

SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC. By Roger Scruton.¹ New York, N.Y.: The Free Press. 1986. Pp. x, 428. \$25.00.

MORALITY, SEX, AND THE CONSTITUTION: A CHRISTIAN PERSPECTIVE ON THE POWER OF GOVERNMENT TO REGULATE PRIVATE SEXUAL CONDUCT BETWEEN CONSENTING ADULTS. By G. Sidney Buchanan.² Lanham, Md.: University Press of America. 1985. Pp. xiii, 227. Cloth, \$23.75; paper, \$11.50.

ARE GAY RIGHTS RIGHT? By Roger J. Magnuson.³ Minneapolis, Mn.: Straightgate Press. 1985. Pp. ix, 137.

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Traditional concepts of gender and sexuality are now very much in controversy in advanced Western societies on grounds of justice that, for Americans, intersect with constitutional values of liberty and equality. The constitutional right to privacy, for example, has been elaborated by the Supreme Court to immunize contraception and abortion from criminal penalties that reflected traditional conceptions of the proper role of sexuality in general and women's sexuality in particular. More recently, a sharply divided Supreme Court declined to extend the constitutional right to privacy to consensual homosexual relations, expressly legitimating the traditional moral attitude. Elsewhere, on grounds of equal protection, the Court has aggressively scrutinized and struck down gender classifications that reflect traditional notions about women's role, but the federal judiciary has extended no comparable scrutiny to classifications on the basis of sexual preference⁵ that reflect traditional views of homosexuality.

The three books reviewed here endeavor to defend traditional sexual morality. They offer a spectrum of conservative stances: Roger Scruton's measured and highly tentative skepticism; G. Sidney Buchanan's centrist moderation; and Roger J. Magnuson's attack on the idea that homosexuals have any distinctive rights, let alone constitutional rights.

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5. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

Both Buchanan and Magnuson write from the perspectives of Christian sexual morality, and at crucial points they appeal to Biblical texts and associated interpretive traditions. In consequence, their arguments have less value to constitutional lawyers than arguments that rely on more broadly accepted traditions.⁶ Indeed, constitutional guarantees of toleration require, I believe, that governmental coercion be justified by reference to something broader than Christianity, or it will fail constitutional tests of sectarian neutrality.⁷ Since Buchanan and Magnuson are so naively unmindful of these constitutional principles, their arguments are, constitutionally speaking, barely literate.

In contrast, Scruton's argument is studiously secular and thus is of correspondingly greater interest for purposes of American constitutional law, although his thesis is not about law as such, and as an English philosopher he has no apparent interest in American constitutional law. Accordingly, I will examine Scruton's arguments at greater length than the others.

I

Scruton begins *Sexual Desire* ominously by stating his objective as follows:

Whether or not the reader comes to agree with my particular conclusions, he will, I hope, agree that it need not be *absurd* to condemn homosexual intercourse, fornication, masturbation, or whatever, even though we all have an urge to do these things, and even though there may be no God who forbids them.

Scruton eventually addresses these issues some 300 pages later, but his discussion is tentative, inconclusive, and only loosely connected to his philosophy of erotic experience, which occupies most of the book. The result is the unhappy marriage of a rather aesthetically florid phenomenology of eroticism and Thatcherism. They are, as I hope to show, strange bedfellows indeed.

Scruton's main aim is abstractly philosophical, namely, the philosophical understanding of erotic experience, and the defense of a certain view of it against a range of both ancient and contemporary accounts that, in his view, distort its nature and role. He emphasizes the distinctively imaginative aspect of human, in contrast to animal, sexuality, and characterizes that aspect as an interpersonal intentionality directed at experience of one another's embodiment. The account is not novel, having been suggested earlier by

6. See, e.g., Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985).

7. See generally D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

Thomas Nagel,⁸ and Scruton adds little more than a rather mystifying way of putting the point of reciprocal interest in one another's bodies.⁹ Scruton conceives his account as an alternative both to the Augustinian essentialist view of sexuality as procreational¹⁰ and to the modern reductions of sexuality to physical orgasm that Scruton associates with Freud, Kinsey, Masters and Johnson, and others. In contrast to such views, Scruton affirms eroticism as a kind of imaginatively elaborated communication of sexual interests in one another's bodies.

It is odd to suppose that the integrity of sexual experience requires the interpersonal intentionality that Nagel and Scruton emphasize. Their view has the unacceptable consequence, for example, that any sexual experience in which one of the parties lacks full reciprocal intentionality must be a kind of perversion; this view seems to condemn not only prostitution but every lover who takes too little interest in his partner's pleasure.¹¹ Scruton stretches the concept of perversion to encompass anything that he regards as outside the perimeter of morally defensible sex—masturbation, for example. He thus fails, like many other conservative sexual moralists, to capture the nature and varieties of good sex and begs the question of the morality of variant sexual styles.¹²

Scruton parodies Freud, Kinsey, and Masters and Johnson because he objects to the emancipatory criticisms of conventional sexual morality that their work unleashed, which he interprets as a kind of depersonalization of sexual experience. The point of their work, however, is exactly the converse: conventional sexual morality unreasonably constrains sexual experience within a narrow range (for example, Augustinian procreational sexuality) and thus stultifies the larger role of sexuality as an independently important experience that becomes the humane bond of intrinsically valuable companionate relationships.¹³

8. See Nagel, *Sexual Perversion*, MORTAL QUESTIONS 39-52 (1972).

9. "In the full ardour of desire, each participant is striving to be present in his body, and striving also to view his own striving from a point of view outside it," R. SCRUTON, SEXUAL DESIRE 127. See also *id.* 289-90.

10. For pertinent discussion of Augustine's views and arguments, see D. RICHARDS, SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 37-38 (1982).

11. I take this criticism from Levy, *Perversion and the Unnatural as Moral Categories*, 90 ETHICS 191 (1980).

12. For elaboration of this point, see D. RICHARDS, *supra* note 10, at 97-112.

13. See, e.g., W. MASTERS & V. JOHNSON, THE PLEASURE BOND (1975). For exploration of emancipatory implications of their arguments, see D. RICHARDS, *supra* note 10, at 29-153.

The distinction between animal and human sexuality was a central postulate of Freud's emphasis on the distinctive role of sexuality in human personality:

The abstract account of erotic experience that Scruton offers is, if anything, more spiritually akin to this modernist understanding of sexuality than it is to the traditional Augustinian view. But Scruton interprets his account in a way that ties it closely to conventional sexual practices and attitudes. There is, he argues, no essentialistic truth of the person and therefore no essentialist truth about erotic experience, but only conventional stylizations of that experience. Scruton endorses the conventional stylization that we associate with heterosexual marital monogamy, and he connects it to a larger structure of historically legitimate institutions. His conservatism is like that of the high Tory tradition of Burke and Oakeshott, which (as he puts it) finds its "picture of political order and legitimate government upon a perception of the nature of domestic relations and the erotic bond which underlies them."

But no political tradition is as simplistically homogeneous as Scruton supposes. For example, the British tradition includes, among its glories, the liberalism of John Stuart Mill's *The Subjection of Women* and *On Liberty*, both of which support positions that Scruton eschews. How are we to adjudicate while caught between Scruton's and Mill's explication of the British tradition? And how are we to adjudicate among competing interpretations of the American tradition, which includes the most radical guarantees of separation of secular and religious authority yet devised by the mind of man?¹⁴ Presumably, we must offer arguments about which traditions are better or worse, more just or less unjust, and more humanely civilized or less barbarously cruel and prejudiced.

It is, after all, a distinctive feature of Western religion, ethics, and law that the sense of enduring values is open to new empirical and normative perspectives that often revise old assumptions (for example, the inferiority of women or homosexuals) in the interest of a deeper elaboration of more abstract values of equality and liberty. Scruton dismisses the kind of historical sensitivity that Foucault brought to the study of Western sexual morality, but whatever the

The sexual instinct . . . is probably more strongly developed in man than in most of the higher animals; it is certainly more constant, since it has almost entirely overcome the periodicity to which it is tied in animals. It places extraordinarily large amounts of force at the disposal of civilized activity, and it does this in virtue of its especially marked characteristic of being able to displace its aim without materially diminishing in intensity. This capacity to exchange its originally sexual aim for another one, which is no longer sexual but which is psychically related to the first aim, is called the capacity for *sublimation*.

S. FREUD, 'Civilized' Sexual Morality and Modern Nervous Illness, in 9 COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 181, 187 (standard ed. 1959-1975). For a comparison of the animal and human data, see C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR 199-267 (1951).

14. See generally D. RICHARDS, *supra* note 7.

merits of Foucault's account,¹⁵ it still raises the kind of historical questions that any serious religious, ethical, or legal analysis should bring to these issues.

Except to those who are already in his camp, Scruton's arguments are singularly unconvincing. Consider, for example, his pivotal discussion of sex and gender. Scruton attacks "Kantian feminism," the view that "what I really and fundamentally am, for myself and another, is a person." He rejects this view because he believes that erotic experience belies it: the experience of sex is not an experience of persons simpliciter, but of persons across "a great ontological divide" of gender. Much of our moral and political experience today does not see women in this way, however, and regards the "ontological" weight that Scruton would give gender as a kind of injustice akin to the now discredited use of stigmatizing racial classifications to set off racial minorities as a distinct moral species.¹⁶ Heterosexuals and homosexuals are attracted to women or men, as the case may be, but today the attraction is not polarized around traditional gender stereotypes.¹⁷ Thus, even from the perspective of the phenomenology of eroticism, Scruton's description of sexual experience along rigid gender-defined lines is, as he acknowledges, a highly personal profession of faith in traditional heterosexuality.

Scruton denigrates homosexual erotic love on the ground that one's own gender is unmysteriously "experienced as through and through familiar to you," and thus incapable of the full consummations of erotic experience that only ignite across the "great ontological divide" of gender. What does this mean? That erotic fires blaze only if partners have different sex organs? This sounds like the biological reductionism Scruton deplores elsewhere, and as such it conveys a false picture of human sexual experience, doing violence to the subtle variations of temperament and personality and character that are the differentiating loci of erotic attraction and love, both heterosexual and homosexual.¹⁸ At precisely the point where we

15. See 1 M. FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION*, (R. Hurley trans. 1978); 2 *THE USE OF PLEASURE: THE HISTORY OF SEXUALITY*, (R. Hurley trans. 1985); 3 *THE CARE OF THE SELF: THE HISTORY OF SEXUALITY*, (R. Hurley trans. 1986).

16. The most brilliant exposition of this argument remains Mill's. See *THE SUBJECTION OF WOMEN* (1869). For a striking judicial exposition of this argument, see Justice Brennan's opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

17. See, e.g., B. EHRENREICH, E. HESS & G. JACOBS, *REMAKING LOVE: THE FEMINIZATION OF SEX* (1986); H. GOLDBERG, *THE HAZARDS OF BEING MALE* (1976); J. PLECK & J. SAWYER, *MEN AND MASCULINITY* (1974).

18. On the continuities in homosexual and heterosexual sexual experience and bonding, see P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES* (1983); W. MASTERS & V. JOHNSON, *HOMOSEXUALITY IN PERSPECTIVE* (1979).

need an argument as to why one tradition of sexual experience is to be preferred over another, instead we get an intuitive appeal to a now embattled conception of sexual experience, which masquerades as the measure of all eroticism.

Scruton glorifies "[t]he nuptiality of desire," including a rich repertoire of marital sexual techniques (for example, fellatio and cunnilingus), and he justifies much sexual morality as a protection against jealousy, "the greatest of psychical catastrophes." But surely these interests cannot be narrowly limited to heterosexual relationships in the way that Scruton assumes. Doesn't the failure of law to accord similar marital protections to homosexuals represent a refusal to respect their interests in "the nuptiality of desire"?

Although Scruton's criticisms of homosexuality are considerably more tentative than one might expect, he does regard it as intrinsically imperfect. This is because homosexuality denies Scruton's phenomenological premise "that gender distinctions play a constitutive role in the sexual act." But Scruton's account is, even on its own terms, strained and unconvincing. The general form of Scruton's philosophy of the erotic (namely, a reciprocal intentionality of mutual embodiment) is, as Nagel's more persuasive account shows,¹⁹ quite consistent with homosexual love, for such love may as fully express erotic reciprocal intentionality as the most fiery heterosexual lovemaking. Ultimately, Scruton offers little more than conservative dogmatism.

II

G. Sidney Buchanan's *Morality, Sex, and the Constitution* is an avowedly Christian perspective on the power of government to regulate sexual morality. Buchanan's conception of enforceable sexual morality rests on two alternative grounds: (1) the right of democratic majorities to impose their moral views, or (2) the enforcement of sectarian religious views. But neither Buchanan's majoritarianism nor his sectarianism is a legitimate principle of constitutional law in the way he supposes.

The scope of the majority rule principle in American constitutionalism is circumscribed by procedural and substantive limits that are designed, in the terms of Madison's classic argument, to curb the powers of "factions." As defined by Madison, a faction is "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citi-

19. See Nagel, *supra* note 8, at 50-51.

zens, or to the permanent and aggregate interests of the community."²⁰ We think today of racism and sexism as exemplifying such factionalized prejudices; and we regard the equal protection clause as a prohibition on the enforcement of moral views that express them. But as Madison clearly saw, religious sectarianism also exemplifies the evils of faction. The religion clauses of the first amendment—which Madison authored—are substantive constraints on the expression of sectarian religious views through law.²¹ Therefore, it does not suffice to cite the principle of majority rule as the ground for enforcing moral views through law, for such majoritarian moral views may flout essential constitutional principles and not provide a proper basis for law.

Unfortunately, the only account Buchanan offers of enforceable public morality, beyond the majority rule principle, is an appeal to sectarian morality. This becomes quite clear in his defense of the constitutionality of the continuing prohibition of same-sex marriages. Although Buchanan defends the expansion of the constitutional right to privacy to homosexual acts, he draws the line at homosexual marriage, which he regards as too great an attack on a majoritarian moral value. But Buchanan explains the moral value in question in terms of a religiously sacramental conception of marriage, which he freely concedes does not have a secular rational basis. If Buchanan cannot offer a secular argument for denying a public good like marriage to homosexuals, he is using the law to deny fair respect to the rights and interests of a minority group for the sake of the heterosexual majority that is crudely insensitive to its claims. I believe it is precisely this factionalized oppression that flouts core principles of American public law.

Roger J. Magnuson's *Are Gay Rights Right?* is, unlike Buchanan's moderate and centrist argument, an attack by a religious fundamentalist on the very idea of gay rights. Magnuson not only simplifies the theological debates over the alleged biblical condemnations of homosexuality,²² but naively supposes these debates to be dispositive on issues of constitutional justice in the United States. That would be enough to remove this book from serious consideration as a constitutional argument. But the constitutional flaw of the book cuts much deeper. For Magnuson, homosexuality is a kind of heretical attack on fundamental values, and he wants to eradicate this subversive menace. This is the sort of crusade that

20. THE FEDERALIST No. 10 at 78 (J. Madison) (C. Rossiter ed. 1961).

21. For more extensive analysis, see D. RICHARDS, *supra* note 7, at 67-162.

22. See J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY (1980).

the Bill of Rights should prevent: "[h]eresy trials are foreign to our Constitution,"²³ and there is nothing more erosive of the spiritual fabric of American public law than to exile any group from the basic rights of all Americans on the ground that their beliefs, or speech, or way of life is a heresy to the true American tradition. We need to be more, not less, sensitive to the constitutional claims of homosexuals today precisely because they are unjustly targeted as vulnerable political exiles from the constitutional community of equal rights under law.²⁴

SUING THE PRESS. By Rodney A. Smolla.¹ New York, N.Y.: Oxford University Press. 1986. Pp. 277. \$19.95.

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Rarely is a Supreme Court decision greeted as enthusiastically as was *New York Times v. Sullivan*. For years, Supreme Court dicta had placed libel and slander outside the protection of the first amendment, leaving the print and broadcast media subject to potentially huge libel judgments under the vagaries of state libel laws. Concluding that a rule of law that required newspapers to guarantee the truth of all assertions inhibited public debate, the Court in *New York Times* held that the first amendment bars public officials from recovering damages for defamatory statements without proof that the challenged statements were made with knowledge of their falsity or with reckless disregard for whether they were true or false. In repudiating the old doctrine of seditious libel and proclaiming the free and unfettered exchange of ideas to be the hallmark of a society dedicated to self-government, the Court won overwhelming approval for a decision considered by knowledgeable observers to be an important step toward the ideal of an open and democratic society. Moreover, the decision appeared to herald the emergence of the media, the federal courts and the black civil rights movement as a powerful coalition destined to change the very nature of American politics. Hence the decision in *New York Times* not only nationalized the libel laws of the fifty states in the name of more effective self-government, but it also symbolized the dynamic political and social changes of the 1960s. Small wonder that as astute a critic as

23. *United States v. Ballard*, 322 U.S. 78, 86 (1944) (Douglas, J., writing for the Court).

24. I develop this argument at greater length in Richards, *Constitutional Legitimacy and Constitutional Privacy*, N.Y.U. L. REV. (forthcoming).

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