Money, Sex, and Speech: The Law of Speech and Law as Speech

DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA. By Steven Shiffrin.[†] Princeton University Press, 1999. 205 pp. ($19.95)[‡]

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I. Introduction

Systems providing legal protection for "speech" or "expression" also, inevitably, establish hierarchies whereby some speakers and/or some forms of expression are not only unprotected, but are subject to particular criminal sanctions. Countless volumes of both law reports and scholarly legal literature are filled with debates about where and how to "draw the line"—or accurately, first how to draw the line between or less protected speech, and then how to draw the significant line separating illegal from legal speech. Some of these debates ask, what exactly counts as libel? Are state-set limits on campaign spending limits on freedom of speech or tools for enhancing public debate? Are state laws against flag burning infringements of the right to forcefully express dissent? How much anger and racial prejudice can be contained in a particular instance of expression before it is permissible for local or state legislators to draw up laws or ordinances prohibiting the said act of expression on the grounds that violence is likely or probable? To what extent can municipal regulators use zoning rules to silence the "adult entertainment" industry?[1]

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1. Campaign spending limits were declared unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976), in a decision challenged by many legal scholars. The Texas flag-burning statute was declared unconstitutional by a narrow majority of the Supreme Court in *Texas v. Johnson*, 491 U.S. 397 (1989). In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court ruled that a municipal ordinance banning such racist activities as burning a cross on a black family's lawn was unconstitutional. This decision has been the subject of countless critiques. The use of zoning laws to regulate sexual speech was approved by the U.S. Court of Appeals, Second Circuit, in 1999, in *Hickerson v. City of New York*, 997 F. Supp. 418 (S.D.N.Y. 1998).

The legal, social, political, and philosophical issues involved in adjudicating these cases—which in the United States are generally classified as First Amendment cases—are complex and fascinating indeed, and it is not suprising that so much journalistic and scholarly commentary has been generated by them. And yet, someone looking at these debates from outside the United States can only be struck by the fact that these ever-fascinating legal debates neglect to directly address, much less to challenge, some fundamental assumptions about the relationship between speech and law.[2] One such assumption is that some types of speech are worthy than others. This distinction is usually put in binary form; that is, "high-value" speech is contrasted to "low-value" speech, or speech close to the "core" of the American political system is contrasted with speech thought to be on "the periphery."[3]

In the 1950s and 1960s the main debate was that between those who thought that all speech is worthy of legal protection and those who argued that the First Amendment can be construed as setting up a two-tier system.[4] The real debate these days, however, is not between First Amendment absolutism and those who would separate protected from unprotected speech—high from low. The key question now is whether the most traditional, most distinctly American way of drawing the line—namely separating political speech from non-political, unprotected speech—still makes sense today, given the realities of mass communications and the realities of politics.[5]

This Review, using Schiffrin as a starting point, suggests that law, which is itself speech, must be examined *as* speech before it can develop a modern theory of the protection of other speech. Part II describes the broad contours of Schiffrin's view of dissent, in particular by contrasting his view with that of radical scholars. Part III explores the limit of the utility of his views by evaluating the shortcomings inherent in any Rationalist conception of discourse such as his own. Part IV broadens the

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2. An exception to this general rule is Stanley Fish's careful critique of the theories of language implicit in American judicial practice generally and in First Amendment debates specifically. *See* STANLEY FISH, DOING WHAT COMES NATURALLY (1989); STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH (1994).

3. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-2, 12-18, at 792, 928-29 (2d ed. 1988) (noting that the Court has adopted a two-tier analysis when evaluating content-based restrictions on free speech whereby the speech at issue is classified as either high value, enjoying the strict scrutiny extended to core political speech, or so low value that it enjoys no first amendment protection at all and is subject to a minimum due process standard).

4. *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 351, 349-52 (1996) (explaining the Warren Court's progression away from the bifurcated public-speech/private-speech doctrine toward First Amendment "absolutism" in the 1950s and 1960s).

5. One influential account of the way in which social changes necessitate revising classic First Amendment doctrine is OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996).

analysis by systematically examining the ways in which Rationalist and Christian prejudices against avarice and lust drive the legal categorization of speech, in Schiffrin's book and elsewhere. Part IV(A) reflects upon law's myopic, unexamined perspective on its own speech; Part IV(B) traces the impact of law's unconscious and unexamined adoption of Christian-rationalist s in its traditional "obscenity"/"offensiveness" treatment of pornography. Part IV(C) describes the newer, "harm-based"/"objectivist" approach to the regulation of pornography that emerged, largely as an outgrowth of the Mackinnonite wing of the feminist movement, in the 1970s; an approach that, in the course of its argument against pornography, takes pornography seriously than the traditional "obscenity" treatment and thus, ironically, tends to justify protecting pornography against attempts to prohibit it. Part IV(D) contrasts the treatment of pornography with the treatment of other potentially harmful or offensive types of speech, using the analogy of the "seven deadly sins" to suggest the extent to which law has failed to do a meaningful job of discriminating among categories of speech deserving various levels of protection. Part V concludes by reiterating the need for legal actors to reflect on law's status as itself a form of speech.

II. Shiffrin's Theory of "Dissent"

Steven Shiffrin's new book is a very thoughtful argument for a way of drawing the protected/unprotected line that takes into account the rise of mass communications. He argues that privileging "political" speech is neither feasible nor desirable. It is not feasible because the world of the soapbox speaker in the marketplace has been replaced by a consumer society in which politics has become subject to marketing and advertising while advertisers have acquired political rights.[6] But in any case, privileging the elusive sphere of the political is not desirable, he argues, because that way of drawing the line does not recognize that democracy requires close attention to power differentials.[7]

The traditional, politically centered theory of the hierarchy of speech insists that CBS, the Republican Party, and the streetcorner pamphleteer promoting animal rights are all basically on the same (political) playing field.[8] Shiffrin first shows that there are many social and legal reasons for doubting the existence of a distinct field of the political.[9] Then he goes on to argue that even if we could distinguish "the political" with some legal clarity, American law should in any case acknowledge that some if

6. Pp. 41-48.
7. P. 48.
8. *See, e.g.*, FISS, *supra* note 5.
9. P. 42.

not most players cannot even get onto this field at all, given the realities of campaign spending and television advertising.[10]

To deal with the problem of access to the field, Shiffrin elaborates his "dissent perspective," a set of principles for prioritizing speech and deciding which forms of speech need state protection than others. "[D]issent . . . mean[s] speech that criticizes existing customs, habits, traditions, institutions, or authorities."[11] Under this approach, traditionally stigmatized or marginalized perspectives would be regarded as worthy of state protection than those views that are already well known and are easily found in the mass media.[12] Under this approach, then, it would not be permissible for the National Endowment for the Humanities to be told by Congress that it had to take "decency" into account in funding decisions (as has happened lately) because that would tend to marginalize gay art and other minoritarian, anti-establishment forms of communication.[13]

In many ways Shiffrin's views converge with those developed in recent years by critical race theorists, feminist legal scholars, and gay writers on legal issues. However, there are two important differences between his perspective and the general approach to hate speech and "words that wound"[14] developed by critical race theorists and their allies. Outlining these differences is probably the best way to explain what makes Shiffrin's suggestions distinctive.

First, a dissent perspective is formalist to the extent that it cannot make clear legal distinctions between forms of dissent from opposite ends of the spectrum. The KKK's speech would, in Shiffrin's scheme, probably qualify for the status of "dissent"—although Shiffrin, wisely, states that because there are good grounds for regarding the KKK's speech as continuous with traditional American racism, adopting a dissent perspective does not tell us a priori how a particular case involving the KKK ought to be resolved.[15] It may be that the KKK would qualify for the status of dissenting speech, depending on the context; but insofar as white supremacy is much closer to the mainstream of American culture than, say, Afrocentrism, it would be very difficult for the KKK to prove that they do indeed dissent.

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10. P. 44.

11. P. xi.

12. Pp. xi-xiii.

13. Because Shiffrin's book was written before the Court's decision in *NEA v. Finley*, 524 U.S. 569 (1998), was handed down, he does not analyze this case.

14. MARI W. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

15. *See* pp. xii-xiii ("[A] focus on dissent in [the white supremacist] context would not offer clear-cut guidance. Tolerating hate speech on this analysis should be a pragmatic concession to the needs of equality.").

The bottom line is that although the dissent perspective is meant to force courts to pay attention to the specificities of American history, "dissent" is nevertheless primarily a formal category—as it is meant to be, because Shiffrin takes very seriously the legal doctrine that laws and government actions should not discriminate among points of view.[16] In Shiffrin's perspective, the main distinction that ought to be taken into account in differentiating protected from unprotected speech is that between the ordinary everyday prejudice that he thinks does not deserve particular protection, on the one hand, and on the other hand, views that radically challenge the habitual, nonextreme racism that easily coexists with professions of faith in equality—the "commonsense" racism that has crucially shaped American culture and society.[17] Whether Shiffrin's emphasis on majority-minority divisions to the detriment of substantive criteria makes him a liberal or a radical is a question his readers may ask.

Secondly, even when Shiffrin's scheme would arrive at the same conclusions as critical race theory and radical feminism, his ground would be different. Critical race theory argues, along lines developed somewhat earlier in some feminist jurisprudence, that there should be less consideration, in the courts and in law reform, of the character of the speech in question—whether it is political or not, aimed at an individual or not—and consideration of the effects of speech, particularly effects that amount to injury and harm. This move away from the world of speech and toward the real world of social harm, a move connected to a larger jurisprudential move from formalism to pragmatism, is one that Shiffrin does not want to make even though he would concur with many conclusions drawn by pragmatists. Shiffrin provides a complex if sometimes confusing critique of those who argue for the harm-based approach and shifts feet rather too quickly from practical arguments about backlash from low-income whites to strictly legal arguments about the difficulties of proving injury caused by speech.[18]

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16. Pp. 8-10.

17. The phrase "commonsense racism" is drawn from HIMANI BANNERJI, RETURNING THE GAZE: ESSAYS ON RACISM, FEMINISM AND POLITICS (1993).

18. In his own words:

> From the perspective of many millions of Americans, to enact racist speech regulations would be to pass yet another law exhibiting special favoritism for people of color. What makes this kind of law so potentially counterproductive is that its transformation of public racists into public martyrs would tap into widespread political traditions and understandings in our culture. . . . Millions of white Americans already resent people of color to some degree. To fuse that resentment with Americans' love for the First Amendment is risky business.

Pp. 82-83 (footnotes omitted). It is somewhat surprising to see Shiffrin, who on other issues is willing to defend dissenters wholeheartedly, suddenly bend backwards to accommodate the prejudices of the white majority.

Underlying his skepticism about the assaultive speech approach is a deep and sincere faith in the First Amendment itself. Shiffrin believes that even if one cannot separate political from nonpolitical speech, one can and should separate speech from nonspeech[19]—a belief that is, we might add, at the core of much of the common law, not just the First Amendment.[20] Extremely racist communications aimed at individuals (such as the infamous cross-burning in the city of St. Paul)[21] can in Shiffrin's view be banned because they directly affect Black Americans' ability to participate in public life[22] and because, importantly, there is a specific victim.[23] But the general, non-targeted rantings of a KKK speaker on television should be allowed, as should the views of members of the Nation of Islam, partly (or perhaps mostly, Shiffrin is unclear on this point) for the purely pragmatic reason that any regulation of hate speech is bound to be used by whites against Afrocentric and other dissenting forms of speech about race.[24]

Political differences aside, the main philosophical point here is that, unlike critical race theorists, Mackinnonite feminists, and queer legal writers, Shiffrin does not want to blur the line between speech and conduct. Although he is not explicit on this point, it is clear that for him the blurring of that line amounts to nothing less than the destruction of law as a distinct entity, and he casts aspersions on "postmoderns" for making this double threat to speech and to law.[25] Shiffrin believes in free speech (or "dissent") with the same fervor that he believes in law, and for the same reasons. Not all law is about dissent, of course, but for him, that which is uniquely American about law is precisely dissent: rational speech challenging convention and prejudice.

For him, dissent (like law itself) is purely intellectual. It is composed of ideas: it is the activity that eighteenth-century philosophers called, without a trace of irony, "the light of reason." And for him, the main problem with the United States today is that large corporations and a few well-funded political parties and groups have monopolized debate, marginalizing the dissenters who, in his view, have always renewed American culture and kept it true to its revolutionary and democratic origins.[26]

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19. P. 46.

20. The split between free speech and regulated conduct is a basic building block of liberal law and politics. For an early influential justification of this opposition, see IMMANUEL KANT, WHAT IS ENLIGHTENMENT? (Lewis White Beck trans., Macmillan 1990) (1784).

21. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

22. Pp. 76-79.

23. Shiffrin would ban burning crosses on someone's lawn but would not ban "nontargeted hate speech." P. 80.

24. Pp. 80-87.

25. Pp. 27-31.

26. Pp. 111-12.

III. Shiffrin and the Rationalist Conception of Discourse

Shiffrin is sociologically sophisticated in seeing that, especially in the wake of identity politics and what is derisively known as lifestyle politics, it is no longer possible to divide speech about political subjects (the president, the law, wars) from speech about private life, lifestyle, and habits.[27] But, like law itself, Shiffrin is linguistically not very sophisticated. His approach relies on an eighteenth-century theory of language as a transparent, potentially fully rational means for communicating ideas that is as outmoded as the eighteenth century civic republican vision of the pre-electricity, pre-television era speaker shouting in the public marketplace. Adopting the naive commonsense view that words are mere vehicles for ideas, Shiffrin does not make his philosophy of speech explicit, but it is what distinguishes him from both postmodern legal writers and critical race theorists. And one can gain a glimpse of the implications of holding such a naive realist theory of meaning and communication when one considers that for all his radicalism in attacking conventional distinctions between "high" and "low" speech, he never questions the basic legal assumption that pornography is spurious speech.[28]

In the rationalist paradigm within which Shiffrin articulates his passionate belief that the protection and encouragement of dissent is the most important feature of American law, dissent is narrowly construed as rational—as systematically articulated ideas about a serious intellectual topic. This is of course not unique to Shiffrin: the belief that mainstreams and majorities may fall into unconscious habits and prejudices but that it is up to dissenters to use their reason to question ideas is at the heart of John Stuart Mill's theory of liberal democracy.[29] Mill's approach is typically nineteenth century, and to that extent it is pre-Freudian, pre-Nietzschean, and pre-Wittgensteinian. It assumes that there is a basic, fundamental split between the mind and the body, reason and passion, conscious rational thought and unconscious habit (or prejudice), and that dissenters are on the side of the mind, reason, and consciousness.[30]

This binary opposition between mind and body, reason and passion (which in J.S. Mill assumes a distinctly ethnocentric shape because the

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27. P. 42.

28. Shiffrin constantly refers to current obscenity law to show that courts could easily justify more regulation of nonobscene speech, *see, e.g.*, pp. 9, 61, but he never challenges the basis of obscenity law.

29. *See generally* JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hacket Pub. Co. 1978) (1859).

30. J.S. Mill's assumption that self-government can only be granted to those who know how to control their low passions—those who are already on the side of the high—is critically examined in Mariana Valverde, *"Despotism" and the Ethical Liberal Subject*, 25 ECONOMY AND SOCIETY 357, 357-72 (1996).

English are said to be furthest from the "state of nature," that is, most civilized, rational, and conscious)[31] underlies Shiffrin's unquestioned belief that pornographic films and magazines, and the sex industry generally, are not possible candidates for the category of "dissent."[32] The J.S. Mill-like dualism of mind opposed to body may also underlie his classification of commercial speech as generally undeserving[33]—although in this instance, it is difficult to say whether the anticorporate argument is based on a left-wing suspicion of corporations, or rather on an older philosophy (curiously persistent in American law) that regards communications motivated by profit as morally suspicious. Either way, to an old-fashioned democratic theorist such as Shiffrin, who is passionately concerned about the declining opportunities for dissent in American culture,[34] avarice is as bad as lust.[35]

As readers of George Eliot and Trollope know, Victorian highbrow culture invariably portrayed avarice and lust as the twin dangers lurking behind the façades of bourgeois respectability. Indeed, the rejection of avarice and lust in favor of honesty, thrift, and marriage for love rather than for money was precisely what constituted the novel as "high" culture rather than "low"—a linguistic usage not unrelated to American law's distinctions between high-value and low-value speech.[36] This highbrow prejudice against the two deadly sins regarded as most likely to distract the populace from serious political debate is something that progressive rationalists like Shiffrin share with conservatives.

If Shiffrin's highly intelligent, very nuanced defense of the dissent perspective convinces some people to abandon the increasingly futile effort to distinguish political from nonpolitical speech, it will have served a useful democratic function. Nevertheless, his dissent perspective has philosophical feet of clay. First, it reproduces and relies upon the questionable binary oppositions of mind vs. body and reason vs. passion that have shaped Western civilization but have been thoroughly deconstructed by feminism, anthropology, and psychoanalysis, each in a different way.[37]

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31. *See* Valverde, *supra* note 30, at 361.

32. Pp. xi-xii.

33. Pp. 32-48.

34. Pp. 121-30.

35. Pp. 32-48.

36. An influential critique of the assumption that cultural practices (including speech) can easily be divided into "high" and "low" is PETER STALLYBRASS & ALLON WHITE, THE POLITICS AND POETICS OF TRANSGRESSION (1986). A more strictly psychoanalytic exploration of the high/low binary is JULIA KRISTEVA, THE POWERS OF HORROR: AN ESSAY ON ABJECTION (1982). These approaches have been used to explain the history of obscenity law, and to illustrate the deeply political character of pornography, in articles in THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500-1800 (Lynn Hunt ed., 1996).

37. ELIZABETH GROSZ, VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM 24 (1994) is but one example.

Secondly, it blithely ignores all the developments in the philosophy of language since Nietzsche and Wittgenstein.[38] Like all forms of legal formalism, the dissent perspective implicitly presupposes a rationalistic theory of language as pure "naming" that has been abandoned within philosophy, and an equally rationalistic theory of human action that is at the very least open to debate.

The dissent perspective, not surprisingly, does not seem to be any self-consciously aware of its own basis in an outmoded philosophy of language than other kinds of legal formalism. This can be seen in the contradictions found in Shiffrin's book and in other equally rationalist tracts regarding the question whether distinctions such as high vs. low and core vs. periphery are legal inventions or are law's recognition of prelegal situations and values.

IV. How Rationalist and Christian Prejudices Against Avarice and Lust Drive the Legal Categorization of Speech

A. *Law as Speech*

That pornography is a low-value speech form, whether because it is not political or because it is not dissent or because, as Canadian Chief Justice Brian Dickson put it in reference to antisemitic statements, it has a "discounted" value,[39] is of course true if we look at the way that such statements are dealt with in law. But is law merely reflecting and acknowledging the prelegal value of such speech? Or does law itself put the discount ticket on pornography? Shiffrin shares the general tendency to schizophrenia on this point, sometimes writing as if law's job is merely to recognize a prelegal fact (in his case, that some views have a great deal power and influence than others)[40] but at other times writing as if the First Amendment actually creates the very category of dissent that is later found to be of higher value than other categories.[41] Other people who defend different criteria for distinguishing high from low speech (law and economics proponents and proponents of politically centered perspectives) are equally ambivalent about whether law creates the high-low distinction for purely legal reasons or whether social reality is prelegally divided in

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38. Current tools for the analysis of meaning are covered in a relatively accessible manner in CATHERINE BELSEY, CRITICAL PRACTICE (1980) and KAJA SILVERMAN, THE SUBJECT OF SEMIOTICS (1983). On Wittgenstein's transformation of linguistic philosophy, see B. RUNDLE, WITTGENSTEIN AND CONTEMPORARY PHILOSOPHY OF LANGUAGE (1990) and DAVID G. STERN, WITTGENSTEIN ON MIND AND LANGUAGE (1995).

39. R. v. Keegstra [1990] 3 S.C.R. 697, 785.

40. *See, e.g.*, p. 41 ("Tobacco advertising is not an instance of the individual striking out against the current. Instead, it is an example of the powerful influencing the market . . . .").

41. *See, e.g.*, p. 10.

that way.[42] This crucial ambivalence, shared by many who otherwise disagree on everything about speech and law, is a symptom of law's systematic failure to reflect upon itself as a form of communication.

Too busy adjudicating issues of speech, legal commentators forget that law is itself speech. Shiffrin's book, and the literature on the First Amendment as a whole, are so concerned about how law governs speech that they repress fundamental questions about law's speech. Does legal speech create entities, in the same way that advertising language creates identities out of nothing (the Gap teenager) and conjures specific desires into being (the Big Mac attack)? Or does law's language merely name that which already exists? to the point: why are so few commentators asking that question?[43]

Law's assumptions about speech require a much thorough examination than is possible within the terms of First Amendment discussions. To ask questions about law *as* speech, it is necessary to approach the issue in a circuitous way, through a detailed consideration of the place of desire and emotion not only in law but also in legal scholarship.

Is law's language the eighteenth-century rationalist language of "naming"? Or is it a twentieth-century language of performativity? Legal scholarship is of limited help here because law's sense of itself as a distinct language is rarely if ever made explicit. Legal language, like all language, constitutes the world, as Wittgenstein showed in great detail;[44] but it also constitutes itself in and as part of the world—not surprisingly taking up a position as the most valuable of all speech.

B. Law's Traditional Treatment of the Moral/Dissent Approach to Discounting Pornography

Because law does not ask about the status of its own speech, our inquiry into how law constructs itself as higher than high-value speech by devaluing other people's speech cannot begin by asking, as does most of

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42. That many contradictions in First Amendment law are due to law's failure to recognize that it *creates* distinctions (such as high vs. low speech) is argued at length in STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 2.

43. Along with Stanley Fish, *see supra* note 2, a thinker who has reflected deeply about the "performativity" of law's speech is Judith Butler, and we are here indebted to her analysis. *See* JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE (1997); *see also* DRUCILLA CORNELL, TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE (1993) (developing the implications of post-Wittgensteinian approaches to language for law, albeit without directly addressing either the regulation of speech or the character of law's own speech); PETER GOODRICH, OEDIPUS LEX (1995) (discussing law's subordination of bodily expression).

44. *See generally* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 2-31 (G.E.M. Anscombe, trans., Macmillan 1970) (1953).

the First Amendment literature, what makes some speech qualify for the exalted status of "protected." We are led here to take the opposite tack, asking instead what makes some kinds of communication or expression appear before law as "discounted," as the lowest of the low. Money and sex, it will be shown, are automatically considered to "lower" speech in virtually every scheme to regulate speech that exists or has been proposed. With regard to money, all common-law jurisdictions, including the United States, are still busy reenacting the Christian prejudices about money as filthy lucre that have, somewhat schizophrenically, always co-existed with or less grudging admiration for money-makers. In the United States, the corporation as a legal subject has amazing powers, and yet a lingering populist fear of concentrated wealth is expressed in antitrust law. If antitrust cases and million-dollar damage awards against negligent corporations provide outlets for the populist distrust of wealth that in other countries is channelled into social democratic parties, First Amendment cases also act as a pulpit from which both conservatives and liberals can proclaim—rather sanctimoniously in the case of pro-corporation conservatives—that the Republic is not based on the almighty dollar but on unselfish devotion to the idea of public-spirited, rational, disinterested debate.[45]

If American law has, even while supporting capitalist development, provided opportunities for Sunday-morning denunciations of merchants in the temple (by classifying commercial speech as "low value," among other things), thus managing to simultaneously castigate and tolerate the deadly sin of avarice, it has been consistently suspicious of sexual desire—the deadly sin of lust—as a motive for action. The criminal law, in many American states, continues to prohibit certain kinds of expressive conduct even when carried out in private among consenting adults if this conduct is construed as sexual and if it is not "redeemed" by socially approved extra-sexual factors.[46] The low status of sex rubs off on speech about sex. Pornography's low status in the hierarchy of speech, though now increasingly justified under the rubric of "risk of harm," is still rooted in the fact that sex, while by no means hidden, remains "dirty."[47] Just as sodomy is tolerated in some American state laws in the case of

45. See the evocation of unselfish devotion to the flag as the basis of the Republic in the rhetorical fireworks of the dissent in the flag-burning case, *Texas v. Johnson*. 491 U.S. 397, 423 (1989) (Rehnquist, C.J., dissenting) (quoting the national anthem in its entirety).

46. First Amendment scholars would do well to peruse state statutes on public lewdness, sodomy, indecency, and so forth. Even if seldom enforced, they amount to an extraordinary genre of legal speech about sex. *See generally* RICHARD A. POSNER & KATHERINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS (1996).

47. For a brilliant analysis of the vagueness of "harm" in this context, see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

heterosexuals, dirt is generally tolerated in the case of art. But dirt that cannot redeem itself by close association with art, politics, or science is not protected speech and is indeed not even regarded as speech in many cases.[48] Any activity that is regarded as primarily appealing to lust and to avarice is then doubly damned. The fatal conjunction created by the intersection of money and sex, avarice and lust, then acts to damn those (particularly women and sexual minorities) who are or are thought to be inhabitants of that location.[49]

A very unusual case from the Ontario Court of Appeal at first appeared to depart from the traditional approach to signification by regarding a woman's removing her shirt in public as a form of protected speech.[50] Nevertheless, despite this case's challenge to the conventional classification of speech about or from the body as low, women sex trade workers have not been able to benefit from this precedent to fight off indecency charges.[51] The woman who took off her shirt managed to present herself as a respectable political speaker, someone making a political speech without sexual content about indecency laws discriminating against women. But ordinary women who take off their shirts in the course of their work—sex trade workers—continue to be regarded as contaminated by money as well as sex, and so they are not deemed to be speaking subjects, much less subjects of protected speech.[52]

There are, of course, deadly sins other than avarice and lust. For example, it may be that the Protestant suspicion of sloth and romanticization of thrift is at the heart of regulations limiting both gambling and casino advertising. But the best evidence for the argument that avarice and

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48. The Supreme Court's still-current decision on obscenity, *Miller v. California*, 413 U.S. 15 (1973), has great difficulty deciding what obscenity is, but in the end the operative definition is "hard core" sexual images that "lack serious literary, artistic, political, or scientific value"—a curiously negative definition. *Miller*, 413 U.S. at 24, 27. "Hard core," incidentally, is a category treated in law as existing prelegally, but as Linda Williams's brilliant study of the evolution of pornographic films in the 1970s shows, LINDA WILLIAMS, HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE" 88-91 (1989), the porn industry enshrined "hard core" sex largely in response to the law's moves. *See also* A. KUHN, CINEMA, CENSORSHIP AND SEXUALITY (1988).

49. *See, e.g.*, LESLIE J. MORAN, THE HOMOSEXUAL(ITY) OF LAW (1996); CARL STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE (1995).

50. R. v. Gowan, No. 97-20544, 1998 W.C.B.J. LEXIS 7632 (Ontario Court of Justice, Mar. 3, 1998).

51. *Id.*

52. The Ontario Court of Appeal decision was *R. v. Jacob*, [1996] 112 C.C.C. (3d) 1. The Supreme Court of Canada, by contrast, ruled that not only the speech but also the wellbeing of strippers in a bar was not relevant to the determination of indecency, a decision that performed the very objectification of women's bodies that the court claims to abhor. R. v. Mara and East, [1997] 115 C.C.C. (3d) 539. These two decisions show that the Supreme Court's earlier decision in *R. v. Butler*, [1992] 1 S.C.R. 452, to move away from a moral-offence standard for obscenity to a "risk of harm" standard did not clarify the law or eliminate ambiguity because judges were still the authorities on what is risk and what is harm. *See* R. v. Butler, [1992] 1 S.C.R., 452.

lust have pride of place in law's hierarchy of speech lies in the fact that American communities, like Christian-dominated communities elsewhere in the world, have historically been very suspicious of lust and avarice but than tolerant of anger and violence arising out of the deadly sins (racial and religious) pride and (cultural) envy.[53] The litany of deadly sins is not a particularly solid philosophical basis for legal schemes regulating speech in multicultural societies, but if sins are to be legally discouraged, there is no basis for regarding speech thought to be motivated by lust and avarice as less deserving of legislative and judicial sympathy than actions that arise out of envy, resentment, and group pride.

Comparing the relative sanctity of forms of communication thought to constitute speech within American legal and judicial discourse to the much less elevated place of speech within British and Canadian legal rhetoric[54] seems to lead most commentators directly into a discussion of the distinct character of the American *political* system: unlike Britain and Canada, which otherwise have very similar legal systems, the United States is a republic, founded on the principle of popular sovereignty and having much greater cultural regard for individual autonomy. This explanation for the exalted place of speech in American law is then usually deployed to justify the legal hierarchy of speech. If the reason to protect speech is political, then it makes sense to regard directly political speech as worthy in the eyes of the law than other forms of speech.[55]

In the 1930s and 1940s, when some of the key First Amendment cases were brought before higher courts, the typical case involved a political or religious dissident claiming that his or her views were being censored either directly or indirectly.[56] The contingencies of American legal and political history, most importantly the shifting views about whether or not communist speech deserved protection, provided credibility to the theory that the main role of the First Amendment was and still is to protect political speech, especially that of individuals. Today, however, the major cases tend to involve either expressive conduct that does not fit within everyday conceptions of speech—burning a flag, for example, or staging a neo-Nazi march through a largely Jewish neighborhood[57]—or else they

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53. *See* MATSUDA ET AL., *supra* note 14.

54. *See also* KLAUS PETERSEN & ALLEN C. HUTCHINSON EDS., INTERPRETING CENSORSHIP IN CANADA (1999) (providing an overview of legal, bureaucratic, and semi-private speech regulations in Canada).

55. This line of thinking is usually associated with James Madison. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xvii (1993) ("Madison explicitly linked the First Amendment to the American revision of sovereignty and to a particular conception of democracy.").

56. *See* FISS, *supra* note 5; SUNSTEIN, *supra* note 55.

57. *See* Texas v. Johnson, 491 U.S. 397 (1989); National Socialist Party of America v. Skokie, 432 U.S. 43 (1977).

involve the disembodied speech that is the anonymous product of corporations and their advertising consultants.[58] Thus, the boundaries of both of the traditional operative terms—"political" and "speech"—have been severely tested. The meaning and scope of both of these crucial words are likely to be subject to even scrutiny and debate in the future, given that privately owned airwaves and shopping malls have come to replace market squares and streetcorners and that politicians today can barely be said to speak, because it is their "personalities" and their "character" that are now marketed, not their ideas. Many commentators have deplored the extent to which political speech has come to imitate commercial speech,[59] but fewer have noted that discussions about politics increasingly focus on the nonspeech dimensions of candidates (their sex acts, their wartime heroism or cowardice, etc.). In the meantime, commercial communications are still classified as low-value speech, but this inferior form of commu-nication has nevertheless acquired significant protection lately, even a right—in shopping mall cases—to physically exclude from premises that function as town squares the archetypal political speakers and pamphleteers whose freedom was so dear to a previous generation of judges.[60]

In this dizzying reversal of the traditional, eighteenth-century framework for distinguishing between commercial and political spheres, it is curious that the argument that pornography is also political has not been successful. "The personal is the political," feminists argued in the 1970s, and what could be personal and therefore gender-political than the sexual fantasies promoted by pornography? Isn't there a whole political theory of gender and of personal identity, a vision of the good life, a conception of "human flourishing," to use John Stuart Mill's phrase,[61] that is not only implicit but even explicit in pornography? Why should Hugh Hefner's philosophy of the body and of freedom not count as political? Feminist theories about these same subjects undoubtedly are political.

C. The New "Harm-Based" Approach to Pornography

Some recent commentators have grudgingly admitted that pornography can be regarded as promoting an ideology rather than as acting sub-

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58. The deregulation of television advertising—in a welter of contradictory cases whose end result has been that states can ban the broadcasting of casino ads but have otherwise little control over how the broadcast media use their tremendous power—is one of the key areas of First Amendment law in the United States today. *See* pp. 32-48. Even in censorship-happy Canada, tobacco advertisers won a major victory in having the Supreme Court strike down most of the federal law prohibiting tobacco advertising. *See* William Leiss, *The Censorship of Commercial Speech*, *in* INTERPRETING CENSORSHIP IN CANADA (Klaus Petersen & Allen C. Hutchinson eds., 1999).

59. Fiss is one of those. *See* FISS, *supra* note 5.

60. *See, e.g.*, Cologne v. Westfarms Assoc., 469 A.2d 1201 (Conn. 1984). *But see* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1993).

61. MILL, *supra* note 29.

linguistically to produce sexual arousal.[62] Indeed, some feminist antipornography activists have unwittingly promoted pornography to the level of high-value political speech by criticizing it on the basis of its sexist ideology rather than on the traditional ground of indecency and desire.[63] This redefinition ended up backfiring: although American law puts obscenity outside of the universe of First Amendment speech, the judge who invalidated the proposed pornography ordinance designed by Andrea Dworkin and Catharine MacKinnon did so on the basis that the ordinance was an unconstitutional restriction based on "viewpoint."[64] Efforts to delegitimize pornography on feminist grounds may unwittingly give pornography the legitimacy of speech—hate speech, perhaps, but hate speech is not criminalized anywhere in the United States as long as it does not "incite" anyone and it is, on the whole, less regulated than pornography.[65]

If anyone wants to simply get rid of the stuff, old obscenity law is probably much effective than any of the new rationales. In addition to the philosophical questions it raises, the newer definition of pornography as a message about sexual inequality that may or may not (like racist speech) cause harm is burdened by the fact that if one bases obscenity prosecutions on the utilitarian principle of harm rather than on the moralistic principle of offense to decency, then the standard of proof will rise.

Of course, Catharine MacKinnon's own approach does not suffer from the same problem, for it defines pornography not as a message—not as speech of any kind—but as itself a harm.[66] For her, pornography does not merely advocate inequality: it is inequality, and no particular evidence is required because all pornography is, in her view, inherently subordinating.[67] But this peculiar effort to classify an ill-defined set of publications, words, and images as a subset within the universe of "abuse"

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62. See Judge Easterbrook's decision striking down an antipornography ordinance, discussed in FISS, *supra* note 5, at 67.

63. The political group Women Against Violence Against Women (WAVAW) promoted this view in the 1980s.

64. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985). There is an excellent, even-handed summary of the ordinance's failure in the courts in OWEN M. FISS, LIBERALISM DIVIDED 69-87 (1996). For a useful, nontechnical explanation of the distinction between viewpoint restrictions and content-based restrictions, see CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 11-14 (1993). Pp. 32-48.

65. Steven Shiffrin shows in fascinating detail that in some areas advertising is heavily regulated (alcohol, tobacco, and casino ads especially), a fact he uses to show that speech is already more regulated than we think. But he never questions the deadly-sin moralistic perspective that underlies the fact that alcohol, tobacco, and gambling advertising is more heavily regulated than speech by or about other hazardous products. Pp. 32-48.

66. *See generally* CATHARINE MACKINNON, FEMINISM UNMODIFIED: ESSAYS ON LIFE AND LAW (1987).

67. *See id.* at 175.

while denying them the status of "speech" has been legally unsuccessful, not surprisingly. The reasonable person might not quite know where to draw the line between pornography and art; but he or she surely believes that wife assault is in a different ontological category from a magazine or a video. The typical jury might buy the argument that a particularly nasty video might cause violence, but they would not be likely to buy MacKinnon's view that the video *is* subordination.

typical of recent efforts to redefine pornography on utilitarian rather than moralistic grounds is the work of Cass Sunstein. He takes from MacKinnon the general approach emphasizing harm to women, but he cannot make up his mind whether pornography is a *message* promoting sexual inequality (a definition that would please most feminists but would have the effect of giving it the status of political speech) or whether it is an object, something " akin to a sexual aid than a communicative expression."[68] Having invoked the possibility of classifying pornography as an object or action that produces sexual arousal and inequality at the same time, Sunstein quickly retreats. The rest of the article proceeds from the assumption that pornography is indeed low-value *speech*. This lapse from his usual high standards of logical rigor is symptomatic of an underlying problem characterizing all efforts to modernize obscenity law: the reluctance to label pornography speech.

Even in Canada, where speech of any kind has fewer claims to legal protection, it is worth noting that, at least at the level of the Supreme Court, there is great unease about banning speech unless it can be described as nonspeech. The section of the Criminal Code under which Mr. Keegstra, an Alberta teacher, was prosecuted for his virulently antisemitic statements is entitled "hate propaganda," not "hate speech."[69] Propaganda is undefined in law, but the use of the term helps to create the impression that the intent of the law is not to regulate speech but simply to do what libel law already does, namely to ban malicious and misleading misinformation.

Nevertheless, hate "propaganda" is still regarded as closer to the core meaning of speech than pornography. Although the *Keegstra* majority went out of its way to describe antisemitic diatribes as a spurious kind of speech,[70] the justices argued their case for prohibition in a very defensive and extremely lengthy decision.[71] And the minority decision eloquently defended doctrine similar to the First Amendment and labelled the hate propaganda law unconstitutional. Two years later, however, the three

68. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606 (1986).

69. This section was added to the Criminal Code of Canada in 1970 as a result of a blue-ribbon committee primarily concerned with anti-semitism.

70. R. v. Keegstra, [1990] 3 S.C.R. 697.

71. *Id.*

Supreme Court justices who had valiantly defended Mr. Keegstra's speech rights, as well as the ones who had deferred to Parliament's prohibitory preferences, united in a decision that began by assuming that obscenity law does not deserve the sort of complex, almost apologetic argument that the hate propaganda law brought out.[72] Unlike *Keegstra*, the *Butler* obscenity decision included no handwringing about being forced to ban obscenity so as to protect the official Canadian values of multiculturalism and equality. That obscenity law might be unconstitutional was not contemplated as a real possibility. The issue was much narrower: the justices agreed it was time to modernize obscenity law, shifting to the new "risk of harm" test and abandoning the old "offence to morals" approach.[73] Even though only a subset of pornography was defined as infringing the legal boundary of obscenity, nevertheless even nonobscene forms of pornography were not given anything like the consideration granted earlier to Keegstra's antisemitic speech.

In *Keegstra*, even the prohibitionist majority was careful to warn against overusing the hate propaganda law[74] (and indeed, prosecutions have been extremely rare). In *Butler*, however, sexual speech was never recognized. The text of the decision unwittingly gave away the court's view of pornography as an act, not a message: throughout the decision's complicated classification of pornography and obscenity, the phrase "explicit sex" was used—as if sex itself, not representations of sex, could be said to be explicit or not. And throughout, as I have shown elsewhere, representations were treated as if they were fisticuffs.[75]

The *Butler* court's interesting slippage between reality and representation, between actual sex and fiction, is not due to ignorance about cultural production. In other cases concerning broadcasting rights, advertising, copyright, and so forth, courts are able to understand that what one sees in a film or on a billboard is a fantasy produced through complex technological and semiotic means, and that adults have some ability to take these cultural practices with a grain of salt.[76] Indeed, the same Court that refused to contemplate even the possibility of striking down the obscenity

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72. R. v. Butler, [1992] 1 S.C.R. 452.

73. *Id.*

74. R. v. Keegstra, [1990] 3 S.C.R. 697.

75. Mariana Valverde, *Judging Speech: An Inquiry into the Supreme Court's Theory of Signification*, *in* INTERPRETING CENSORSHIP IN CANADA 56, 57 (Klaus Petersen & Allen C. Hutchinson eds., 1999); Mariana Valverde, *The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law*, 8 SOC. & LEGAL STUD. 181, 181-98 (1999).

76. This is implicit when television programs and commercials aimed at children are subject to special regulation on the basis that children cannot exercise their critical faculties in the same way as adults. In Canada, the Supreme Court upheld, in the 1989 *Irwin Toy* case, a Quebec ban on all television commercials aimed at young children; in the United States, regulation depends more on the FCC than on law. Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 1004-05. *But see* The Children's Television Act of 1990, 47 U.S.C. §§ 303(a)-(b), 393a, 394, 397, 609 (1994 & Supp. IV 1998).

statute rejected outright a proposed federal ban on all smoking advertising on the basis that the epidemiological evidence tendered about smoking's risks did not apply holus bolus to *advertising*.[77] In the tobacco case, the court had no trouble distinguishing between reality and representation, and the justices asked, much to the chagrin of federal bureaucrats, that evidence of any link between the two be produced in court, not assumed.[78] So why is it that, while pictures of people smoking are thought to have an indirect and complex relationship to behaviour, pictures of sex are discussed as if they were themselves sexual acts? Why do consumers of pornography get no credit for being able to distinguish fantasy from reality, advertising from life? The courts have not asked themselves this question and probably will not, precisely because law assumes, in advance of legal case, that pornography is, as Sunstein put it, like a sex toy than like a form of speech. Statutes and judicial decisions are written as if pornography were itself a thing: a sex toy, in some views; a physical blow to women, in other views; or, in conservative views, an indecent sexual *act*.

D. The Hierarchy of the Seven Deadly Sins

Steve Shiffrin's thoughtful articulation of a dissent perspective leads to the obvious contradiction between the ease with which "smut" is banned or regulated and the care with which Supreme Court justices try to avoid banning even the most hate-filled racist speech. He suggests that racist speech should be treated like pornography.[79] He points out that the defenses of free speech one hears in the context of racialized insults look rather disingenous when one recalls that "obscenity law is an instance in which content discrimination, subject matter discrimination, and point-of-view discrimination coincide, yet strict scrutiny is not employed, and the legislation is not invalidated."[80]

Perhaps there is a simple answer to the refusal of the United States Supreme Court to apply the doctrines governing obscenity and sexual speech broadly to justify restrictions on racially (or sexually) oriented hate speech, namely that many of the justices are right-wing Republican appointees. This explanation may work for the United States Supreme Court today: indeed, the text of *R.A.V. v. City of St. Paul*[81] borders on outright racism.[82] But we believe it is useful to look at underlying

77. R.J.R. MacDonald v. Canada, [1995] 3 S.C.R. 199.

78. *See* William Leiss, *The Censorship of Commerical Speech*, *in* INTERPRETING CENSORSHIP IN CANADA 107 (Klaus Petersen & Allen C. Hutchinson eds., 1999).

79. P. 60.

80. P. 61.

81. 505 U.S. 377 (1992).

82. Shiffrin delicately states that "no practitioners of outsider jurisprudence sat on the Supreme Court when the famous cross-burning case, *R.A.V. v. City of St. Paul*, arrived on its docket." P. 49 (citation omitted).

factors, systemic features of law, rather than to point fingers at individual judges. It is useful to examine the obvious contradiction between obscenity law and hate speech law as a symptom of an underlying condition that has existed so long that it has become an institutional habit. For a variety of historical reasons, in most common-law jurisdictions but especially in the United States, race, ethnicity, and religion are close to if not directly within "the political"—for good or for ill. Anything to do with sexuality, by contrast, especially in the money-oriented arena of commercial sex and pornography, is in the realm of the flesh. Of course, for feminists, gay activists, transgendered persons, and some heterosexuals, the flesh is always intrinsically political, always shaped by power relations ranging from gender ideologies to property considerations.[83] But law's habitual stance toward issues of sexuality is that the flesh is not itself cultural, political, or ethical: it has no reality of its own, being a mere negativity, a dark force that constantly threatens the higher faculties from within.

Recognizing that at least some pornography counts as speech or even as political speech, therefore, would involve challenging the basic mind/body, high/low split that, as feminist writers and nonfeminist anthropologists have repeatedly pointed out, is a crucial systematic feature of Western culture. Bodily desire may sometimes threaten to escape the confines of that binary opposition by assuming the mantle of speech, of course, and courts have decided that they must police that all-important cultural boundary by firmly pushing speech-like entities such as pornography firmly back where they belong, the domain of the flesh.

This may explain the otherwise odd legal fact that even when pornography and other forms of (commercial, or non-artistic) sexual speech are recognized as speech, they are governed as if they were not speech. In the New York City zoning case mentioned earlier, for instance, the New York Court of Appeals was happy to hear all sorts of evidence not about the sexual speech in question, its character and meaning, the intention of the speakers, and so forth, but rather about the extralinguistic harms that the sex industry supposedly caused—mainly "increased crime and decreased property values."[84] So sex was being governed as if it were garbage, something that rarely happens even to the most hateful racist speech acts. Apart from the fact that much of the evidence of harmful consequences was put forward by clearly partisan groups, such as the Times Square Business Improvement District, and was thus of dubious objectivity and reliability, what is curious in the New York zoning decision is that such extraneous

83. *See, e.g.*, ALAN HYDE, BODIES OF LAW (1997) (showing with much legal detail that the body is always already legal and political even when sexuality is not at issue).

84. *See* Hickerson v. New York, 146 F.3d 99, 105 (1998) (relating the decrease in property values and increase in crime rates caused by adult entertainment centers).

factors as decreased property values, even if valid, should trump First Amendment rights. It may well be the case that people owning a home across the street from controversial political organizations suffer a certain decline in their property value due to the presence of either the organization itself or of picketers, and it may well be that Jewish homeowners in Skokie found it difficult to sell their houses in the wake of the infamous KKK march through their neighborhood, but such considerations are thought to be irrelevant in First Amendment law. The refusal to use strict scrutiny in the case of obscenity statutes and of zoning regulations that are overtly designed to restrict speech, therefore, seems to be based on the rather questionable assumption that hatred directed at marginalized groups sits higher in the hierarchy of speech than anything sexual—as if hatred were a less bodily and hence political emotion than lust. There may also be a belief that zoning is somehow less damaging to speech rights than direct forms of regulation although, at least in the New York case, the zoning bylaw was probably a draconian way of regulating the sex industry and curtailing its speech than policing activity governed by criminal statutes.

V. Conclusion: Law as Speech

The main purpose of this essay is not to return to First Amendment "absolutism" by challenging the various ways in which judges and scholars have separated high-value from low-value speech. This essay develops a critique of the ways in which money and sex, separately but also and especially in combination, seem to act to damn certain forms of expression, excluding them from the select realm of protected speech. But the critique of the high-low distinction (in its various forms) undertaken here is not limited to showing that the Christian prejudices of American society infuse the law. The critique of the "deadly sins" criterion for leaving speech either unprotected or criminalized has a basic purpose: to increase the ability of legal practitioners and scholars to reflect further about the assumptions made not only in particular legal texts but, importantly, by legal practice itself.

In purporting to be the only judge of speech, of what counts as political or nonpolitical speech but also of what counts as speech at all, what assumptions does law make about its own speech? Should legal speech be judged according to the eighteenth-century standards of clarity and accurate reflection of the world? Or is legal speech performative, and thus subject to evaluation in terms of its effects? If legal speech is performative, what exactly is it performing; what real effects is it having upon the world? If other people's speech—that of sellers of sex magazines and toys in New York City, for instance—is now to be judged by its social effects, what standard is to be used to judge the effects of law's own speech?

Law does not ask itself those questions, even as it discourses endlessly about the merits of this or that speech form. As Judith Butler pointed out in a brilliant analysis of the *R.A.V. v. City of St. Paul* decision, the Supreme Court writes as if its own words could not possibly be evaluated from the standpoint of whether they injure or insult.[85] The justices assume that legal speech is to be judged by formalist standards rather than by pragmatic ones, but this assumption is never made explicit. Discussions such as Butler's have been thus far marginalized in writings, nearly all outside of law reviews, that tend to be inaccessible to the philosophically untrained. But if war is too important to be left to the generals, so too philosophical questions in law are too important to be left to the philosophers. If this essay helps some lawyers and judges to become more self-conscious about the theories of language that are implicitly affirmed every time that law speaks about speech, it will have succeeded in its aim of promoting a different kind of dissent from that eulogized by Steven Shiffrin—dissent not about what government or the judiciary ought to do, but rather dissent about how law works. As people continue to argue with or against Shiffrin about how law ought to be used to regulate speech, we must also ask why it is that law seems to crown itself as the highest-value speech form, thus removing legal speech from the universe of speech forms to be classified and adjudicated. Law too is speech: the implications of this simple insight have yet to be explored.

85. JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 53-54 (1997).