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." The Court agreed that individuals have the right to satisfy their "intellectual and emotional needs in the privacy of [their] own home[s]."

In 1972 the Court in *Eisenstadt v. Baird* invalidated the conviction of a campus lecturer for giving a contraceptive device to a young woman of undisclosed marital status. The state statute under which the defendant had been convicted prohibited, *inter alia*, the distribution to unmarried persons of any "article whatever for the prevention of conception." Four justices were prepared to hold on equal protection grounds that unmarried persons must be allowed the same access to contraceptive devices which the statute accorded to married persons. The plurality opinion made it clear, however, that the issue of whether a statute forbidding the distribution of contraceptives to unmarried persons "conflicts with [a] fundamental human right" (i.e., the right to privacy) was not being addressed by the Court. This was so because, under the equal protection clause, "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." Nonetheless, the following expansive dictum appears to give broad support to the idea that the *Griswold* right to privacy is not strictly limited to the marital relationship:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into

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95. Id. at 564.
96. Id. at 565.
98. The Court noted that while the lower court had described the woman as unmarried, the record contained no evidence as to her marital status. Id. at 440 n.1.
99. Id. at 441 n.2.
100. Id. at 446-55. Justice Brennan wrote the opinion of the Court, in which he was joined by Justices Douglas, Stewart and Marshall. Justice White, joined by Justice Blackmun, concurred in the result, but reached neither the equal protection nor the right to privacy issues. Justices Powell and Rehnquist took no part in the decision.
101. Id. at 453, quoting the court below, 429 F.2d 1398, 1402 (1st Cir. 1970).
matters so fundamentally affecting a person as the decision whether to bear or beget a child.\textsuperscript{103}

The scope of the right to privacy was further expanded in 1973 in \textit{Roe v. Wade}.\textsuperscript{104} The Court there held that a Texas statute forbidding abortion except to save the life of the mother violated the mother's fundamental right to privacy, "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . ."\textsuperscript{105} In adopting this rationale, the Court made clear what all but two Justices in \textit{Griswold} had avoided saying\textsuperscript{106}—that the constitutional right to privacy is among the liberties guaranteed by due process of law.\textsuperscript{107}

Finally, in \textit{Paris Adult Theatre I v. Slaton}\textsuperscript{108} the Court rejected a privacy-based challenge made by owners of an adult movie house to a Georgia civil provision allowing injunctive relief against the presentation of obscene materials.\textsuperscript{109} The Court held that no general privacy right—such as that protecting a woman's right to an abortion—protects the use of obscene materials\textsuperscript{110} and that a commercial theatre is not sufficiently analogous to a private home to merit limited, place-oriented privacy protection such as was extended in \textit{Stanley}.\textsuperscript{111}

The implications of these precedents for other areas have been a matter of dispute.\textsuperscript{112} As regards homosexual conduct, Justice Harlan's dissent in \textit{Poe v. Ullman},\textsuperscript{113} which first discussed marital privacy as a fundamental right, explicitly excluded homosexual practices.\textsuperscript{114} Justice Goldberg's opinion in \textit{Griswold}, in which Chief Justice Warren and

\textsuperscript{103} 405 U.S. at 453 (emphasis in original).
\textsuperscript{104} 410 U.S. 113 (1973).
\textsuperscript{105} Id. at 153.
\textsuperscript{106} See notes 90-93 supra and accompanying text.
\textsuperscript{107} In Board of Educ. v. LaFleur, 414 U.S. 632 (1974), the Court invoked the idea of a woman's right to decide whether to bear a child, recognized in Roe, as part of its reasoning holding unconstitutional a mandatory pregnancy leave after only four months of pregnancy. Id. at 639-40.
\textsuperscript{108} 413 U.S. 49 (1973).
\textsuperscript{109} Addressing the question of the applicability of the first amendment, the Court reiterated its holding in \textit{Miller v. California}, 413 U.S. 15 (1973), that obscenity is not constitutionally protected expression, and vacated and remanded the trial court's finding of obscenity for reconsideration in the light of the new standards enunciated in \textit{Miller}. Id. at 54-55. For a criticism of the \textit{Miller} and \textit{Paris} opinions, see Free Speech, supra note 5.
\textsuperscript{110} 413 U.S. at 65-66.
\textsuperscript{111} Id.
\textsuperscript{113} 367 U.S. 497 (1961).
\textsuperscript{114} Id. at 553 (Harlan, J., dissenting).
Justice Brennan joined, also excluded deviant sexual conduct from the right and cited Harlan's language in *Poe* with approval. Thus, at least four of the *Griswold* justices appear to have been unwilling to expand privacy to include homosexual conduct. On the other hand, a number of lower courts have either held or stated in dictum that statutes forbidding homosexual relations between consenting adults are unconstitutional on privacy grounds.

The difficulty in predicting the implications of the right to privacy cases is symptomatic of the unprincipled, amorphous form which the constitutional right to privacy has had from its inception. Its history has been more suggestive of legislative fiat than judicial reasoning. This sense of intellectual legerdemain is suggested even by the name of the right—"the right to privacy." As we have seen, the right of privacy, as conventionally understood both in the law of torts and in constitutional law, with relation to illegal searches and seizures and the like, turns on an individual's right to withhold personal information or experiences from others. However, the constitutional right to privacy, as developed since *Griswold*, cannot be characterized as merely a right protecting information control. It involves affirmative personal rights. This feature of the right to privacy cases, which commentators had observed even about *Griswold*, was made quite clear by *Roe v. Wade*. In *Roe*, the challenged law subjected the person performing the abortion to criminal sanctions and was unconstitutional because it made it difficult for women to obtain the desired service. There is not the remotest suggestion in *Roe* that the state could cure the constitutional infirmity by removing any criminal sanction from the woman while continuing effectively to restrict abortion by attacking

115. 381 U.S. 479, 498-99 (Goldberg, J., concurring).
118. See note 28 supra.
119. See note 89 supra and accompanying text.
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suppliers of the service. Indeed, since Roe, the Court has insisted that the Roe-defined right extends to "the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." In short, there is no evidence that the constitutional right to privacy depends on outrageous government surveillance violative of conventional right of privacy interests.

Undoubtedly, there are significant relationships between the conventional right of privacy and the values it protects, and the kind of personal liberty involved in Griswold and its progeny. First, the enforcement of laws limiting sexual liberty (e.g., anti-contraception laws) often would involve particularly egregious forms of interference with the conventional right of privacy (e.g., searching the bedroom).

Second, one of the primary underlying values, made possible by the conventional right of privacy, is the capacity, by informational control, to create different kinds of intimacy with some but not others, a capacity fundamental to the growth of friendship and love. Griswold and Roe also apparently were intended to enhance the growth of intimate relationships by granting forms of intimacy freedom from governmental control. Third, privacy in the conventional sense (being left alone without anyone observing) is a generally accepted prerequisite to human sexual intercourse and the protection of sexual activity seems to be an important aspect of the constitutional right to privacy cases.

These similarities between the conventional right of privacy and the kind of liberty established in Griswold and its progeny are persuasive analogies. Reasoning by analogy is, of course, one traditional mode of legal reasoning by which courts gradually extend or develop precedents in a principled way. The Court cannot be faulted for using such a mode of reasoning in developing the implications of constitutional

122. Note Justice Rehnquist's dissent which indicates that the problems implicit in enforcing abortion laws are completely different from those involved in Griswold. 410 U.S. at 172 (Rehnquist, J., dissenting).
124. These issues were obviously central in Justice Douglas' mind in the majority opinion in Griswold where he contrasted the Connecticut criminal statute to other measures, such as regulation of the sale and manufacture of contraceptives, that would also have achieved the state's goal of discouraging use. 381 U.S. at 485.
125. See Fried, supra note 89, at 137-52.
126. See C. Ford & F. Beach, Patterns of Sexual Behavior 68-72 (1951) [hereinafter cited as Ford & Beach]. This is not a characteristic of animal sexual behavior. "A desire for privacy during sexual intercourse seems confined to human beings. Male-female pairs of other animal species appear to be unaffected by the presence of other individuals and to mate quite as readily in a crowd as when they are alone." Id. at 71.
127. See notes 180-204 infra and accompanying text.
values. The challenge of the right to privacy cases is to articulate in a principled way the constitutional considerations which have motivated the Court in this area.  128

The constitutional right to privacy, we have observed, clearly does not rest on some kind of right of information control. Rather, it turns on some form of substantive liberty or autonomy 129 to act in certain ways without threat of governmental sanction, interference, or penalty. The Court's remarks about the nature of this substantive right are suggestive. Activities protected by the right implicate individuals' "beliefs, their thoughts, their emotions and their sensations," central values of the "right to be left alone."  130 These experiences are at the core of "protected intimate relationship[s]" 131 and require some kind of sanctuary in order to be properly cultivated and perfected. 132 These remarks cry out for more fundamental examination of the right to privacy in the light of relevant moral theory.

2. The Principles of Justice, Self-Respect as the Primary Human Good, and Liberty to Love as a General Good

Contractarian moral theory, we have suggested, has an authoritative role in the analysis of constitutional values.  133 Accordingly, we turn to such a moral theory in order to elucidate the problem at hand—the moral and constitutional values underlying the right to privacy cases.

This Article employs a contractarian analysis, based upon the model of John Rawls, 134 which proposes the following approach: Moral principles are those that perfectly rational men, irrespective of historical or personal age, in a hypothetical "original position" of equal liberty and having all knowledge and reasonable belief except that of their specific personal situation, would agree to as the ultimate stan-

128. See Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) [hereinafter cited as Wechsler].
129. See note 121 supra.
132. In Paris, both the Court's rejection of the principle—well articulated by John Stuart Mill—that liberty should be limited only to prevent harm to others (see On Liberty, in The Philosophy of John Stuart Mill 197 (M. Cohen ed. 1961) [hereinafter cited as On Liberty]) and its citation of the adage "a man's home is his castle," 413 U.S. at 66, suggests that the source of the value placed on the "privacy of the home" in Stanley, which Paris reaffirms, arises from the significance in one's life of a private sanctuary for personal relationships.
133. See notes 15-24 supra and accompanying text.
134. J. Rawls, A Theory of Justice (1971) [hereinafter cited as Rawls]. See also Action, supra note 24, at 75-91.
dards of conduct that are applicable at large.\textsuperscript{135} Since our concern is to apply this definition of moral principles to develop a theory of justice, we must introduce into the orginal position the existence of conflicting claims to a limited supply of goods and consider a specific set of principles to regulate these claims.\textsuperscript{136}

"General goods" are those things or conditions that are typically the objects of rational choices as the generalized means to a variety of particular desires.\textsuperscript{137} Liberty, in all its manifestations, is usually classified as one of these general goods. Similarly, it is natural to identify capacities, opportunities and wealth as general goods.\textsuperscript{138}

The original position presents a problem of rational choice under uncertainty. Rational men in the original position have no way of predicting the probability that they will end up in any given situation in life. If a person agrees to principles of justice that permit deprivations of liberty and property rights and later discovers that he occupies a disadvantaged position, he will have no just claim against deprivations which may render his entire life prospects meager and bitterly servile. To avoid such consequences, the rational strategy in choosing the basic principles of justice would be the conservative "maximin" strategy;\textsuperscript{139} one would want to make certain that the worst position in the adopted system is the best of all conceivable worst positions—that is, one would maximize the minimum condition. Thus, if a person were born into the worst possible situation of life allowed by the adopted moral principles, he would still be better off than he would be in the worst situation allowed by other principles. The rational decision on such principles requires consideration of the relative weight assigned the general goods by those in the original position.

Self-respect or self-esteem occupies a place of special prominence. People desire general goods—liberties, opportunities, wealth—in order to attain self-respect through the fulfillment of their life plan; self-respect will thus be referred to as the primary human good.\textsuperscript{140} People

\textsuperscript{135} See Rawls, supra note 134, at 11-22.

\textsuperscript{136} If there were goods in abundant superfluity, or if people were more willing to sacrifice their interests for the good of others, the need for a moral system might be nonexistent or significantly different. For David Hume's remarkable discussion of the conditions of moderate scarcity, see D. Hume, A Treatise of Human Nature 485, 495 (1888).

\textsuperscript{137} Rawls describes these general goods as "things which it is supposed a rational man wants whatever else he wants," Rawls, supra note 134, at 92. The notion of rationality considered here is developed in Action, supra note 24, at 27-48. See also Fried, supra note 89, at 87-101; Rawls, supra note 134, at 407-16. The general view of the good is discussed in id. at 395-452 and in Action, supra note 24, at 286-91.

\textsuperscript{138} Rawls, supra note 134, at 92; see Equal Opportunity, supra note 4, at 41-49

\textsuperscript{139} See Rawls, supra note 134, at 150-61.

\textsuperscript{140} See id. at 433, 440-46.
in the original position would regulate access to the general goods so as to maximize the possibility that each member of society will be able to attain self-respect.

Self-respect is based on one's ability to exercise his capacities competently.\(^{141}\) Human beings have complex capacities including the ability to think and deliberate, to use language, to create artifacts of a practical or aesthetic nature, to plan and shape life in terms of desires and aspirations over time,\(^ {142}\) and the like. Deprived of the experience of personal competence and self-mastery, humans lack a sense of self-worth, leading to the despairing inner death central to apathy, cynicism, stoical remoteness, and spiritual slavery.\(^ {143}\)

Another conclusion of contractarian theory is that, in reaching an agreement upon a system of morality and justice, people in the original position will give priority to the maximization of liberties. At least after a minimal level of wealth has been secured to all people, the original contractors would not accept limitations on their freedom in exchange for enhanced economic well-being. Maximization of liberty best enables all people to attain fulfillment, and thus self-respect, by opening up myriad possible areas of experience and endeavor.

Of course, it does not follow that in a just society everyone is unconcerned with matters of status. . . . But in a well-ordered society the need for status is met by the public recognition of just institutions, together with the full and diverse internal life of the many free communities of interests that equal liberty allows. The basis for self-esteem in a just society is not then one's income share but the publicly affirmed distribution of fundamental rights and liberties. And this distribution being equal, everyone has a similar and secure status when they meet to conduct the common affairs of the wider society.\(^ {144}\)

The liberties distributed by the principles of justice typically include liberties of thought and expression (freedom of speech, the press, religion, and association), civic rights (impartial administration of civil and criminal law in defense of property and person), political rights (the right to vote and participate in political affairs), and freedom of physical, economic, and social movement. The importance of these liberties rests on their relation to the primary good of self-respect, since these liberties nurture personal competences, for example, full expres-

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142. For the notion of a lifeplan, see Rawls, supra note 134, at 407-16; Fried, supra note 89, at 105-15; Action, supra note 24, at 27-48, 63-74.

143. Psychologists deal with this as the problem of depression. See, e.g., A. Lowen, Depression and the Body 17-39 (1972).

144. Rawls, supra note 134, at 544.
The original contractors thus would wish to ensure that all citizens enjoy these liberties. In the United States this has been accomplished through the constitutional guarantees of the Bill of Rights and the Fourteenth Amendment.

Full liberty to enjoy and express love deserves to be recognized as an additional general good since it similarly develops self-respect. First, love in some form is a necessary ingredient of a fulfilled life. Whether such love is for a specific individual, a number of individuals or even for an abstract entity, love is part of what is commonly meant by the meaning of life. Its absence renders a life plan incoherent and the life of the spirit deformed and miserable. Second, love in its sexual forms affords a uniquely ecstatic experience, for it makes available to modern man experiences increasingly inaccessible to him in his public life: self-transcendence, expression of private fantasy, release of inner tensions, and socially acceptable expression of regressive desires to be again the omnipotent child—unafraid to lose control, playful, vulnerable, spontaneous, sensually loved. While people may choose to forego love, any coercive prohibition of certain forms of it would be a deprivation of a uniquely significant experience. Third, such love in its sexual forms is a crucial ingredient of the human capacity to form lasting personal relationships and thus facilitates the special good that these relationships afford in human life. Human beings are sexually responsive throughout the year, not just during the period of possible fertilization and procreation, as is generally the case with other mammals. This greater capacity for sensual experience is an ingredient of the distinctively human capacity for lasting, profound personal relationships, because the possibility of continuing sensual experience renders the relationship one of continuing delight. Such durable relationships founded on sexual intimacy are happily denominated, in the Biblical locution, a form of knowledge, for they afford to people the capacity for a secure disclosure of self, not only through exposure

145. For a fuller development of this element of the moral theory of free speech, see Free Speech, supra note 5.

146. The damaging effects of deprivation of love on young children are increasingly well-evidenced. See generally J. Bowlby, Child Care and the Growth of Love (1975), M. Rutter, Maternal Deprivation Reassessed (1972); J. Bowlby, Attachment and Loss (1969).

147. See M. Balint, Primary Love and Psychoanalytic Technique 109-17 (1952).

148. On the values of these relationships, see Benn, Privacy, Freedom, and Respect for Persons, in Privacy 16 (Nomos XIII) (J. Pennock & J. Chapman eds. 1971)

149. See Ford & Beach, supra note 126, at 199-267.

of sexual vulnerabilities, but also through the sharing of recesses of the self otherwise remote and inaccessible.  

It is no accident, therefore, that these relationships are regarded as of fundamental importance among the strategic decisions in one's life plan. Whom one marries, for example, is conventionally conceived of as a decision at least as strategically important as the choice of occupation.  

Like this decision, the choice of one's lover shapes one's entire self-conception—one's sense of personal possibilities and the kind of person one wants to become over time. The disclosures of self that love involves, the mutual shaping of expectations and life styles, the sharing of common aspirations and hopes—all these, and others, suggest the extraordinary significance of decisions about matters of love in human life, and further support the proposition that freedom to love should be considered a general good. Fourth and finally, love in its sexual forms expresses itself in the desire to participate with the beloved in the development of and care for common projects created by the relationship, some of which take on a durable character in terms of objects or activities or even persons who survive the relationship and thus embody its lasting value.  

Love is conceptually defined by its peculiar aims, beliefs, and experiences—for example, the intensity of the experience (one does not typically feel moderately in love), the desire to promote the good of another, the identification of another's interests as one's own (experiencing joy when the other is joyful, sadness when the other is sad), the desire for physical and psychological closeness (lovers naturally live together). The concept of love says nothing about the form its physical expression might take other than, for example, that it involves forms of intimate closeness expressing the evident intention of good to another. Thus, sexual intercourse enables one to express love through the sharing of pleasure. It is a logical truth that love cannot be expressed by nonconsensual sadism. Short of that, however, there is no ideal or exclusive or proper physical expression of sexual love, for a large and indeterminate class of forms of sexual intercourse is compatible with the aims of love.

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151. See Fried, supra note 89, at ch. IX.  
152. The gravity of this choice was stressed as early as Aristotle's seminal discussion of friendship. See Nicomachean, supra note 37, at Book VIII; cf. Action, supra note 24, at 266-67.  
153. The thought that falling in love involves thinking of the love object as the parent of a common child, understood either physically or metaphorically as a common interest fostered by the relationship, is as old as Plato. Plato Symposium 206c et seq.; see, for other statements of the view, M. Scheler, The Nature of Sympathy (P. Heath trans. 1954); A. Schopenhauer, 2 The World as Will and Representation 531-67 (E. Payne trans. 1958).  
These observations illustrate in a striking way the profound philosophical error in Augustine’s classic and influential model of sexuality. Augustine supposed human sexuality always to be a wild, incoherent animal passion whose drives undermine human capacities for self-control. He believed that complete human self-control would result in the use of sexuality only for procreation within marriage and that human beings experience shame over their sexuality when they do not experience sex in the only proper way. Augustine’s conception, however, both underestimates the distinctively human capacity for self-control over sexual desire and overestimates the force of sexuality as a kind of dark, Bacchic possession, incapable of human control. Human sexuality, as sexologists have emphasized, is, unlike all other comparable biological appetites, malleable and subject to conscious control. Humans can and do postpone engaging in it indefinitely, and sometimes for a lifetime; they use sexuality for diverse purposes—to express love, for recreation, or for procreation. No one purpose necessarily dominates; rather, human self-control chooses among the purposes depending on context and person. The extraordinary human capacity for sensual experience, not tied to the reproductive function, is a central aspect of the human competence to sustain longstanding and intense personal relationships which rest, in part, on the possibility of reciprocal sexual delight. Augustine and the tradition he fostered failed to see these distinctive ways in which humans can regulate their sexual lives. They failed to understand the wholly natural human competence to control one’s sexual life, supposing unnatural the most natural use of sexuality, namely, as a way to express love between two people. Indeed, from this perspective, we can see that the Augustinian idea that procreation is the only proper end of sexuality is, at best, a plausible description of the animal, not the human, world. If anything, the distinctive mark of natural human sexuality is that it is not narrowly tied to procreation. A more exact use of the “natural-unnatural” distinction would, therefore, be to call the exclusive use of sex for procreation unnatural for humans, though

155. See notes 68-72 supra and accompanying text.
156. See W. Masters & V. Johnson, Human Sexual Inadequacy 10 (1970): “Seemingly, many cultures and certainly many religions have risen and fallen on their interpretation and misinterpretation of one basic physiological fact. Sexual functioning is a natural physiological process, yet it has a unique facility that no other natural physiological process, such as respiratory, bladder, or bowel function, can imitate. Sexual responsiveness can be delayed indefinitely or functionally denied for a lifetime. No other basic physiological process can claim such malleability of physical expression.”
157. See note 150 supra.
158. This uniquely human capacity is the basis of the spiritual and aesthetic dimension of human sexual love. See D. de Rougemont, Love in the Western World (M. Belgion trans. 1956).
natural for animals. Thus, sexual relations between same-sexed partners need not be included within the notion of "unnatural acts"; homosexuality is not necessarily an impairment of proper function.\(^{159}\)

We will now introduce these considerations regarding love into the contractarian model of moral principles. We noted earlier that choice in the original position is choice under uncertainty: rational men in the original position have no way of predicting the probability that they may end up in any given situation of life. By definition, none of the contractors knows his own sex, age, native talents, particular capacity for self-control, social or economic class or position, or in general the particular form of his desires (e.g., whether he likes asparagus or spinach; or is homosexual or heterosexual). Each contractor will be concerned that he not end up in a disadvantaged situation where he will have no appeal to moral principles to denounce deprivations which may render his life prospects bitter and mean. To avoid such consequences, the rational strategy in choosing the basic principles of justice would be the "maximin" strategy.\(^{160}\)

As we have suggested, the contractors in the original position would regard self-respect as the primary good. Accordingly, their focus would be on principles which would ensure that people have the maximum chance of attaining self-respect. Under such principles, people would not be constrained to love or not to love, or to love in certain ways and not others, or to love with certain consequences but not others.\(^{161}\) Freedom to love would mean that a mature individual must have autonomy to decide how to or whether to love another. Restrictions on the form of love imposed in the name of the distorting rigidities of convention which bear no relation to individual emotional capacities and needs would be condemned. Individual autonomy, in matters of love, would ensure the development of people who could call their emotional nature their own, secure in the development of attachments which bear the mark of spontaneous human feeling and which touch one's original impulses. In contrast, restrictions on this individual autonomy would starve one's emotional capacities, withering individual feeling into conventional gesture and strong native pleasures into vicarious fantasies.\(^{162}\) Further, the opportunity to give in-

\(^{159}\) See notes 39-58 supra and accompanying text. It will be argued that homosexual acts are not, in fact, unnatural. See notes 238-47 infra and accompanying text.

\(^{160}\) See note 139 supra and accompanying text.

\(^{161}\) Note also Fourier's striking conception that, just as the utopian state has a duty to supply a minimum of food, it has a duty to supply a minimum of sexual gratification to all citizens. The Utopian Vision of Charles Fourier 336-40 (J. Beecher & R. Bienvenu eds. 1971).

\(^{162}\) See the similar arguments in On Liberty, supra note 132, at ch. III. For one example of such vicarious fantasy, see note 322 infra.
stitutionalized expression to love is an important element in the full realization of self-respect. The idea here is that social institutions are to be arranged so that people are accorded fair opportunity to form love relationships according to their desires, and to receive whatever institutional recognition is necessary to perfect such relationships. One central institution obviously is marriage. Because liberties, opportunities, and capacities relating to love figure so importantly in the quest for self-respect, the rational contractors would not agree to any principle which would permit restrictions upon these liberties, opportunities, and capacities. Inequality in distribution of general goods in general is consistent with the "maximin" strategy of rational choice only where it would in fact work out for the benefit of the worst off. For example, inequality in the distribution of wealth and income might satisfy this condition if such inequality would encourage especially talented people to become trained and to perform functions which would "result in compensating benefits for everyone, and in particular for the least advantaged members of society." But, as regards liberties, opportunities and capacities relating to love, no such effect exists. The greater access of some to love, made possible by the greater distribution to them of such liberties, opportunities and capacities, can not afford commensurable advantages making the most disadvantaged better off. Those with less liberty, opportunity and capacity to love would suffer a wounding deprivation of a fundamental ingredient of a fulfilled human personality for which nothing can compensate. Use of the "maximin" strategy in choosing principles relating to liberty, opportunity and capacity to love, then, tends to eliminate the disadvantaged class: the highest lowest condition is equality for all persons.

The following principle of justice would thus be accepted in the original position:

163. The capacity for love turns on early childhood experiences. A difficult or tormented childhood may result in the meagre development of emotional capacities for attachment and love. See note 146 supra. An emotionally abundant childhood may richly endow a child with such capacities. In addition, love, like other complex human capacities, requires forms of guidance and education, the absence of which retards the development of the intelligent competence to understand what love offers and involves. No small part of this requisite training is adequate sex education. Interestingly, the Commission on Obscenity and Pornography adopted its proposal for the liberalization of obscenity law in the light of its recommendations of the need for better sex education. United States Commission on Obscenity and Pornography, Report of the Commission on Obscenity and Pornography 47-48, 58, 265-79 (1970). For an identical view, see B. Russell, Marriage and Morals 93-117 (1929). Since the developed capacity for love is a general human good, child rearing and educational institutions must be so regulated as to secure a fair opportunity to develop these capacities.

The principle of love as a civil liberty.

Basic institutions are to be arranged so that every person is guaranteed the greatest liberty, opportunity and capacity to love, compatible with a like liberty, opportunity and capacity for all.

The derivation of this principle, being a specification of the more general principles of justice, depends on the preliminary assumption that the contractors are ignorant of their particular desires, nature and circumstances. The contractors thus cannot appeal to special religious duties to procreate to override the equal liberty to love; nor can there be appeals to any taste or distaste for certain forms of the physical expression of love in order to override the equal liberty to love. Rather, the contractors' reasoning in the original position will depend on empirical inference and knowledge. Arguments based on perceptions and intuitions not admissible in the original position must be rejected.

Finally, we must ask whether the contractarian model will yield any other moral principles relevant to the question of sexual liberty. Thus, on contractarian grounds, one may easily derive principles forbidding killing or the infliction of harm or gratuitous cruelty. These principles would be accepted because they ensure a higher lowest. Such moral principles obviously are relevant to the expression of love; lovers should not inflict serious and irreparable bodily harm on one another, even if such harm is intended as an expression of consensual love. Similarly, moral principles of fidelity can be derived from the original position. Such principles obviously put constraints on sexual freedom once loving relationships have been voluntarily and maturely entered into.

In addition, the contractarian model justifies a moral principle of paternalism in certain carefully delimited circumstances. Thus, the contractors would be aware that people such as children or the mentally deficient or insane lack the developed capacities of rational choice and deliberation, or that people may fail to exercise their developed capacities of rational choice in ways damaging to their life and limb. In such extreme circumstances, it would ensure a higher lowest if such people were paternalistically dissuaded or prevented

165. For a derivation of the more general principles of justice, see Free Speech, supra note 5, at 59-65; Equal Opportunity, supra note 4, at 41-49.

166. See Action, supra note 24, at 176-85.

167. On this view, forms of sadism, not inflicting serious or irreparable harm, may be morally practiced among consenting adults. Id. at 179-80. Whether the law can or should, as a matter of sound administration, adopt these moral distinctions is another question. Cf. id. at 184-85.

168. See id. at ch. IX.

169. See Action, supra note 24, at 192-95; Dworkin, Paternalism, in Morality and the Law 107 (R. Wasserstrom ed. 1971).
RIGHT TO PRIVACY

from seriously damaging behavior. Accordingly, in such circum-
stances, interference would be morally justified, indeed sometimes
morally required.

Such a paternalistic principle is relevant to certain cases of the
physical expression of love. For example, it may justify some kind of
lower age limit on marriage or even sexual relations in general; it
might also justify interferences in forms of extreme sexual sadism.

3. Judicial Review and the Constitutional Right to Privacy

Contractarian theory makes two kinds of theoretical contributions to
the analysis of constitutional law and values. First, it explains the
overall purpose of constitutional adjudication. Second, it affords a
method for clarifying the moral basis of particular constitutional
values. Particular constitutional rights, like the right to privacy, exist
within the larger framework of established constitutional traditions.
Accordingly, a brief examination of the contribution of contractarian
theory to this larger framework will give necessary background to the
detailed examination of the constitutional right to privacy.

In general, constitutional adjudication is characterized by two per-
vasive structural features. First, judicial review on constitutional
grounds is fundamentally counter-majoritarian. The idea of such judi-
cial review and invalidation of existing law rests on the founding
fathers' deep distrust of absolute majority rule, and their intention to
afford institutional constraints on the capacity of majority will to
trample on the rights of minorities. 370 Second, judicial review is
intended to protect certain kinds of moral rights. The founding fathers
believed that the rights guaranteed, for example, in the Bill of Rights
were natural moral rights which government had no authority to
transgress. Man, they supposed, is foremost a moral being, and
secondarily a member of a political union. Once having joined such a
union, he retains moral status as a person and is immune from legal
claims that violate that status. This is one of the basic ideas of the
social contract theory of natural rights, familiar to the founders
through the writings of John Locke and others. 371 This moral percep-
tion underlies the idea of judicial review and invalidation on constitu-
tional grounds. Literally, laws which violate certain kinds of moral
rights are invalid.

170. Note the remarks of Alexander Hamilton to the effect that judicial supremacy was
intended as a bulwark against "encroachments and oppressions of the representative body." The
Federalist, No. 78, at 462 (C. Rossiter ed. 1961), and "serious oppressions of the minor party in
the community." Id. at 469.

171. See note 8 supra.
Much current constitutional theory flatly fails to account for these general structural features of constitutional adjudication. Such theory typically fails to take seriously the counter-majoritarian cast of the constitutional design, instead limiting or criticizing judicial review on the ground that it violates the majoritarian will of the people, which is the alleged fundamental premise of the democratic order. Correlatively, these theorists either admit the existence of moral rights in the contemplated constitutional design but then evince utter skepticism about them, or fail to give any weight at all to the existence of such moral rights, sometimes substituting neutral procedural principles. Having thus failed to appreciate fundamental structural features of the constitutional design, it is not surprising that these theories fail to do justice to the practice of constitutional law in the United States.

Contractarian theory, in contrast, takes seriously the role of natural rights thinking in the history of the Constitution. Thus, whatever the historical obscurities which surround the proposal and adoption of the Bill of Rights, there is little question that the Bill was part of, and gives expression to, a developing moral system regarding the rights of man which had been elaborated by Milton and Locke and which found expression in the works of Rousseau and Kant. It is not surprising, therefore, that contractarian theory explains the general structural features of the constitutional order in a way in which other theories cannot.

Contractarian theory does not start from the premise of the ultimate good of majority rule or of neutral principles, nor is the theory

172. This claim is more extensively defended in Moral Criticism, supra note 5, at ch. III. See also Dworkin, The Jurisprudence of Richard Nixon, N.Y. Rev. of Books, May 4, 1972 at 27.
173. See, e.g., Hand, supra note 1; Thayer, supra note 21.
174. See Hand, supra note 1.
175. See Thayer, supra note 21.
177. See sources cited in note 172 supra.
178. See note 8 supra and accompanying text.
skeptical about the possibility of giving reasonable expression to the moral notions implicit in the constitutional order. On the contrary, constitutional democracy is conceived of as an attempt to realize the requirements of the principles of justice.

From the perspective of contractarian theory, it is unlikely that there is a unique solution to the problem of just constitutional design; rather, any one of a range of constitutions, involving different institutional frameworks, might be adopted compatibly with the principles of justice. However, a form of constitution that is clearly justified by these principles would be one in which certain requirements of justice, for example, those established by the principle of greatest equal liberty, are embodied in the constitution itself as conditions of legal validity. Constitutional delegates might justly and reasonably recognize the tendency of popular majorities to be short-sighted in not respecting the liberties of their opponents or of minorities in general. Majority rule would be justified only to the extent that it is compatible with the deeper moral principle of greatest equal liberty. To the extent that judicial review enforces the requirements of this more basic principle in a way that majority rule cannot, it is morally justified. Accordingly, one just solution to the problem of constitutional design would be a constitution like that of the United States in which such liberties, and others, are themselves embodied in the Constitution.

Further, contractarian theory illuminates the nature and scope of particular constitutional rights. In dealing with the constitutional right to privacy, we must focus upon a constitutional right not specifically cited in the Constitution. Thus, we must consider whether, or to what extent, the Court may properly develop constitutional rights.

The seminal exposition of this approach was Justice Douglas' opinion in *Griswold v. Connecticut.* There Douglas argued that certain unenumerated rights, including a right to privacy, are found in the "penumbra" formed by emanations from specific constitutional guarantees. He began his analysis of the alleged right by citing a number of cases where the Court upheld rights not specifically mentioned in the Constitution. Freedom of association and other developments of the first amendment were used to show that the Court had extrapolated from specific rights in order to protect activities thought to be corollaries of those rights. Since the first amendment has a penumbra of

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179. See notes 144 & 145 supra and accompanying text. For a derivation of such a general principle, see Free Speech, supra note 5, at 59-65; Equal Opportunity, supra note 4, at 41-49.
180. 381 U.S. 479 (1965).
181. Id. at 484.
182. Id. at 482-83.
183. Id.
protected activity, Douglas inferred that specific guarantees in the Bill of Rights also can have such penumbras. In particular, the first, third, fourth and fifth amendments illustrate protections of interests that can be regarded as forms of "privacy." This pervasive constitutional concern, together with the ninth amendment's reservation clause, led Douglas to postulate a general right to privacy which exists independently of specific constitutional guarantees.

Contractarian moral theory affords a solid intellectual and moral foundation for both the method of reasoning employed in inferring the constitutional right to privacy, and the specific right there recognized and later developed. As we have noted, the provisions of the Bill of Rights and later amendments are remarkably general in form with legislative history typically nonexistent, meagre or ambiguous. The scope of "freedom of speech or of the press" in the first amendment, or "unreasonable searches and seizures" in the fourth amendment, or "due process of law" in the fifth and fourteenth amendments is not self-evident. The interpretation of each constitutional liberty has required a slow process of development through accepted methods of judicial reasoning. In this process, the Supreme Court has regarded itself as the ultimate expositor of underlying constitutional values, not limiting itself to the specific catalogue of rights or remedies which existed at the time, for example, of passage of the Bill of Rights. In this regard, the Court has correctly understood that its role in the constitutional order is to preserve certain durable concepts of justice which are to act as constraints on majoritarian political bargaining. The moral values underlying the constitutional order are specified by the concept of justice and its associated principles, especially the principle of greatest equal liberty. The specific applications of these principles may require change over time. To the extent this is so, the Court, in order to maintain fidelity to constitutional values, must adjust its interpretation of constitutional provisions in order to ensure that justice is done in the way that fundamental constitutional principles require.

184. Id. at 484-85. The amendment provides: "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. Commentators have questioned the usefulness of this part of Douglas' argument. Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Mich. L. Rev. 235, 243 (1965). One commentator claimed Douglas' use of this argument had broader implications than Justice Goldberg's similar argument. See Emerson, Nine Justices in Search of a Doctrine, 64 Mich. L. Rev. 219, 228-29 (1965).

185. See note 14 supra and accompanying text.

The earlier analysis, leading to the principle of freedom to love as a civil liberty,\textsuperscript{187} illustrates one form of this change in moral values. The modern conception of love as independent of procreation or the possibility of procreation, dictates corresponding shifts in the conception of the liberties regulated by the principle of greatest equal liberty.

This contractarian analysis could explain and justify the Supreme Court cases establishing a constitutional right to privacy. We have observed the pregnant suggestions in these cases to the effect that the substantive right in question turns on the internal beliefs and emotions involved in intimate relationships perfected within the sanctuary of the home.\textsuperscript{188} We may now discern a possible meaning of these suggestions: the Court may be working out, through the process required by contractarian principles, the right to autonomy in deciding how or whether to love. The broader language in the right to privacy cases seems to imply an appreciation of the values articulated in this Article in discussing freedom to love as a general good: the value of love per se, the significant relationships it makes possible, the quality of sexual experience, the need for intimate emotional self-disclosure and release in a sanctuary remote from public roles and pressures, and the like. In each case the Court has tried to protect these values: especially the right to pursue them independently of procreation. Thus, prohibitions of contraception, being clearly violative of the right to decide with what consequences one will engage in acts of love, were held unconstitutional.\textsuperscript{189} Proscriptions on the use of pornographic materials in the privacy of one's home, possibly for non-procreative, masturbatory purposes, are forbidden.\textsuperscript{190} Similarly, the prohibition of abortion limits the right to decide whether an act will have procreative consequences, and can affect whether or not one will enter into a new love relationship; thus, such prohibition violates the right of autonomy in love.\textsuperscript{191} While one may plausibly believe that other rights may be relevant to the sound disposition of the abortion issue,\textsuperscript{192} the principle of love as a

\textsuperscript{187} See notes 146-69 supra and accompanying text.
\textsuperscript{188} See notes 103, 130-32 supra and accompanying text.
\textsuperscript{191} See Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{192} See, e.g., Wertheimer, Understanding the Abortion Argument, in The Problem of
civil liberty at least could explain the moral nature of one crucial right involved in that issue.

The very intellectual process of the Court, in first enunciating the constitutional right to privacy, illustrates the kind of reasoning called for by contractarian principles. In *Griswold*, Justice Douglas argued by analogy that various constitutional provisions preserve values similar to the constitutional right to privacy, and that accordingly that right may be established as an independent value.

These analogies may be stated in more compelling fashion. While the specific catalogue of rights guaranteed by the Bill of Rights is not involved in the right to privacy cases, the values underlying those rights are profoundly implicated in the conception of the liberty to love as a general good, so that the principles of justice, in light of modern knowledge, require that that liberty be acknowledged as a constitutional right. First, the idea of sexual love as a form of communication is a prominent feature of the modern conception of the experience. Surely, autonomy in controlling this form of communication is, to the modern mind, no less important to individual self-mastery and self-worth than the conventional forms of verbal communication protected by the free speech and free press clause of the first amendment. Second, the values of freedom of association, which protect the right of social clubs to engage in racial and religious discrimination, should apply *a fortiori* to the depth of human significance derived by lovers from this form of association. As we have noted, the decision

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Abortion 33 (J. Feinberg, ed. 1973); Brody, Abortion and the Sanctity of Human Life, in id. at 104; Brody, Abortion and the Law, in id. at 140.

193. See notes 180-84 supra and accompanying text.


195. Freedom of speech does extend to some expressive acts. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (picketing); Thornhill v. Alabama, 310 U.S. 88, 103-05 (1940) (same). But the Court has stated that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968) (statute prohibiting knowing destruction or mutilation of selective service certificate upheld).


198. See Justice Douglas' praise of marriage in *Griswold* as an "association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486. More recent cases, notably Roe v. Wade, 410 U.S. 113
on whom one shall love is a fundamental life choice, shaping one's entire self-conception and life plan.\textsuperscript{199} Third, the privacy interests, associated with the third, fourth and fifth amendments, are generally connected with forms of sexual intimacy. Human sexual love must take place in private and unobserved.\textsuperscript{200} Accordingly, privacy, conventionally understood as the control of personal information or experience,\textsuperscript{201} has one of its most valued uses in protecting sexual intimacy.\textsuperscript{202} And fourth, privacy, thus involving the capacity to control information about oneself, is a crucial ingredient in the capacity for love since loving relationships require as a prerequisite the possibility of selective disclosure of certain aspects of oneself to some but not others.\textsuperscript{203} Thus the values of privacy and love again converge.

Such arguments from analogy strongly imply that the right established in \textit{Griswold} was a logical inference from values previously accepted. Contractarian theory fills out and gives foundation to these arguments, showing that this legal development is required by the underlying principles of the constitutional order: the protection of fundamental liberties from unjust encroachment by majority rule.

In particular, contractarian theory enables us to see that this right is not a right of privacy in the conventional sense.\textsuperscript{204} Rather, the constitutionally protected right to privacy established by these cases is the legal embodiment of a moral principle which ensures to each person, among other things, the maximum equal liberty, opportunity and capacity to love.

\section*{III. The Constitutionality of Laws Prohibiting Unnatural Acts}

It should now be possible to apply the foregoing explication of the unnatural and the moral analysis of the right to privacy to the issue raised in \textit{Doe v. Commonwealth's Attorney for City of Richmond}\textsuperscript{205}—the constitutional permissibility of state prohibition of unnatural acts.

\textsuperscript{199} See note 152 supra and accompanying text.

\textsuperscript{200} See note 126 supra.

\textsuperscript{201} See note 89 supra and accompanying text.

\textsuperscript{202} Justice Douglas' opinion in Griswold was particularly influenced by the forms of criminal enforcement that the statute there in question might require (e.g., searching the bedroom). 381 U.S. at 485. See note 124 supra.

\textsuperscript{203} See Fried, supra note 89 at ch. IX.

\textsuperscript{204} See note 89 supra and accompanying text.

Doe summarily affirmed the decision of a three-judge district court, and although this does not necessarily mean that the Court meant to adopt the opinion of the district court as its own, the opinion below must be given careful consideration. The majority opinion of the district court held that Virginia’s “crimes against nature” statute was not unconstitutional as applied to private, consensual homosexual relations between adult males.

The majority opinion first considered whether consensual adult homosexual relations came within the constitutional right to privacy established by Griswold. In focusing on Griswold, the court regarded as dispositive the fact that Justice Goldberg’s concurring opinion cited with approval the dissenting opinion of Justice Harlan in Poe v. Ullman to the effect that the constitutional right to privacy is limited to marital relationships and does not include homosexual conduct.

Having thus dismissed the relevance of the constitutional right to privacy, the majority inquired whether there is any other ground for finding the Virginia sodomy statute unconstitutional and concluded that the “promotion of morality and decency” is a sufficient basis for the prohibition even of private, consensual adult conduct. In order to uphold this aim as a legitimate state purpose, the court held that it is not necessary “to show that moral delinquency actually results from homosexuality,” it suffices, rather, “that the conduct is likely to end in a contribution to moral delinquency.” As evidence for this latter proposition, the majority cited Lovisi v. Slayton, in which a mar-

206. Recent opinions of the Court make clear that summary affirmances do not necessarily affirm the grounds of the lower court opinion, only the result reached between the parties in question. See, e.g., Fusari v. Steinberg, 419 U.S. 379, 391-92 (1974) (Burger, C.J., concurring). Indeed, the Court now takes the view that summary affirmances have a somewhat attenuated precedential value, and may expressly be overruled when the Court comes to consider the matter on the merits. Id. See also Edelman v. Jordan, 415 U.S. 651, 671 (1974); Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976) (Brennan, J., dissenting from denial of certiorari); Richardson v. Ramirez, 418 U.S. 24, 83 n.27 (1974) (Marshall, J., dissenting).

207. The statute read, in pertinent part: “§ 18.1-212. Crimes against nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.” Law of April 2, 1968, ch. 427, § 1, [19681 Va. Acts 529 (repealed and superseded 1975) (current version at Va. Code Ann. § 18.2-361 (1975)).

208. 403 F. Supp. at 1200.
210. 403 F. Supp. at 1202.
211. Id.
212. Id. at 1204.
ried couple was convicted of sodomy under the Virginia statute for participating in acts of fellatio with a third party, where the married couple's daughters (aged 11 and 13) later distributed pictures of the said acts in school. The idea seems to be that Lovisi justifies the proposition that sodomy may lead to moral delinquency—here, corrupting the young. Finally, the court took note of the age of this sodomy statute, pointing out that it had an "ancestry going back to Judaic and Christian law," citing in this connection Old Testament prohibitions.

Judge Merhige, dissenting, argued that the majority opinion failed to give weight to the right to privacy opinions after Griswold in which he contended the right to privacy was extended to unmarried couples. Such opinions, he argued, made it clear that the right to privacy is not limited to the marriage relationship, and, therefore, the Goldberg-Harlan limitation of the scope of Griswold can no longer be regarded as controlling. He noted that these later opinions show that the right to privacy includes "intimate personal decisions or private matters of substantial importance to the well-being of individuals," including consensual adult sexual relationships "whether heterosexual or homosexual." Having identified a fundamental right, which the sodomy statute limited, Judge Merhige argued that the Virginia statute could be upheld only if it had a compelling justification. He noted:

To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response. In any event, what we know as men is not forgotten as judges—it is difficult to envision any substantial number of heterosexual marriages being in danger of dissolution because of the private sexual activities of homosexuals.

Judge Merhige observed, in conclusion, that the promotion of morality and decency, cited by the majority opinion as grounds for the Virginia sodomy statute, is a "salutary" legislative goal, but is

214. 403 F. Supp. at 1202.
215. Id. at n.2; namely, Leviticus 18:22 and 20:13.
216. Id. at 1203-04 (Merhige, J., dissenting).
217. Id. at 1204 (Merhige, J., dissenting). Judge Merhige cites his own opinion in Lovisi v. Slayton, 363 F. Supp. 620, 625 (E.D. Va. 1973), aff'd, 539 F.2d 349 (4th Cir.) (en banc), cert. denied, 97 S. Ct. 485 (1976) where he characterized the constitutional right to privacy as follows: "It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection."
218. 403 F. Supp. at 1204 (Merhige, J., dissenting).
219. Id. at 1205 (Merhige, J., dissenting).
220. Id.
limited by the constitutional right to privacy when it leads to limitations on personal consensual adult conduct in the home.221

Thus, the majority opinion in *Doe*, affirmed by the Supreme Court, found that allegedly unnatural acts, even between consenting adults in the privacy of their homes, are outside the protection of the constitutional right to privacy. But, the analysis of this Article suggests that these decisions are wrong. An understanding of the moral status and weight of the constitutional right to privacy in the light of the contractarian theory of justice herein described compels a conclusion contrary to that of the Court. There are convincing moral and constitutional reasons why putatively unnatural acts, of the kind involved in *Doe*, should be accorded the protection of the constitutional right to privacy.

1. The Unnatural and the Equal Liberty Principle

We begin with the opinions of Justices Harlan and Goldberg in *Poe v. Ullman*222 and *Griswold v. Connecticut*,223 respectively, cited by the district court in *Doe* as the foundation of its holding that the constitutional right to privacy is limited to marital relationships and does not include deviant sexual conduct. In fact, as Judge Merhige showed in his dissent, later opinions have found the constitutional right to privacy applicable in non-marital contexts.224 If the right to privacy extends to sex among unmarried couples or even to autoeroticism, it is impossible to understand how in a principled way the Court could decline to consider fully the application of this right to private, consensual deviant sex acts.

The Court might distinguish between heterosexual and homosexual forms of sexual activity; but could this distinction be defended rationally? At bottom, such a view must rest on the belief that homosexual or deviant sex generally is unnatural. Under this view, the unnatural would have to be excluded altogether from the scope of the constitutional right to privacy just as the obscene is excluded from first amendment protection.225 However, an analysis of the application of the notion of the “unnatural” to deviant sexual acts and an exam-
ination of the moral force of the constitutional right to privacy seems to compel the clear and decisive rejection of such a view.

The term "unnatural," as we have dealt with it,\(^{226}\) means the interruption or disruption of proper or essential function or purpose, resulting in frustration, impairment, corruption or degradation. An unnatural human act is one which involves a deviation from fundamental human nature, warping that nature into the evil or degraded non-human—the animal, the demonic, the possessed, the alien.

The notion that private, sexually deviant acts between consenting adults are unnatural rests on the Augustinian view that the only natural function of human sexuality is procreation and that any other sexual activity is the natural object of shame.\(^{227}\) In this view, the use of contraceptives, abortifacients, or pornography is unnatural,\(^{228}\) because such practices tend to frustrate the essential connection between sexual experience and procreation. Homosexual acts are supposed unnatural on similar grounds. Thus, for example, Victorian physicians wrote of the weak, scrofulous, and even monstrous children that resulted from the use of contraceptives in the home;\(^{229}\) homosexuality, similarly, was perceived as a kind of distorting nervous disorder.\(^{230}\)

But, the use of so imprecise a notion as that of the "unnatural" to distinguish between those acts not protected by the constitutional right to privacy and those which are so protected is clearly unacceptable. The case where the constitutional right to privacy had its very origin was one involving contraception—a practice which the Augustinian

\(^{226}\) See notes 24-54 supra and accompanying text.

\(^{227}\) See notes 68-72 supra and accompanying text.

\(^{228}\) See note 71 supra and accompanying text; see also note 51 supra and accompanying text.

State statutes condemning the public reference to, or sale of, contraceptives suggest that they are either obscene or indecent. See, e.g., Mich. Comp. Laws Ann. § 750.40 (1968). Consider also the remarks of one court on the interpretation of the term "unnatural sexual act": "The sociological and biological range of sex acts is almost infinite, going from so-called Freudian impulses, alleged by some to exist in all human behavior, to the viewpoint that all sex acts which do not lead to the production of offspring are unnatural. Disregarding these extreme viewpoints, it is yet apparent that many sex acts which may be logically classified as unnatural have widespread acceptance and frequent use. By way of example: Certain types of birth control are obviously unnatural; also, the practice of artificial insemination . . . is obviously unnatural. Various types of sex acts useful in or even required for medical diagnostic practices are equally unnatural. . . . Such things as intercourse within certain proscribed age limits . . . and, possibly in some states, even miscegenation, are . . . unnatural." State v. Sharpe, 1 Ohio App. 2d 425, ———, 205 N.E.2d 113, 114 (1954), cited with approval in Harris v. State, 457 P.2d 638, 643 (Alas. 1969).


The Court has apparently concluded that the “unnaturalness” of contraception, or of abortion, is constitutionally inadmissible and cannot limit the scope of the right to privacy. The very origin of the right to privacy as a morally necessary constitutional concept arose from the Court’s just perception that the use of the notion of the unnatural in limiting personal liberty in the sexual area was inconsistent with basic constitutional values of personal liberty.

The Court’s implicit rejection of the view that contraception and abortion are unnatural reflects a considered contemporary view. As a general empirical matter, there is simply no evidence that these practices are damaging or that they somehow distort human nature. On the contrary, people justly suppose that contraception, for example, affords a humane and desirable way of regulating the consequences of sexual activity. By such means, the use of sexuality in the expression of love is sharply demarcated from the use of sexuality in procreation, thus desirably broadening the range of choices.

In considering the constitutional permissibility of allowing majoritarian notions of the unnatural to justify limitations on the right to privacy, the Court must take into account two crucial variables: (1) the absence of evidence that these practices are, in any plausible sense to which empirical evidence is relevant, unnatural; and (2) the growing contemporary understanding that people should have the optimal liberty to love. In particular, the Court, in the contraception and abortion decisions, impliedly rejected the legitimacy of state adoption of the classic Augustinian view of human sexuality. The enforcement of majoritarian prejudices, without any plausible empirical basis, could be independently unconstitutional as a violation of due process rationality in legislation. To enforce such personal tastes in matters involving fair access to love would violate a fundamental human right. The moral theory of the Constitution, built as a bulwark against

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231. Note the Court’s concern in Roe v. Wade to show that prohibiting an abortion is in fact damaging to women in quite specific ways. 410 U.S. 113, 153 (1973).

232. For a Catholic argument to this effect, see M. Valente, Sex: The Radical View of a Catholic Theologian (1970).

233. See Justice Stewart’s remark, in the context of the permissibility of isolating the harmless mentally ill on the ground that they failed to conform to normal behavior: “One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.” O’Connor v. Donaldson, 422 U.S. 563, 575 (1975). But see Chief Justice Burger’s remark in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), that state legislatures may rationally indulge in “unprovable assumptions” as to public morality, at least so long as fundamental individual rights are not infringed. See Comment, The Constitutionality of Sodomy Statutes, 45 Fordham L. Rev. 553, 582-83 (1976).
"serious oppressions of the minor party in the community," requires that such moral rights be upheld and protected against majoritarian prejudices. Contractarian theory provides the moral basis for such constitutional protections by its emphasis upon each person's moral right to a greatest equal liberty, opportunity and capacity to love, compatible with a like liberty, opportunity and capacity for all.

For the same reasons that notions of the unnatural are constitutionally inadmissible in the right to privacy decisions involving contraception, abortion, and the use of pornography in the home, these ideas are also inadmissible in the constitutional assessment of laws prohibiting forms of sexual deviance between consenting adults in private. In general, there is no generally acceptable empirical evidence that homosexuality is unnatural. Many cultures which may share in the notion of the unnatural do not regard homosexuality as unnatural. Individuals within our culture, who may find certain conduct unnatural (for example, torturing one's own children) have argued that homosexuality is not unnatural on the basis of various facts which the traditional view either did not know or understand.

For example, it is known that homosexual behavior takes place in the animal world. This suggests that homosexuality is part of our mammalian heritage of sexual responsiveness. Many societies (including ancient Greece) have included or include homosexuality among legitimate sexual conduct, and some prescribe it in the form of institutional pederasty. With respect to exclusive homosexuals, there appears to be no distinction between this group and the general population in terms of symptoms of mental illness or measures of self-esteem and

241. See sources cited in note 238 supra.
242. See, e.g., Hooker, The Adjustment of the Male Overt Homosexual, 21 J. of Projective Techniques 18 (1957). In late 1973 the Board of Trustees of the American Psychiatric Association (APA) decided to remove homosexuality from the list of mental diseases. N.Y. Times, Dec. 16, 1973, at 1, col. 1. The Board's action was approved by a general vote of the APA membership in
self-acceptance.\textsuperscript{243} In general, apart from their sexual preference, exclusive homosexuals are indistinguishable from the general population.\textsuperscript{244} Finally, homosexual preference appears to be an adaptation of natural human propensities to very early social circumstances of certain kinds,\textsuperscript{245} so that the preference is settled, largely irreversi-
bly, at a quite early age.

The cumulative impact of such facts is clear. The notion of "unnatural acts," interpreted in terms of a fixed concept of proper sexual functioning, deviations from which result in damage or degradation, is not properly applied to homosexual acts performed in private between consenting adults. Such activity is clearly a natural expression of human sexual competences and sensitivities, and does not reflect any form of damage, decline or injury. To deny the acceptibility of

that gender identity and sexual object choice coincide with the development of language, i.e., from 18-24 months of age. See Money, Hampson & Hampson, An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism, 97 Bulletin of the Johns Hopkins Hospital 301 (1955).

246. For the substantial irreversibility of sexual preference, see W. Churchill, Homosexual Behavior Among Males 283-91 (1971); Tripp, supra note 245, at 251; West, supra note 245, at 266. Claimed cure rates by psychotherapists probably include instances in which the individual is merely refraining from homosexual conduct while retaining his or her homosexual inclinations and fail to indicate whether those alleged to be changed remained heterosexually oriented. W. Barnett, Sexual Freedom and the Constitution 227 (1973). For a discussion of change techniques employed by therapists, see L. Hatterer, Changing Homosexuality in the Male (1970).

247. See note 242 supra. One form of health problem, that might be adduced in this connection, is venereal disease on the ground that it is common among homosexuals. See Fluker, Recent Trends in Homosexuality in West London, 42 Brit. J. Venereal Diseases 48 (1966). In fact, however, there is no necessary connection between homosexuality and the incidence of venereal disease, and in any event, there is reason to believe that the incidence of venereal disease among homosexuals has been fostered, not combated, by prohibitory sodomy statutes. As regards the incidence of venereal disease among homosexuals, two significant classes of homosexuals do not involve the venereal disease problem: (1) lesbians do not in general suffer from venereal disease, in that women "practically never become infected except through contact with men." G. Henry, All the Sexes 366 (1955); (2) stable homosexual relations, male and female, do not implicate the disease. In general, the root of the venereal disease problem among homosexuals arises from isolated, promiscuous relations among male homosexuals. M. Hoffman, The Gay World 168 (1968); Jackson, Syphilis: The Role of the Homosexual, 19 Med. Services J. Canada 631, 634 (1963); Schofield, Social Aspects of Homosexuality, 40 Brit. J. Venereal Diseases 129, 131-32 (1964), not from the form of anal and oral intercourse. Homosexual Practices and Venereal Diseases, 1964 Lancet 481. But, promiscuity among homosexuals probably is fostered by absolute prohibitions on all forms of homosexual relations and concomitant forms of economic and social discrimination. Since any form of stable homosexual relationship is easily identified as a form of criminal activity, homosexuals are often driven into furtive, anonymous affairs where they suffer less risk of identification. See note 272 infra and accompanying text. See also Jefferiss, Venereal Disease and the Homosexual, 32 Brit. J. Venereal Diseases 17, 20 (1956); Schofield, supra, at 131. These prohibitions also contribute to the incidence of venereal disease among homosexuals by making it more difficult for them to seek treatment or proper diagnosis. Diagnostic difficulties in identifying venereal disease among homosexuals would be lessened if homosexuals were not inhibited by such laws from disclosing their sexual orientation to their physician. See Nicol, Homosexuality and Venereal Disease, 184 The Practitioner 345, 349 (1960); Trice & Clark, Transmission of Venereal Diseases Through Homosexual Practices, 54 S. Med. J. 76, 79 (1961); Trice, Homosexual Transmission of Venereal Diseases, 88 Medical Times 1286 (1960). Efforts to trace venereal disease are also inhibited by the inability of a homosexual engaging in anonymous
such love is itself a human evil, a denial of the distinctive capacities of human nature for sensual and loving experience—in short, in a plausible sense, itself unnatural.

As we have seen, the application of the term “unnatural acts” to sexual deviance grew out of Plato’s twin arguments: (1) that male homosexual relations involved the loss of desirable character traits (e.g., courage and temperance); and (2) that human sexuality has one proper form, namely, procreation. We have already discussed at length the misconceptions underlying the procreational model.

The view that male homosexuality necessarily involves the loss of desirable character traits probably rests on the idea that sexual relations between males involve the degradation of one or both parties to the status of a woman, assumedly a degraded thing to be. But, this view rests on intellectual confusion and unacceptable moral premises since it confuses sexual preference with gender identity, whereas, in fact, there is no correlation at all between them. Male homosexuals or lesbians may be quite insistent about their respective gender identities and have quite typical “masculine” or “feminine” personalities. Their homosexuality is defined only by their erotic preference for members of the same gender.

sex to identify his partner and by his reluctance to incriminate either himself or the partner. Jefferiss, Homosexually Acquired Venereal Diseases, 42 Brit. J. Venereal Diseases 46 (1966); Schofield, supra, at 133.

248. See notes 59-86 supra and accompanying text.

249. See notes 154-57, 227-47 supra and accompanying text.

250. See note 60 supra and accompanying text. This interpretation explains why lesbianism was never condemned with the force that male homosexuality was. The Old Testament prohibitions clearly seem to be directed against men. See, e.g., note 62 supra. Note that lesbianism carried far lighter penalties than did male homosexuality under later rabbinical law. D. Bailey, supra note 62, at 61-63. For a similar view of the extreme condemnation of male homosexuality, see J. McNeill, The Church and the Homosexual 83-87 (1976). The same has been true under Christian religious law. Id. at 160-65. The thought seems to be that since women are already degraded, they cannot be made much worse by having homosexual sex. Men, on the other hand, not being degraded, degrade themselves by acting like women in having sex with men. The underlying thought is expressed universally among primitive peoples by the idea that women have status inferior to men, since they are passive, autochthonous creatures subject to the rhythms of nature, including uncontrollable and polluting menstrual flows and the burden of bearing and raising children. See Rosaldo, Woman, Culture, and Society: A Theoretical Overview in Woman, Culture, and Society 17-42 (Rosaldo & Lamphere eds. 1974); Chodorow, Family Structure and Feminine Personality, in id. at 43-66; Ortner, Is Female to Male as Nature is to Culture?, in id. at 67-87. A woman’s place, in this view, is defined by her limited nature. To depart from this pattern is literally unnatural. This thought has found expression among primitive peoples in the idea that deviational women are witches. See Rosaldo & Lamphere, supra, at 34, 38, 86, 290-91. See also E. Janeway, Man’s World, Woman’s Place 119-33 (1974).

RIGHT TO PRIVACY

If such crude and unjust sexual stereotypes lie at the bottom of anti-homosexuality laws, they should be uprooted, as is being done elsewhere in modern life.

In our culture, as we have seen, the procreational model of human sexuality has been in large part fostered by religious groups; for example, the religious influence on the origin of laws prohibiting "crimes against nature" is apparent. Thus, the opinion of the district court in Doe cites the Old Testament prohibitions as part of the ancient history behind the Virginia sodomy statute. In fact, as previously noted, there is growing controversy within religious groups as to the proper interpretation of these and other Biblical prohibitions. This tradition of rational theology, including attacks by Catholic theologians on the procreational model of sexuality, indicates that even the religious foundations on which these laws were constructed are now seen to be jerrybuilt.

No doubt, however, some religious groups in our society will continue to condemn homosexuality as unnatural, just as they continue to so regard, for example, contraception. Such people acknowledge a religious duty to procreate, believing that any use of sexuality

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253. See S. de Beauvoir, The Second Sex (1952); E. Janeway, Man's World, Woman's Place (1971); J. Mill, The Subjection of Women (1869); V. Woolf, A Room of One's Own (1929); Moral Criticism, supra note 5, at ch. IV, pt. III.

254. See sources cited in note 252 supra.

255. See notes 62-64 supra and accompanying text.

256. See note 75 supra and accompanying text.

257. 403 F. Supp. at 1202 n.2. Such citation of Old Testament texts in support of the intrinsic evil of homosexuality is common in American judicial opinions. See, e.g., Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971), which cites the Sodom and Gomorrah episode at Genesis 19 in support of the proposition that the "practice is inherently inimical to the general integrity of the human person." Id. at 1322.

258. See notes 62 & 63 supra and accompanying text.


260. For an account of the Catholic tradition regarding the unnaturalness of contraception, see J. Noonan, Contraception 238-57 (1965).
without the intention and likelihood of procreation is unnatural. These
people have a moral right to govern their own personal lives in accord
with their views. However, the imposition of their conception of
sexuality on society at large is not based on generally acceptable
empirical grounds, and thus they cannot justly, compatible with the
constitutional right to privacy, demand and require that others, who
do not share their views, deprive themselves of sexual expression and
love in the only way that they may be able to feel it. That their views
are based on religious perceptions, not mere personal whim, should not
allow them to enforce their views on others. Indeed, to the contrary, to
the extent their views rest solely on religious perceptions, not accessible
to ordinary empirical investigation, the enforcement of their views
violates not only the constitutional right to privacy but the estab-
lishment of religion clause of the first amendment.

There is no logically consistent explanation for the Court's refusal to
enforce concepts of the "unnatural" in the case of contraception while
permitting statutes based on similar concepts to prohibit sexual de-
viance. Indeed, the moral arguments in the latter case are more
compelling. For one thing, statutes condemning and prohibiting forms
of contraception probably no longer reflected a majoritarian under-
standing of the unnaturalness of this form of birth control when they
were struck down in Griswold. Accordingly, the need for constitu-
tional protection, while proper, was not perhaps exigent. However,
in the case of homosexuality, there is good reason to believe that, as a
group, homosexuals are subject to exactly the kind of unjust social
hatred which constitutional guarantees were designed to combat.

261. See text accompanying note 165 supra.
262. See Epperson v. Arkansas, 393 U.S. 97 (1968); Barnett, supra note 75, at 74-93; Henkin,
263. In Poe v. Ullman, 367 U.S. 497 (1961), the predecessor case to Griswold, a main reason
for judicial abstention was Justice Frankfurter's view that lack of enforcement of the Connecticut
contraception law evinced complete lack of belief in the law by enforcement officials and the
citizens of Connecticut. See Least Dangerous, supra note 22, at 143-56.
264. See Least Dangerous, supra note 22.
265. Like racial and ethnic minorities, exclusive homosexuals constitute a quite small
percentage of the nation's population. Kinsey stated that 37 per cent of the total male population
has had some overt homosexual experience and that 4 per cent of white males are exclusively
even overestimate the incidence of male homosexuality. See 21 Playboy, Mar. 1974, at 54-55. No
major party has yet espoused the rights of homosexuals. American popular and legal attitudes
toward homosexuals derive from traditional Christianity's abhorrence of homosexuality, which
took the form of making homosexuality a capital offense. See notes 64-80 supra and accompany-
ing text. The cases are replete with expressions of judges' general revulsion with homosexuality
See, e.g., Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969), cert. denied, 397 U.S.
1039 (1970); In re Labady, 326 F. Supp. 924, 927 (S.D.N.Y. 1971); H. v. H., 59 N.J. Super. 227,
237, 157 A.2d 721, 727 (1959); In re Schmidt, 56 Misc. 2d 456, 460, 289 N.Y.S.2d 89, 92 (Sup.
Presumably, the naturalness of homosexual experience would not in itself legitimize such experience. Many forms of murder, for example, are quite natural human occurrences, yet we do not regard them for that reason any less properly criminally punishable. But, we have argued not only that homosexual acts are natural, but that they may involve the liberty to love which must, within limits, be morally and constitutionally guaranteed. Indeed, the anti-homosexuality laws involve a more severe incursion on this liberty than that at issue in the other right to privacy cases. Contraception, abortion, and pornography laws do not forbid sexual intimacy altogether; anti-sodomy laws forbid certain forms of the expression of love completely.

Thus, we have argued that the concept of love is marked by certain characteristic ends, beliefs and experiences—for example, the desire for physical and psychological closeness, the desire to give pleasure to the other, and the like. Such ends, beliefs and experiences are compatible with a wide and indeterminate class of forms of physical expression, regardless of whether the expression is homosexual or heterosexual. To suppose that only heterosexual sex can be love is to suppose that love has a kind of canonical physical form. But as we have seen this view is based on conceptual confusion, which leads here to moral error.

The term "unnatural acts" may no doubt properly be applied to some kinds of sexual acts, but homosexual acts are not among them. Once the deathly pall of the unnatural is lifted from homosexuality, the concept of love can no longer be limited to parties of different genders, and we may thus perceive the prohibition of homosexuality as the moral wrong it is.

The depth of the injustice that these prohibitions inflict can be seen in terms of their effects upon exclusive homosexuals and their right to fair access to self-respect. First, laws prohibiting homosexual conduct inhibit persons inclined toward this form of sexual activity from obtaining sexual satisfaction in the only way they find natural. Second, these laws probably encourage blackmail by providing a means by which homosexuals can be threatened with exposure and prosecution. Such vulnerability to blackmail may discourage employers from hiring homosexuals, on the ground that they are security risks. Third, laws prohibiting consensual adult homosexual activity

Ct. 1968). Not surprisingly, empirical surveys confirm the attitudes expressed or commented on in judicial opinions. Fifty per cent of respondents in one study, all “from large cities in the United States agree ‘very much’ that homosexuality is obscene and vulgar.” M. Weinberg & C. Williams, Male Homosexuals 84 (1974).

266. See notes 189-91 supra and accompanying text.
267. See note 322 infra.
provide a ground for discrimination against people of homosexual preference in employment, housing, and public accommodation.\textsuperscript{269}

The cumulative effect of such laws accordingly is to deprive homosexuals of the experience of a secure self-respect in their competence in building personal relationships. The degree of emotional sacrifice thus exacted for no defensible reason seems among the most unjust deprivations that law can compel.\textsuperscript{270} Persons are deprived of a realistic basis for having confidence and security in their most basic emotional propensities. Criminal penalty, employment risks, and social prejudice converge to render dubious a person's most spontaneous native sentiments—dividing emotions, physical expression and self-image in a cruelly gratuitous way.\textsuperscript{271} The deepest damage is spiritual. A person surrounded by false social conceptions supported by law, finds it difficult to experience self-esteem in his emotional propensities and their natural expression. Without such self-esteem love lacks foundation and physical desire, wayward and restless, finds no meaningful or enduring object. Instead of being ensured fair access to love, the homosexual's capacity to express such feelings is driven into a secretive and concealed world of shallow and often anonymous physical encounters.\textsuperscript{272} The achievement of emotional relationships of any depth or permanence is made a matter of heroic individual effort when it could, like heterosexual relations, be part of the warp and woof of ordinary social possibility and opportunity.\textsuperscript{273} In thus forbidding exclusive homosexuals to express sexual love in the only way they naturally can, the law deprives them of the good in life that love affords.\textsuperscript{274}


\textsuperscript{270} See generally H. Hart, Law, Liberty and Morality 22 (1963); G. Weinberg, Society and the Healthy Homosexual 78-82, 142-43 (1972).

\textsuperscript{271} See generally M. Hoffman, supra note 43. For an account of the damaging effects of prejudice on the self-conception of the group discriminated against, see G. Allport, The Nature of Prejudice ch. 9 (1958).

\textsuperscript{272} See L. Humphreys, Tearoom Trade 1-15 (1970); Hoffman, supra note 43; note 247, supra.


\textsuperscript{274} See notes 146-54 supra and accompanying text.
In terms, then, both of the lack of empirical evidence for applying
the label "unnatural acts" to sexual deviance and the intrusion upon
individuals' right to love and self-respect, we can see that the perfor-
mance of such so-called "unnatural acts" involved in Doe v. Common-
wealth's Attorney for City of Richmond\textsuperscript{275} should fall within the
protection of the constitutional right to privacy articulated in earlier
case law. The district court in Doe erred both in failing adequately to
take into account the implications of the post-Griswold Supreme Court
privacy cases, and in failing even to note that the issue before it
merited the most exacting constitutional scrutiny. The Supreme Court,
in summarily affirming this clearly erroneous opinion, failed to develop
underlying constitutional values in a rationally or morally defensible
way. Indeed, by neither hearing oral argument nor writing an opinion
on an issue so significant to the preservation of the fundamental
constitutional rights of minorities, the Court failed not only to do
justice, but even to explain itself in a way that minimal due process
should require in a case of such importance.

2. \textit{Equal Liberty and the Protection of Moral Standards}

We see, then, that private, consensual homosexual acts between
adults deserve to fall within the protection of the constitutional right to
privacy and should be accorded whatever protection is given other
forms of love. The relevant constitutional question, therefore, is
whether statutory restrictions on putatively unnatural acts, such as
those upheld in Doe, are compatible with the underlying constitutional
principles of greatest equal liberty, opportunity and capacity to love,
consistent with a like liberty, opportunity and capacity for all.

Initially, it is important to be clear how the principle of love as a
civil liberty is to be understood. In deriving the principle, we observed
that the value of autonomous capacities in matters of love turned on
the existence of developed capacities of rational choice. Thus, the
principle is not intended to apply to persons presumably lacking
rational capacities, such as children. Nor, is there any objection to the
reasonable regulation of obtrusive sexual solicitations or, of course, to
forcible forms of intercourse of any kind.

In addition, we noted that the scope of the principle of love as a civil
liberty is limited by other moral principles that would be accepted in
the original position, for example: principles of not killing, harming or
inflicting gratuitous cruelty; principles of paternalism in narrowly
defined circumstances; and principles of fidelity.\textsuperscript{276} Thus, we have

\textsuperscript{276} See notes 167-69 supra and accompanying text.
formulated the relevant moral and constitutional principles to permit some reasonable, legitimate restrictions on complete individual freedom. The Supreme Court in *Paris Adult Theatre I v. Slaton* 277 confirmed this view when it held that the constitutional right to privacy did not require that consenting adults have access to obscene materials in a movie house. Whatever may be the correctness of *Paris* as an interpretation of the relation of obscenity law and the first amendment, 278 it correctly emphasized that the values of the constitutional right to privacy are largely concerned with the special status of the home as a sanctuary for intimate emotions and relationships.279

This Article is at one with the Court’s rejection of the view that the law should have no role in enforcing moral principles.280 However, this leaves open the question of whether the Court in *Doe* correctly construed its own principles, i.e., whether statutes of the kind upheld in *Doe* can be justified by any of the principles qualifying the principle of love as a civil liberty, recalling, as we must, that any restriction upon liberty must be justified on the basis of facts ascertainable by generally acceptable empirical methods.

Statutes such as that considered in *Doe* which absolutely prohibit deviant sexual acts cannot be justified consistently with the principles just discussed. For example, such statutes are not limited to forcible or public forms of sexual intercourse, or to sexual intercourse by or with children. They extend to private, consensual acts between adults as well. To say that such laws are justified by their indirect effect of stopping homosexual intercourse by or with the underaged would be as absurd as to claim that absolute prohibitions on heterosexual intercourse could be similarly justified. There is no reason in general to believe that homosexuals as a class are any more involved in offenses with the young than heterosexuals. 281 Nor is there any reliable evidence that such laws inhibit children from being naturally homosexual

278. See Free Speech, supra note 5.
279. See note 132 supra.
280. See On Liberty, supra note 132, at 185.
281. See P. Gebhard, J. Gagnon, W. Pomeroy, and C. Christenson, Sex Offenders (1965); Hoffman, supra note 43, at 89-92. Analysis of imprisonment statistics of homosexuals sometimes shows high percentages of arrests for offenses against children. See, e.g., C. Berg, Fear, Punishment, Anxiety and the Wolfenden Report 33-34 (1959). Cf. R. Mitchell, The Homosexual and the Law 11 (1969). However, these higher percentages probably simply reflect the fact that homosexuals who molest children are far more frequently apprehended than homosexual people who engage only in consensual relations with adults. The failure to note the distinction between homosexuality and pedophilia is deplored by the majority of homosexual people who “do not share, do not approve, and fear to be associated with pedophilic interests,” West, supra note 245, at 119. On the impropriety of forbidding adults access to obscene books on the ground that access to such books harms children, see Butler v. Michigan, 352 U.S. 380 (1957).
who would otherwise be naturally heterosexual. As has been noted, sexual preference generally is settled, largely irreversibly, in very early childhood well before laws of this kind could have any effect. If the state has any legitimate interest in determining the sexual preference of its citizens, that interest cannot constitutionally be secured by overbroad statutes which tread upon the rights of exclusive homosexuals and which, in any event, irrationally pursue the claimed interest, which could be effected only by state intervention in quite early stages of child rearing.

Other moral principles which might qualify the principle of equal liberty to love also fail to justify absolute prohibitions on consensual sexual deviance. Homosexual relations, for example, are not in general violent. Thus, prohibitory statutes could not be justified by moral principles of nonmaleficence. There is no convincing evidence that homosexuality is either harmful to the homosexual or correlated with any form of mental or physical disease or defect. To the contrary, there is evidence that anti-sodomy laws, which either force homosexuals into forms of heterosexual marriage which are unnatural for them or otherwise distort and disfigure the reasonable pursuit of natural emotional fulfillment, harm homosexuals and others in deep and permanent ways. Accordingly, principles of legitimate state paternalism do not here come into play.

One quite relevant set of facts which would justify prohibitions of homosexuality, would be empirical support for the view that homosexuality is a kind of degenerative social poison and natural catastrophe, leading directly to disease, social disorder, and even natural disaster, as, for example, Justinian supposed in condemning homosexuality as a capital offense. As we have observed, principles of justice must be compatible with the stability of institutions of social cooperation. In particular, the principle of greatest equal liberty would not extend to forms of liberty that are incompatible with stable social cooperation. Thus, if the above allegations regarding homosexuality were true, the existence of homosexuality might justly be prohibited on the ground

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282. See note 245 supra.
283. It is not at all self-evident that it has such a constitutionally legitimate interest. See generally Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923), which question the propriety of certain types of state regulation of the education of children.
284. See note 245 supra.
286. See note 242 supra.
287. See note 322 infra and accompanying text.
288. See notes 265-74 supra and accompanying text.
289. See note 66 supra.
that it would undermine the entire constitutional order of equal liberties, so that justice on balance would be secured by the prohibition of these acts. However, these beliefs are quite untenable today. Many nations, including many in Western Europe, have long allowed homosexual acts between consenting adults with no consequent social disorder, disease, disruption or the like. England recently legalized such acts with no untoward results.

One final argument has been supposed to justify a general prohibition upon homosexuality—the argument for preserving moral standards, invoked by the district court in Doe as "the promotion of morality and decency." That court believed this to be the ultimate ground for the legitimacy of the Virginia sodomy statute. The argument takes two forms: (1) a general jurisprudential thesis about the relation of law and morals, and (2) an interpretation of the moral principles qualifying the principle of love as a civil liberty. Neither view can be sustained.

The classic modern statement of the jurisprudential thesis was made by Devlin against Hart, repeating many of the arguments earlier made by Stephen against Mill. The Devlin-Hart debate centered on the jurisprudential interpretation of the Wolfenden Report, which recommended, inter alia, the abolition of the imposition of criminal penalties for homosexual acts between consenting adults. Devlin, in questioning the Report, focused on the proposition that certain private immoral acts are not the law's business. The criminal law, Devlin argued, is completely unintelligible without reference to morality, which it enforces. Thus, for example, the fact that two parties agree to kill one another does not relieve the killer of criminal liability, for the act in question is immoral. The privacy of the act is irrelevant. Similarly, the criminal law in general arises from morality. Morality, Devlin maintains, is the necessary condition of the existence of society. Thus, to change the law in such a way as to violate that morality is to threaten the stability of the social order. Morality, in this connection, is to be understood in terms of the ordinary man's intuitive sense of right and wrong, as determined, Devlin suggests, by taking a man at random from the Clapham omnibus. Just as we prove the

290. See Barnett, supra note 75, at 293, 305-07.
291. Sexual Offenses Act, 1967, c. 60.
293. Devlin, supra note 74.
standards of negligence for purposes of civil or criminal liability by appealing to the judgment of ordinary men acting as jurors, so the applicable standards of morality can be proved in the same way. Ordinary men morally loathe homosexuality; accordingly, homosexuality is immoral and must be legally forbidden.

Superficially, Devlin's argument appears to have the general form of an acceptable constitutional argument. There should be no constitutional objection to prohibiting clearly immoral acts which threaten the existence of society. Further, it is surely very plausible that law and morals have a deep and systematic connection of the kind Devlin suggests. However, these abstractly plausible propositions will not support the specific argument which Devlin propounds. Devlin argues, probably correctly, that the criminal law arises from morality, which it enforces. But he then falsely identifies morality with conventional social views in a way which renders unthinkable, if not unintelligible, the whole idea of moral criticism and the reform of social convention. Adoption of this view would effectively freeze the measure of legally enforceable moral ideas into a possibly quite ephemeral interim victory of one set of contending ideological forces over another. But there is no good reason to make this identification of morality and social convention, since it is based on an indefensible and naive moral philosophy as well as an unexamined and unsound sociology.

Recent moral philosophy has been increasingly occupied with the clarification of the conceptual structure of ordinary moral reasoning. The concept of morality or ethics is not an openly flexible one; there are certain determinate constraints on the kind of beliefs that can be counted as moral in nature. Some examples are the principles of mutual respect—treating others as you would like to be treated in comparable circumstances; universalization—judging the morality of

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principles by the consequences of their universal application; and minimization of fortuitous human differences (like clan, caste, ethnicity and color) as a basis for differential treatment. It follows from this conception that a view is not a moral one merely because it is passionately and sincerely held, or because it has a certain emotional depth, or because it is the view of one’s father or mother or clan, or because it is conventional. On the contrary, the moral point of view affords an impartial way of assessing whether any of these beliefs, which may often press one to action, is in fact worthy of ethical commitment.

Thus, moral views of the kind that the law enforces do not rest on mere social convention. Rather, as we have said, moral questions are marked by a special, universalizing kind of reasoning. For example, the view that non-remedial preferential quotas are immoral rests on a principle which a morally aware person would defend whether he was helped or hurt by it. Whatever the adequacy of the contract model of moral principles employed in this Article, it at least attempts to take these features of moral reasoning seriously. Devlin’s theory, if it can be so called, does not; it is based on quite non-moral instincts, social tastes and accepted conventions. It is a mark of the unhappy separation of legal theory from serious moral theory that Devlin’s superficial analysis can have been taken so seriously when its moral basis is so transparently inadequate.

Devlin’s theory is not, however, merely theoretically unsatisfactory. If it were accepted, it would be morally repelling in its conclusions. It would elevate all forms of social prejudice, even though unsupported by intelligible moral reasoning of any kind (indeed, intransigently resistant to critical moral scrutiny), into moral bases for law. It would thus undermine the entire notion of rational due process of law,

304. See R. Hare, Freedom and Reason 91-94 (1963); Action, supra note 24, at 83-85, 216. 305. This idea is the basis of Kant’s theory of autonomy. See I. Kant, Foundations of the Metaphysics of Morals 65-71 (L. Beck trans. 1959). Also note J.S. Mill’s remark that the true idea of distributive justice consists in “redressing the inequalities and wrongs of nature.” J. Mill, 2 Principles of Political Economy 398 (1864). Mill thus concludes that primogeniture is unjust in that distinctions are grounded on accident. Id. at 505. Note also Sidgwick’s claim that justice rewards voluntary effort, not natural ability alone. H. Sidgwick, The Principles of Political Economy 505-06, 531 (1887).

306. Cf. Devlin, supra note 74, at 114: “What is important is not the quality of the creed but the strength of the belief in it.”

307. See sources cited in note 301 supra.

308. For examples of the force of this kind of reasoning, see R. Hare, Freedom and Reason 86-185 (1963).

which requires that reasons be given in order to justify deprivations of life, liberty or property. At bottom, it makes blind and possibly vicious prejudice into the moral foundation of law. Instead of defending people from passions born of ignorance, it simply makes those passions the measure of legally enforceable morality.

The attraction of Devlin’s theory for judges is its seeming objectivity: it affords a definite criterion for the morality that the law enforces without appeal to subjective considerations.\(^3\) But the empirical objectivity of existing custom has nothing to do with the notions of moral impartiality and objectivity which are, or should be, of judicial concern in determining the public morality on which the law rests. The idea that the pursuit of the latter must collapse into the former is a confusion of inquiries, arising from an untenable and indefensible distinction between subjective moral belief and the public morality of the law. There is no such distinction. Views, to be moral, require a certain kind of justification. Judges, in interpreting legally enforceable moral ideas, must appeal to the kind of reasoning that is moral. They do not as judges abdicate their capacity for moral reasoning as persons. On the contrary, competence and articulateness in such reasoning comprise the virtue that we denominate judicial.

Devlin’s theory is for such reasons theoretically and practically unacceptable. However, even if it could be defended on such grounds, it must be rejected as it is incompatible with the moral theory implicit in the constitutional order. The Constitution, we have argued, rests on the idea that moral rights of individuals cannot be violated, notwithstanding majoritarian sentiments to the contrary. Accordingly, the Supreme Court has rightly and consistently rejected arguments which question constitutional rights on the basis of popular prejudices, whether the prejudices are racial or sexual.\(^3\) Such prejudices, so far from being enforced, have been circumscribed in order to protect constitutional liberties.\(^3\)

We have here argued that homosexual love comes within a constitu-

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311. Historically, racial and sexual prejudices were interdependent; the inferiority of blacks was used as a ground for arguments for the inferiority of women, and conversely. See G. Myrdal, An American Dilemma 1073-78 (1944); see also J. Haller & R. Haller, The Physician and Sexuality in Victorian America 48-61 (1974); Slavery Defended (E. McKitrick ed. 1963). For evidence of the psychological interrelationships of racial and sexual prejudice, see T. Adorno, E. Frenkel-Brunswik, D. Levinson & R. Sanford, The Authoritarian Personality, 399-441, 452-54, 506-17, 866-72 (1950).

tionally protected right, the right to privacy. The basis of this constitutional right is a moral right, the right of maximum access to love. This moral right rests on the thought that just as a mature person would not want the form in which he or she feels and expresses love to be regulated or prohibited, he or she should extend similar consideration to others. Accordingly, so far from homosexuality being immoral, as Devlin argued, it is immoral to prohibit it. Social attitudes to the contrary, not being based on generally acceptable empirical facts, are precisely forms of sexual prejudice and shibboleth from which people should be protected. To appeal to popular attitudes, in the way in which Devlin does, in order to restrict the moral rights of the unpopular minority, is precisely to withhold the constitutional right to privacy for the very reason it is most exigently needed.

Pursuing Devlin's line of thought, the district court in Doe argued that "[i]f a State determines that punishment [for consensual adult homosexual acts], even when committed in the home, is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so." The majority opinion went on to say that this ground does not require the state to show that immoral consequences actually occur. All that need be shown is that "the conduct is likely to end in a contribution to moral delinquency." In support of this proposition, the court cited a case where fellatio among a married couple and a third party involved distribution of pictures of the said acts in school by the couple's daughters (aged 11 and 13). The citation of a case of apparently heterosexual sodomy, involving clear elements of a waiver of privacy rights as evidence for the propriety of proscribing clearly private homosexual sex is a remarkable non-sequitur, illustrating the kind of shabby reasoning to which courts are driven in order to lend a shred of moral plausibility to these prohibitions. The invocation of "morality and decency" has here, as in Devlin, the force of a circular appeal to social conventions which the courts of the United States have a constitutional duty to review and question in the light of applicable constitutional values which these social conventions violate.

We see, then, that this general kind of argument for preserving moral standards is objectionable in moral and constitutional principle. There is, however, another form of the argument, which is not

313. On the force of these attitudes as prejudices, see G. Weinberg, Society and the Healthy Homosexual 1-20 (1972).
314. 403 F. Supp. at 1202.
315. Id.
317. 403 F. Supp. at 1202.
similarly objectionable, resting, as it does, on an interpretation of the moral principles restricting the principle of love as a civil liberty. The district court in *Doe* employed such a mode of argument when it suggested that the moral issue before it was not that homosexuality is objectionable per se, but rather that in the present state of society it tends to evade certain moral principles, for example, principles of fidelity involved in heterosexual marriage and family obligations.\(^{318}\) That court's use of the argument is, as we have seen, fundamentally fallacious. There remains, however, the general intuition that homosexuality, if allowed, would violate moral principles implicit in the institution of the heterosexual family.

While this line of thought has the general form of an acceptable moral and constitutional argument, its factual assumptions are utterly unsupported by evidence. For example, the argument makes the unsupported assumption that homosexuality would cause the decline of heterosexual marriage. But, as Judge Merhige indicated in his dissent in *Doe*, such a claim is so empirically flimsy as to be "unworthy of judicial response."\(^{319}\) For one thing, historical and contemporary data show that homosexual connections are compatible with heterosexual marriage.\(^{320}\) The many countries which have legalized homosexual relations show no decline in the rate of heterosexual marriage as an institution.\(^{321}\) It thus appears that prohibitions of homosexual relations have no effect on heterosexual marriage.\(^{322}\)

\(^{318}\) Id. Thus, Lovisi, on which the judge focused, involved both a breach of the traditional marital bond (a threesome, two of whom are a married couple, engaging in fellatio) and elements of degradation of the young (the children, aged 11 and 13, who distributed pictures of their parents' activities in school).

\(^{319}\) 403 F. Supp. at 1205 (Merhige, J., dissenting).

\(^{320}\) For example, in ancient Greece and in many primitive societies, the preferred model was homosexual relations and heterosexual marriage. See note 238 supra. The United States data illustrates that this pattern still persists; homosexual and heterosexual relations can coexist in the same person either at one time or over time. See Kinsey-Male, supra note 55, at 610-66.

\(^{321}\) See Barnett, supra note 75, at 293.

\(^{322}\) Some homosexuals, who are in fact exclusively homosexual, do marry and have children. P. Wilson, The Sexual Dilemma 52-53 (1970). In general, those whose sexuality is entirely homosexual can function heterosexually for periods of time. D. West, Homosexuality 233-34 (1961); Knight, Overt Male Homosexuality, in Sexual Behavior and the Law 442-43 (R. Slovenko ed. 1965). By employing sexual fantasies of a person for whom they do experience erotic feeling, people can thus have intercourse with people in whom they experience nothing erotic. Note Kinsey's description of how people have intercourse with prostitutes they find unattractive: "As far as his psychologic responses are concerned, the male in many instances may not be having coitus with the immediate sexual partner, but with all of the other girls with whom he has ever had coitus, and with the entire genus Female with which he would like to have coitus." A. Kinsey, W. Pomeroy, C. Martin, & P. Gebhard, Sexual Behavior in the Human Female 684 (1953). In the case of exclusive homosexuals, the effect of thus frustrating natural feeling to conform to conventional modes of conduct is probably to starve and waste resources of spontaneous and individual human feeling. See note 162 supra and accompanying text.
The intuition, regarding the connection of homosexuality, if allowed, and the decline of the heterosexual family, is an ancient and pervasive one. One modern formulation of this notion which is striking and suggestive is that it is not the mere occurrence in private of consensual homosexual acts that results in any cognizable social harm, but it is the way of life that exclusive homosexuality involves. According to this view, consensual homosexual acts in private are not of social concern, but the way of life that such sex acts exemplify is. To legitimate these sex acts is to legitimate an undesirable way of life; thus these sex acts, even in private between consenting adults, may justly be prohibited.

It is important to inquire with care what this intuitive allegation amounts to, for a form of it bears the imprimatur of the Supreme Court itself. The suggestion, I believe, is this: Public knowledge of the legitimacy of homosexual acts would undermine the capacity of heterosexuals to sustain the way of life required for the monogamous nuclear family and the personal sacrifices that such a way of life requires. But no one in the Western cultural tradition could reasonably claim that the existence of legitimate ways of life outside marriage undermine social stability. The legitimacy of remaining unmarried has not undermined the heterosexual family. Indeed, one form of the legitimate state of being unmarried, religious celibacy, has long been regarded as a sanctified state by influential Western religions; the fact that celibacy is legitimate, and indeed is sanctified as a preferable religious and moral ideal, has not made the heterosexual family less stable.

Why, then, should the recognition of homosexuality as a legitimate way of life be treated in a radically different way? The suggestion must be that homosexual preference is so strong and heterosexual preference so weak (and conventional family life so unattractive) that people would tend not to undertake heterosexual marriage if homosexuality as a way of life were legitimate. But, as we have seen, there is no shred of empirical support for this view. Not only is exclusive heterosexual preference much the majority view, but the attractions of heterosexual

In addition, there is growing evidence that heterosexual marriages of exclusive homosexuals typically end unhappily for all concerned. One authority, for example, reports that one third of the divorce cases he handled arose from the homosexuality of one of the parties. See J. McNell, The Church and the Homosexual 136 (1976).

323. See Plato's suggestion that the prohibition of homosexuality "wins men to affection of their wedded wives." Laws, Book VIII, 839a. For commentary, see G. Grube, Plato's Thought 118-19 (1958).

324. See the development of this argument in the obscenity context in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); for commentary thereon, see note 331 infra.

marriage are deep-seated and permanent features of the human condition. Human beings, generally raised in the nuclear heterosexual family, naturally regard the cooperation and creative sharing which typifies the heterosexual family as the answer, or part of the answer, to the recurrent human problem of loneliness and isolation. For most people, conventional marriage is and will long remain the standard answer to the meaning of life—supplying a natural response to human needs for sexual release, intimacy and the desire for permanence (child-rearing). It is a bizarre underestimation of the attractions of family life to suppose that the legitimacy of homosexuality as a way of life would have any effect on it at all. Even in this era of growing sexual freedom and rising divorce rates, there is no sign that heterosexual marriage as an institution is in general less attractive. The rising divorce rates show, not a distaste for marriage, but only less willingness to stick with the original partners in marriage. The important and striking feature of this phenomenon is that divorced people typically remarry; they reject their previous partner, not the institution of marriage itself.326

The "way of life" argument, applied to the legitimization of homosexuality, thus lacks empirical content, and must for its force rest on a kind of hystericalized sexual fantasy regarding the pervasive and deadly attractions of homosexual sex. That argument cannot be sustained as an empirical proposition, even though it can be understood as the psychological residue of fear and loathing unmistakably left by the long tradition that condemned homosexuality and non-procreative sex in general as unnatural. Thus, the intuition that legitimate homosexuality will destroy the family is circular. It has or should have no force independent of the empirical assumptions on which it rests. Undoubtedly, residues of guilt and fear remain long after we reject on rational grounds the beliefs on which those guilts and fears rest. But, this psychological truth does not validate such regressive emotions as a legitimate basis for law. If the life of reason requires us to circumscribe such negative emotions as a basis for ethical conduct, the morality of law can require no less.327

In any event, it is difficult to understand how the state has the right, on moral grounds, to protect heterosexual love at the expense of homosexual love. Contractarian principles seem precisely to forbid the kind of calculation that this sort of sacrifice contemplates. They forbid the sacrifice of the fundamental interests of one group in order to secure the greater happiness of other groups or of the whole. These principles prescribe minimal benchmarks of human decency, resting on

326. See generally M. Bane, Here to Stay (1976).
boundary constraints respecting the interests of all persons equally in general goods, which limit the power of majority rule to plough under the interests of minorities.

In general, there is surely no constitutional or moral duty to marry or, more generally, to procreate; such an idea violates everything that the constitutional right to privacy was designed to protect, namely, autonomy in deciding whether and how to love. People have children for reasons tied up with their conceptions of personal happiness and fulfillment; they perform no moral duty, nor are they morally admirable, in having children. Indeed, in the present state of overpopulation, many suppose and argue that there are moral duties not to procreate.\textsuperscript{328}

Finally, there is reason to believe that the argument for protecting marriage and the family is hypocritically proposed. If the argument were meant seriously, state laws against fornication and adultery would be vigorously pressed in addition to the anti-homosexuality laws. But, in many states, such laws either do not exist or penalize homosexuality much more severely than heterosexual offenses.\textsuperscript{329} This suggests what should by now be reasonably clear—that anti-homosexuality laws rest not on rational arguments consistently pursued, but on ancient prejudice and a vestige of ideas of unnatural sexual witchcraft and demonology.\textsuperscript{330}

At bottom, the argument for preserving moral standards is circular. It assumes that homosexuality is immoral and that prohibiting it accordingly is moral.\textsuperscript{331} But, we have argued that anti-homosexuality

\textsuperscript{328} For a discussion of the seriousness of the population problem, see M. Mesarovic & E. Pestel, Mankind at the Turning Point, The Second Report to the Club of Rome 70-82 (1974); for a discussion of the existence of moral duties to limit population, see Action, supra note 24, at 134-35.

In Custodio v. Bauer, the court cited Griswold for the proposition that the state could exercise no legitimate limitation over a person’s right to sterilization. 251 Cal. App. 2d 303, ———, 59 Cal. Rptr. 463, 472-73 (1967). Accordingly, the court allowed a broad measure of damages for the failure of a doctor to perform his services adequately, including costs of the operation, costs of pregnancy and birth, compensation for mental anguish, pain and suffering, and for the loss of the mother’s attention by others in the family. Id. at 323-26, 59 Cal. Rptr. at 576-78. Other courts have followed the lead of Custodio, see, e.g., Coleman v. Garrison, 281 A.2d 616, 617-19 (Del. Super. Ct. 1971) (damages); Jackson v. Anderson, 230 So. 2d 503 (Fla. App. 1970) (theories of liability); Troppi v. Scarf, 31 Mich. App. 240, 250-62, 187 N.W.2d 511, 518-21 (1971) (damages).


\textsuperscript{330} See generally R. Masters, Eros and Evil: The Sexual Psychopathology of Witchcraft (1960). For the more general social significance of notions of witchcraft, see Witchcraft and Sorcery (M. Marwick ed. 1970).

\textsuperscript{331} Two other forms of the argument from moral standards, both in the same way circular,
laws violate the moral right of people to be treated as persons with fair access to love and self-respect. So far from homosexuality being immoral, the anti-homosexuality laws appear now themselves to be unjust and immoral, perpetuating a traditional persecution, for that is its proper name, built on indefensible prejudice.

are worthy of note. First, there is the argument made by Justice Burger in Paris Adult Theatre I. v. Slaton, 413 U.S. 49 (1973), invoking Professor Bickel's remarks to the effect that, to allow people consensually to gather to view obscene materials, in a way not obtrusive on others, "is to affect the world about the rest of us, and to impinge on other privacies [for] [e]ven supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not." Id. at 59, quoting Bickel, 22 Pub. Interest 25-26 (1971). Such an argument could easily be applied to homosexual acts in private between consenting adults, to the effect that prohibitions of such acts are based on the ground that they protect "other privacies."

It is doubtful, however, that the Court would apply the argument, at least in this form, to the analysis of the constitutionality of anti-homosexuality laws, for as applied to such acts the argument is more patently improper than it is as applied to obscenity. For a discussion of this aspect of the Paris case, see Free Speech, supra note 5, at 85-87. As applied to consensual acts in private between consenting adults, the argument takes the paradoxical form that permitting any form of conduct, in fact disliked by many people in the society, violates the rights to privacy of those who disapprove of the conduct. This seems to be an abuse of language and a perversion of basic moral and constitutional values. For the argument amounts to nothing more than the claim that the knowledge of certain disapproved conduct suffices without more to justify the legal prohibition of that conduct. At bottom, the argument would rest on the crude confusion between an obtrusive offense and the subjective offense derived from the mere knowledge of something. If accepted, this view would dilute the constitutional right to privacy from the strong substantive protection of individual autonomy that it is, to the empty and pale idea that people should be allowed to do only that to which no one has any objection. Cf. H. Hart, Law, Liberty, and Morality 46-47 (1963).

Second, the argument for protecting moral standards, as applied to anti-homosexuality laws, may be posed in terms of advancing certain demonstrable moral virtues or character traits which citizens of a stable constitutional democracy should have, but which homosexuals as a class lack. But, again, the argument is circular: it identifies the virtues of democratic citizenship with a certain narrowly defined sexual morality, and then assumes that homosexuals, as a class, are morally vicious because they fail to conform to that morality. These assumptions will not withstand critical examination. There is no reason whatsoever to identify the virtues of democratic citizenship—public spiritedness, civil reponsibility, democratic tolerance, mutual respect—with heterosexuality. Courts increasingly have acknowledged that the general assumption that homosexuality per se renders one unfit for normal responsibilities is unfounded and unjust. See Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), aff'd on other grounds, 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (in bank). See also Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973); Richardson v. Hampton, 345 F. Supp. 600 (D.D.C. 1972). Cf. Boutilier v. Immigration & Naturalization Serv., 387 U.S 118, 129 (1967) (Douglas, J., dissenting): "It is common knowledge that in this century homosexuals have risen high in our own public service—both in Congress and in the Executive Branch—and have served with distinction." Good citizenship is surely compatible with many sexual styles and moralities. Indeed, one might suppose that the virtues of democratic tolerance and mutual respect are fostered by practicing tolerance toward different sexual moralities and by insistence on maintaining constitutional liberties, including the constitutional right to privacy, for all groups.
Everyone praises love in our civilization; but a particular form of love between parties of the same gender, transmogrified unrecognizably by popular imagination from its simple nature into an unnatural grotesquerie of degradation and exploitation, is thus made the butt of social ridicule and the object of criminal penalty. The Supreme Court's summary affirmance in *Doe* reflects popular imagination, abruptly truncating the reach of constitutional values in the name of "unnatural acts," which are excluded from the constitutional scrutiny otherwise required. In *Doe*, the Court failed to develop constitutional values in a reasonable way. Instead of showing how constitutional values, popularly accepted in the area of contraception, equally apply to unjustly hated minorities, the Court acquiesced in unexamined popular bromides and shabby arguments unworthy of our constitutional tradition.

IV. CONCLUSIONS

This Article has tried to show how an examination of moral and philosophical theory can fundamentally clarify the constitutional right to privacy. On the view presented here, the Supreme Court could not have affirmed the decision of the district court in *Doe* had it given precise thought to the nature of the unnatural and the force of the moral theory behind the constitutional right to privacy.

We have not here discussed arguments, other than the constitutional right to privacy, that can be used to attack these prohibitory statutes; nor have we discussed in proper detail the many constitutional arguments that could be developed to protect sexual minorities in other areas. Certain of these arguments are weighty; others less so.

332. See note 255 supra.


336. The argument, for example, that criminal punishment of homosexual behavior violates the eighth amendment, in violation of Robinson v. California, 370 U.S. 660 (1962) and Powell v. Texas, 392 U.S. 514 (1968), seems weak. The compulsion involved in homosexual acts is of a different kind than that involved in narcotics addiction or chronic alcoholism. Sexual preference
We focused here on the constitutional right to privacy because it seems to be the most fundamental constitutional value here implicated. The clarification of this right throws light not merely on constitutional values but on the larger question of moral values which underlie, or should underlie, the use of the criminal law.

With respect to the decriminalization debates, this Article proposes an analysis of moral considerations which establish that it is wholly improper for the state to impose criminal sanctions on certain forms of consensual conduct between adults in private. Thus, we proposed the principle of love as a civil liberty and various qualifying moral principles which forbid the application of criminal penalties to such conduct. These principles undoubtedly apply to other forms of consensual sexual conduct and thus would justify a constitutional argument, of the kind suggested here, invalidating the criminalization of such conduct (for example, consensual adult heterosexual deviance or fornication). However, these principles do not establish that all forms of consensual sexual conduct between or among adults are immune from criminal penalty. For example, moral principles of fidelity might justify the existence of criminal penalties for adultery or bigamy, at least in some form. Principles of legitimate state paternalism may raise serious arguments for anti-prostitution laws, at least in such a form as to make wholesale constitutional invalidation an unwise step. The moral analysis here proposed is suggestive, however, and

is not a voluntary decision. See note 245 supra. But, the decision to engage in sexual acts does not seem compelled in the same way that forms of addiction compel. Humans can be celibate. See note 156 supra. Homosexuals can sometimes perform heterosexually. See note 322 supra. In addition, the Robinson-Powell argument would typically assume that homosexuality is a disease. But there is no longer any scientific consensus that it is. See note 242 supra. But for a treatment of the eighth amendment argument which is not subject to the above objections, see Comment, The Constitutionality of Sodomy Statutes, 45 Fordham L. Rev. 553, 567-72 (1976).


338. See notes 132, 277, and 280 supra and accompanying text.

339. In rejecting Mill's principle in Paris, the Court cited with approval statutes making adultery, fornication, bigamy, and prostitution illegal. 413 U.S. at 68 n.15. Homosexuality was not included in the list.

340. Courts in general have resisted constitutional arguments directed against prostitution laws. See Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975); United States v. Moses, 339 A.2d 46 (D.C. App. 1975); note 339, supra. For examples of constitutional arguments against prostitution laws, see Prostitution: A Non-Victim Crime?, 8 Issues in Criminology 137 (1973). Many of the arguments, adduced in support of prostitution laws, do not seem rationally advanced by absolute prohibitions on prostitution. For example, the ancillary connections of prostitution to organized crime (criminogenesis), the alleged relation to the spread of venereal disease, and the claimed exploitation of prostitutes by pimps—all these evils would surely be more rationally attacked by a program of licensing prostitutes, rather than by absolute prohibitions. Indeed, many of these evils, alleged to be the reasons for absolute prohibitions of prostitution, probably themselves result from such prohibitions (in particular, criminogenesis and pimp exploitation are natural concomitants of criminalization, being ways in which prostitutes are protected from the
its implications for other problems of decriminalization should be developed in careful detail.341 One general observation seems in order. The various issues, lumped under the brocard "victimless crimes," seem to be significantly different. Advocates of decriminalization would do well, if they are to remain morally credible and forceful, to advert more honestly to fundamental moral distinctions among the kinds of activities they would remove from criminal penalty.

Finally, we may observe the striking felicity of the union of contractarian and constitutional theory. Contractarian theory helps explain not only quite traditional constitutional values like free speech, but quite novel developments like the constitutional right to privacy. Law and morals, surely, are not by definition one. But, for Americans, the Constitution is a moral order built on substantive moral conceptions and ideals. Moral theory, thus, is and should be a pivotal organon in the explanation and justification of constitutional ideas.

police). The only weighty argument, rationally related to the prohibition of prostitution, is the idea that such prohibitions discourage the impersonal and non-emotional experience of sexuality that commercialized prostitution typically, though not always, involves. Arguably, the state has an interest in encouraging the experience of sexuality as part of a loving and emotional expression of reciprocal love. If this is a legitimate state interest, prostitution, it may be argued, frustrates it—substituting impersonal sexual release, for the kind of patient understanding and sensitivity that reciprocal sexual love calls for; relative to this kind of model of romantic love, commercialized sex is perceived as "degraded," in the sense that the higher capacities, engaged by sex with love, are here unemployed and thus diminished. On the other hand, it may be argued that prostitution in fact promotes emotional commitment in that it affords a safety valve for forms of sexual experience which cannot, without danger, be satisfied in the central emotional relationship (e.g., the desire for a kind of intercourse which the loved partner cannot or will not satisfy). Or, at a more fundamental level, proponents of prostitution may argue that the state has no more legitimate role in enforcing a possibly parochial model of romantic love than it does in dictating the ways in which people will experience eating (some, for example, eat only to live, while others live to eat). On this view, there is a wide range of functions that sexuality serves in human life; love is one, procreation is another, recreation yet a third. The state has no proper role or even right to frustrate human autonomy in deciding in what form mature people choose to experience sexuality.

Arguably, these arguments are so complex and difficult to unravel, and the form of remedy so difficult to design (for example, the substitution of licensing for prohibitions) that courts are not the proper forum to consider the issue. On the other hand, perhaps courts could deal with this problem in the same way they have been able to cope with the complexities of school financing. See Equal Opportunity, supra note 4, at 64-70.


343. See Free Speech, supra note 5.