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ADAM, EVE AND THE FIRST AMENDMENT: SOME THOUGHTS ON THE OBSCENE AS SACRED*

SHELDON H. NAHMOD**

> And the Lord God commanded the man, saying: 'Of every tree of the garden thou mayest eat; but of the tree of knowledge of good and evil, thou shalt not eat of it; for in the day that thou eatest thereof thou shalt surely die.'. . . And they were both naked, the man and his wife, and were not ashamed. . . . And the serpent said unto the woman: 'Ye shall not surely die; for God doth know that in the day ye eat thereof, then your eyes shall be opened, and ye shall be as God, knowing good and evil.'. . . [S]he took of the fruit thereof, and did eat; and she gave also unto her husband with her, and he did eat. And the eyes of them both were opened, and they knew that they were naked; and they sewed fig leaves together, and made themselves girdles. . . . Therefore the Lord God sent him forth from the garden of Eden . . . .[1]
>
> Would we allow the police to search the *sacred* precincts of marital bedrooms for telltale signs of the use of contraceptives? . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being *sacred*.[2]

INTRODUCTION

First Amendment obscenity doctrine and its accompanying rhetoric are grounded on the assumption that obscene material is without literary, artistic, political, scientific or other value. Indeed, obscenity itself is defined as having low value or no value. Lack of value is typically put in harm-causing terms: obscenity causes violent antisocial conduct, corrupts character and erodes moral standards through persuasion and indirect degradation of values.[3] This lack of value is the reason that material identified as obscene can be excluded from protection under the First Amendment: obscene material adds little or nothing to the marketplace

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1. *Genesis* 1: 26-28; *Genesis* 2: 16-17, 25; *Genesis* 3: 4-7, 23, *in* PENTATEUCH AND HAFTORAHS (J.H. Hertz ed., 2d ed. 1978).

2. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (emphasis added).

3. *See* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 1207-08 (2d ed. 1991) (cataloging "the interests furthered by the suppression of obscenity"). Also noted are the interests in protecting adults from the "shock effect" of unexpected exposure to obscenity and in protecting minors from harm.

of ideas and does not promote self-government.[4]

I propose to deconstruct[5] this low value assumption of First Amendment obscenity doctrine by turning it on its head. In my view, the obscenity exception to the First Amendment may also be explained in large measure as carving out an area in which the state is permitted to maintain the sacred aspect of sexuality so as to prevent private market forces from debasing, commercializing and effectively desacralizing it. Thus, certain kinds of obscenity are excluded from First Amendment coverage not because they have little or no value but rather because they have such high value that they are sacred.[6]

This move shifts the explanation of obscenity regulation away from a negative Augustinian, original sin view of sexuality and toward a very different affirmative Judaeo/Christian view of it. As will be seen, competing interpretations of the Biblical narrative of Adam, Eve and the serpent[7] ground these different views of sexuality. The move also has

4. The third mainstream rationale of the First Amendment is individual autonomy/self-fulfillment.

5. Jacques Derrida is the thinker most associated with deconstruction. *See* STRUCTURALISM AND SINCE: FROM LEVI-STRAUSS TO DERRIDA 169-70 (John Sturrock ed., 1979). While he is also an influential philosopher, it is Derrida as an interpreter of texts who is of relevance here. Derrida explicated deconstruction, an interpretive technique that focuses on inverting textual hierarchies and meanings. Derrida's deconstructive approach is based both on the instability and indeterminacy of language emphasized by Friedrich Nietzsche and on what Ferdinand de Saussure called the arbitrary relationship between the signifier and the signified. *See* Friedrich Nietzsche, *On Truth and Falsity in an Extra-Moral Sense* 171 & 178, *in* EARLY GREEK PHILOSOPHY AND OTHER ESSAYS (Maximilian A. Mugge trans., 1964); Jonathan Culler, *Introduction* to FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS, at xiv-xv n.1 (1959).

However, Derrida goes further by indicating that texts themselves have lives separate and apart from their authors and contain incompatible meanings. That is, there is no authoritative meaning; there are only meanings. In a famous passage, Derrida puts it this way:

> [R]eading. . .cannot legitimately transgress the text toward something other than it, toward a referent (a reality that is metaphysical, historical, psychobiographical, etc.) or toward a signified outside the text whose content could take place, could have taken place outside of language, that is to say, in the sense that we give here to that word, outside of writing in general . . . . *There is nothing outside of the text.*

JACQUES DERRIDA, OF GRAMMATOLOGY 158 (Gayatri Chakravorty Spivak trans., 1977).

Derrida obviously did not invent the idea of interpretive ambiguity. Nevertheless, deconstruction is useful in connection with my move to invert the low value assumption of First Amendment obscenity doctrine by replacing it with a view of certain kinds of obscenity as possessing extremely high value.

6. The claim that there is a close connection between the obscene and the sacred has to be qualified because the fit between the obscene and the sacred is not perfect. Not every sexual act that is obscene is sacred. For example, depictions of sexual relations between people and animals, and depictions of excretory functions, are not sacred even though they can be obscene under the *Miller v. California* test. However, this is not inconsistent with my interpretation because such depictions still debase sexuality even though they are not themselves sacred. Thus, prohibitions against such depictions function prophylactically to protect the sacred nature of sexuality. Obscene child pornography can be similarly explained under my approach. *Cf.* New York v. Ferber, 458 U.S. 747 (1982).

The applicability of my interpretation to depictions of homosexual conduct is considered in Part IV, which also comments on pornography and feminist theory.

7. *See Genesis, supra* note 1.

intriguing implications for the relation between First Amendment obscenity doctrine and the substantive due process right of privacy. Indeed, under this approach, obscenity and privacy may be considered two sides of the same coin. Furthermore, the move may suggest possible changes in obscenity and privacy doctrine as well, although that is not the purpose of this Article.

I. THE LOW VALUE ASSUMPTION OF OBSCENITY DOCTRINE

First Amendment doctrine is hierarchical. Certain kinds of speech—political speech is a good example—have a more privileged status than other kinds of speech which are accorded either lesser First Amendment protection or no First Amendment protection at all. This hierarchical flavor is captured in the famous *Chaplinsky* dictum:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[8]

The assumption that the obscene is not protected by the First Amendment because of obscenity's lack of value played its first Supreme Court role in *Roth v. United States*[9], a seminal Supreme Court obscenity decision. In his since-regretted opinion, Justice Brennan stated for the Court:

> The dispositive question is whether obscenity is utterance within the area of protected speech and press. . . . [All] ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance . . . . [In] light of this history, it is apparent [that] obscenity . . . [was] outside the protection intended for speech and press. [We therefore] hold that obscenity is not with the area of constitutionally protected speech or press.[10]

The Court in *Roth* thus defined obscenity in no-value terms as "utterly without redeeming social importance." Distinguishing sex from ob-

8. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
9. 354 U.S. 476 (1957).
10. *Id.* at 481, 483-85.

scenity, the Court went on to declare: "Obscene material is material which deals with sex in a manner appealing to prurient interest . . . . [The proper test is] whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[11]

The *Roth* Court's assertion that obscenity is outside the protection of the First Amendment has been much criticized on both historical and explanatory grounds. More important for present purposes, though, is the continued viability in Supreme Court case law of the assumption that obscenity has little or no value. Just as this assumption was part of the *Roth* definition of obscenity, it is part of the currently applicable definition of obscenity articulated in *Miller v. California*.[12] While the *Miller* Court retained *Roth*'s criterion of prurient interest and added the criterion of patent offensiveness, it rejected *Roth*'s "*utterly* without redeeming social value" standard and insisted that the work must lack "*serious* literary, artistic, political, or scientific value."[13] Hence, under *Miller*, material which has some value may still be judged obscene so long as it does not have serious value.

This assumption—that obscene material by definition has little or no value—is what I wish to deconstruct.

II. Deconstructing Obscenity Doctrine and the Sacred

A. Deconstructing Obscenity

I observed earlier that First Amendment doctrine is hierarchical because it is grounded on assessments of the value of different kinds of speech. Certain speech is accorded maximum First Amendment protection while other speech, such as defamation and commercial speech, is accorded somewhat less protection. However, obscenity is accorded no First Amendment protection at all because it is considered to have little or no value. Once material is defined as obscene, it is entirely outside of the world of the First Amendment even though it is clearly speech. Indeed, it is more accurate to describe obscenity as *beneath* the world of the First Amendment, consigned to a special Hell.

When obscenity is placed beneath the world of the First Amendment (the center), it has thereby become marginalized. Obscenity has been given an existence apart from the First Amendment so that First

11. *Id.* at 487, 489.
12. 413 U.S. 15 (1973).
13. *Id.* at 24 (emphasis added).

Amendment concerns and rhetoric are automatically excluded once material is found to be obscene.

Deconstructing obscenity doctrine changes all of this. Such a move inverts the hierarchy of values under current First Amendment law. Instead of possessing little or no value, obscenity is now sacralized and given the highest value. Rather than being placed beneath the world of the First Amendment, obscenity is located *above* the world of the First Amendment, at the top of any hierarchy.

A deconstructive move is often interesting for its own sake because it functions as a kind of aesthetic or literary technique to force an interpreter to see texts in an entirely new light. But there is considerably more than this implicated in the obscenity setting. A deconstruction of obscenity doctrine through inverting the dominant low value assumption sheds some light on the possible religious sources of obscenity doctrine and its relation to sexuality. It also suggests a close connection to substantive due process privacy doctrine.

I want to make clear at the outset that I am making no historical claims for this interpretation of obscenity. I do not know whether or to what extent obscenity doctrine is in fact grounded on the sacred as a matter of the "original intent" of the framers or the thinking of the Supreme Court. It is enough, for me at least, that the endeavor explains current obscenity doctrine at least as well as, if not better than, the low value assumption and that it generates some interesting insights.

B. The Concept of the Sacred [14]

The distinction between the sacred and the non-sacred appeared several millennia ago in Western religion. Although it did not originate with Judaism, the Pentateuch repeatedly emphasizes the distinction between "Koh'desh" (the sacred or holy) and "Chol" (the non-sacred or non-holy) in connection, for example, with the Israelites (the "holy people") and the land of Israel (the "holy land").[15] The concept of the sacred was carried over into Christianity, but it was not until the 20th century that it became important in the comparative study of religions.[16]

Theologian Mircea Eliade, in an influential book, *The Sacred and*

14. This discussion of the concept of the sacred is adapted from, and based on, the more comprehensive discussion in Sheldon Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L. J. 511, 527-30 (1991).

15. *E.g.*, *Leviticus* 19:1-2 *in* PENTATEUCH AND HAFTORAHS, *supra* note 1 ("And the Lord spoke unto Moses, saying. Speak unto all the congregation of the children of Israel, and say unto them, Ye shall be holy, for I the Lord your God am holy.").

16. *See* RUDOLPH OTTO, THE IDEA OF THE SACRED (Eng. trans. 1928).

the Profane,[17] focuses on the concept of the sacred with its aspects of awe and separateness, and articulates a comprehensive theory regarding religion. In particular, he demonstrates the ways in which humanity divides time, space and matter into the two realms of the sacred and the non-sacred, or the holy and the non-holy.

Eliade begins his analysis with a discussion of those ways in which the sacred manifests itself in human life through what he calls *hierophany*, i.e., the sacred literally making itself seen.[18] According to Eliade, the history of religion is, in essence, a great number of these hierophanies, each of which represents the same phenomenon: a manifestation of a wholly different reality. Further, the worship of seemingly ordinary places and things, such as rocks or sacred groves, is in fact a recognition of the hierophany rather than a veneration of the object itself. This is true because the object, while remaining itself, has, through the hierophany, become transformed into another supernatural reality. As in the Christian mystery of transubstantiation, the object retains all the substance and accidents of its original nature while also assuming the substance of the sacred object.[19]

After an extensive analysis of sacred space and sacred time, Eliade considers the sacralization of nature and natural objects. He discusses the symbolism of water which represents creation or the possibility of recreation. He then moves on to other symbols. He examines in particular the symbols adopted by Christianity. He also considers the sacralization of life as a whole whereby the human body is made sacred through ritual and becomes a realization of the cosmos.[20] At the same time, he describes the many symbols present in this sacralization, from domestic objects to funerary objects, each of which is made holy in itself. Eliade goes on to assess rites of passage, initiation, and rebirth, and how these convert the human body and related objects into religious symbols.

Eliade concludes *The Sacred and the Profane* with an examination of the presence of the sacred in modern life. He maintains that even modern, non-religious man is still surrounded by the sacred and by ritual, as reflected in political parties, the occult and philosophical movements such as those for nudism or sexual freedom.

> In short, the majority of men "without religion" still hold to pseudo religions and degenerated mythologies. There is nothing surprising in this, for . . . profane man is the descendant of *homo religiosus* and he

17. MIRCEA ELIADE, THE SACRED AND THE PROFANE (1957).
18. *Id.* at 11.
19. *Id.* at 12.
20. *Id.* at 175-79.

cannot wipe out his own history.[21]

Eliade's insights into the sacred, together with his discussion of the sacralization of different human activities and the continued presence of the sacred in modern life, are helpful in grounding my deconstruction of First Amendment obscenity doctrine. Eliade's work suggests the interpretive possibility that the representation of certain kinds of sexual conduct may be considered sacred under First Amendment obscenity doctrine, and therefore prohibited by the state, because the conduct is itself sacred.

As I will show, sacralizing obscenity by means of my interpretive move is not so far-fetched as it might initally appear. Indeed, it derives some support from the history of the concept of original sin.

III. JUDAEO/CHRISTIAN VIEWS OF SEXUAL CONDUCT AND ITS REPRESENTATION

The low value assumption of current First Amendment obscenity doctrine can be viewed as premised on the Augustinian position on original sin that considers sexual conduct, even between husband and wife, to be inherently sinful. In contrast, an interpretation of certain kinds of obscenity as sacred can be grounded on the very different Judaeo/Christian position that sexual conduct is not only not sinful but is inherently good and indeed sacred.

A. The Judaic Position

The Judaic account of sexual conduct stems from its interpretation of the story of creation and of Adam, Eve and the serpent. Under this account as it appears in Genesis,[22] men and women are told by God to be fruitful and multiply. The reason that Adam and Eve are expelled from the Garden of Eden has little to do with their sexuality, but is rather the result of their disobedience to God. Rabbinic interpretation further maintains that even though the primary function of marriage is the legitimation of sexual relations between man and woman for the purpose of procreation, sexual relations may, and should, nevertheless take place between husband and wife where procreation is not possible. Indeed, the

21. *Id.* at 209.

22. *Genesis* 1: 26-28, reads as follows:

> And God said: 'Let us make man in our image, after our likeness.'. . . And God created man in His own image, in the image of God created He him; male and female created He them. And God blessed them; and God said unto them: 'Be fruitful and multiply, and replenish the earth, and subdue it.'

See also Genesis, supra note 1.

husband is under an affirmative obligation to engage in sexual relations with his wife.

Consequently, traditional Judaism views sexual relations between husband and wife as salutary for two reasons: procreation and pleasure. In no sense, particularly in the context of marriage, are sexual relations sinful. In fact, they are considered sacred. Under Judaic law, celibacy and abstinence are discouraged and even considered unnatural.

B. The Christian Positions

Elaine Pagels observes in her recent book, *Adam, Eve and the Serpent,*[23] that there was a split in early Christianity with regard to the connection between sexual relations and sin, a split stemming from conflicting interpretations of Genesis and the narrative of Adam, Eve and the serpent. At one extreme, there were early Christians who took the position that sexual relations were to be encouraged for procreation purposes in marriage. Like the Rabbis, they did not view sexual relations as inherently sinful and, like the Rabbis, they considered the sin of Adam and Eve to be disobedience to God.

For example, Clement of Alexandria, who lived one hundred years after Paul, interpreted Paul as follows: "In general, all the letters of the apostle teach self-control and continence, and contain numerous instructions about marriage, begetting children, and domestic life, but they nowhere exclude self-controlled marriage."[24] Building on this and other statements of Clement, Pagels asserts that "Clement rejects, above all, the claim that Adam and Eve's sin was to engage in sexual intercourse—a view common among such teachers as Tatian the Syrian, who taught that the fruit of the tree of knowledge conveyed *carnal* knowledge."[25] In her view, "Clement confirms the traditional Jewish conviction, expressed in the deutero-Pauline letters, that legitimate procreation is a good work, blessed by God from the day of human creation."[26]

At the other extreme, there were early Christians who interpreted Genesis, together with certain statements attributed to Jesus in the Gospels, for the proposition that the sin of Adam and Eve was embodied in their discovery of sexuality through their disobedience to God. Tatian the Syrian, mentioned above, is one example. Pagels states that he "blamed Adam for inventing marriage, believing that for this sin God

23. ELAINE PAGELS, ADAM, EVE AND THE SERPENT (1988).

24. Clement, *Stromota* 3,84 (John Ernest Leonard Oulton & Henry Chadwik trans.) *in* 2 ALEXANDRIAN CHRISTIANITY, 40-92, *quoted in* PAGELS, *supra* note 23, at 27.

25. PAGELS, *supra* note 23, at 27.

26. *Id.*

expelled Adam and his partner in crime from Paradise."[27]

Jerome is another example. After describing Jesus as "a virgin in the flesh and monogamist in the spirit," he declared: "I will say what the apostle [Paul] has taught me . . . indeed in view of the purity of the body of Christ, all sexual intercourse is unclean."[28] Jerome put his famous quarrel with Jovinian as follows:

> He puts marriage on a level with virginity, while I make it inferior; he declares that there is little or no difference between the two states; I claim that there is a great deal. Finally . . . he has dared to place marriage on an equal level with perpetual chastity.[29]

For these and other Christians, then, original sin meant that sexual relations were inherently sinful and would only, and barely, be tolerated for procreation purposes in the context of marriage. Under this view, Christian values were best promoted through monogamy.

Pagels contends that this latter original sin position, directly connected to sexuality, was taken by Augustine in the fourth century. He read the story of Adam, Eve and the serpent as showing that "the sexual desire of our disobedient members arose in those first human beings as a result of the sin of disobedience . . . and because a shameless movement resisted the rule of their will, they covered their shameful members."[30] This original sin was transmitted to the human race as follows:

> The entire human race that was to pass through woman into offspring was contained in the first man when that married couple received the divine sentence condemning them to punishment, and humanity produced what humanity became, not what it was when created, but when, having sinned, it was punished.[31]

The major point of Pagels's book is her contention that political factors were largely responsible for the fact that Augustine's position eventually became the dominant one in the Catholic Church. After Christianity became allied with the Roman Empire, freedom was no longer to be the primary message of the story of Adam, Eve and the serpent. Rather, Augustine's position on original sin became politically expedient for the Church "since it persuaded many of his contemporaries that human beings universally need external government."[32]

Whatever one thinks of her political assessment, the contrasting views of sexuality in the early Church, as described by Pagels, can

27. *Id.*
28. JEROME, ADVERSUS JOVINIANUM I,10; 20, *quoted in* PAGELS, *supra* note 23 at 94.
29. JEROME, LETTER 48, TO PAMMACHIUS, 2, *quoted in* PAGELS, *supra* note 23, at 95.
30. AUGUSTINE, DE CIVITATE DEI 13,13, *quoted in* PAGELS, *supra* note 23, at 111.
31. AUGUSTINE, DE CIVITATE DEI 13,3, *quoted in* PAGELS, *supra* note 23, at 109.
32. PAGELS, *supra* note 23, at xxvi.

ground the current low value assumption of obscenity doctrine and the deconstructive interpretation I suggest.

C. *The Representation of Sexual Conduct*

The dominance of the Augustinian position on original sin and sexual conduct can be connected interpretively to the low value assumption of First Amendment obscenity doctrine because what is sinful possesses low value by definition. It also follows from the Augustinian position that the representation of sexual conduct is similarly sinful because it could lead to the sinful conduct itself.

Conversely, the contrasting Judaeo/Christian position on the sacred nature of sexual conduct can be connected interpretively to my deconstructive move regarding the high value of obscenity. Under this move, representations of certain sexual conduct are prohibited not because of the sinfulness of such conduct. Rather, they are prohibited because, as I suggest shortly, such sexual conduct itself would otherwise be debased and commercialized and thereby desacralized.

Under this interpretation, a representation of sacred sexual conduct might even be considered sacred in its own right. One reason is that the sexual conduct of a man and woman, insofar as it could lead to procreation, may be viewed as the equivalent of God's act of creating the universe. Thus, such sexual conduct is God-like and the Second Commandment prohibits the representation of God.[33] Another possible reason derives from the Genesis account that God created man and woman in His/Her own image. The Second Commandment therefore prohibits representations of sexual conduct because they constitute representations of God's image. However, this goes beyond representations of sexual conduct to include every representation of a person, in much the same way that certain religious or ethnic communities prohibit picture taking of their members because they believe that their souls would thereby be taken from them.

The close connection between sexual conduct and its representations is reflected in the following assertion by Chief Justice Burger in *Miller v. California*: "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such

33. "Thou shalt have no other gods before Me. Thou shalt not make unto thee a graven image, nor any manner of likeness, of any thing that is in heaven above. . . ." *Exodus* 20: 3-4, *in* PENTATEUCH AND HAFTORAHS, *supra* note 1.

public places."[34] Similarly, in his discussion of hard core pornography, Fred Schauer maintains that "it is . . . designed to produce a purely physical effect [and is] essentially a physical rather than a mental stimulus . . . . [H]ardcore pornography *is* sex . . . ."[35] Both of these statements suggest that representations of sexual conduct can plausibly be treated as surrogates of the sexual conduct depicted.

IV. THE SACRED OBSCENE, PRIVACY AND PORNOGRAPHY

A. The Marketplace of Ideas

When speech is in the world of the First Amendment—meaning that it has First Amendment protection—it is part of the marketplace of ideas and competes with other speech for attention and action. The marketplace puts a value on that speech, but the valuation process is dynamic: the value of particular speech changes from time to time. To describe certain speech as sacred under my deconstructive interpretation means that it does not have First Amendment protection. When speech dealing with certain sexual conduct is thus sacralized, it means that government may determine that it does not belong in the marketplace of ideas because it cannot and should not be valued in marketplace terms.

A second characteristic of the marketplace of ideas is that the ideas bought and sold there are treated like commodities bought and sold in the marketplace of products and services. The latter marketplace is part of the everyday world and is therefore nothing out of the ordinary. To permit obscene speech, whose subject is sexual conduct, in the marketplace similarly treats that speech like any other commodity. In effect, sexual conduct, which is sacred, is commoditized.

A third characteristic is that ideas are bought and sold *publicly*. To the extent that obscene speech is permitted in that marketplace, representations of sexual conduct are necessarily bought and sold publicly as well. Yet one of the sacred aspects of sexual conduct is that it is *private*.

Thus, excluding obscenity from the First Amendment functions to preserve the sacred nature of sexual conduct by preventing its commercialization and exposure in the marketplace. This anti-commercialization aspect of obscenity doctrine is demonstrated especially clearly in *Ginzburg v. United States*,[36] where the Supreme Court determined that "the question of obscenity may include consideration of the setting in

34. 413 U.S. 15, 25-26 (1973).

35. Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922, 923, 926 (1979).

36. 383 U.S. 463 (1966).

which the publications were presented."[37] In *Ginzburg*, the defendant attempted to mail his publications from Intercourse and Blue Ball, Pennsylvania, and his advertising "boasted" that his publications would "take full advantage . . . of an unrestricted license allowed by law in the expression of sex and sexual matters."[38] The Court ruled that "commercial exploitation of erotica solely for the sake of their prurient appeal [may] support the determination that the material is obscene even though in other contexts the material would escape such condemnation."[39]

This function of First Amendment obscenity doctrine—permitting government to preserve the sacred nature of sexual conduct[40]—is to a considerable extent consistent with, and complements, Supreme Court decisions that prevent the state from interfering with sexual conduct in the marital relationship.[41]

B. Privacy

The Supreme Court's right of privacy decisions, particularly those relating to sexual conduct in marriage, are the other side of the high value, sacred obscenity interpretation that I propose. These decisions prevent the state from interfering with the sexual conduct of married heterosexuals because that conduct is sacred. A good example is the Supreme Court's decision in *Griswold v. Connecticut*[42] where the state attempted to regulate the sexual conduct of husband and wife in the privacy of the home. The Court ruled that the constitutional right of privacy prevents a state from so doing.

It is because such sexual conduct is sacred that First Amendment obscenity doctrine and the right of privacy function to protect it against desacralization. In the case of obscenity, the sources of the danger are private persons who wish to buy and sell obscene material. In the case of the right of privacy, the source of the danger is the state which attempts to regulate marital sexual conduct. Regardless of the source, in both cases the function of the applicable constitutional doctrines is to preserve the sacred nature of this sexual conduct.

37. *Id.* at 465.
38. *Id.* at 468.
39. *Id.* at 466, 476.
40. Chief Justice Burger intimated a view of obscenity resembling mine when he described sex as "a sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality . . . [that] can be debased and distorted by crass commercial exploitation . . . ." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).
41. Homosexual conduct, pornography and feminist theory, and whether they fit my interpretation, are addressed at Part IV.
42. 381 U.S. 479 (1965).

The complementary relationship between First Amendment obscenity doctrine and the right of privacy is further buttressed by the fact that the only meaningful protection carved out by the Supreme Court for obscenity is found in a privacy case involving a *home*, no less. In *Stanley v. Georgia*,[43] the Court ruled that the state may not suppress obscenity in the privacy on one's home: to do so would amount to an attempt to control a person's private thoughts. *Stanley* is unique among the Supreme Court's obscenity decisions because it is clear that the state may prevent persons from buying and selling obscene material outside of the home.[44] It is only where a person succeeds in getting it into the home that First Amendment protection becomes applicable.

Stanley is consistent with my interpretation of the obscene as sacred because it stands for the proposition that obscene representations of sexual conduct are protected only in the privacy of the home. Once obscenity arrives in the home, it is no longer in the marketplace of ideas to be there valued, bought, sold and made public.

Read together, then, *Griswold* and substantive due process do for marital sexual conduct in the privacy of the home what *Stanley* and the First Amendment do for obscenity in the privacy of the home. Both cases reflect a deep concern for the sacred.

C. Homosexual Conduct

The present constitutional status of homosexual conduct poses two related difficulties for my interpretation of obscenity doctrine and its connection to privacy doctrine. Clearly, representations of homosexual conduct can qualify as obscene under the *Miller* test, a test which I took as a given for the purposes of this Article. Under my interpretation, this ought to mean that obscenity doctrine functions to prevent the desacralization of homosexual conduct because it is sacred. But this is problematic if one looks historically at the Judaeo/Christian grounding of my interpretation. Under that tradition, as constituted over two millennia ago, homosexual conduct was clearly not considered sacred. To the contrary, it was taboo.[45]

There is a problem with my interpretation on the privacy side as well. Suppose that homosexual conduct were considered sacred under

43. 394 U.S. 557 (1969).

44. The Court made clear in *Paris Adult Theatre* that *Stanley*'s privacy rationale does not apply outside of the home. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

45. "If a man lie with a man as with a woman, both of them have committed an abomination; they shall be put to death, their blood in on them." *Leviticus* 18:22 *in* PENTATEUCH AND HAFTORAHS, *supra* note 1.

obscenity doctrine so that government could prevent its desacralization by prohibiting the marketing of its representations. Nevertheless, current privacy doctrine, as exemplified by the Supreme Court's decision in *Bowers v. Hardwick*,[46] holds unequivocally that homosexual conduct is not protected by substantive due process. Consequently, while my deconstructive interpretation, satisfactorily explains the relationship among obscenity doctrine, privacy doctrine and heterosexual conduct, it apparently does not do the same for homosexual conduct.

There are various ways of dealing with this problem. That my deconstructive interpretation does not satisfactorily account for every aspect of obscenity and privacy doctrine as they are presently constituted does not destroy the fundamental insight that obscenity doctrine can in large measure be grounded on the sacred nature of heterosexual conduct. After all, the current low value assumption of obscenity doctrine which I deconstruct generates its own serious problems of which every First Amendment scholar is aware.[47]

But there is a better response. In setting out my deconstructive interpretation, I took current obscenity and privacy doctrines as givens. However, I am certainly not wedded to these doctrines as a critical matter. My deconstructive interpretation is not inconsistent with the suggestion that homosexual conduct may be considered sacred because the category of sacred sexual conduct should not be frozen into a position several millennia old. Indeed, various mainstream religious denominations have recently determined that homosexual conduct and relationships may partake of the sacred.[48] Similarly, I can adhere to my deconstructive interpretation of obscenity doctrine while at the same time maintaining that *Bowers v. Hardwick* was incorrectly decided. Consequently, if substantive due process were to protect homosexual conduct, then the fit between that privacy doctrine and an obscenity doctrine that considered representations of homosexual conduct to be sacred would be a good one.

46. 478 U.S. 186 (1986).

47. These include: the questionable assumption that obscenity possesses low or no value even though obscenity deals with sexuality, one of the most important aspects of human life; the incompatibility of obscenity doctrine with the marketplace of ideas and individual autonomy/self fulfillment rationales of the First Amendment; and the absence of any real proof that the dissemination of obscenity causes harm.

48. For example, the leaders of Reconstructionist Judaism recently adopted a statement on homosexuality and Judaism which

> affirms that "kedushah," or holiness, resides in committed homosexual relationships, and welcomes lesbian and gay individuals and families as full and equal members of congregations and havurot, "with the same rights and responsibilities as heterosexual individuals and families."

CHI. JEWISH SENTINEL, Feb. 20, 1992, at 25.

D. *Pornography and Feminist Theory*

In contrast, my high value interpretation of obscenity appears incompatible with the argument made by some feminists that government should be allowed to ban non-obscene pornography because it depicts the subordination and dehumanization of women and presents them either as submissive sexual objects who enjoy pain, humiliation and rape or as whores.[49] This argument, because it is obviously harm-based, can readily be made consistent with the dominant low value assumption of current obscenity doctrine which is similarly harm-based.[50] In effect, the argument seeks to expand the categories of unprotected speech under the First Amendment.

However, inasmuch as this position defines pornography primarily in terms of the insubordination and dehumanization of women, it cannot be squared with a view that pornography is sacred. Only if the feminist argument were fundamentally recast to the effect that pornography debases the sexuality of *both* men *and* women could it be made consistent with my deconstructive interpretation. If it were so recast, then pornography would not have to be considered sacred under my interpretation in order for feminists to argue that it should be banned. Rather, banning pornography would prophylactically protect the sacred nature of sexuality.[51]

CONCLUSION

Mircea Eliade was correct when he observed that modern men and women are still surrounded by the sacred and by ritual.[52] This is surely true for constitutional law, even apart from the obvious religious considerations implicated in cases involving the First Amendment's establishment and free exercise clauses. Thus, as I have argued elsewhere,[53] Chief Justice Rehnquist's dissenting opinion in *Texas v. Johnson*,[54] the flag-desecration case, can best be understood as an argument about the sacred. Similarly, Sanford Levinson's analysis of what he terms "constitutional faith" resonates with religious concepts.[55] And Robert Bellah's

49. *See* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985). *But see* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (holding anti-pornography ordinance unconstitutional).

50. *See supra* note 3 and accompanying text.

51. *Compare supra* note 6, where I make a similar point regarding depictions of bestiality and excretory functions.

52. *See supra* note 21 and accompanying text.

53. *See* Nahmod, *supra* note 14.

54. 491 U.S. 397 (1989).

55. SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

concept of American civil religion does the same.[56]

Along parallel lines, I have suggested that a deconstructed obscenity doctrine, with its low value assumption replaced by a high value assumption, can be grounded on a Judaeo/Christian position of sexuality very different from the Augustinian position. This interpretation of obscenity doctrine, as complemented by privacy doctrine, permits government to draw a line at the sacred obscene and to declare that private persons may not desacralize it in the marketplace.[57] On this view, government may educate the political community with respect to the sacred nature of sexuality. True, this governmental role is controversial from a classical liberal perspective. But surely it is no more so than the current educational role of government, grounded on the low value assumption of obscenity, as to the sinful and harmful nature of sexuality.

56. *See* Robert N. Bellah, *Civil Religion in American*, 96 DAEDALUS 1 (1967). *See generally* AMERICAN CIVIL RELIGION (Donald G. Jones & Russell E. Richey eds., 1974). I consider American civil religion briefly in Nahmod, *supra* note 14, at 536-37.

57. My purpose in this Article has been to explore the possibility of grounding First Amendment obscenity doctrine on a high value assumption and to consider some of the implications of such a move. I am aware, of course, that any discourse about the sacred and sexuality may reflect the exercise of power. *See* Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989). Thus, it may be argued that such discourse, supported as it appears to be by traditional religious values, would serve only to perpetuate the status quo with respect to women and homosexuals. One answer is that traditional religious values can and do change, albeit very slowly. Another is that the current low value assumption of obscenity doctrine, coupled with present privacy doctrine, is surely no better for women and homosexuals.