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THE HERMENEUTICS OF SEXUAL ORDER

Ali Khan*

I. INTRODUCTION

Throughout history, the mystique of sex has occupied a conspicuous place in human consciousness: almost all disciplines, including religion, psychology, and law, have examined multi-faceted manifestations of the sexual instinct, offering numerous and often opposing interpretations of the magic and the myth of sexual love, revealing both its moral danger and its inherent beauty.¹ Theologians, moral philosophers, and legislators create complex codes to define, regulate and suppress forms of sexual love thought to be immoral. Artists, psychoanalysts, and libertarians, on the other hand, often emphasize the need for sexual liberty, deconstructing apparent and hidden social barriers that law and morality have erected between (and among) free men and free women who want to experience the joy of uninhibit-

¹ Roth v. United States, 354 U.S. 476 (1957)

Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

Id. at 479.
Each culture and each generation attempt to strike a balance between these controversial interpretations of sexual love. The splendor of sexual controversies, however, lies in their perpetuity.

The history of Western sexual order reveals a grand cluster of contradictions, containing both vice and virtue, guilt and innocence, order and freedom, law and liberty. Rape, celibacy, fornication, and adultery all are interpretations of the sexual instinct: the pieces of a complex puzzle, the faces of a paradox, the constructs of human sexuality. These and other manifestations of sexual love are autobiographical notes in the history of the human species. They reveal the dilemmas of instinctual animation, the duality in human nature, the contradictions of sexual civilization. Each expression of sexual love argues for some moral principle, some cultural paradigm, some psychological propulsion. For example, rape can be understood to represent the brutish nature of man, the triumph of violence, the need for law; celibacy to represent the glorification of virtue, the fear of sexuality, the need for liberty. Similarly, marriage dwells upon an historically ingrained precept that genital sex is legitimate within a socially contracted relationship. Through the ritual of marriage, genital sex acquires a new meaning: it becomes marital sex, a new reality, a new symbol, which represents a bond, a commitment, a family.

Not all interpretations of sexual love are universally accepted, however; cultures distinguish themselves with differing hermeneutics of sexual order. Some allow polygamy but

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3. Sexual love in its popular and barest meaning may be described as the union of the genitals, copulation or sexual intercourse: it is made when the male sex organ penetrates the female sex organ. For the purpose of clarity, sexual love may be distinguished from genital sex. Genital sex is essentially the union of the genitals, and it may exclude other forms of sexual contact. A broad definition of sexual love on the other hand would include any sexual contact between two persons. Sexual love therefore is a more expansive concept that includes but is not limited to genital sex. Anal and oral sex, for example, fall within the definition of sexual love. A vivid contrast may be noted between genital sex and sexual love: Genital sex is potentially procreative, but sexual love may or may not be; stated differently, genital sex is always heterosexual, but sexual love may be heterosexual, it may be homosexual, it may even be bisexual.
6. The term "hermeneutics" has a particularized meaning for the purposes
prohibit fornication; some allow fornication but prohibit polygamy; some prohibit sexual love between men and women of different religions, some between different castes, some between different races. Each culture develops a unique ideology of sexual love. But even within the same culture, the manifestations of sexual love do not remain static: they are constantly debated, attacked, modified, discarded, but also defended and retained. Each generation, if not each individual, interprets sexual love in a different way, following its own imagination, asserting its own libido, interjecting its own superego. Traditional interpretations, however, linger on in new costumes, behind new masks, in a different vocabulary. Thus old and new manifestations of sexual love join to create new combinations and conflicts, and the sexual order appears to be in constant flux, always flowing, meandering, changing course.

New moral and philosophical twists are being constantly added to further compound the nature of sexual order. For example, the feminist movement rejects the traditional views of sexual morality and notions about female sexuality. Some women demonstrate how men have constructed intricate moral and legal sex codes to subjugate women and to entrench male superiority. Others argue that new sexual liberties are male subterfuges that deprive women of their human dignity, that new images of “freedom” turn them into objects of visual gratification, showing them stripped and bound in the name of choice and ecstasy. Still others debunk the significance as well as the necessity of genital sex and espouse female friendship, militant lesbianism. Similarly, male ho-

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of this article, detailed below (see infra note 11). However, the term may be generally defined as “the science of interpretation, or of finding the meaning of an authors words and phrases, and explaining it to others; exegesis . . . .” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 851 (2d. ed. 1983).

7. Islam, for example, forbids Muslims to marry nonbelievers except Jews and Christians. Under Hinduism, inter-caste marriages were proscribed. In the United States, interracial marriages were largely prohibited until the Supreme Court declared marriage as a fundamental right. See Loving v. Virginia, 388 U.S. 1 (1967).


10. R. Simpson, From the Closets to the Courts 43-55 (1977). For a cri-
mosexuals object to the traditional morality that considers
genital sex the only acceptable form of sexual love, and ex-
cludes anal and oral sex from social respectability. Both male
and female homosexuals reject the exclusive social status to
which genital sex has been elevated in human sexuality.

The hermeneutics of sexual order provide a moral orga-
nization to control and guide the raw energy of the human
sexual instinct.11 Traditional prohibitions against unlawful
sex such as fornication, adultery, and homosexuality, and
conventional institutions such as marriage and family are
aspects of a moral framework designed to bring order and
stability to human sexuality. Although modern constructs of
sexual order are based on secular ethics, traditional struc-
tures to regulate human sexuality are often founded upon
religion. The hermeneutics of sexual order in the Western
Christian Tradition, for example, has derived its initial va-

11. The hermeneutics of sexual order is rooted in the interpretations of two
great texts: the Bible and the Constitution. The content and methods of herme-
neutics, confined to theological-exegetical understanding in earlier times, have un-
dergone several revisions. Yet hermeneutics remains in essence the art of textual
interpretation in a human context. This article is influenced by a conception of
hermeneutics that blends methodological skills of interpretation with experiential
self-awareness. According to this concept, the understanding of the written word
becomes inseparable from existential reality as well as transcendental reflection. See
H. GADAMER, REASON IN THE AGE OF SCIENCE, (F. Lawrence, trans. 1981); TRUTH
AND METHOD: OUTLINES OF A PHILOSOPHICAL HERMENEUTICS, (C. Barden & J.
Cumming ed. 1975); J. HABERMAS, KNOWLEDGE AND HUMAN INTEREST, (J. Shapiro,

12. See generally J. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDI-
cesses by which sexual norms are placed within the meaning of a principal text may be called the hermeneutics of sexual order. This article explores the sexual order constructed in the name of the Bible and compares it with contemporary sexual norms seeking legitimacy in the name of the Constitution, finding several direct and inverted relationships between interpretations of these two foundational texts. This comparison, however, poses difficult methodological problems. While it is safe to assume that the United States Supreme Court is the final interpreter of the Constitution, there is no such consensus regarding the final interpreter of the Bible. Serious interpretive differences exist among ancient as well as contemporary theological schools of thought. A sincere attempt to classify these interpretive schools in broad categories such as Catholic and Protestant may have some legitimacy, but such an attempt must inevitably fail given the divergence of interpretations even within Catholicism and Protestantism. In the presence of such hermeneutic diversity, any choice of an authentic interpretive authority is open to criticism and opposition.

This article explores the hermeneutics of sexual order that St. Augustine developed in the fourth century.\textsuperscript{13} It is not contended that St. Augustine's interpretation of the Bible represents the authoritative version of Christianity. Nor is it asserted that St. Augustine is or must be considered the chief arbiter of biblical jurisprudence. Nonetheless, few would deny he is one of the greatest interpreters of the holy text. In addition, his views on human sexuality have profound psychological insights. Therefore, an examination of the Augustinian sexual order is helpful in understanding religious neurosis,\textsuperscript{14} which suppresses the sexual instinct both at the individual and collective level and provides a stable mechanism by which an institutional moral structure is transmitted to posterity. Furthermore, this article demonstrates some of the connections between the constitutional jurisprudence of sexual order and Augustinian consciousness. It is not con-

\textsuperscript{13} See infra notes 37-42 and accompanying text. With a fascinating background in grammar, literature, music, rhetoric, and philosophy, St. Augustine rejected his father's wish to become a lawyer. At the age of 32, he converted to Christianity.

\textsuperscript{14} See infra note 15 and accompanying text.
tended that constitutional jurisprudence is explicitly based upon Augustine's theology; Augustinian consciousness must be distinguished from Augustine's consciousness. Augustinian consciousness is used in this article as a generic term that includes a broad-based consciousness cutting across sects and denominations, particularly in the realm of sexual morality. Augustine's consciousness, on the other hand, is more specific knowledge or awareness rooted particularly in Augustine's works and his conception of Christianity.15

Some major aspects of constitutional jurisprudence are discussed to show their conformity with the Augustinian sexual order. It is then shown how the constitutional jurisprudence in the past few decades has begun to drift away from religious neurosis. Nonetheless, the article maintains that even contemporary sexual culture of individual rights and freedoms has failed to sever the umbilical cord that has linked the Constitution to the Augustinian sexual order. In other words, the religious neurosis that has shaped constitutional jurisprudence in the past has not been fully overcome. It still is a major force, which continues to assert itself behind a changed and even inverted legal vocabulary.

To discuss the hermeneutics of sexual order, several key terms are employed: religious neurosis, the sexual partner, the sexual practice, and the sexual objective. While in ordinary language these terms may vary in meaning, here they are used with some precision. Therefore, a few clarifications might be helpful.

Religious neurosis in the broad sense is essentially a form of compulsive consciousness rooted in a specific religion and transmitted from one generation to another. The term religious neurosis in popular meaning has negative implications, since many people associate neuroses with abnormal behavior and even mental illness. Here, however, the term is not used in a pejorative sense. Although extreme forms of religious neurosis may have some pathological aspects, there is no need to assume that religious neurosis is a mental disease. Religious neurosis should not be confused with Freud's concept of psychoneurosis. Psycho-neurosis is

15. The claim that constitutional jurisprudence is directly derived from St. Augustine's theology is a claim of historical causation. No such causational connection is suggested or presumed in this paper.
caused when internal sexual suppression and external limitation of freedom or inaccessibility of a normal sexual partner bring about perversions in persons. Several distinctions between psychoneurosis and religious neurosis may be noted. First, psychoneurosis is limited to sexuality, which religious neurosis is not; religious neurosis is a broader mental construct that regulates many spheres of life. Second, psychoneurosis is intra-subjective and individualistic, religious neurosis is inter-subjective and communal. Third, psychoneurosis may lead to perversions; religious neurosis may provide the moral framework and the requisite communal consciousness that allow individuals to express their sexuality in an orderly and socially acceptable manner.

Ordinarily, religious neurosis manifests itself through the shared values and laws (as well as the biases and prejudices) of the community. The older the religion, the more entrenched is its neurosis. In fact, their historical dimension imparts additional validity to the values sanctioned by and emanating from religious neurosis. Ordinarily, religious neurosis is so overpowering that each generation experiences an inner compulsion and perhaps a subconscious drive to transmit its values to the next generation. This inter-generational neurosis is transmitted in varied and complex ways including the formation of cultural habits, taboos, mores, and institutionalized education. During transmission, neurosis may undergo a few distortions or modifications causing some changes in the neurotic formation of the succeeding generation. But there is no need to assume that such distortions or modifications would necessarily diminish the main thrust of religious neurosis or its core values. Sixteenth-century reformers, for example, challenged the patristic belief that any sex for pleasure was sinful. Their protest, however, constituted only a

18. At Washburn University, this paper was presented for comments and criticism in the Law and Religion seminar. There were two participants who did not hesitate to show their disgust, openly in the seminar. In fact, the paper was so offensive to their sense of religion that they read only the first few pages and stopped. These participants also objected to the concept of religious neurosis.
marginal modification to accepted tenets, by proposing that married couples should be morally permitted to have sex for pleasure. Consistent with the central assertion of religious neurosis, their condemnation of sex for pleasure outside marriage remained blunt and severe.19

The sexual partner is the person with whom the sexual act takes place.20 The term does not require that the sexual partner must always be a person of the opposite sex. It includes persons of the opposite sex as well as of the same sex. Because sex with animals is universally condemned, consideration of the implications of bestiality would require an intricate moral discourse, beyond the scope of this article. Therefore, the term means a person, even though it is broad enough to include animals. Similarly, the term sexual partner implies a living person; there is little dispute that sex with dead bodies is morally repugnant and, therefore, properly forbidden. Thus, the term sexual partner used in this article means a living person of either sex.

A sexual practice21 is a voluntary sexual act between adult sexual partners in a noncommercial, private setting. Sexual acts involving elements of force, commercialization, and public exposure pose an important but different set of moral questions and, therefore, they are excluded from the definition. The term sexual practice is further restricted in meaning: it excludes sexual acts such as masturbation and

19. Although the sixteenth-century reformers proposed some changes in old sexual beliefs, they did not challenge the central thesis that sex is legitimate only within the marriage. Luther and Calvin, for example, denounced the old belief that marital sex for pleasure was sinful. Nonetheless, their condemnation of non-marital sex was unequivocal. Some of Calvin's Puritan followers believed that sex outside of marriage resulted from flawed minds and crooked souls. Almost all reformers advocated stiff penalties for illicit sex. Luther and Bucer proposed that adultery ought to be punished by death. Samuel Saxey, an extreme puritan, suggested that the couple who had been consumed by the fires of illicit passion deserved to be burnt alive. J. BRUNDAGE, supra note 12, at 557.

20. S. FREUD, supra note 16, at 2. Freud uses the term "sexual object" to mean a person from whom sexual attraction proceeds. Since the Freudian term dehumanizes the person, it is not used here. Moreover, sexual partner has become a standard term in judicial analysis.

21. S. FREUD, supra note 16, at 2. Freud uses the term "sexual aim" to define the act towards which the sexual instinct tends. Again the Freudian term is not used in this article, partly because the term "sexual practice" is now frequently used in legal analysis, and partly to avoid any confusion that might arise between "sexual aim" and "sexual objective." See, e.g., People v. Onofre, 415 N.E. 2d 936, 994 (Gabrielli, J., dissenting) (employing the term "sexual practices").
other acts of autoeroticism that an individual may perform without a sexual partner. Likewise, the term is not used to discuss the variety of positions and postures that individuals may use to enhance the quality of their sexual pleasure or the degree of their sexual adventure. The term focuses upon only principal sexual practices involving genital organs. One principal sexual practice is the union of the genitals, genital sex, commonly known as sexual intercourse or copulation. Other principal sexual practices involve at least one genital organ. Oral sex, for example, is a sexual practice involving the genital organ of one sexual partner and the mouth of another; anal sex is a sexual practice involving the male genital organ and the anus of the other partner. These sexual practices are often grouped together and called acts of sodomy.

The *sexual objective* focuses upon the purpose for which sexual partners engage in a sexual practice. There are two main sexual objectives: sex for procreation and sex for pleasure. Sexual practices for the purpose of procreation are limited. In fact, there is only one sexual practice available for procreation: the union of the genitals. Because anal and oral sex cannot result in procreation, the sexual objective of such practices is of course pleasure. There is no need to assume that procreation and pleasure are always mutually exclusive sexual objectives. For example, heterosexual partners may copulate, simultaneously for procreation and pleasure. When heterosexual partners engage in copulation using contraceptives, however, their sexual objective is pleasure and not procreation. Given the availability and increased reliability of contraceptives, all sexual practices including genital sex may now be exercised for pure pleasure.

II. THE TRADITIONAL SEXUAL ORDER

The hermeneutics of sexual order in the Western Christian tradition is founded upon a duality that sex is both good and bad: it is good because it procreates; it is bad because it corrupts human spirituality. According to the first Fathers of the Church, pleasures of the flesh are inher-
ently ungodly. In fact, the flesh is sin, destined to damn the soul. Nonetheless, reproductive necessity mandates that the sin be committed. This is how the story of sexual morality begins, taking an erratic start, falling into a duality, tormenting through a self-inflicted paradox from which the hermeneutics of sexual order has yet to recover. Over the centuries, theologians, philosophers, and legislators have created intricate moral and legal codes to justify, explain, and enforce the rules against unacceptable forms of sexual love, which in their view polluted the soul, the faith, and the community, leading the faithful away from God and Church. The order of duality, which drove a wedge between body and soul, instinct and spirit, pleasure and virtue, liberty and law, was developed in the name of the Gospels which had little to say about sex, and in the name of Jesus who seemed relatively uninterested in the subject. But the Fathers of the Church were determined to give a dualistic interpretation to biblical verses and events. Thus the Church incorporated dual sexual morality and became an authoritative source of its approval as well as its dissemination.

Although sexual duality was cultivated in the patristic age, by the Church Fathers of the fourth and fifth centuries, its seeds had already been sown in the Greek thought. Plato, for example, treated love and sexuality with a profound ambiguity, setting in motion the contradiction between pleasure and purity: the dialectic of duality. In the Symposium, Plato described sex as a positive force, a natural manifestation of love, an essential union between body and soul. But in the Republic and in the Laws, Plato seemed to have changed his mind. In these works he argued that sexual love was a distraction from the search for beauty, truth, and

23. Id. at 83-84.
24. Id.
25. Id. at 74.
26. Id. at 80-87.
27. Id.
28. Id. at 12-21.
29. Id. at 16.
wisdom, and that any sexual love in which gratification of
the body was the primary goal ought to be avoided.\(^{32}\) Similarly, Aristotle presented sexual love as antithetical to reason
and wisdom; in his view, it hindered higher pursuits and its
pleasure was unworthy.\(^{33}\) Nonetheless, if the species were to
be saved from a philosophical suicide, some recognition of at
least genital sex was unavoidable. Therefore, Plato proposed
that sex be restricted to procreation in marriage. He further
argued that marriage be made sacred in the highest de-
gree,\(^{34}\) and not merely a social cloak to engage in sexual
intemperance—a disease of the soul.\(^{35}\) Licentiousness, he de-
clared, is an unholy freedom that ought not to be permit-
ted.\(^{36}\)

Intellectuals of the patristic age were pleased to discover
Christianity in Greek philosophy.\(^{37}\) Among the patristic in-
tellectuals, St. Augustine of Hippo (354-430), is certainly the
most eloquent and the most influential.\(^{38}\) He belonged to
the first generation of Christian scholars who began to treat
sexual morality as a central issue in the Christian life, and
provided a rational basis to support Christian sexual beliefs,
which ascetics and monks had developed in the past three
centuries.\(^{39}\) Augustine's views about sexual order, however,
were not confined to the patristic age: his morality has fundamentally influenced ideas about sexuality in the West. It shaped the sexual order of the Middle Ages and beyond; in fact, only a few decades ago legislation in the United States dealing with sexual love was to a large extent consistent with his views. Even today, many religious and non-religious people promote and even practice the sexual life-style that Augustine proposed sixteen hundred years ago. No longer, however, is Augustine the undisputed authority in the Christian world. To some his sexual order is restrictive, outdated, foolish, and sexist. Although he misunderstood the role of sex in human life, his elucidation of the sexual order captured the imagination of millions of people over a period of sixteen centuries, and it still does. Augustine's formidable intellect baptized the order of duality and made it Christian.

Following, perhaps, Plato's concept of sexual love, Augustine builds his morality based on the proposition that sexual love plays a dual role in human life: it procreates and it corrupts. The corrupting influence of sex, however, becomes his central concern as he considers the equation between sex and spirituality. He interprets the birth of Christ to argue that everyone who is born of sexual intercourse is in fact sinful flesh.

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40. The patristic period spans over the fourth and fifth centuries. The Church Fathers of this period imparted a systematic and rigorous theological justification to Christian beliefs. St. Gregory of Nyssa (J. Brundage, supra note 12, at 336-395), St. Jerome (J. Brundage, supra note 12, at 347-420) and St. Augustine of Hippo (J. Brundage, supra note 12, at 354-430) are the most influential among patristic thinkers. Their teachings constituted the original sources of Christian morality, which inspired many subsequent generations of Christian thinkers. Early in the fifth century, Christianity became the official religion of the Roman state.

41. J. Brundage, supra note 12, at 608-17.


43. Id. at 339.

44. 1 W. Oases, Basic Writings of Saint Augustine, xx-xi (1948). In his introduction, Oases shows that among pagan sources that Augustine used to develop his major theses, Plato is the most important. Augustine regarded Plato as the greatest of the Greek and Roman thinkers.

through sex is a divine punishment for the original sin, which has condemned the entire human stock. Jesus, of course, is the only exception.\textsuperscript{46} That is why, he argues, Jesus alone has the spiritual authority to teach us, to save us. According to Augustine, all children are born condemned and rooted in sin, from which nothing but spiritual regeneration may liberate.\textsuperscript{47} This theological axiom, which may still have some credibility for the faithful, seems to have inspired Augustine to denounce all manifestations of the sexual instinct except the necessity of reproduction.

A. Sexual Repression

The Augustinian order is built on the assumption that repression is necessary to regulate and channel sexual energy. Augustine argues that the genital organs are not fully under the control of the human will, that they are inherently unruly.\textsuperscript{48} To make his point, he distinguishes the generative organs from the other members of the human body. Except the generative organs, he argues, all other members of the human body, whether they are furnished with joints and solid bones like the hands, feet, and fingers or whether they are composed of slack and soft tissues like the muscles of the mouth and face, are under the control of the human will.\textsuperscript{49} These human organs can be moved at will: “We can put them in motion, or stretch them out, or bend and twist them, as we do with the muscles of the mouth and face.”\textsuperscript{50} But the generative organs, he maintains, are moved by the “heat of lust” and not by the human will. Indeed, the generative organs may even resist the authority of the human will.\textsuperscript{51}

\textsuperscript{46} ST. AUGUSTINE, ON MARRIAGE AND CONCUPISCENCE, supra note 45, at 269.

\textsuperscript{47} St. Augustine, On Original Sin, book II, ch. 43, \textit{trans. in The Nicene and Post Nicene Fathers of the Christian Church} Vol. 5 at 252 (P. Holmes & R. Wallis 1887) (“Where God did nothing else than by a just sentence to condemn the man who wilfully sins, together with his stock; there also, as a matter of course, whatsoever was even not yet born in justly condemned in its sinful root.”).


\textsuperscript{49} Id. at book 14, ch. 24.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at book 14, chs. 15, 16, 19, 24.
Phrases such as "human will" and "heat of lust" that Augustine uses are now somewhat archaic, and they tend to obscure the power of his analysis. For example, one might attack his assertion that the heat of lust moves the genitals, whereas the human will moves other parts of the human body, on the ground that all human motions including the excitation of the genitals are controlled by the human brain. But when his phrases are translated into modern language, they unfold a deeper meaning. If the heat of lust is the force behind the sexual instinct and if the human will is the force behind a deliberate act, then Augustine draws a defensible distinction. For example, he defines lust as "a certain appetite which is felt in the flesh like a craving, as hunger and thirst . . . ." (Almost sixteen hundred years later, Sigmund Freud draws a similar parallel between the sexual instinct and the instinct of hunger. Furthermore, Freud explains in a footnote that "lust" is the only appropriate word in the German language to describe "libido.") Therefore, the instinctual sexual energy (the heat of lust) that excites the genitals may be differentiated from the volitional force that an individual may use to commit an act. Stretching the arm for a handshake, for example, is a deliberate act; but erection of the penis may result from a non-volitional instinctual urge. Therefore, when Augustine insists that the human genitals are not fully under the control of the human will, he seems to identify not only the instinctual nature of sexual excitement, but also the unruly impulse of sexual instinct that may resist and even disregard the commands of reason.

Sexual instinct is not only inherently disobedient but the pleasure that results from the union of the genitals, Augustine states, is the greatest of all bodily pleasures. "So possessing indeed is this pleasure that, at the moment of time in which it is consummated, all mental activity is suspended."

52. Id. at book 14, ch. 15. Cf. S. Freud, supra note 16, at 1 n. 2.

53. For example, rape may occur when a strong sexual impulse defies rational control. Until recently, psychodynamic studies portrayed rapists as mentally diseased men with uncontrollable sexual impulses, but rape is now regarded as an expression of violent behavior and pathological desire to control. L. Bourque, Defining Rape 59 (1969).

54. St. Augustine, The City of God, book 14, ch. 16, trans. in St Augustine, The City of God, book 14, ch. 16, trans. in Great Books of the Western World Vol. 18 at 390 (M. Dods trans. 1952). This is, perhaps, the most
Sexual excitement is not only forceful in its initiation, he states, it is also exhilarating in its satisfaction. This is why the sexual instinct is unruly. Recognizing both the power of sexual excitement and the pleasure experienced in the act of consummation, Augustine concludes that unchecked sexual excitations pose grave moral danger. In the absence of "the restraining bridle of reason," he maintains, the sexual energy may lead individuals to commit all sorts of sexual acts indiscriminately.\footnote{Id. at book 14, ch. 19.}

In order to bring indiscriminate sexual excitations under the authority of the human will, Augustine proposes to repress the sexual instinct. "[T]he organs of generation are so subjected to the rule of lust, that they have no motion but what it communicates."\footnote{Id.} This blind energy built into the sexual instinct (the heat of lust) needs "the regulation of mind and reason."\footnote{Id. at book 14, ch. 23.} He seeks support from Cicero to argue that disobedient sexual inclinations "must be treated as slaves, and be coerced with a more stringent authority."\footnote{Id. at book 14, ch. 19 (emphasis added).}

Firm control on sexual excitations is needed, he suggests, to "bridle and recall them from those objects to which they are unlawfully moved, and give them access to those which the law of wisdom sanctions."\footnote{Id. at book 14, ch. 19.} This sexual repression is justified in order to contain the sexual instinct in morally acceptable behavior. The power of the instinct is harnessed and guided toward the right sexual partner, the right sexual practice and the right sexual objective. Thus Augustine builds a structure of religious neurosis and roots it in the law of wisdom.

The law of wisdom prefers sexual continence. But out of regrettable necessity, it allows genital sex for procreation. The sexual allowance even within marriage is limited: spouses are required to engage only in genital sex for the sole purpose of procreation. "Carnal concupiscence, however, must not be ascribed to marriage: it is only to be tolerated in marriage. It is not a good which comes out of the essence of..."
marriage, but an evil which is the accident of original sin." Furthermore, genital sex within the confines of conjugal chastity is presented as a physical chore for the faithful, a brief distraction from spirituality. Genital sex, Augustine mandates, ought to give no pleasure to Christians. The union of male and female for the purpose of procreation is the natural good of marriage, but whoever abuses this good is akin to a beast, particularly if the gratification of lust rather than procreation is the sexual objective. Augustine also postulates that genital organs are unclean and genital sex morally dirty. Married Christians, therefore, ought to avoid sex as much as possible. But whenever they engage in genital sex, they are required, he insists, to clean themselves before participating in religious services. In the Augustinian order, sexual pleasure is the opposite of Christian virtue. The two are mutually exclusive, and oppose each other: sex versus Christianity.

Augustinian sexual repression works at two levels. First, it shifts the focus and force of the sexual instinct from sexual love to genital sex. Consequently, all potentially sexual parts of the body except the genitals are morally and sexually neutered. Since sexual love includes acts of sodomy, sexual repression is needed to make genital sex the exclusive locus of human sexuality, and to prohibit the instinctive drive toward anal or oral sex. Second, it seeks to eliminate feelings of passion or love from the experience of genital sex. Augustine drives a moral wedge between procreation and pleasure, arguing that even within marriage individuals may engage in sex for procreation, but are not allowed to seek sex for pleasure. This existential split, acting as a kind of spiritual barrier, effectuates sexual repression among spouses and seeks to turn procreative sex into a mechanical coupling of the genitals, a process in which there is no pleasure, no passion, no warmth. In the Augustinian sexual order, once married partners accept the morality of conjugal chastity, they begin to develop the discipline to unlearn the pleasure of lust, the joy of sex, and eventually the urge to engage in genital sex. The

60. ST. AUGUSTINE, ON MARRIAGE AND CONCUPISCENCE, book 1, ch. 19, supra note 45, at 271.
61. Id. at book 1, ch. 5.
62. J. BRUNDAGE, supra note 12, at 81.
more they avoid sexual temptations, the closer they draw to the Augustinian ideal of sexual continence.

B. Duality

The Augustinian law of wisdom is simple: not to touch a woman is the highest virtue that ought to be practiced by the “strong,” conjugal chastity is next best, permitted to the “weaker.”\footnote{63. ST. AUGUSTINE, THE MORALS OF THE CATHOLIC CHURCH, ch. 35, \textit{quoted in THE BASIC WRITINGS OF ST. AUGUSTINE} 356 (W. Oases ed. 1948).} The sexual order of duality divides up individuals into two distinct classes. The religious elite, the “Brahmans,” must shun sexuality altogether, rejecting both sexual pleasure and procreation, choosing a life without any sexual contamination. They must remain virgin. Their self-denial, their chastity, their celibacy represent the higher virtue, the superior side of the sexual paradox.\footnote{64. \textit{Id.} at 356 (“Not to touch a woman is the highest virtue, conjugal chastity is the next best.”). Conjugal chastity may be equated with the term ‘singular relationship,’ as used herein (see \textit{infra} notes 73 and 74 and accompanying text).} This holy virginity emulates Jesus, “the Son of a virgin, and the spouse of virgins, born after the flesh of a virgin womb, and wedded after the Spirit in virgin marriage.”\footnote{65. ST. AUGUSTINE, \textit{OF HOLY VIRGINITY}, para. 2 (P. Schaff ed. 1887 at 417).} Sexual continence, Augustine states, is the virtue of the soul: it is “the portion of Angels, and a practice, in corruptible flesh, of perpetual incorruption.”\footnote{66. \textit{Id.} at 420, para. 12.} While the elite practices celibacy, the religious proletariat is allowed to engage in limited genital sex for the sole purpose of procreation, keeping in mind that sexual continence is the preferred value. The institution of celibacy acts as a constant reminder to weaker members of the community that good individuals stay away from pleasures of the flesh but perfect individuals are supposed to be sexually dead. Thus the order of duality creates a cleavage between pleasure and procreation, sex and spirituality, body and soul, marriage and priesthood.

But Augustine does not stop here. His ideology takes the next unfortunate step, justifying the inferiority of women. He interweaves gender differentiation into the order of duality, assigning different values to men and women. He sees hidden and prophetic significance in the biblical story that
Eve was formed from the side of Adam. Woman is not only made from man: she is also made for him. She is inferior, he argues, because Adam and not Eve was created first. “[I]t is more consonant with the order of nature that men should bear rule over women, than women over men.” Thus assuming female inferiority, he begins to identify what is superior with the male and what is inferior with the female. For example, in the dichotomy between sex and spirituality, women embody sex, men incarnate spirituality; in the antithesis between body and soul, women constitute the body, men represent the soul. Men epitomize the spiritual nature of the human species, which deems sexual continence as an indispensable prerequisite. Women personify the physical nature of the species, which makes procreation a regrettable necessity.

Indeed, women are a regrettable necessity. “I fail to see what use woman can be to man,” Augustine concluded, “if one excludes the function of bearing children.” He believes that God created women for no other purpose than breeding because they are not as good as men for anything else. Furthermore, he argues that women are a source of sexual temptation who distract men from higher pursuits. They are not even good companions, which implies that men may seek women only for procreative sex and not for any meaningful relationship. But even when men engage in procreative sex with women, he maintains, they must refrain from any passionate involvement since the objective of their sexual activity is simply to cause a pregnancy. Thus in the Augustinian sexual order, the existential worth of a woman is essentially utilitarian in that her greatest wealth is a reproductive womb: she is the victim of the species, the beast of burden, a useful object, but devoid of spirituality, serving no higher cause in the grand plan of salvation. This objectification of women, which denigrates their human dig-

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67. K. Borresen, supra note 42, at 30-35.
69. K. Borresen, supra note 42, at 32.
70. J. Brundage, supra note 12, at 85. (St. Augustine, De Genesi ad litteram 9-5-9).
71. J. Brundage, supra note 12, at 85-86.
72. J. Brundage, supra note 12, at 85.
nity, their spiritual worth, and their existential integrity, became for centuries a source of sexist bias and sexual exploitation, justifying their subordination and subjection to men.

C. The Singular Relationship

While sexual continence is superior, the singular relationship is the next most significant constitutive principle of the Augustinian sexual order. The singular relationship provides a moral structure within which spouses may engage in sex for the purpose of procreation. Furthermore, the singular relationship preserves the superiority of man over women, since Augustine believes that in marriage man is the dominant partner, the authority, the lord. He mentions with approval notions such as “The head of the woman is the man” and “Wives, submit yourself unto your own husbands.” Thus the singular relationship that Augustine envisioned might be flawed according to contemporary thinking for two reasons. First, it suppresses sexuality even between lawful partners, by prohibiting sex for pleasure. Second, it creates an unequal equation in which women are relegated to a subordinate position. Despite these flaws, however, the Augustinian concept of the singular relationship has maintained over the centuries its hold on familial consciousness. Moreover, when these defects are eliminated, the singular relationship, with its social respectability, becomes an almost universal ideal.

The Augustinian order allows each individual to enter into an intimate relationship with another individual of the opposite sex, for life. Furthermore, it mandates that sexual partners be married to each other. While an individual may have several meaningful nonsexual relationships with others, relational singularity permits only one intimate relationship with another individual of the opposite sex; any second intimate relationship would violate the concept of relational singularity. It is morally wrong for unmarried persons to engage in any sexual activity even if their sexual practice is morally defensible and even if the objective of their sexual

73. ST. AUGUSTINE, ON MARRIAGE AND CONCUPISCENCE, book 1, ch. 10 supra note 45, at 268. To support his view of male domination, Augustine quotes the Apostle Peter: “Even as Sara obeyed Abraham, calling him lord.” Id.
74. Id. at 267.
activity is to procreate. This is why fornication as well as the decision to have a child out of wedlock are prohibited under the Augustinian sexual order. The internal logic of the singular relationship requires that sex be limited to one's own spouse. It outlaws adultery in the broadest sense: it is immoral for a married person to engage in sex with any third person.

The singular relationship is not a secret relationship. It is required that individuals undertake their relationship with public knowledge. Thus marriage is essentially a formal act by which two individuals of opposite sex announce the formation of their singular relationship. The public exchange of vows or wedding rings makes the intimate relationship legitimate in the eyes of the community. Accordingly, the intimate relationship is both private and public in nature. It is private because the sexual activity must take place in privacy, outside the public view. It is public because the intimate relationship must be announced to the public. In fact, the announcement must be made before engaging into any sexual intercourse.

Even though marriage initiates the singular relationship, the marital relationship is not synonymous with the singular relationship. This becomes evident by examining the concept of marital fidelity. Although the meaning of marital fidelity may be expanded to outlaw sexual activity before and after marriage, such an expansive definition strains the concept of marital fidelity. The natural meaning of marital fidelity forbids spouses from engaging in any sexual relations with any third person during the marriage. Marital fidelity by definition presupposes the existence of marriage. Therefore, sexual activity outside of marriage does not breach marital fidelity. For example, sexual relations that the spouses may have had with unmarried third persons before entering into marriage fall outside the definition of marital fidelity, as do sexual relations that they may form with unmarried third persons after the dissolution of their marriage. In other words, premarital and extramarital fornication does not offend the notion of marital fidelity.

The singular relationship, on the other hand, is a much more comprehensive concept, and explains why premarital and extramarital fornication, bigamy and divorce are prohibited under the Augustinian sexual order. Once the singular
relationship has been publicly consecrated, it of course requires the partners to be faithful to each other. But the singular relationship prohibits any sexual relationship before and after marriage. Premarital sex is prohibited because there is no guarantee that the sexual partners will remain together. Moreover, since premarital sex occurs without public announcement of the singular relationship, individuals may have several such secret relationships. Extramarital fornication is a violation of the singular relationship because individuals are entitled to only one intimate relationship, which they have already had in their marriage.

To reinforce the concept of the singular relationship, the traditional moral code prohibits divorce. Augustine was perhaps the first Christian intellectual who clearly formulated the doctrine of marital indissolubility. He argues that the New Testament authorizes separation, but not termination of marriage. Separation is not as detrimental to the concept of the singular relationship as is the termination of marriage; it leaves open the option to reunite and rebuild the strained relationship. But the termination of marriage dissolves the significance of the nuptial institution. To underscore the significance of the sacramental bond, he specifically cites: "Wherefore they are no more twain, but one flesh. What, therefore, God hath joined together, let no man put asunder." The man and the woman joined together in matrimony, he states, should remain inseparable as long as they live. Divorce is prohibited even if the marriage is "fruitless" and would remain so in the future. "Thus between the conjugal pair, as long as they live, the nuptial bond has a permanent obligation, and can be cancelled neither by separation nor by union with another." Furthermore, the nuptial bond does not break even when the spouses practice

75. J. Brundage, supra note 45, at 268. See also St. Augustine, On Marriage and Concupiscence, book 1, ch. 11 (P. Schaff ed. 1887 at 268).


78. St. Augustine, On Marriage and Concupiscence, book 1, ch. 11, supra note 45, at 268).

79. Id.
sexual abstinence. Under Augustinian morality, divorce exhibits the frailty of moral commitment; it weakens the human will to nurture and preserve the nuptial bond; it undermines the mystique of the singular relationship.

In order to further preserve the singular relationship, Augustine opposes polygamy and remarriage. Polygamy is prohibited because a plural marriage is antithetical to the idea of the singular relationship. Augustine explains away the polygamous practices of the prophets and holy fathers of olden times, suggesting that they had a plurality of wives not for sexual gratification but for the multiplication of their offspring. He further argues that the time before Christ was a time for propagation, but that since Christ it has been a time for sexual continence. Therefore, there is now no excuse for polygamy. The very first union of Adam and Eve, he argues, shows plainly enough that the good of marriage is better promoted by the singular relationship. The concept of monogamy in contemporary meaning prohibits a concurrent plural marriage; it does not prevent consecutive marriages. The Augustinian sexual order forbids concurrent polygamy; but by banning divorce it also preempts consecutive polygamy, further reinforcing the concept of the singular relationship.

If marriage is terminated by the death of a spouse, second marriage would be prohibited under a strict definition of the singular relationship. Augustine, however, seems to allow remarriage after the death of a spouse: “If the husband die, with whom a true marriage was made, a true marriage is now possible by a connection which would before have been adultery.” Despite this concession, he commends the singu-

80. Id. book 1, ch. 11 at 268.
81. Id. book 1, ch. 9 at 267. Augustine explains why women were not allowed to have a plurality of husbands. The reason that it was lawful for one man, he asserts, to have a plurality of wives was for producing a greater number of children. While a man may need several women to multiply procreation, a woman, he argues, does not need several men to produce more children. Id. bk. 1, ch. 10 at 268.
82. Id. at book 1, ch. 14 at 269.
83. Id. at book 1, ch. 10 at 267.
84. Nature may terminate marriage, but it does not dissolve the singular relationship.
85. ST. AUGUSTINE, ON MARRIAGE AND CONCUPISCENCE, book 1, ch. 11 (P. Schaff ed. 1887 at 268).
lar relationship. After all, under the Augustinian order sexual continence is always a superior Christian value. Thus a married Christian who has children but whose spouse has died would have little justification to enter a second marriage. Any such justification is further weakened if the spouse dies in old age.

The fortification of the singular relationship is flawless. Prohibition against fornication encourages individuals to enter into the singular relationship; prohibition against adultery preserves the relationship from internal subversion; prohibition against divorce protects the relationship from dissolution; prohibition against polygamy keeps the relationship singular. The concept of the singular relationship may be rooted in the misreading of the New Testament. Nevertheless, it has traditionally embodied a romantic ideal, the ultimate definition of mutual human commitment.

D. The Procreation Principle

In addition to sexual continence and relational singularity, the procreation principle is essential to the Augustinian sexual order. This principle makes procreation the exclusive lawful sexual objective and genital sex the exclusive lawful sexual practice. All non-procreative sexual practices including anal and oral sex are therefore morally wrong and prohibited. The procreation principle demands that sexual partners be none other but persons of the opposite sex. Therefore, persons of the same sex may not enter into a singular relationship because sexual practices available to homosexuals are essentially non-procreative. But even a heterosexual couple has no moral excuse or justification to violate the principle of procreation and indulge in anal or oral sex. Traditional moral proscriptions against all forms of sodomy therefore flow from the logic of the procreation principle.

86. ST. AUGUSTINE, ON THE GOOD OF WIDOWHOOD, supra note 45, para. 16 at 447.
87. Id.

You see how the holy widow is not only commended in this, that she had one husband, but also, that she had lived few years with a husband from her virginity, and had with so great service of piety continued her office of widowed chastity even unto so great age.
The procreation principle may be further extended to formulate appropriate moral standards regarding the use of contraceptives. Since the moral objective of genital sex is exclusively procreation, any sexual love for pleasure may be morally forbidden, even in the singular relationship. For example, married couples may not engage in anal or oral sex because the objective of such sexuality is essentially non-procreative. But they may not engage in even genital sex if they have no intention to procreate. Augustine considered it a grave sin for married couples to engage in genital sex but avoid procreation. This moral stricture, then, would forbid the use of contraceptives. Contraceptives prevent procreation, subverting thereby the natural and moral objective of genital sex; moreover, genital sex using contraceptives has no purpose other than pleasure, that is, recreation. Since sex for pleasure violates the procreation principle, a ban on the use of contraceptives is consistent with the Augustinian order.

Furthermore, abortion is forbidden. Once again, the logic for banning abortion flows from the procreation principle. Abortion vitiates procreation: it destroys the moral objective for which genital sex, an otherwise morally regrettable physical act, is tolerated in the realm of chastity and celibacy. Abortion within marriage is the complete antithesis of procreation: it is a deliberate rejection of the mission of genital sex, a violent rebellion against its core value. Abortion is, therefore, offensive to the Augustinian order, particularly when it is sought to avoid the unintended consequence of playful, non-procreative sexuality, which is itself immoral according to that order.

Under the combined force of the singular relationship

88. J. BRUNDAGE, supra note 12, at 89.
89. According to Augustine, married couples who attempt to prevent procreation through evil agencies are condemned:

Sometimes . . . cruel lust resorts to such extravagant methods as to use poisonous drugs to secure barrenness; or else if unsuccessful in this, to destroy the conceived seed by some means previous to birth, preferring that its offspring should rather perish than receive vitality; or if it was advancing to life within the womb, should be slain before it was born.

and the procreation principle, Augustine has introduced into consciousness a formidable religious neurosis which each generation has glorified in its law and morality and faithfully transmitted it to its children. The sexual order rooted in religious neurosis is complete, clear and coherent. The right sexual partner is one’s spouse; the right sexual practice is the union of the genitals; the right sexual objective is procreation. Any other sexual partner, any other sexual practice, any other sexual objective is morally forbidden. Therefore, proscriptions against fornication, adultery, polygamy, sodomy, use of contraceptives and abortion flow naturally from the intrinsic logic of the principles of procreation and the singular relationship, the two pillars of the Augustinian sexual order. One might disagree with the moral code that Augustine constructed some sixteen hundred years ago, but its structural integrity and coherence, like that of an old cathedral, is impeccable. From a contemporary Western perspective, however, the traditional sexual order is inconsistent with new freedoms that individuals have begun to cherish. The concept of the singular relationship, for example, may still be attractive to some. To others, however, it is a moral prison.

III. CONSTITUTIONAL CONFORMITY

The Augustinian consciousness has remained a potent force in shaping the sexual order in the United States. Not too long ago almost all states had statutes against fornication, adultery, cohabitation, bigamy, sodomy, contraceptives and abortion. Even though divorce was available, grounds for obtaining a divorce were often restricted and difficult to

90. The Catholic religious elite, for example, still practice celibacy, and the Catholic church still encourages people to adhere to the singular relationship. In the United States, it is not uncommon to find people from many different creeds within Christianity who remain monogamous throughout their lives, and who cherish the concept of the singular relationship. This is striking in a country where the majority of the people are neither born nor raised in an Augustinian tradition. One might conclude that most Christian denominations, despite their sectarian differences and historical antagonism, share the same collective subconscious, at least in the area of sexual love, in that the concept of the singular relationship is so deeply rooted in their conscience.

prove.\textsuperscript{92} The legal and moral culture, rooted in the religious neurosis of the Augustinian order, inculcated among the citizens of the United States a deep aspiration for the singular relationship, and married couples nurtured mutual expectations of the permanence of their relationships. Even today, the vows traditionally exchanged on the wedding day solicit from each partner a total commitment to the marriage, and emphasize the permanence of marriage. Even for those who reject the theological basis of sexual love, the idea underlying the singular relationship has a profound romantic appeal. The remnants of the Augustinian order may be found in traditional households, where the husband is still the dominant partner and the wife is confined to the role of producing and raising children.\textsuperscript{93} Gender equality is still largely illusory, because men control the political, economic and religious affairs of the community, from which women are systematically excluded.\textsuperscript{94} It would therefore be premature to conclude that the era of religious neurosis has come to an end.

This section examines the relationship between the Augustinian sexual order and constitutional jurisprudence. Even though, in the past few decades, constitutional jurisprudence has begun to drift away from the traditional sexual order, it is important to discuss the extent to which the constitutional jurisprudence has been and still is compatible with religious neurosis. As discussed earlier, religious neurosis suppresses the sexual instinct to achieve two distinct objectives: first, it proposes the concept of the singular relationship, outlawing fornication, adultery, bigamy and divorce. Second, it advances the procreation principle, outlawing sodomy, recreational sex, contraceptives and abortion. These objectives constitute the core of the traditional sexual order.\textsuperscript{95} This section argues that constitutional jurisprudence still protects, to a large ex-

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\footnotesize93. This inferior status of women derives its validity from the Augustinian notion that God created women just for breeding.


\footnotesize95. There is yet another dimension of religious neurosis, which justifies the inferiority of women and denigrates them as the source of sexual temptation who lead men away from higher pursuits. Religious neurosis treats women as mere reproductive objects whom God created for no other purpose than procreation and who were destined to be subservient to men.
\end{footnotesize}
tent, the concept of the singular relationship as well as the principle of procreation, the two fundamental projections of religious neurosis.

Private conformity with the Augustinian sexual order is fully compatible with the United States Constitution. For example, if someone wants to be a celibate, he or she may do so without any constitutional obstacle: sexual continence is constitutional. Similarly, if individuals embrace the concept of the singular relationship, there is nothing in the Constitution that forbids them to do so. If individuals choose to refrain from premarital fornication, no state or federal law can force them to conduct such sexual relations. Even if a state has repealed the fornication statute, its citizens are under no legal duty to indulge in premarital sex. Likewise married couples are under no obligation to breach marital fidelity, even if the state does not enforce the law against adultery. Moreover, they may renounce divorce, as they may renounce the concept of remarriage after the death of a spouse. They are free to make the ultimate commitment to stay permanently in the singular relationship that they have lawfully contracted. Furthermore, the Constitution does not require married couples to engage in anal or oral sex, nor does it mandate that they use contraceptives. They may reject all forms of contraceptives, abortion and recreational sex: they may engage in sexual activity for procreation only.

While the Augustinian sexual order if privately embraced does not offend the Federal Constitution, the question remains whether the state can enact constitutionally valid statutes to impose such a concept on its citizens. Principles of federalism confer upon states the power to regulate marriage, divorce and sexual morality. Historically, regulation of domestic relations and public morality have been the state prerogative. It is within the states that the people live, marry, procreate and maintain their relationships under laws passed by their elected representatives, which will normally reflect the morals of the people of the state. Thus, the states

96. Sosna v. Iowa, 419 U.S. 393, 404 (1975) (holding that domestic relations is an area within the exclusive provinces of states). In Pennoyer v. Neff, 95 U.S. 714, 734-35, the Court affirmed the State's absolute right to prescribe conditions for marriage and divorce.

preserve a stable social order in which the citizens lead their lives according to their beliefs, aspirations and morals. Yet the power of the states over their citizens' intimate relationships is not without limitation. The Federal Constitution protects certain fundamental freedoms and individual rights, which the state may not take away in the name of collective morality. On the other hand, the Constitution recognizes certain rights such as marriage and procreation which facilitate the enforcement of traditional sexual order.

A. The Singular Relationship

Constitutional jurisprudence protects marriage as a basic civil right. Of course, the Constitution does not require that individuals be married. Marriage is not a constitutional compulsion; individuals are free to remain celibate. However, constitutional jurisprudence describes marriage as fundamental to the very existence and survival of the human race. (This conception of marriage is intriguing in the context of religious neurosis. The Supreme Court seems to believe there is a fundamental relationship between marriage and the perpetuation of the species through procreation, even though the fallacy of this argument is rather evident, given that the survival of the human race depends on reproduction and not upon the institution of marriage). No state may lawfully adopt a legal scheme to prevent marriages between consenting men and women. The state may impose reasonable regulations relating to prerequisites for marriage, but it cannot interfere directly and substantially with the right to marry. For example, the state cannot prohibit interracial marriages. By invalidating state miscegenation statutes, constitutional jurisprudence restored the hermeneutic order which slavery and racism had disturbed. Similarly, state statutes cannot deny poor people the right to marry. According to Justice Stewart, the state may not prohibit what it

98. See Khan, Invasion of Sexual Privacy, 23 SAN DIEGO L. REV. 957, 971-72 (1986).
considers to be financially irresponsible marriages.\textsuperscript{104} Chief Justice Warren summed up the significance of marriage in the following words: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."\textsuperscript{105}

In addition to the institution of marriage, constitutional jurisprudence has protected several other pillars of the Augustinian sexual order that fortify the singular relationship. First, it has allowed states to ban nonmarital sex.\textsuperscript{106} Consequently, a state may lawfully prevent and even punish premarital and extramarital sex. According to Justice Goldberg, safeguarding marital fidelity is a legitimate state interest; and the constitutionality of carefully tailored statutes that prohibit adultery and fornication is beyond doubt.\textsuperscript{107} Fornication and adultery, Justice Harlan has argued, are not immune from criminal inquiry.\textsuperscript{108} Right now, several states have repealed fornication statutes and where such statutes still exist they are rarely enforced;\textsuperscript{109} similarly, adultery statutes have become almost moribund.\textsuperscript{110} This relaxation, however, does not diminish the power of religious neurosis underlying constitutional jurisprudence which allows laws against adultery to preserve marital fidelity and laws against fornication to safeguard the concept of relational singularity. Should there be a religious revival, laws against nonmarital sex could be resur-

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\item \textsuperscript{104} Id.
\item \textsuperscript{105} Loving v. Virginia, 388 U.S. 1, 12 (1967).
\item \textsuperscript{106} Here, a major distinction must be noted. The Supreme Court has indicated that state fornication and adultery statutes are constitutional, which means that the state has the moral authority to enforce the marital principle; accordingly, it may forbid any and all sex outside of marriage. Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (state statutes prohibiting fornication and adultery, i.e., nonmarital sex are constitutional). And yet states are under no constitutional obligation to legislate or enforce the marital principle. For example, a state will commit no constitutional wrong if it repeals the fornication statute, as several states have. Similarly, a state may refuse to enforce or even repeal the adultery statute. Thus, the Constitution allows but does not mandate that states enforce the marital principle.
\item \textsuperscript{107} Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring.)
\item \textsuperscript{108} Id. at 499 (Goldman, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 553 (Harlan, J., dissenting).
\item \textsuperscript{109} Schneider, Moral Discourse and the Transformation of American Family Law, 83 MICH. L. REV. 1803, 1818 (1985) (showing that statutes against fornication, adultery and cohabitation either have been repealed or not enforced).
\item \textsuperscript{110} Id.
\end{footnotes}
rected without any constitutional objection.

Second, in conformity with the traditional sexual order, and further supporting the singular relationship, constitutional jurisprudence has condemned polygamy as an odious and notorious example of promiscuity, which has "long been branded as immoral in the law." The Court has ruled that the state has a "perfect right" to outlaw polygamy. All states do. But should a state refuse to prohibit polygamous practices, Congress may lawfully intervene to defeat such practices. This interference by Congress with the police powers of the states, the Court holds, does not amount to an unconstitutional interference. However, the question remains whether the states, in the absence of a federal statute outlawing polygamy, are under a constitutional obligation to prevent and punish polygamous practices. Is there any legal principle embodied in the Constitution that forbids bigamy? This question has not yet been decided. The Court's unequivocal denunciation of polygamy, however, may be interpreted in support of the argument that states are required to prohibit bigamy. But even if the Constitution does not require such a proscription, it allows states to enforce the singular relationship to the extent that no individual may have a plural marriage. A plural marriage, the Court has stated, "is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." This statement shows the power of religious neurosis and its impact on a constitutional jurisprudence that claims to require the separation of state and religion.

112. The Late Corp. of the Church of the Latter-day Saints v. United States, 136 U.S. 1, 50 (1890) (hereinafter Mormon Church v. United States).
114. However, in the absence of state and federal laws prohibiting polygamy, a good case may be made that a consensual plural marriage supported by a religious belief may not violate the Constitution.
115. Mormon Church v. United States, 136 U.S. 1, 49 (1890); see Cleveland v. United States, 329 U.S. 14, 19 (1946) (citing with approval Mormon Church v. United States, 136 U.S. 1 (1890)).
116. The separation of church and state is a fundamental norm protected in the United States. "The First Amendment teaches that a government neutral in the field of religion better serves all religious interests." This is what Justice Douglas noted in Engle v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring). Although the courts have enforced the separation of church and state principles against the executive and legislative branches of the government, it may be
The prohibition against bigamy may be justifiable on secular grounds; nonetheless, constitutional jurisprudence seems to depend on religious models for its validation, and not on secular paradigms. Furthermore, the religious neurosis underlying constitutional jurisprudence is essentially Christian, because it discredits other religions that do not embrace the notion of the singular relationship. Islam, for example, allows polygamy. Even under the Mormon faith, a sect of Christianity, polygamy was permitted. But Moslems and Mormons cannot practice their hermeneutics of sexual love, even though the Constitution recognizes the freedom of religion. The first amendment, the crown jewel of constitutional freedoms, offers no protection for a plural marriage. Individuals may not invoke their religious beliefs to practice polygamy, and religion is no defense in a prosecution for bigamy. Indeed any religious community that spreads and practices polygamy, the Court has pronounced, invites "a return to barbarism."

Third, constitutional jurisprudence has failed to state in unequivocal terms that individuals have a right to divorce. Certainly, no Supreme Court case has held that the Constitution requires states to outlaw divorce. However, the question whether the Constitution allows a state to ban divorce merits some discussion. Right now, divorce is available in all states; and the trend is toward relaxing the restrictions on obtaining a divorce. In the United States, a divorce must be obtained through the state judicial machinery; individuals cannot dissolve their marriages without state approval. Given the monopolization of the means for legal termination of marriages, different states have placed different substantive and procedural restrictions on the granting of a divorce. The Supreme Court has reviewed a few restrictions on obtaining a divorce. In a key case, for example, the Court held that

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further argued that even the courts should refrain from using religious arguments to support a legal conclusion.

117. The holding against bigamy in Mormon Church v. United States, 136 U.S. 1 (1980), for example, is partly rooted in religious rhetoric. Id. at 49.
118. Mormon Church v. United States, 136 U.S. 1, 49 (1890).
120. Mormon Church v. United States, 136 U.S. 1, 49 (1889).
121. M. GLENDON, supra note 92, at 188-89.
due process of law prohibits a state from denying access to its courts to indigents who seek dissolution of their marriage but who cannot afford court fees and costs. In a subsequent case, the Court remarked that one's inability to dissolve a marriage seriously impairs the freedom to "pursue other protected associational activities." On the basis of these cases, one might argue that individuals have a right to dissolve their unhappy marriages so that they may pursue a more meaningful relationship or another marriage. A state's categorical refusal to grant divorces might advance the cause of the singular relationship, but it would place an unreasonable restriction on individual liberty and pursuit of happiness. Yet the Supreme Court has not held divorce to be a fundamental right, entitled to constitutional protection. In the absence of such a constitutional right, it can be argued that the states have the authority to ban divorce altogether. It is unlikely, of course, that any state in the foreseeable future will ban divorce, absent a profound moral revolution and the resurrection of the concept of the singular relationship.

B. The Procreation Principle

Procreation, the raison d'être of genital love in the Augustinian sexual order, is also a fundamental right recognized in the constitutional jurisprudence. It is a legitimate sexual objective that no state can prohibit without strict judicial scrutiny. The Court struck down a statute that authorized the state to sterilize habitual criminals convicted two or more times for crimes amounting to felonies involving moral turpitude. Sterilization, Justice Douglas argued, inflicts upon individuals an irreparable injury and thus forever deprives them of the right to procreate. The power to sterilize, he further argued, may have devastating effects, particularly if it is in evil or reckless hands. In another case, Justice

127. Id. at 538.
128. Id. at 535, 541.
129. Id. at 541.
Goldberg remarked that a law requiring compulsory birth control would be unconstitutional because the Constitution forbids such totalitarian limitation of family size. To the question why procreation is a basic right in the United States, several explanations may be given. Judges use the language of law and rights to underscore the significance of procreation. However, another explanation could be that the Augustinian consciousness is so deeply rooted in people that collective religious neurosis compels them to treat procreation as sacred. Sacred or not, the right to procreation is a basic civil right protected as much in the constitutional jurisprudence as it is in the Augustinian sexual order.

Prohibition of homosexuality has been a natural extension of the procreation principle under the Augustinian sexual order. Homosexuality is considered unnatural because it is nonprocreative; it therefore not only subverts the procreation principle, but legitimizes recreational sex. Mirroring the Augustinian sexual order, constitutional jurisprudence condemns homosexual relationships. The Supreme Court has declared that the states have the authority to criminalize homosexual sodomy, and that the right of privacy does not allow homosexuals to enter into an intimate relationship. Since law is consistently based on notions of morality, the Court argued, majority sentiments about the morality of homosexuality may be an adequate basis to outlaw homosexual sodomy. In his concurring opinion, Chief Justice Burger invoked religious morality to suggest that proscriptions against homosexuality had ancient roots in the history of Western Civilization. To hold that homosexuality is a fundamental right protected under the Constitution, he argued, "would be

131. This explanation is lent some credibility by the observation that China, a non-Christian society, does not consider procreation to be sacred. In China, the government has used several legal techniques to discourage and even punish unlimited procreation. J. Barton, J. Gibbs, V. Li & J. Merryman, LAW IN RADICALLY DIFFERENT CULTURES 923-49 (1983). Of course, this explanation is subject to the criticism that China's birth control policies are explained by the fact that it is a totalitarian state, or that it is justified in pursuing such policies because of its large population and persistent poverty.
133. Id. at 196.
134. Id. at 196-97.
to cast aside millennia of moral teaching." Here is the rub. Constitutional jurisprudence presents itself as a prisoner of the moral conscience that Augustine shaped centuries ago. It cannot cast aside sixteen centuries in which religious neurosis against nonprocreative sexual practices grew, developed and flourished, shaping a deep prejudice against homosexuality.

IV. CONSTITUTIONAL DEVIATION

In the past few decades, the traditional sexual order in the United States has undergone a profound transformation. In several states, fornication and anti-cohabitation statutes have been repealed, and adultery statutes are rarely enforced. The divorce rate is high, remarriage is common, and cohabitation is on the rise. Citizens have a constitutional right to procure contraceptives in order to avoid procreation and to engage in purely recreational sex. Abortion is legal and available, despite recent protests, legislative initiatives and Supreme Court holdings. Homosexual couples have begun to live together, and the laws against sodomy are seldom enforced. Pornographic magazines, mov-

135. Id. at 197.
137. Schneider, supra note 109, at 1818.
138. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1990). Table No. 51 shows the increase in the rate of divorce (47 per 1,000 in 1970 to 133 in 1,000 in 1988); Table 127 shows the increase in the rate of remarriage (16.5 percent in 1970 to 23.4 percent in 1988); Table 54 shows the increase in the rate of cohabitation (523,000 in 1970 to 2,588,000 in 1988).
140. In light of recent pro-life protests, there was widespread speculation that the Supreme Court would overrule Roe v. Wade, 410 U.S. 113 (1973). This has not yet happened, even though the Court has begun to nibble away the outer limits of Roe v. Wade. See Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).
ies and videotapes that accentuate erotic love may be lawfully purchased in the open market. A culture of sexual freedom has set in, liberating the individual from the bondage of old sexual order.

In opposition to the traditional sexual order, a counter-paradigm has emerged in social consciousness, as well as in legal discourse. This is the principle of consensual sex, which proposes that any sexual practice between adults, engaged in privacy, is a matter of individual morality, and that the state may not intervene to enforce any specific sexual code. So defined, consensual sex is the antithesis of the Augustinian sexual order and of religious neurosis, and provides a philosophical and functional structure to dismantle the religious fortification of sexuality: the procreation principle and the singular relationship. This section discusses the principle of consensual sex and the related constitutional concept of privacy. It also examines the extent to which constitutional jurisprudence has drifted away from the traditional sexual order. Furthermore, it is shown that despite constitutional deviations, there seems to have emerged with respect to the treatment of women an inverted association between constitutional jurisprudence and religious neurosis.

A. Consensual Sex & Privacy

Although constitutional jurisprudence has not embraced the paradigm of consensual sex as a constitutional principle, it has recognized a similar concept called the right of privacy. In many ways, the principle of consensual sex

(indicating the moribund character of sodomy statutes).

144. In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court said: "[A]ny claim that... any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." Id. at 191.
and the right of privacy share a profound kinship. Both tend to protect adult sexual activity formed on mutual consent and exercised within the precincts of personal quarters.\textsuperscript{146} Both are inclined to free the individual from theological suppression as well as from unwanted government intrusion.\textsuperscript{147} Both carry the potential to unravel the moral web that the traditional sexual order has woven around the sexual instinct, and challenge the superego guarding the fortress of religious neurosis. Nonetheless, the principle of consensual sex is a much broader concept, repudiating the moral authority of the state to intervene and police private sexual affairs of consenting adults. Comparatively, the right of privacy recognized in constitutional jurisprudence is a rather conservative doctrine, intended primarily to protect marital privacy.\textsuperscript{148} In recent Supreme Court cases, although the right of privacy has been expanded to protect unmarried individuals, constitutional jurisprudence has declined to embrace fully the new paradigm of consensual sex. It might be useful first to discuss the consensual principle and its potential for effectively countering the Augustinian sexual order.

1. The Consensual Principle

Both in its reach and philosophical clarity, the principle of consensual sex presents a powerful paradigm to repudiate the traditional sexual order.\textsuperscript{149} Rejecting almost all traditional restraints placed on sex, the consensual principle protects the right of individuals to select consenting adult sex

\begin{footnotes}
\footnote{146. Massey, \textit{Federalism and Fundamental Rights: The Ninth Amendment}, 38 \textit{HASTINGS L.J.} 305, 339-40 (1987) (arguing that the right of private consensual sex is protected under the unenumerated natural rights retained by the people in the ninth amendment of the United States Constitution).}

\footnote{147. \textit{Id. But see} People v. Onofre, 415 N.E. 2d 936, 940 n.3 (striking down the anti-sodomy statute but declining to express any theological evaluation of consensual sodomy).}

\footnote{148. "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." Griswold v. Connecticut, 381 U.S. 479, 495 (1965).}

\end{footnotes}
partners. The principle is founded upon the integration of three simple ideas. First, it allows sexual activity between adult partners only. Sex with a child or a minor is not protected under the principle. Second, the adult sexual partners must mutually consent to engage in a sexual act. Any forced sexual activity against the will of a sexual partner falls outside the boundaries of the principle. In fact, the principle does not protect a forced sexual act even with one's spouse: individuals may be lawfully punished for raping their spouses. Third, the sexual act between consenting adults must take place in privacy. Public sexual acts even between consenting adults are not protected. Hence, a state may regulate and punish sexual acts involving children, elements of force and public exposure. But the principle prohibits the government from preventing or punishing any sexual act engaged in privacy between consenting adult partners.

The consensual principle dismantles traditional barriers regarding sexual partners and sexual practices. In fact, it stands the Augustinian sexual order on its head. For example, the principle does not require that sexual partners be married. Of course, the principle does not reject the institution of marriage and if consenting adults wish to confine their sexual activity within a marital framework, they may do so. Nonetheless, marriage is not an essential moral prerequisite for engaging in sexual activity. In fact, the marital status is immaterial under the consensual principle. Couples are

150. Note, To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 Harv. L. Rev. 1255 (1986) (arguing that the subordination of women was accomplished by the absence of laws restraining male power); see generally D. Russel, Rape in Marriage (1982). In People v. Liberta, 64 N.Y. 2d 152, 474 N.E. 2d 567 (1984), the marital rape exemption was removed. In Warren v. State, 225 Ga. 151, 336 S.E. 2d 221 (1985), it was held that the rape statute does not incorporate the common law exemption. Several states have enacted statutes to punish marital rape. See, e.g., Cal. Penal Code § 262 (West Supp. 1988):

a) Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury on the spouse or another, or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat . . . .

151. Fornication statutes that prohibit sexual intercourse outside a lawful marriage would be incompatible with the principle of consensual sex. Similarly, the consensual principle rejects the concept of adultery.
under no obligation to announce their alliance to the public; nor are they required to formalize their relationship before any church or state official. The consensual principle rejects the traditional definition of lawful sex, which presupposes a marital bond. Accordingly, the prohibition against fornication loses its logical meaning. The principle dismantles the moral boundary between marital and premarital sex, between marriage and cohabitation.

Furthermore, the consensual principle deconstructs the moral foundation of the singular relationship. It allows individuals to engage in extramarital sexual acts based on consent. Thus the traditional proscription against adultery is incompatible with the consensual principle. It has been argued that the consensual principle may not be extended to permit adultery because marriage is distinguishable from cohabitation and other sexual relations based on weaker mutual commitment: in marriage, spouses take a pledge of fidelity and therefore extramarital sex may have an adverse impact upon the nonparticipating spouse or spouses.152 This is true. The consensual principle, however, does not draw formalistic distinctions between marital and nonmarital vows. From the viewpoint of the consensual principle, if mutual commitment has weakened, formal vows may not prevent partners from engaging in sex outside their declared relationship. On the other hand, if the bond is intact the partners would remain faithful to each other even in the absence of a formal commitment. Therefore, if vows of fidelity are breached, the consensual principle accepts in a realistic spirit the flaw in the existing relationship rather than condemning the act of infidelity. The consensual principle does not discard the idea of relational fidelity; it only declines to punish the breach of such a commitment. In other words, the legitimacy of sex flows from mutual consent, not from any formal status.153

153. The consensual principle is primarily intended to protect consensual sexual activity between two adult sexual partners. But the principle may be extended to encompass polygamy and group sex. If two or more adult partners freely choose to enter into a plural marriage or a plural relationship, the consensual principle does not preclude their consensual decision. The principle would expand the traditional meaning of polygamy under which a man could have multiple spouses but a woman could not: it would allow both men and woman to practice
To further promote liberation from religious neurosis, the consensual principle allows sexual practices prohibited under the traditional sexual order. Religious neurosis equates sex with procreation and forbids all non-procreative sexual practices. The consensual principle does not limit itself to procreation or to genital sex. It allows anal and oral sex. Therefore, it does not discriminate against homosexuality, the so-called deviant sexual behavior. Nor does it condemn heterosexual sodomy. Furthermore, the principle rejects traditional constraints of the procreation principle placed on genital sex. Sexual partners are free to use or not to use contraceptives. They may of course engage in procreative sex if they want to have a child. But they are free to seek recreational sex as well. In fact, they may shun the procreative objective altogether and may pursue sex exclusively for pleasure. The consensual principle allows both heterosexual and homosexual partners to experience erotic pleasure without legal or moral recrimination. In the animated eroticism of mutuality, the consensual principle does not interpose any moral stop signs.

The consensual principle may be criticized on the ground that it promotes promiscuity and mechanical sex. This permissiveness may be condemned on the basis of religious neurosis, but the specter of sexual excess may not be
summoned to support the argument that the sexual order based on the consensual principle leads to relational anarchy. It must be kept in mind that, in addition to the requirements of adulthood and privacy, the consensual principle has a solid intrinsic constraint: mutual consent. There is no reason to assume that consenting adults would prefer casual sex over a more permanent and a more meaningful relationship. Originating from religious neurosis, such assumptions misread human inclinations to form intimate relationships.

An intimate relationship is primarily an association between two persons, of the opposite sex or the same sex, who have some kind of sexual intimacy. Ordinarily, an intimate relationship is distinguishable from a casual sexual affair. In a casual affair, sexual partners seek each other primarily for sexual gratification. Such relationships are often brief and one-dimensional, in that the partners' interest in each other is defined by and often limited to sexual activity. The intimate relationship, on the other hand, is much more complex. Of course, sex is an essential part of an intimate relationship, but partners in an intimate relationship develop a more profound bonding. This bonding normally involves mutual commitment and is founded upon bilateral care, compassion, and even sexual fidelity. Furthermore, an intimate relationship may establish intellectual, artistic or aesthetic unions between the partners. Each intimate relationship has a unique character, depending upon the mutual expectations of the partners. On a more practical level, intimate partners often prefer to live together, and tend to share their income, property, and other resources. One clarification is in order. The consensual principle does not reject the concept of the singular relationship. An intimate relationship may meet the test of the singular relationship. Yet the distinction is clear: the consensual principle does not impose the singular relationship on individuals; the traditional Augustinian sexual order does.

Numerous arguments derived from psychological, sociological, philosophical and legal sources have been advanced to support and justify the consensual principle. These ar-

156. Thus an intimate relationship is distinguishable from nonsexual friendship.
guments attempt to free consensual sex from instinctual suppression, archaic morality and state intervention. Consensual sex introduces a new paradigm that reflects contemporary social freedoms and new individual attitudes toward sexuality. It challenges the exclusivity of vaginal sex, heterosexuality, marital vows of fidelity and the concept of the singular relationship, turning the traditional sex code upside down. It recognizes that many men and women now cherish a sexual freedom that offers a range of sexual partners, sexual practices and sexual objectives. It acknowledges without moral duplicity that homosexuality is real and widely practiced. It accepts sexuality as it is; it refuses to enshrine a moral consciousness to which many no longer adhere.

2. The Right of Privacy

The new paradigm of consensual sex has not only weakened roots of the Augustinian sexual order, it has introduced significant confusion in constitutional jurisprudence. In a culture where individual rights and freedoms attain approval and respectability, the power of the consensual principle is irresistible. Consequently, to defend individual liberty constitutional jurisprudence has begun to challenge religious neurosis and accommodate some aspects of the consensual principle. As noted earlier, the United States Supreme Court does not use the consensual principle in its legal analysis; instead it has utilized the concept of privacy to grant freedoms which have historically been denied under the dictates of the traditional sexual order.\textsuperscript{158} Some state supreme
courts, however, have ruled that the right of privacy includes the right to select consensual adult sex partners. Although the right of privacy recognized in the constitutional jurisprudence has also been invoked to protect non-sexual matters, recent privacy cases examine principal norms of the traditional sexual order.

Among privacy cases, the ones dealing with contraceptives seem to have most deeply shaken the foundation of religious neurosis. In *Griswold v. Connecticut*, the Court invoked the right of privacy to invalidate a statute under which it was unlawful for married couples to use contraceptives. To allow the government to search bedrooms for signs of the use of contraceptives, the Court ruled, is repulsive to the principle of privacy. In *Eisenstadt v. Baird*, the Court extended the right of privacy to unmarried sexual partners and ruled that a ban on distribution of contraceptives to unmarried sexual partners is equally impermissible. In a subsequent case, the Court took yet another step and prohibited the states from limiting the distribution of contraceptives to licensed pharmacists. Consequently, the Court has made it constitutional for any individual to use contraceptives without a prescription.

State statutes prohibiting the use of contraceptives were consistent with the procreation principle embodied in the Augustinian sexual order. These statutes were enacted not to ban the distribution of contraceptives for the prevention of disease; contraceptives for preventing the spread of disease were already available. The purpose of these statutes was to punish individuals who engaged in sex using contraceptives to avoid procreation. This purpose, the Court ruled, is

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160. For example, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the concept of privacy was invoked to recognize parents' right to teach German to their children.

161. 381 U.S. 479 (1965).

162. *Id.* at 485-486.

163. 405 U.S. 438 (1972). *But see R. BORK, supra note 136, at 111*. Bork criticizes the Court's expansion of the right of privacy, arguing that constitutionally protected availability of contraceptives to unmarried people undermined the appreciation of marriage. *Id.*


incompatible with the protected right of privacy which allows individuals the decisional freedom of whether to bear or beget a child. By invalidating anti-contraceptive statutes, the Court has not only undermined the procreation principle but legitimized recreational sex as well. Individuals have gained a new freedom: to engage in sex for pleasure without governmental intrusion. As a result, the state has lost its moral authority to impose the traditional procreation principle.

The state's moral authority to enforce the procreation principle was further weakened when the Supreme Court extended the right of privacy to allow abortion. The Court's reasoning in upholding a woman's decision to terminate her pregnancy is both complex and controversial, and has been widely commented upon. For the purpose of this article, however, two limited points may be made. First, the right of privacy allowing abortion subverts in a fundamental way the traditional procreation principle. The contrast is vivid. Under the traditional code, lawful sexual partners may engage in sex for procreation only; but under the extended right of privacy that allows contraceptives and abortion, they may repel procreation completely. Second, lawful availability of abortion stretches recreational sex to its logical limits. Sexual partners in general, and women in particular, may now lawfully seek sex for pleasure to the extent that partners, by mutual consent, or even women acting alone can terminate an unwanted pregnancy caused by recreational sex.

Since the procreation principle has begun to disintegrate under the pressure of constitutional privacy, the traditional

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167. Under the Augustinian sexual order, procreation is the only legitimate sexual objective: sex for pleasure is prohibited. See supra text accompanying notes 88-90. See also Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. CAL. L. REV. 777, 781 n.19 (1988) (explaining Thomas Aquinas' theory of procreational sex). The constitutional jurisprudence recognizes procreation as a fundamental right. See Skinner v. Oklahoma, 316 U.S. 535 (1942). But it does not allow states to make procreation the exclusive objective of sexual activity, because individuals have a constitutional right to use contraceptives and, thus, prevent procreation. See cases cited supra note 145. This is how constitutional jurisprudence begins to drift away from Augustinian hermeneutics.


prohibition against acts of sodomy no longer makes much logical or hermeneutic sense. As discussed earlier, the traditional moral code allows only one sexual practice: genital sex. Sexual practices such as anal and oral sex are prohibited because they are inconsistent with the procreation principle, but the right of privacy has largely subsumed the procreation principle. If sexual partners may obtain contraceptives and engage in nonprocreative sex, if unmarried couples may seek abortion to terminate unwanted pregnancies, and if these activities are protected by the right of privacy, then prohibitions against other nonprocreative sexual practices which are, if anything, less threatening to the principle of procreation, may as well be annulled. Although the Supreme Court has not yet decided the question whether the right of privacy prevents states from punishing sexual partners of the opposite sex for engaging in acts of sodomy, there are reasons to believe that such sexual practices are protected behind the veil of privacy. Justice Stevens has indicated that under the constitutional jurisprudence of the right of privacy, it might be unconstitutional for a state to prohibit sexual partners of the opposite sex to engage in sodomy within the precincts of their bedrooms.170

The right of privacy seems to have substantially undone enforcement of the procreation principle. Nonetheless, the Supreme Court has refused to extend the right of privacy to protect nonprocreative sexual practices between persons of the same sex.171 Thus the concept of privacy recognized in constitutional jurisprudence lacks the philosophical coherence of the consensual principle. Several commentators have argued that the analytical sleight of hand with which the High Court tolerates heterosexual sodomy but condemns homosexual sodomy is duplicitous and arbitrary.172 The equal protection of laws should mandate that the right of privacy be

extended to homosexuals.173 The inconsistent manner in which the courts have applied the right of privacy suggests that the Augustinian tradition of religious neurosis still influences many members of the judiciary.

Still, the limited right of privacy recognized in constitutional jurisprudence seems to have impaired the edifice of the singular relationship as well. Again, the contraceptive cases have caused the injury. While *Griswold* has weakened the procreation principle,174 *Eisenstadt* has undermined the institution of marriage.175 *Eisenstadt* accords unmarried couples a constitutional right to use contraceptives without government intrusion.176 It might be helpful to examine the reasoning underlying *Eisenstadt*. To counter the argument that availability of contraceptives would encourage nonmarital sex, the Court observed that pregnancy and the birth of an unwanted child could not be a defensible punishment for fornication.177 Moreover, the Court rejected the argument that the ban on distribution of contraceptives to unmarried persons deters premarital sex.178 Such a ban is an unconstitutional infringement of the right of privacy: "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 matters so fundamentally affecting a person as the decision whether to bear or beget a child."179

This right of privacy extended to unmarried persons has substantially impaired the state's moral authority to enforce the marital principle, under which marriage is a prerequisite for sexual intercourse and bearing children. If unmarried couples have a constitutional right to use contraceptives, it follows that marriage is no longer a legal prerequisite to engage in sexual intercourse. Of course, the Constitution

173. See Khan, supra note 98, at 960-63. If the use of contraceptives is legal for heterosexuals, why is it not for homosexuals? If heterosexual sodomy is protected under the right of privacy, why isn't homosexual sodomy protected? If sex for pleasure is allowed to heterosexuals, why is it not to homosexuals? Discrimination on the basis of sexual preference may violate the equal protection clause of the fourteenth amendment.
176. *Id.* at 439.
177. *Id.* at 448.
178. *Id.* at 449.
179. *Id.* at 453 (emphasis original).
recognizes and protects the right to marry. Nonetheless, a mere recognition of the right to marriage does not satisfy the traditional marital principle, which would forbid all sexual activity outside of marriage. But *Eisenstadt* seems to suggest that the constitutional jurisprudence protects nonmarital sex. In light of *Eisenstadt*, it may be argued that while states may arguably enforce the marital principle, they are under no constitutional obligation to do so. For example, a state will commit no constitutional wrong if it repeals the fornication statute, as several states have.\(^\text{180}\) Similarly, a state may refuse to enforce or even repeal the adultery statute. In other words, a plain reading of *Eisenstadt* would suggest that the Constitution allows but does not mandate that states enforce the marital principle. *Eisenstadt* seems an important rejection of religious neurosis under which any sex outside of marriage is forbidden.

But the Court's analysis in *Eisenstadt* is murky and its rejection of religious neurosis evasive. While it protects the privacy right of unmarried couples to use contraceptives, it also asserts that state fornication and adultery statutes are constitutional, which means that the state has the moral authority to prevent and punish any and all sex outside of marriage.\(^\text{181}\) This inconsistency is the defining attribute of a constitutional jurisprudence torn between religious neurosis and the consensual principle. If unmarried persons have a protected right to decide whether to bear or beget a child and if governmental intrusion into this matter is unconstitutional, state fornication statutes are incompatible with the right of privacy. But if a state may lawfully punish unmarried persons for fornication, it is not clear how they can exercise their constitutional right to decide whether to bear or beget a child. Conversely, how can taking advantage of a recognized right be a criminal act? To uphold that individuals have a constitutionally protected privacy right to decide whether to beget a child, but to simultaneously insist that the state can punish these individuals for fornication, places a constitutional right directly within the precinct of a criminal act. If the *Eisenstadt* ruling is meaningful, the constitutionality of fornication statutes rests on a fractured foundation and

180. See Schneider, *supra* note 109, at 1818.
would not be upheld if challenged. On the other hand, if in the presence of the right of privacy the fornication statutes are still valid, the constitutional jurisprudence of privacy is both confusing and incoherent.

It might be instructive to summarize the constitutional jurisprudence protecting privacy rights. Sexual partners of the opposite sex have a fundamental right to use contraceptives. Thus the traditional procreation principle is incompatible with the constitutional jurisprudence in that sexual partners have a right to enjoy sex and repel procreation. Moreover, even if recreational sex results in an unwanted pregnancy, the woman has a constitutional right to abort the fetus. There are reasons to believe that heterosexual sodomy is also protected under the right of privacy. Furthermore, constitutional jurisprudence does not require that to enjoy these privacy rights heterosexual partners be married. Thus as far as heterosexual partners are concerned, the traditional sexual order must yield to the right of privacy exercised. In this historic dismantling of religious neurosis and the attendant sexual order, however, constitutional jurisprudence has carved out an apparently indefensible exception, insisting that the right of privacy does not protect homosexual love. Finally, it has failed to clearly articulate a constitutional right to non-marital intimacy.

B. Despiritualization of Women

At the risk of oversimplification, this section attempts to provide an insight into the relationship between religious neurosis and contemporary treatment of women. Again, it is
not contended that religious neurosis is exclusively responsible for the historical subordination of women. Complex physical, social and economic forces worked together over the centuries to create, entrench and defend the subjugation of women. While religious neurosis might have played some part in the causation of gender inequality, its historical role has been to provide a hermeneutic justification for supporting the inferior status of women. In the past few decades, the traditional structure of family and the male-dominated socio-political order are in the process of deconstruction. Much has changed, some in the name of the Constitution. This section first discusses the principle of equal respect. In order to complete the discussion of religious neurosis, it is argued that constitutional protection of pornography has resulted in despiritualization of women. One caveat is called for. This section does not address the range of reasons for which pornography is protected. Rather, it provides a few hermeneutic insights into an otherwise complex jurisprudence.

Constitutional jurisprudence has traditionally embraced the old notions that women are dependent on men, that “in the struggle for subsistence she is not an equal competitor with her brother,”187 or that “[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”188 These beliefs were of course consistent with the Augustinian sexual order and the concomitant religious neurosis that treat women as a source of sexual temptation who lead men away from higher pursuits, and whom God has created for no other purpose than procreation.189 According to Justice Brennan, throughout much of the 19th century (and even before) the position of women in the United States was in many respects comparable to slaves: women could not vote or hold office, serve on juries or bring suit in their own names, and married women could not hold or convey property or even serve as legal guardians of their own

189. See supra note 69 and accompanying text.
children. To counter the religious neurosis that reduces women to mere reproductive objects, new arguments are being made for changing the status of women from one of dependence to one of independence. This new consciousness expresses itself through the principle of equal respect, which emphasizes the inherent dignity of women and promotes the participation of women, on equal terms with men, in all spheres of life. The principle of equal respect proposes to modify existing social and cultural patterns, gender biases and prejudices based on the idea of the inferiority of women or on stereotyped roles of men and women. The principle protects the full development of the potentialities of women and rejects the notion that women are mere reproductive organisms who ought to be domesticated for the good of the family. Of course, women carry a substantially higher burden in procreation, but this natural responsibility does not justify their exclusion from the political, economic, social, or cultural life of the nation, nor does it relieve men of their responsibility in the upbringing and development of children. Women are equally entitled to all the rights and freedoms that men have enjoyed over the centuries. They are born free and equal in dignity, and therefore they are entitled to equal respect.

If the principle of equal respect were fully embraced, it would replace religious neurosis and reject concomitant atti-

192. Convention, supra note 191, art. 3.
193. Id. art. 5.
194. Id.
195. Id. see preamble.
tudes that deny women their inherent dignity. If women are allowed to participate fully in all spheres of life, it would discredit the Augustinian thesis that the role of women is confined to procreation. There is a vivid contrast between religious neurosis and the principle of equal respect. Religious neurosis conceives women as limited beings whom God has created primarily for reproduction, whereas the principle of equal respect postulates the dignity and worth of each human person and requires the maximum participation of women on equal terms with men in all fields. Religious neurosis justifies placing women in traditional households; the principle of equal respect justifies the full development and advancement of women, recognizing their right to education, their right to work in the marketplace, and their right to participate in all social and community activities.

On the surface, constitutional jurisprudence has begun to enforce the principle of equal respect in granting women civil and political rights. Of course, the position of women in America has improved markedly in recent decades and only cynics would insist that nothing has changed. Nonetheless, a profound bond still appears to exist between religious neurosis and constitutional jurisprudence. It might be useful to restate at this point the duality that constitutes the traditional hermeneutic order which prohibits sex for pleasure, considers procreation as a regrettable necessity and exalts sexual continence as a preferred value. The contradiction between reproductive necessity and higher virtue is founded upon the cleavage between body and soul, sex and spirit. Embodied in this cleavage is the further belief that women represent body and sex, but men epitomize soul and spirit. The traditional sexual order reduces women to reproductive objects whom good men seek not for any spiritual union but for procreation only. This objectification of women has been part of Augustinian sexual order. In the

196. Id. arts. 3, 5, 7.
197. Id. art. 10.
198. Id. art. 11.
199. Id. art. 3, 13, 14.
201. See supra note 69 and accompanying text.
202. See supra note 69 and accompanying text.
presence of such a tradition, the principle of equal respect has failed to significantly influence the constitutional jurisprudence dealing with the condition of women. Contemporary constitutional jurisprudence is still rooted in the Augustinian consciousness, and continues to treat women as sexual objects. However, the Supreme Court has inverted the traditional sexual order to the extent that it protects, under the first amendment, speech that presents women not as objects of procreation but of erotic pleasure and sexual gratification.

First amendment jurisprudence has legitimized a hermeneutic inversion, in which women are mere objects of pornographic pleasure. Constitutionally protected pornography has depicted women as sexual objects who “love to be fucked by animals, dildoes, fists and penises, especially while being bound, beaten, cut, mutilated and killed.” In some cities, ordinances have been proposed to outlaw pornography that present women as sexual objects who enjoy pain, humiliation, and rape, and which exhibit women’s body parts including vaginas, breasts and buttocks. These ordinances have been vetoed or held to be unconstitutional. Some commentators defend the need for sexually explicit expression, and argue that such speech expands the possibilities of aesthetic


204. Baldwin, The Sexuality of Inequality: The Minneapolis Pornography Ordinance, 2 LAW & INEQUALITY 629, 632 (1984). The constitutional jurisprudence draws a distinction between pornography and obscenity. The state may lawfully regulate obscene materials if the following criteria are satisfied: a) the average person applying contemporary community standards find such materials appealing to the prurient interest; b) such materials depict a defined sexual conduct in a patently offensive way; and c) such materials taken as a whole lack serious literary, artistic, political or scientific value. See Miller v. California, 413 U.S. 15 (1973). These tests are inadequate from a feminist viewpoint, in that they do not consider whether such pornographic materials denigrate women.

205. Minneapolis, Minn., Ordinance amending tit. 7, chs. 139, 141 (1982) (passed Dec. 30, 1983; vetoed Jan. 5., 1984), reprinted in 34 UCLA L. REV. 1265, 1270 NN.23-25 (1987). This ordinance was proposed to make pornography a separate violation of women's civil rights. A similar city ordinance was successfully enacted in Indianapolis but was held to be unconstitutional. See American Booksellers Ass'n v. Hudnut, 598 F.Supp. 1316 (S.D. Ind. 1984), aff'd, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 106 S. Ct. 1172, reh'g denied, 475 U.S. 1001 (1986).

and artistic expression regarding sex,\textsuperscript{207} protects the free marketplace of ideas,\textsuperscript{208} and allows women to express themselves in creative sexuality.\textsuperscript{209} However, arguments made defending pornography under the rubric of freedom of speech assume that, in the hierarchy of social values, free speech is superior to the dignity of women.\textsuperscript{210}

The Augustinian sexual order and pornography that denigrates women share a common bond: both present women as sexual objects. The traditional, Augustinian sexual order reduces women to wombs that men may impregnate with fetuses, thus turning women into mere procreative objects. Pornography, largely protected under first amendment jurisprudence, portrays women as vehicles for male sexual gratification, thus turning women into mere erotic objects.\textsuperscript{211} At one level, first amendment jurisprudence rejects the traditional order of sexual repression and sexual shame, vindicating

\textsuperscript{207} Dunlap, Sexual Speech and the State: Putting Pornography in its Place, 17 Golden Gate U.L. Rev. 359, 367 (1987).

\textsuperscript{208} Pope v. Illinois, 107 S. Ct. 1918, 1930 (1987) (Stevens, J., dissenting). Comment, The Indianapolis Pornography Ordinance: Does the Right to Free Speech Outweigh Pornography's Harm to Women?, 54 U. Cin. L. Rev. 249, 251 (1985) (distinguishing forms of sexual expressions that might be protected). Of course, those who argue for strong first amendment protection of free speech would reject any constraints on pornography and even obscenity. See, e.g., L. Tribe, American Constitutional Law 925-26 (2d ed. 1988) (Professor Tribe argues that "it is constitutionally tenuous for the government to outlaw or to make civilly actionable the incitement of violence against women only when such incitement is caused by words or pictures that express . . . that women are meant for domination." Id. at 926).

\textsuperscript{209} G. Steinem, Erotica v. Pornography, in OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 219 (1983) (making a useful distinction between erotica and pornography: erotica is as different from pornography "as love is from rape, as dignity is from humiliation, as partnership from slavery, as pleasure is from pain." Id.).

\textsuperscript{210} L. Tribe, American Constitutional Law (2d ed. 1988). Professor Tribe has questioned the distinction that the Supreme Court makes between pornography and obscenity. He would protect obscene materials under the First Amendment as well.

\textsuperscript{211} C. Mackinnon, supra note 4, at 148.

In pornography, women desire dispossession and cruelty. Men, permitted to put words (and other things) in women's mouths, create scenes in which women desperately want to be bound, battered, tortured, humiliated, and killed. Or merely taken and used. This is erotic to the male point of view. Subjection itself, with self-determination ecstatically relinquished, is the content of women's sexual desire and desirability. Women are there to be violated and possessed, men to violate and possess them, either on screen or by camera or pen, on behalf of the viewer.

\textit{Id.}
critics of the traditional Augustinian sexual order. But at another level, the same first amendment jurisprudence protects inverted manifestations of religious neurosis, which continue to deny social and sexual equality to women. There is a profound connection between pornography and the traditional sexual order, even though they appear to be quite antithetical to each other. They are inverted images of each other, rooted in the same perception and founded upon the same premise: in the realm of creation, women represent nothing else but body and sex.

Similarly, the constitutional protection of contraceptive sex reflects and reinforces the old notion, again in an inverted way, that women are mere physical bodies devoid of spirituality. Free availability of contraceptives may be socially defensible to avoid unwanted pregnancies. The use of contraceptives may also be justified under the consensual principle which allows consenting adults to engage in recreational sex. Nonetheless, nonprocreative sex in a pornographic climate acquires a new meaning: contraceptives are devices that turn female bodies into sexual merchandise, erotic commodities, empty wombs. Pornography presents women as


213. MacKinnon believes the availability of contraception is one of the ways a woman has control over her own body. However, she emphasizes that many women decide not to take the necessary precautions because of the social connotations of such behavior.

214. MacKinnon would argue further that abortion is another devise which frees men to engage in sex without responsibility.

In the context of sexual critique of gender inequality, abortion promises to women sex with men on the same reproductive terms as men have sex with women. So long as women do not control access to our sexuality, abortion facilitates women's heterosexual availability. In other words, under conditions of gender inequality, sexual liberation in this sense does not free women; it frees male sexual aggression.
seductive mannequins; contraceptives promote exploitation of female bodies without fear or guilt. This combination of pornography and sex free from the constraints of possible procreation makes women targets of sexual objectification, reinforcing the Augustinian precept that women are mere physical entities, and that sexual activity with them is without any redeeming spiritual value. On the superficial level, therefore, the constitutional jurisprudence of contraceptive sex seems to reject the hermeneutic principle of procreation; but deep down both are engaged in the same neurotic enterprise: despiritualization of women.

The objectification of women is also reflected in constitutional jurisprudence regarding homosexual love. As discussed before, constitutional jurisprudence seems to distinguish homosexual sodomy from heterosexual sodomy.\textsuperscript{215} Although homosexuality has no constitutional protection, there are reasons to believe that heterosexual sodomy is protected under the right of privacy. According to Justice Stevens, it might be unconstitutional for a state to prohibit sexual partners of the opposite sex from engaging in sodomy within the precincts of their bedrooms.\textsuperscript{216} This constitutional duality might be explained in several different ways.\textsuperscript{217} An explanation rooted in hermeneutic inversion would root this duality in religious neurosis, which identifies women with the flesh and men with the spirit. Since men are identified with spirit and not with the body, any constitutional protection of male homosexuality would disturb the Augustinian religious order, under which the distinction between body and soul is critical. There can be no sex between spiritual beings; hence male homosexuality is a profound violation of the spiritual order. Compared to male homosexuality, it would appear that both female homosexuality and heterosexual sodomy pose a lesser threat to the hermeneutic order. Since under Augustinian precepts female homosexuality is a union of mere bodies, it does not offend the spiritual order. Likewise, heterosexual

\begin{thebibliography}{99}
\item \textsuperscript{215} See supra note 170 and accompanying text.
\item \textsuperscript{216} Hardwick v. Bowers, 478 U.S. 186, 220 (1986) (Stevens, J., dissenting).
\item \textsuperscript{217} Law, Homosexuality and the Social Meaning of Gender, Wis. L. REV. 187 (1988).
\end{thebibliography}
sodomy involves the use of the female body for sexual gratification. Of course, acts of sodomy breach the traditional procreation principle. Nonetheless, both female homosexuality and heterosexual sodomy are less disruptive of religious neurosis since both, in inverted ways, validate the hermeneutic belief that God created women as sexual objects. This might explain why male homosexuality is ordinarily more threatening to religious neurosis than heterosexual sodomy and even female homosexuality.\textsuperscript{218} This might also illuminate why constitutional jurisprudence tolerates heterosexual sodomy, but not homosexual sodomy.\textsuperscript{219}

V. CONCLUSION

In the past few decades, the constitutional sexual order has begun to drift away from religious neurosis rooted in the Augustinian consciousness. The counter-paradigms of consensual sex and the right of privacy are in the process of dismantling the old structure founded on the singular relationship and the procreation principle. Nonetheless, religious neurosis still is a formidable force. Its conspicuous manifestations may be seen in constitutional jurisprudence. Justices of the United States Supreme Court do not hesitate to invoke the gospels to justify the outlawing of sexual conduct that might be defensible under contemporary norms.\textsuperscript{220} Although legal reasoning rooted in religious neurosis is understandable in a theocratic culture, it does not fit with a jurisprudence founded upon separation of church and state. Because the Augustinian hermeneutics of sexual order continue

\textsuperscript{218} T. Szasz, The Manufacture of Madness 192 (1973) (Szasz argues that, historically, homosexuality is forbidden only for men); H. Hyde, The Other Love: An Historical and Contemporary Survey of Homosexuality in Britain 176-82 (1970) (Hyde shows that lesbianism has not been illegal in Britain.); E. Ettorre, Lesbians, Women, and Society 70-71 (1980) (Ettorre states that lesbianism has historically been viewed as non-existent and therefore non-threatening.)

\textsuperscript{219} As Law has said:

Homosexual relationships challenge dichotomous concepts of gender. These relationships challenge the notion that social traits, such as dominance and nurturance, are naturally linked to one sex or the other. Moreover, those involved in homosexual relations implicitly reject the social institutions of family, economic, and political life that are premised on gender inequality and differentiation.”

Law, supra note 217, at 196.

\textsuperscript{220} See supra text accompanying notes 114-120.
to be a source of law and judicial reasoning, constitutional jurisprudence presents itself as a confused mix of the old hermeneutics and new sexual freedoms. Constitutional jurisprudence recognizes the right of unmarried individuals to use contraceptives, clearly implying a right to engage in nonprocreative sex, but has not held that state adultery and fornication statutes are unconstitutional, and refuses to protect nonprocreative homosexuality. Furthermore, the constitutional protection of pornography that portrays women as sexual objects reveals an inverted form of traditional religious precepts stressing the inferior status of women, contrary to the principle of equal respect. The coherency and viability of constitutional jurisprudence will remain impaired until these defects are addressed and remedied.