

August 10, 1992

*To the editors:*

Sodomites began to realize that, if all actions were governed by natural laws, then their sexual conduct could not possibly be unnatural. The inevitable dialogue between proponents of the two world-views took place in seventeenth-century Italy when a confessor told a sodomite, "This is a sin against nature," and was told in reply, "Oh father, but it is very natural to me."<sup>1</sup>

[L]egal scholars often are stigmatized by their peers for addressing homosexual issues, and . . . the legal community often trivializes and ignores legal issues involving homosexuals.<sup>2</sup>

Professor Harry V. Jaffa's "book review" of Richard Mohr's *Gays/Justice* (in Volume 8, No. 1 of *Constitutional Commentary*) may well top the dismal evidentiary heap. I am reluctant to call Jaffa's piece a book review—only 47 of its 161 lines discuss Professor Mohr's arguments (which Jaffa either misunderstands or ignores completely). The remainder is a homophobic, (arguably) misogynous screed *cum* jeremiad verging on the hysterical (in both the clinical and comical sense of the word).

Jaffa begins in this way: "The author is—we are told by the dust jacket—an 'openly gay professor' who . . ." The gift for nuanced innuendo Jaffa displays here will recur. The quotation marks around "openly gay professor" seem merely to indicate Jaffa is quoting the dust jacket. But there is also the hint of some kind of contradiction between being gay and being a professor—much like my use of quotation marks when I refer to Jaffa's "book review." Jaffa probably would deny vehemently that the validity of a person's arguments should be judged on the basis of his or her sexual orientation, but those who do so (often unconsciously) have all the information they need about *Gays/Justice*.

Later Jaffa tells us that "[h]omosexuals like Professor Mohr take the position that whatever is done by consenting adults is morally right." It is unclear whether Jaffa means "some" homosexuals (Mohr included) or "all" homosexuals—probably the latter, since

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1. David F. Greenberg, *The Construction of Homosexuality* 350 (U. of Chi. Press, 1988).

2. John Charles Hayes, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C. L. Rev., 375, 394 n.97 (1990).

Jaffa's subsequent remarks suggest a monolithic and stereotypic view of gays (i.e., gays as promiscuous slaves to "the uncontrolled indulgence of sexual perversion" and the inevitable "bathhouse culture") quite out of touch with the reality of many gay lives—even before AIDS. At any rate, he has again reminded us of Mohr's sexual orientation, which may deflect attention from the distortion of Mohr's views. Mohr, and other philosophers, gay and straight, at least since the openly heterosexual John Stuart Mill, take the position that whatever is done by consenting adults—especially in the privacy of their bedroom—is no concern of government if what they do causes no harm to themselves or others. Laws forbidding their actions based on religious views or majority loathing cannot be morally justified. As Mohr explains:

[T]he feelings of disgust that some people have to gays will hardly ground a charge of immorality. People fling the term "unnatural" against gays in the same breath and with the same force as calling gays "sick" and "gross," and when they do this, they give every appearance of being neurotically fearful, while at the same time violating the moral principle that one needs justifying reasons for moral beliefs.

When "nature" is taken in *technical* rather than ordinary usages, it looks like the notion also will not ground a charge of homosexual immorality. When unnatural means "by artifice" or "made by man," one need only point out that virtually everything that is good about life is unnatural in this sense. . . .

Jaffa continues:

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.

The line that so discombobulated Jaffa is on page 34. Clearly Mohr is reluctant to say either sodomy or incest is unnatural because their "naturalness" *vel non* is irrelevant to whether they are

immoral. He is saying that like rape and violated trust, incest is immoral. He believes the law can punish rape and therefore I assume he also believes the law can punish incest. Later he says that "not everything that is consensual is private" and suggests that incest, like marital rape and child abuse, is illegitimate. But that's on page 105 (of a 357-page book)—since the quotation above is the last we ever hear about Mohr or his ideas in Jaffa's piece I suspect Jaffa never got that far.<sup>3</sup> From the little Mohr says about incest, it seems unfair to attribute to him the belief that incest between consenting adults is either moral or beyond the law's reach.

Jaffa neither discusses nor evaluates the validity of Mohr's criticism of *Bowers v. Hardwick*. To paraphrase Professor Tribe, the central question posed by that case is not what Michael Hardwick was doing in his bedroom, but what Harry Jaffa's forces were doing there. In *Hardwick*, five of the nine Justices agreed—unfortunately, not all at the same time—that what Hardwick was doing was protected by the Constitution against State intrusion. I presume Jaffa would join Justice White's opinion on the grounds that sodomy is immoral because unnatural. As Jaffa puts it: "Sodomy is against nature, since it treats men as if they were women." So much for the position of women in Jaffa's schema. (Is he defending the morality/legality of heterosexual sodomy?) At least he answers a question bewildering constitutional scholars since Justice Holmes. The Fourteenth Amendment enacts Aquinas' *Summa Theologica*. Or maybe Plato's *Laws*.

The remaining two pages should have been published as an editorial in *The Dartmouth Review* or *Osservatore Romano*. Jaffa bemoans the dissolution of the traditional family—"at the root of nearly all the social problems afflicting contemporary American society"—and the rise of "'alternative lifestyles.'" "Legalizing sexual perversion could only make matters worse."

Among contemporary social problems, he is particularly concerned about AIDS. Jaffa writes:

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

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3. An earlier mention of Mohr alludes to a central section of *Gays/Justice*. Jaffa thinks Mohr's discussion (at pages 49-133) of *Griswold v. Connecticut* and its progeny is a plea for legalizing gay marriages. Mohr actually goes out of his way to avoid that argument, believing that "[t]he sanctifications that descend instantly through custom and ritual on current marriages, descend gradually over and through time on gay ones—and in a way they are better for it." Mohr does explore why sodomy laws are wrong, the inconsistency of *Bowers v. Hardwick* with privacy case law from *Griswold v. Connecticut* to *Hardwick*, and the existing (and a possible alternative) constitutional basis for the right to privacy.

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. . . . 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.

At this point, Jaffa is not just writing nonsense but—to borrow a phrase from a philosopher Jaffa ought to read more often—“nonsense upon stilts.” Vicious, malignant nonsense.<sup>4</sup> Jaffa’s statement will be a revelation to the million people who in recent months, according to the World Health Organization, contracted HIV worldwide, 90% through heterosexual intercourse; enlightenment to those in the medical community who believe that HIV is a mutation of SIV and originated in Africa, where it was first transmitted from monkey to humans. (Perhaps Jaffa theorizes that the virus was “generated” by a flamboyant San Franciscan buggering a chimp while on safari in the 1950s.)

Jaffa has an even more profound question upon which to instruct us:

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. . . . 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. . . . That nature itself seems to reward chastity with health, and punish promiscuity with disease, is seldom if ever mentioned. . . .

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

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4. By keeping statistics as to the demographics of those diagnosed with AIDS primarily by such limited variables as sexual orientation, race and IV drug use, many other variables which more accurately describe AIDS victims and which may have greater utility in explaining HIV transmission become masked or obscured. The absence of statistics as to the extent of homophobia, racism and other forms of bigotry suffered by people with AIDS both before and after diagnosis makes it unlikely that we will ever be able to conclude, using current empirical principles of causation, that bigotry is a medical cause of HIV vulnerability. Nonetheless, a causal model that incorporates psychological and political factors in disease patterns would underscore the effects of homophobia, racism and poverty as significant contributors to the AIDS epidemic in the United States. Such a multidisciplinary causal model for AIDS would no more accept the popular explanation of sexual “promiscuity” among gay men as the “cause” of AIDS in the United States than it would accept the explanation that AIDS in Africa is “caused” by heterosexuality.

Mary C. Dunlap, *AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus*, 34 Vill. L. Rev. 909, 920 (1989).

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. . . .

As an abstract debater's point, one might perhaps distinguish between homosexuality and promiscuity.

Jaffa staunchly resists the impulse toward fundamental fairness—never mind logic—hinted at in that last sentence. But there we have it: Homosexuals (all rabidly promiscuous by nature) created the HIV virus by their unnatural sex acts. If gay liberation movements had sprung up in Ancient Greece or Rome, the virus would have been "generated" much earlier. At any rate, nature will guard the traditional family, even if it means killing every queer on the planet. And every promiscuous heterosexual (if as an abstract debater's point we distinguish between homosexuality and promiscuity).

Consider another abstract debater's point. Jaffa's etiological inquiries reveal that "AIDS can be contracted by women from bisexual men, and they in turn may spread it to other men and thereby to other women." Among traditional families, presumably there are some in which only one partner is promiscuous, but nonetheless the non-promiscuous one becomes infected with HIV through sex with the promiscuous partner. Apparently, in its zeal to protect the traditional family, nature has created a virus that cannot distinguish between promiscuous and not, let alone gay or straight, and is now destroying people whether in traditional families or pursuing "alternative lifestyles." Can nature get *nothing* right? Maybe next time nature will come up with some disease that only kills promiscuous queers (is the phrase redundant?). Until then thank "nature's God" for latex.

Jaffa concludes: "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.'" An important step toward ending persecution of gays would be the passage of anti-discrimination laws of the kind Mohr defended at great length. Mohr also has strong views about the AIDS crisis and government's responsibilities to respond. Jaffa never mentions these sections of *Gays/Justice*. The governmental actions that were taken—i.e., none, at least while it seemed only gays were dying—are consistent with the Jaffaesque philosophy quadrennially dusted off by the Reagan-Bush-Quayle administrations.

Whether eliminating laws criminalizing sodomy in the privacy

of the bedroom between consenting adults would “only make matters worse” I do not know.<sup>5</sup> Five reasonably civilized gentlemen—Harry Blackmun, John Paul Stevens, William Brennan, Thurgood Marshall and (however belatedly) Lewis Powell—did not think so. I do know that no person who thinks sexual orientation is simply a lifestyle choice (as if someone would choose a life of public and private discrimination and subjection to serious, sometimes lethal, violence); who premises his argument against sexual relations between males on the supposedly degraded status of women; who blames victims for their disease—no such person can be taken seriously when he pontificates on the values that define a civilized person.

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*Harry Jaffa replies:*

Professor Dynia prefaces his diatribe with an epigraph. A priest advises a sodomite that his sin is against nature. The sodomite replies, “Oh, father, but it is very natural to me.” Professor Dynia evidently thinks the sodomite’s reply is a sufficient one, although it should be evident that the priest and the sodomite are using “nature” in two entirely different senses.

The antebellum slave owner, who sipped his mint julep while sitting in the shade, as Sambo chopped cotton in the burning sun, thought it entirely natural to do so. The Inca priests, who disemboweled maidens on their altars, evidently thought human sacrifice to be entirely natural. Hindus, who burned widows on their husband’s pyres, evidently thought *suttee* to be natural. Hitler, of course, thought it quite natural to kill Jews.

The central point of my review—which Professor Dynia nowhere addresses—was that the only ground in unassisted human reason for objecting either to slavery or genocide is the ground of nature, not in the sense of what “is,” but in the sense of what “ought” to be. We ought not to enslave other human beings—as we may “enslave” dogs or horses or oxen—because we recognize in them a nature that we share. We ought not to slaughter (or eat)

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5. States that have decriminalized sodomy or protected gays from discrimination have experienced neither increased criminal behavior nor increased spread of AIDS. Mohr, *Gays/Justice* at 43 (cited in note 3).

other human beings, as we may cattle, for the same reason. All moral obligation arises from the perception that another being is a human being—towards whom we should act as we would have him (or her) act towards us—and not a being of a lower order of nature. At the normative center of the idea of nature itself is the distinction of male and female, which is the ground of morality because it is the ground of the existence of nature itself (the being of being). If then sodomy is not unnatural, in the sense in which the priest said it is, then nothing is unnatural, and nothing (including the persecution of sodomites) is wrong.

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