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Book Review: Sexual Orientation and the Law. by Richard D. Mohr.

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ical context, Karst illuminates their connection to the creation of a system of caste.

Having given judges the tools to work with, Karst renews the argument for the centrality of the federal judiciary, and particularly the Supreme Court, in remedying the hurt of exclusion. Judicial enforcement of the equal citizenship principle vindicates the central tenets of the American civic culture, invites outsiders into the national community, and promotes the national good by assuring that no group is a permanent loser in the political process.

As we begin the 1990s, this prescription seems hauntingly sad. A court that could tell Native Americans that their religious practices (and everyone else's, for that matter) were the proper subject of political brokering⁷ is an unlikely candidate for spiritual leader in the quest for constitutional equality. But as Karst himself points out, the strength of the judicial commitment to equality has never been the measure of its pull on American consciousness—else how could *Brown v. Board* ever have come about? Perhaps, then, we should view *Belonging to America* as an eloquent reminder of the importance of thinking seriously about equality, even if our judges will not.

GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW. By Richard D. Mohr.¹ New York, NY: Columbia University Press. 1988. Pp. 357. Cloth \$39.00; paper \$14.00.

*Harry V. Jaffa*²

The author is—we are told by the dust jacket— an “openly gay professor” who has turned his attention

to the lives of gay people in America and to the ethical issues raised by society's perception and treatment of gays.

This “timely book,” it is said,

will prompt Americans to consider whether they have consistently applied their basic values to lesbians and gays.

7. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1606 (1990).

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Professor Mohr invites us to recognize sodomy as belonging to that sphere of privacy recognized in the *Griswold* case as deserving constitutional protection. In *Griswold* the Supreme Court declared unconstitutional a Connecticut statute that made it a felony for a physician to prescribe birth control devices to a married couple. Mohr would have us place homosexual relationships on the same level as the privacy of married couples; he argues that homosexual liaisons ought to be offered the same legal footing as the marriage of a man and a woman.

Mohr claims not to be a moral relativist. "One of our principles," he writes,

is that simply a lot of people saying something is good [or bad!]. . . does not make it so. Our rejection of the long history of socially approved and state-enforced slavery is a good example of this principle at work. Slavery would be wrong even if nearly every one liked it. So consistency and fairness requires that the culture abandon the belief that gays are immoral simply because most people dislike or disapprove of gays or gay acts, or even because gay sex acts are illegal.

What Mohr says here about morality being independent of opinion is common ground between us. He and I agree that "slavery would be wrong even if nearly everyone liked it." What he fails to see is that homosexuality is equally wrong—no matter how many say they like it. Slavery is against nature, because it treats human beings as subhuman chattels. Sodomy is against nature, since it treats men as if they were women.

Consider that man is a species-being, and the species to which he belongs—the species that defines his nature—is both rational and social. Man cannot live at all—much less live well—except by the mutual protection and mutual support of other human beings. Morality refers to those rules that mankind has learned, both from reason and experience, are necessary for surviving and prospering. The inclination of many men—what we might call the inclination of their lower nature—to take their sex where they find it and ignore the consequences, must be subordinated to their higher nature, which includes the interest of society (and the interest of nature in the species). For in no other species are the young so helplessly dependent for so long. Hence the importance, even for survival, of the laws both moral and civil governing the institution of marriage and of the family. We know that the relaxation of these laws leads to disorder, disease, and death, no less surely in the most advanced cultures than in the most primitive. But the good of the family is not merely self-preservation and survival, but the higher good—the happiness—of all its members, including those whose original horizon may not have extended beyond immediate gratification.

Homosexuals like Professor Mohr take the position that

whatever is done by consenting adults is morally right. This position has implications that extend beyond sodomy to other sexual practices that have traditionally been condemned as immoral. Consider, for example, the question whether incest is wrong. We find this curious sentence in the book before us:

Incest used to be considered unnatural [sic!] but discourse now usually assimilates it to the moral machinery of rape and violated trust.

Mohr seems reluctant to say candidly that the abhorrence of incest is just another superstition. But someone who cannot say that sodomy is unnatural cannot say that incest is unnatural. Mohr, like other advocates of "sexual liberation," appears to make consent rather than nature the ground of morality, without regard to what is being consented to. Incest, in this view, is bad only when the victim is too young or dependent to give "informed consent." It becomes morally acceptable when the parties are both adults.

It is painful but unfortunately necessary to repeat the obvious. Incest, like adultery, strikes at the good order of the family, because jealousy—properly understood—necessarily accompanies that passion by which and out of which the family is constituted. This jealousy is implanted by nature, and serves the good ends of nature. It is acknowledged in the traditional marriage service, in which the partners promise to "renounce all others." A wife does not expect to be in sexual competition with other women, and a husband does not expect to be in such competition with other men. Confining sexual friendship to its proper sphere—between man and wife—is the very core of that morality by which civilization is constituted. It did not require Freud to instruct us in the fact that the sexual passion in its primal force is anarchic, and that the "discontents" of civilization may be traced to its imperfect sublimation. Nevertheless, without the control of the libido by the super ego, all the interests of civilized existence are at risk. Our contemporary moralists, whose categorical imperative is, "If it feels good, do it" have forgotten the lessons of Freud no less than those of Aristotle or Aquinas.

The dissolution of the family is at the root of nearly all the social problems afflicting contemporary American society. The high rate of divorce is making emotional cripples out of children at all levels of society. And the children of divorce become divorced themselves at much higher rates than others. Crime, drug abuse, alcoholism, mental illness, venereal disease, low educational achievement, lack of job related skills, inability to function well on jobs, all of these things—and many more—are due at least partly to the disintegration of the traditional family. And at the root of the disability of the American family is the ethic that says that sexual

gratification is and should be only a matter of personal preference and personal choice. The traditional family, the embodiment and expression of "the laws of nature and of nature's God," as the foundation of a free society, has become merely one of many "alternative lifestyles."

The first cases of AIDS—and the first isolation of the HIV virus in the United States—occurred in 1981. In its origins it was entirely a disease of male homosexuals, generated in and by anal intercourse. At the present time, according to the latest statistics I have seen, more than eighty-five percent of AIDS cases are male homosexuals. AIDS can be contracted by women from bisexual men, and they in turn may spread it to other men and thereby to other women. Infected women may transmit it to their unborn children. Intravenous drug users may contract it by sharing needles with infected persons. Others may contract it from transfusions of infected blood. While the proximate cause of AIDS may not now in every case be sodomy, the etiology of every case leads back to sodomy as its point of origin.

Why AIDS now? That the first case was diagnosed a little over a decade after the "Gay Rights" and "Gay Pride" movements gained momentum may not be coincidental. It was as if the number of smokers had increased by a factor of four or five, and the per capita consumption of cigarettes per smoker had gone from one to three or four packs a day. The result would have been a sudden jump in the incidence of lung cancer, emphysema, and heart disease. Homosexuality has always been with us. But in the last generation we have seen it "come out of the closet." We have seen growing public acceptance of the doctrine that there is no moral distinction between promiscuity and chastity and that the only morality of sexual behavior is conformity with personal preference and personal choice. That nature itself seems to reward chastity with health, and punish promiscuity with disease, is seldom if ever mentioned. For AIDS is a venereal disease, and as much the result of promiscuity as ever were syphilis or gonorrhea.

The reigning assumption is that it is the function of science to emancipate human behavior from the restraints of nature. But it is by no means clear that this is possible in the long run. There was a time in the 1960s when antibiotics appeared to have conquered syphilis. Together with the birth control pill, this seems to have promoted an increase in heterosexual promiscuity. It was only a short time however before a new venereal disease, herpes, made its appearance, a virus immune to antibiotics. It would certainly seem that nature had an interest in the morality that is conducive to the

family, and punishes behavior inimical to it. I would suggest therefore that the quest for a cure of AIDs, unaccompanied by any attempt to modify the behavior out of which AIDS was generated, is ultimately futile. I would venture to suggest that if a cure for AIDS were discovered tomorrow, it would not be very long before a new venereal disease would make its appearance, just as herpes did in the 60s and AIDs did in the 80s. What is needed above all is not a medical miracle cure but a moral and behavioral change.

As an abstract debater's point, one might perhaps distinguish between homosexuality and promiscuity. Some homosexuals, especially women, maintain "exclusive" relationships. These may reduce somewhat the incidence of venereal disease. If they are sufficiently discreet—that is to say, if they remain "in the closet"—they may avoid the evil of scandal. "Marriages" between homosexuals would not solve any problems, however. It was not the lack of marriage certificates that produced the bathhouse culture, but rather the uncontrolled indulgence of sexual perversion. Legalizing sexual perversion could only make matters worse. Promiscuity, whether homosexual or heterosexual, is best controlled by moral constraint.

No civilized person today wants to persecute homosexuals, or to see them suffer and die from horrible diseases. But it is equally true that no civilized person should wish to see homosexuality accepted as an equally valid "alternative lifestyle."

SEXUAL ORIENTATION AND THE LAW. By the editors of the Harvard Law Review. Cambridge: Harvard University Press. 1990. Pp. 170. Cloth, \$17.50; paper, \$9.95.

*Beverly Balos*¹

I wish you would notice that you are heterosexual.

I wish you would grow to the understanding that you choose heterosexuality.

I would like you to rise each morning and know that you are heterosexual and that you choose to be heterosexual—that you are and choose to be a member of a privileged and dominant class, one of your privileges being not to notice.

—Marilyn Frye

This book was originally published as a student-authored "developments note" in volume 102 of the *Harvard Law Review*. It is a broad survey of the discrimination faced by lesbians and gay men

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