Beyond *Lawrence*: Metaprivacy and Punishment

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“[P]rivacy is nothing less than society’s limiting principle.”¹

INTRODUCTION

Can the State kill someone for being a bad person? Consider the following Connecticut case: In 1997, Todd Rizzo, then eighteen years old, invited thirteen-year-old Stanley Edwards into his backyard, telling him that they would be hunting snakes. Once there, Rizzo straddled Edwards, in Rizzo’s words, “like a horse,” and struck him thirteen times with a sledgehammer as the boy pleaded for his life. He dumped the dead body in the woods nearby. Rizzo’s motive? While stationed in Hawaii less than a year before the murder, the members of Rizzo’s Marine platoon had been asked to list their ten goals in life. The second goal on Rizzo’s list was “to kill a man.” An avid student of past serial killings, Rizzo told police after he was taken into custody that he had bludgeoned Edwards to death because he wanted to see what it felt like. He pleaded guilty to capital murder and was sentenced to death in August 1999.²

I suspect that most Americans, regardless of their moral or legal stance on capital punishment, would at least deny any inconsistency in believing that the State may execute people like Todd Rizzo, and yet believing that it may not kill someone for being a bad person. It is not a difficult moral position to make out: Individuals are sentenced to death because they are convicted of committing heinous crimes, not because they are bad people, though the former may be strong evidence of the latter. The premise of this position is more complicated, however, than I have presented it. While being convicted of a heinous crime is a necessary precondition of a capital sentence, it is not a sufficient one. Many convicted of murder are not sentenced to death, and not only because of the capriciousness of sentencing juries or the serendipity of a plea bargain. In *Woodson v. North Carolina*, the Supreme Court found within the Eighth Amendment the notion that some convicts are more death-worthy than others.³ As such, no capital sentence since *Woodson* may be imposed without considering, in some fashion,⁴ those factors that aggravate and mitigate an individual’s death-worthiness. Among the aggravating factors that were a but-for cause

¹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302 (2d ed. 1988).

² *State v. Rizzo*, 833 A.2d 363 (Conn. 2003).

³ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁴ State schemes for considering aggravating and mitigating factors may be divided into two types. Under “weighing” schemes, aggravators and mitigators are balanced against each other. *See, e.g.*, CAL. PEN. CODE § 190.3 (2005). Under “threshold” schemes, jurors have the option of a death sentence so long as a single aggravator is present, but they are told that they must consider mitigating evidence. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 2005).

of Todd Rizzo's capital sentence were his "long-standing fascination with violent death and serial killers; his preexisting desire to kill; and the callous way in which he disposed of the victim's body."⁵ Rizzo, then, was not sentenced to death because he was found guilty of a heinous murder—that only explains his detention. He was sentenced to death because he had what Kant called "inner wickedness."⁶ He would be a prime candidate for a diagnostic label for which a number of psychiatrists have been agitating in recent years: clinically "evil."⁷

For most of America's constitutional history, the distinction between detention for conduct and detention for ontological status has not been legally relevant. That American courts did not scrutinize punishments for unconstitutional excess before the twentieth century provides a partial explanation,⁸ but the more important one is that we have viewed punishment for "inner wickedness" with skepticism during only a brief and recent epoch in our constitutional life. The homosexuality cases are paradigmatic. As late as 1986, the Court was "quite unwilling," in *Bowers v. Hardwick*, to "announce . . . a fundamental right to engage in homosexual sodomy."⁹ Homosexual sex acts could be criminalized because the Court refused to acquiesce in the view that "majority sentiments about the morality of homosexuality should be declared inadequate."¹⁰ The past nine years, however, have brought us *Romer v. Evans*, in which the Court declared that a Colorado constitutional amendment that prohibited the enactment of anti-discrimination laws that protected homosexuals and bisexuals violated the Equal Protection Clause,¹¹ and *Lawrence v. Texas*, which affirmed the right of adults to engage in consensual homosexual relations in the privacy of their homes.¹² Whatever its enduring contours, *Lawrence* seems at least to turn a suspicious eye towards arguments against conduct from pure moral illegitimacy.

This paper considers the extent to which the logic of *Lawrence* compels an inquiry into the constitutionality of *incremental* punishment based on character, focusing particularly on capital sentences. On Justice Kennedy's terms, *Lawrence* stands for the proposition that the State may not punish the

⁵ *Rizzo*, 833 A.2d at 382.

⁶ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 106 (Mary Gregor ed., 1996).

⁷ See Benedict Carey, *For the Worst of Us, the Diagnosis May Be 'Evil'*, N.Y. TIMES, Feb. 8, 2005, at F1.

⁸ See *Weems v. United States*, 217 U.S. 349 (1910) (holding, for the first time, a punishment unconstitutional under the Eighth Amendment).

⁹ 478 U.S. 186, 191 (1996).

¹⁰ *Id.* at 196.

¹¹ 517 U.S. 620 (1996).

¹² 539 U.S. 558 (2003).

conduct that “defines” an individual as homosexual, but need not endorse a homosexual lifestyle as legitimate, nor afford gay persons the same protection against invidious discrimination granted to those identified by race or sex. Writing this time for an outright majority, Justice Kennedy reaffirmed in *Lawrence* an opaque and controversial statement made by the plurality in *Planned Parenthood v. Casey*, that the Court’s “obligation is to define the liberty of all, not to mandate [its] own moral code.”¹³ Without making any judgments into the rightness or wrongness of *Lawrence*’s reasoning or holding, this paper scrutinizes what follows from taking Justice Kennedy at his word. I conclude that, subject to the inevitable retroactive tinkering of the common law, the character-based retributive rationale for capital punishment that the doctrine presently employs does not survive scrutiny under *Lawrence* because it is not ontologically neutral. That is, it depends intimately and therefore impermissibly on judgments about the punishment-worthiness of an individual’s defining moral characteristics.

The paper proceeds as follows. Part I scrutinizes *Lawrence* itself in an effort to identify a non-arbitrary principle that justifies its result. Unless *sui generis*, a possibility that I address below, *Lawrence* may be justified by one of at least two broad, competing rationalizations. The first is the one Justice Scalia suggests in dissent, namely that the State may not criminalize “morals” offenses.¹⁴ This rationale would read into the Constitution some form of John Stuart Mill’s “harm principle,” the notion that an individual has an absolute right to perform either self-regarding acts or consensual acts affecting others.¹⁵ Section I.A rejects this view of *Lawrence*, and Section I.B argues for a second, more narrow, rationale for its holding—the proposition that conduct agreed by social consensus to be “self-definitional” cannot be punished for morality’s sake. Punishment, that is, may be moral, but it must be impersonal. I term the right to remain free of government interference into one’s transcendent identity a right to “metaprivacy.”

Part II connects *Lawrence*’s conception of metaprivacy to the particular form of retributive punishment countenanced by present doctrine. Section II.A establishes that excessive punishment is constitutionally defective and that capital punishment is susceptible to judicial review on the question of excessiveness. Section II.B gives doctrinal content to the elusive concept of retribution and argues that retributive punishment in action involves

¹³ *Lawrence*, 539 U.S. at 571 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion)).

¹⁴ *Id.* at 590 (Scalia, J., dissenting).

¹⁵ See JOHN STUART MILL, ON LIBERTY 139 (David Bromwich & George Kateb eds., 2003).

impermissible judgments about the content of the condemned's ontological commitments, and therefore fails review under the principles of *Lawrence*-style metaprivacy.

Part III attempts to harmonize my reading and extension of *Lawrence* with the existing doctrinal and theoretical landscape. Section III.A traces the evolution of metaprivacy within the tort privacy, Fourth Amendment privacy, and fundamental decision privacy cases, and relates metaprivacy to the doctrine on government regulation of hate speech and hate crimes. Section III.B situates metaprivacy within the academic literature on privacy. I ultimately argue that refusing to read into the doctrine a distinction between homosexual conduct and certain other forms of a priori criminal conduct is consistent with a shift in our understanding of liberty towards a government of presumptively limited powers.

A footnote is in order before I proceed. By taking seriously the language Justice Kennedy uses in *Lawrence*, this paper engages in a self-conscious act of what Roberto Mangabeira Unger has termed, with considerable distress, "rationalizing legal analysis."¹⁶ Rationalizing legal analysis is the translation of "law prospectively made as the product of conflicting wills and imaginations, interests and ideals," into "law retrospectively represented as the expression of connected policies and principles."¹⁷ It is turning one's head at jurisprudence as socio-political compromise, and pretending that it is grounded in reason. A convincing realist reading of *Lawrence* is plainly available. *Lawrence* appears to be but the most high-profile installment in a jurisprudence of homosexuality that arose in the years following *Bowers*. Without an alternative theory of the case,¹⁸ the many voices in sympathy with the result the *Romer* majority reached could not help but find Justice Scalia's bitter dissent a touch disquieting. If homosexual status was not subject to heightened scrutiny, and indeed if homosexual conduct could be criminalized, how could a law forbidding gays from acquiring anti-discrimination legislation be unconstitutional? Would it also be unconstitutional to forbid legislation that excludes convicted felons from anti-discrimination legislation? But one explanation of *Romer*, *Lawrence* and, more recently, *Limon v. Kansas*,¹⁹ is that, whatever the rhetoric of those decisions, a person who desires physical

¹⁶ ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 36 (1996).

¹⁷ *Id.* at 69.

¹⁸ See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996) (suggesting that Colorado's Amendment 2 violated the Bill of Attainder Clause of Article I, § 10)

¹⁹ 539 U.S. 955 (2003). In *Limon*, the Court remanded to the Court of Appeals of Kansas a case in which that court had upheld a statutory rape law that applied a greater penalty to same-sex rapists. See *State v. Limon*, 41 P.3d 303 (Kan. Ct. App. 2002).

and emotional intimacy with a same-sex partner simply is treated differently under the Constitution than a person who desires other socially disfavored conduct. On this view, *Romer* does for gays what *City of Cleburne v. Cleburne Living Center*²⁰ did for retarded persons: it extends to them the courtesy of heightened scrutiny without quite saying so.

I do not doubt that, at least in “hard cases,”²¹ jurisprudence is forged in the manner just described, nor do I doubt that cases raising the constitutionality of capital punishment sentencing schemes or laws against homosexual sodomy qualify as “hard cases.” But this paper is less interested in what the Justices were doing than in what they were saying. *Romer*, *Lawrence*, and *Limon* could be limited to their facts, but they would not then qualify as jurisprudence under our doctrinal fictions.²² I am less interested in reaching a firm conclusion than in broadening the terms of doctrinal debate by challenging the Court to articulate a non-arbitrary reason why particular a priori criminal conduct—sodomy—receives unique judicial protection. If the reader and I end this conversation disagreeing only on the proper place of legal formalism in American constitutional discourse, then I consider it a victory for the argument.

Rationalizing legal analysis holds that “[t]he voice of reason must speak, although belatedly, in history, redescribing and reorienting the historical mess.”²³ Though concededly messy, the privacy jurisprudence, if it is to earn the title, must either be willing to recognize gays as having distinct interests worthy of special protection just like other identity-based groups, or it needs to examine whether the content of one’s character has any legal significance. Otherwise, principle and logic will indeed “have nothing to do with the decisions of this Court.”²⁴

I. *LAWRENCE V. TEXAS* AND METAPRIVACY

In September, 1998, officers of the Harris County Police Department entered a private residence in the Houston area to investigate a report of an armed intruder breaking into a home.²⁵ Upon entering the home, the officers

²⁰ 473 U.S. 432 (1985).

²¹ I borrow here from Ronald Dworkin. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81 (1977).

²² See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 666 (1958) (writing that “adjudication is meaningless unless the decision is reached by some rational process . . . [and] if a decision is to be rational it must be based upon some rule, principle or standard”).

²³ UNGER, *supra* note 16, at 68.

²⁴ *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

²⁵ See Associated Press, *Activists See Case as Test of Texas Sodomy Law*, CHI. TRIB., Nov. 7, 1998, at 5. The report turned out to be false. *Id.*

witnessed John Geddes Lawrence and Tyron Garner engaged in anal sex. The two men were arrested, charged, and convicted of violating Section 21.06(a) of the Texas Penal Code, which prohibited “deviate sexual intercourse” with someone of the same sex.²⁶ The case on appeal concerned the constitutionality of the statute under the Fourteenth Amendment. *Lawrence*’s immediate holding was that Texas’s prohibition on same-sex sodomy violated the Due Process Clause, and that *Bowers v. Hardwick* was wrong, both in methodology and in outcome, the day it was decided.²⁷

Lawrence is otherwise famously obtuse. An extraordinary number of commentators have weighed in on its holding and we must, as always, look forward to future cases to vindicate this account or that one. But a lawyer’s job is to harmonize evidence, and *Lawrence* leaves many clues as to its holding, clues that provide substantial fodder for discourse even at this relatively early stage in its precedential life. This Part defends one reading of *Lawrence*, namely that the case raises a bar to morals-based regulation of conduct recognized by social consensus as self-defining. Along the way, I demonstrate how this reading is related to but distinct from three alternative views: first, that the case instantiates a broad form of John Stuart Mill’s harm principle; second, that it is fundamentally a case about desuetude; and third, that it forms a part of what William Eskridge describes as a “jurisprudence of tolerance.”²⁸

A. *Lawrence as On Liberty*

Reading into *Lawrence* John Stuart Mill’s harm principle—the idea that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”²⁹—is tantalizing, and Justice Kennedy does not do enough to discourage it. *Lawrence* does not, after all, call itself a privacy case. The opinion mentions the right of “privacy” only in stating the questions presented for certiorari and in recapping the Court’s holding in *Griswold v.*

²⁶ TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). The Texas Penal Code defined “deviate sexual intercourse” as “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” *Id.* § 21.01(1).

²⁷ *Lawrence*, 539 U.S. at 576-78.

²⁸ William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004).

²⁹ MILL, *supra* note 15, at 80.

Connecticut,³⁰ whereas it mentions “liberty” upwards of twenty-five times.³¹ The opinion makes its emphasis clear from the opening paragraph:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.³²

This passage could be the prologue to Mr. Herbert Spencer’s *Social Statics*,³³ and it is far from the opinion’s only grist for libertarian spin. Justice Kennedy writes that the Court’s ruling, “as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”³⁴ In attempting to define, as it has to, what is meant by “injury,”³⁵ the Court makes clear that morals offenses will not suffice. Justice Kennedy writes explicitly that Justice Stevens’s *Bowers* dissent, in particular the hardly obvious assertion that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ,”³⁶ controls the analysis in *Lawrence*. Finally, the six-Justice majority reaffirmed the statement made by a three-judge plurality in *Planned Parenthood v. Casey*, that the Court’s “obligation is to define the liberty of all, not to mandate our own moral code.”³⁷ This view carries strong echoes of the neo-Millian philosophy of H.L.A. Hart, who believed

³⁰ See *Lawrence*, 539 U.S. at 564-65 (discussing 381 U.S. 479 (1965)).

³¹ See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in *CATO SUPREME COURT REVIEW*, 2002-2003, at 21, 34 (James L. Swanson ed., 2003)

³² *Id.* at 562.

³³ Cf. *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”).

³⁴ *Id.* at 567.

³⁵ Mill never defined “harm” with any satisfaction. Living as we do within social space, virtually every action we take intrudes in some way upon the interests of others. See note 338, *infra*, and accompanying text.

³⁶ *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

³⁷ *Id.* at 571 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)).

that even prostitution could not be regulated so long as it occurred outside of public view.³⁸

While some commentators have taken the “harm principle” bait,³⁹ others have kept the wax of constitutional pragmatism firmly in their ears.⁴⁰ Perhaps the best evidence that Justice Kennedy’s principle is neither Mill’s nor Hart’s is that he more or less tells us as much. He explains in dicta that the case “does not involve . . . prostitution,” implying thereby that it would be a different case if it did.⁴¹ Although one can imagine theoretical grounds for distinguishing anti-prostitution from anti-sodomy laws—based, for example, on implied coercion or regulation of commerce—these distinctions are not unimpeachable. Certainly not all commercial sex exchanges are coercive, and refusing to allow individuals to engage in a particular form of commerce because it is viewed as immoral runs only slightly less directly afoul of a Millian reading of *Lawrence* than the Texas anti-sodomy regulation. Moreover, Justice Kennedy conspicuously segregates his mention of prostitution from his earlier mention of “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”⁴² It is difficult to avoid the conclusion that anti-prostitution laws still survive scrutiny not on some consent-based theory but because prostitution is traditionally viewed as immoral.

Similarly, Justice Kennedy in two places appears determined to remove same-sex marriage from the scope of *Lawrence*’s holding. First, he exempts from the case’s purview, as mentioned above, “abuse of an institution the law protects.”⁴³ Second, he disclaims having announced that “the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁴⁴ What beyond an explicitly moral judgment, Laurence Tribe asks, “could be the rationale for permitting an otherwise eligible same-sex couple to enjoy the tangible benefits and assume the legal obligations of some version of civil union but withholding from them that final measure of respect—that whole that plainly exceeds

³⁸ H.L.A. HART, LAW, LIBERTY AND MORALITY 13 (1963).

³⁹ See, e.g., Barnett, *supra* note 31, at 21; Richard A. Epstein, *Of Same-Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 S. CT. ECON. REV. 75 (2004); Paul M. Secunda, *Lawrence’s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117 (2005).

⁴⁰ See, e.g., Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004); Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004). But see Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1500 (2005).

⁴¹ *Lawrence*, 539 U.S. at 578.

⁴² *Id.* The second clause is an obvious reference to incest.

⁴³ *Id.* at 567.

⁴⁴ *Id.* at 578.

the mere sum of its component legal parts?”⁴⁵ It is not for a Court, in dicta, to limit the prospective scope of its holdings.⁴⁶ But a Court’s attempts to do so do speak directly to the principle it is presumptively announcing, and Justice Kennedy’s various proscriptions and disclaimers do not seem consistent with a broad harm principle.

We can expand our examination of prospective applications beyond what is express, and hypothesize responses to other morals legislation, including the remainder of Justice Scalia’s laundry list of state laws he believes threatened by the majority’s holding. Faced with his imagined challenges to laws against bigamy, bestiality, and obscenity,⁴⁷ or, say, drug use, kidney sales, suicide, or slave wages,⁴⁸ among others, the passive virtues exhort us to seek within *Lawrence*’s text a more jurispathic limiting agent than a simple harm principle.⁴⁹ Justice Kennedy writes that “adults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons,”⁵⁰ and so perhaps the correct limiting principle is that consensual conduct will be protected when it occurs within the home. Such a principle does not seem well-tailored to the text of the opinion, however, as it would appear to protect incest and prostitution and yet would be deeply inconsistent with the majority’s apparently self-conscious shift away from the word “privacy.” “There are other spheres of our lives and existence, outside the home,” the Court tells us, “where the State should not be a dominant presence. Freedom extends beyond spatial bounds.”⁵¹ Thus, while *Lawrence*’s libertarian overtures are too brazen to be countenanced fully, they are also too brazen to be ignored. The opinion clearly means to disfavor certain species of morals legislation. The trick is to figure out what is so special about anti-sodomy laws. As I explain below, the permissibility

⁴⁵ Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1946 (2004); see also *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (“[P]reserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples.”) (quoting *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring in the judgment)).

⁴⁶ See *id.* at 605 (“This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”).

⁴⁷ *Id.* at 590.

⁴⁸ Randy Barnett argues that *Lawrence* in fact opens the door to challenges to economic regulation, and properly so. See Barnett, *supra* note 31, at 21. But see Carpenter, *supra* note 40, at 1152 (“A Court about to embark on a new and highly controversial adventure into judicially mandated laissez-faire economics would at least drop a hint.”).

⁴⁹ As Justice White wrote in *Bowers*, “The law is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.” *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

⁵⁰ *Lawrence*, 539 U.S. at 567, 575.

⁵¹ *Id.* at 562.

of the legislation depends not on the nature of the interests being protected—for example, community morals versus physical victimization—but on the nature of the interests being infringed.

B. *Lawrence as Metaprivacy*

The principle *Lawrence* announces is both more timid and bolder than a simple harm principle. It does not reach the full panoply of morals regulation, but failing to do so grants it the jurisprudential space to be arguably more protective of particular facets of individual liberty than even *Mill*. In the eyes of the *Lawrence* majority, laws regulating the private sexual conduct of homosexuals do not simply infringe on their right to privacy, the way a law against viewing pornography in the home might,⁵² or on their right to liberty, the way a law against public nudity might.⁵³ Rather, the Court held that such regulations effect a dignitary harm. Justice Kennedy uses the word “demean” in three places in the opinion. First, he writes, “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”⁵⁴ Second, he writes that *Bowers*’ very “continuance as precedent demeans the lives of homosexual persons.”⁵⁵ Finally, he writes that the State “cannot demean [petitioners’] existence or control their destiny by making their private sexual conduct a crime.”⁵⁶

The comparison to marriage should help illuminate how it is that defining the right simply as a right to engage in sexual intercourse is not just misleading but is in fact a dignitary insult. Justice Kennedy’s allusion to marriage refers directly to *Griswold*, in which the Court struck down Connecticut’s anti-birth control laws.⁵⁷ In that case, Justice Douglas wrote in sweeping terms for the majority that marriage “is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”⁵⁸ Physical intimacy in marriage is no mere vulgar satisfaction of prurient interests, but rather stands in for a transcendent, merged identity. Marriage is a redefinition of

⁵² See *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁵³ See *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

⁵⁴ *Id.* at 567.

⁵⁵ *Id.* at 575.

⁵⁶ *Id.* at 578.

⁵⁷ 381 U.S. 479 (1965), cited in *Lawrence*, 539 U.S. at 564-65.

⁵⁸ *Id.* at 486.

personhood, of which the freedom to engage in sexual intercourse—with or without birth control—is but one element. Similarly, the freedom to engage in sexual intercourse within a homosexual relationship helps constitute a manifestation of gay personhood; it is a form of self-identification.⁵⁹ Thus it is that criminalization of homosexual conduct both demeans the lives of homosexuals and controls their destiny. The connection to *Casey*, which Justice Kennedy cites repeatedly, is readily apparent, for outlawing abortion similarly threatens to control an individual's destiny, that of the would-be mother. He writes, quoting *Casey*, that a homosexual person, as much as a heterosexual, “may seek autonomy” for the purpose of “defin[ing] the attributes of personhood” by “defin[ing] one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁶⁰

The crucial rhetorical move is the presumption that private sex acts are elemental to the self-definition of gays. Justice Scalia makes much in his dissent in *Romer v. Evans* of the lack of a meaningful distinction between homosexual “orientation” and homosexual “conduct.”⁶¹ So long as *Bowers* remained good law, it was useful for someone urging the constitutionality of laws disfavoring gays to collapse this distinction. Said Justice Scalia in *Romer*, “[W]here criminal sanctions are not involved, homosexual ‘orientation’ is an acceptable stand-in for homosexual conduct.”⁶² *Lawrence* said, in essence, that where criminal sanctions are involved, the fact that homosexual conduct is a stand-in for homosexual orientation means anti-sodomy laws must fail. It is precisely because homosexual orientation may be defined by homosexual conduct that a law disfavoring the conduct is, like *Romer*'s Amendment 2, in fact a law whose purpose is to disfavor a class of individuals. As Justice Kennedy writes, “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”⁶³ The principle that we can draw from this statement is that where an individual's status is defined by conduct, the State may not outlaw that conduct on moral grounds.⁶⁴ To do

⁵⁹ See *id.* at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”); see also Tribe, *supra* note 45, at 1905-06 (arguing that even if the Texas law had applied both to same-sex acts and to opposite-sex acts, the Court would still be struck down because “sodomy” is pervasively and pejoratively associated with gays).

⁶⁰ *Lawrence*, 539 U.S. at 574.

⁶¹ *Romer v. Evans*, 517 U.S. 620, 640-42 (Scalia, J., dissenting).

⁶² *Id.* at 642.

⁶³ *Lawrence*, 539 U.S. at 575.

⁶⁴ Cf. *Robinson v. California*, 370 U.S. 660, 666 (1962) (striking down a statute for making “the ‘status’ of narcotic addiction a criminal offense.”).

so would interfere too intrusively in the life of the individual, and violate her right to privacy in its “more transcendent dimensions.”⁶⁵

The reading I urge helps to explain why Justice Kennedy does not specify the level of scrutiny he is applying. On one hand, he writes that Texas’s anti-sodomy statute “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁶⁶ This formulation implies that Justice Kennedy is employing rational-basis review. On the other hand, he makes this statement immediately after quoting *Casey*’s mandate that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”⁶⁷ Under our constitutional tradition, the realm of personal liberty which the government may not enter is not protected by mere rational basis review.⁶⁸ Rather, the State must justify its entrance into such realms with a compelling interest, and it must tailor its means narrowly to effectuate that interest. To suggest, as Justice Kennedy does explicitly, that *Lawrence* follows from the *Griswold* line of cases is to imply that strict scrutiny applies.⁶⁹ A third option, of course, is that Justice Kennedy is employing strict scrutiny but that he does not believe the statute even survives rational basis review.⁷⁰ The important point, though, is that once we collapse the status-conduct distinction, it becomes unnecessary to specify a particular standard of review. In the spirit of the Bill of Attainder clauses, to make a particular class of individuals a target of the criminal law for no reason other than disapproval of their very being is illegitimate as a matter of first principles.⁷¹ Thus, on this view, even to reach a tiers of scrutiny analysis in *Lawrence* demeans the lives of homosexual persons.

⁶⁵ *Lawrence*, 539 U.S. at 562.

⁶⁶ *Id.* at 578.

⁶⁷ *Id.* at 578 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).

⁶⁸ See generally *supra* text accompanying notes 272-273 (discussing the doctrinal void formed by weakening the level of scrutiny to apply to Fourth Amendment cases).

⁶⁹ See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 48 (“The Court’s assimilation of the *Lawrence* problem to that in *Griswold* and its successors suggests that a fundamental right was involved.”); Tribe, *supra* note 45, at 1917 (“[T]he strictness of the Court’s standard in *Lawrence*, however articulated, could hardly have been more obvious.”).

⁷⁰ Justice Scalia would quarrel with this conclusion. See *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (calling the proposition that there is no rational basis for the Texas law “so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion”). But see *id.* at 583 (O’Connor, J., concurring in the judgment) (“Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause . . .”).

⁷¹ See, e.g., Amar, *supra* note 18 (arguing that the Colorado amendment at issue in *Romer* could have been invalidated under the logic of the Bill of Attainder clauses).

What is so special, then, about anti-sodomy laws is that they threaten not some undifferentiated liberty, but specifically the liberty of self-definition. We now can hypothesize an answer to the libertarian who extols the opinion's scant references to "privacy." *Lawrence* concerns not what Michael Sandel calls "old privacy"—"the interest in keeping intimate affairs from public view"—but what he calls "new privacy"—"the right to make certain sorts of choices, free of interference by the state."⁷² The particular types of choices an individual has the right to make are those that qualify in some relevant way as self-defining. Given that *Lawrence* involved paradigmatic "old privacy" conduct, it would have confused matters to write the opinion in the language of privacy rights. To avoid similar confusion, I refer to *Lawrence*'s particular brand of privacy as "metaprivacy," and define it as the right to engage in self-definitional conduct free from normalizing governmental interference.

1. *On Desuetude*

To this point, my argument remains underspecified. I have not yet nominated any particular catalyst for identification of conduct as self-definitional. Surely not all acts of self-definition are equally protected. Unless *Lawrence* identifies a process for defining the relevant class, it has no answer to Justice Scalia's criticism that a law against public nudity, for example, is suspect because it "targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.'"⁷³ Miranda Oshige McGowan illustrates the point by comparing *Lawrence* to *Barnes v. Glen Theatre*, in which a Court plurality held that an Indiana statute that required strippers to wear pasties and g-strings in adult-only clubs "further[s] a substantial government interest in protecting order and morality."⁷⁴ Unless *Lawrence* overrules *Barnes*, it must explain, as McGowan puts it, "why [t]he liberties of nude dancers and strip club goers [don't] count, and the liberties of gays do." The answer McGowan settles on is that "gays as a set are a group while the set of nude dancers and people who go to strip clubs are not a group."⁷⁵ She writes that in distinguishing between simple

⁷² Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 526, 528 (1989).

⁷³ *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

⁷⁴ McGowan, *supra* note 40, at 1326 (citing 501 U.S. 561, 569 (1991)).

⁷⁵ *Id.* at 1329.

classifications and relevant groups, “the Court’s practice is essentially normative.”⁷⁶

This paper’s project is to not give up quite so easily. I wish to take seriously the Justices’ contention that the distinctions drawn in *Lawrence* are neither ad hoc judgments nor naked manifestations of their own moral codes. In fact, the opinion provides generous support for just the opposite. The Court spends substantial ink on the idea that the crucial moving part in defining the scope of the Due Process Clause is not the composition of the Court but rather social convention. Justice Kennedy rejects the backward-looking amateur historiography of the *Bowers* majority in favor of his own sideways-looking amateur sociology. “In all events,” he writes, “we think that our laws and traditions in the past half century are of most relevance here. These references show an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁷⁷ The references Justice Kennedy cites include changes in the Model Penal Code and state statutes, the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*,⁷⁸ and, perhaps most significantly, the fact that sodomy statutes had been systematically unenforced.⁷⁹

Cass Sunstein, acknowledging the importance of this language, concludes that *Lawrence* is an application of the common law principle of desuetude.⁸⁰ The idea at play in *Lawrence*, Sunstein suggests, is that “at least in some circumstances, involving certain kinds of human interests, a criminal law cannot be enforced if it has lost public support.”⁸¹ The justification for desuetude is that statutes that remain on the books but are not generally enforced invite arbitrary, discriminatory, and undemocratic prosecutions.⁸² The individual interest at stake in *Lawrence* was thereby converted from a simple interest in sexual autonomy to an interest in avoiding victimization by arbitrary exercises of public power. This reading of *Lawrence*, Sunstein notes, “mutes the apparent roots of *Lawrence* in substantive due process. The idea of desuetude is, in a sense, a procedural

⁷⁶ *Id.* at 1334.

⁷⁷ *Lawrence*, 539 U.S. at 571-72 (emphasis added).

⁷⁸ 45 Eur. Ct. H.R. (ser. A) (1981) (holding that Northern Ireland’s anti-sodomy law violated Article 8 of the European Convention on Human Rights).

⁷⁹ *Id.* at 572-73.

⁸⁰ See Sunstein, *supra* note 69, at 30.

⁸¹ *Id.*

⁸² *Id.* at 50; see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 152 (1962) (“When [an unenforced statute] is resurrected and enforced, it represents the *ad hoc* decision of the prosecutor, and then of the judge and jury, unrelated to anything that may realistically be taken as present legislative policy.”).

one.”⁸³ Since the issue is primarily one of “notice,” the *Lawrence* Court extended beyond simply responding to social fact to “*requiring* an evolution in public opinion—something like a broad consensus that the practice at issue should not be punished.”⁸⁴

Sunstein criticizes the libertarian reading of *Lawrence*—what he calls the “simple autonomy” reading—for insufficiently taking account of the role social consensus plays in the opinion.⁸⁵ But the desuetude reading might similarly be criticized as insufficiently responsive to the remainder of the opinion. Sunstein essentially concedes as much. Referring to the “narrow” version of his thesis, that “the state may not rely on a justification [for a criminal statute] that has lost public support,”⁸⁶ Sunstein writes that “for it to operate, we must have an antecedent way, to some extent independent of public convictions, to determine whether an interest has some kind of constitutional status.”⁸⁷ Social consensus, that is, is not in itself sufficient to cabin *Lawrence*’s holding within workable limits. Neither, I argue above, is the principle of self-definitional conduct. The best way to understand the roles of social consensus and of self-definitional conduct, however, is in combination.

2. *On Social Consensus*

Social consensus plays a crucial role in delimiting the contours of the right the Court seeks to protect. It may operate in *Lawrence*—and presumably in other privacy cases—in one of at least two ways. First, it may function literally as Justice Kennedy suggests: an emerging awareness that a particular practice forms part of the liberty protected by the Due Process Clause incorporates that practice into the canon of fundamental freedoms. One is reminded here of Justice Handy’s views on the central role public opinion should play in the fate of the Speluncean Explorers.⁸⁸ While this tautological approach to constitutional decisionmaking is perfectly sensible for a legal realist like Justice Handy, it will not satisfy the doctrinalist, ceaselessly concerned that “legislative policy making [b]e distinguished from judicial rule applying.”⁸⁹ The role of a judge is to apply law, such as the Due Process Clause, to relevant facts, such as the presence

⁸³ Sunstein, *supra* note 69, at 50.

⁸⁴ *Id.* at 49 (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Id.* at 51.

⁸⁷ *Id.* Sunstein does not resolve this difficulty.

⁸⁸ See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 637-44 (1949).

⁸⁹ PHILIP BOBBITT, CONSTITUTIONAL FATE 41 (1982).

of a particular social consensus. This approach converts fact *into* law by allowing social consensus to supplant the judge as decisionmaker.

Social consensus is not, however, incapable of playing a part in principled constitutional decisionmaking. Consider the following alternative to the approach just discussed: The relevant social consensus is not that homosexual sodomy is protected by the Due Process Clause but that homosexual sodomy is definitional—as opposed to merely incidental—conduct for certain members of the political community. It is true that reasonable people may differ as to whether “gay person” describes an “identity” in precisely the same way as, say, “nudist” does, but *Lawrence* might plausibly be read as a judicial announcement of *public recognition* of the former identity but not the latter. Nudism, that is, is not (yet?) recognized as an “attribute of personhood.” Rather, like “juggler,” “jogger,” or “strip club goer,” it is viewed, rightly or wrongly, as a recreational choice incidental to self-definition. The advantage of this approach over the Justice Handy approach is that its rule of decision is not the fact of social consensus, but the legal principle that self-definitional conduct forms part of the liberty protected by the Due Process Clause. What doctrine asks of its principles is that they define with consistency the contours of the relevant legal debate. The first approach, awarding due process protection to conduct that social consensus recognizes as deserving due process protection, generates no criteria for debate. The second approach allows lawyers, judges, and academics to engage in Socratic dialogue over whether “self-definitional conduct,” however defined, is sufficiently important or coherent to warrant incorporation into substantive due process.

Taking seriously this narrow role for social consensus, Justice Scalia’s list of threatened morals laws begins to diminish.⁹⁰ There is hardly an identifiable social consensus that masturbators or those who have sex with animals are, like gays, a class of individuals whose life choices are not merely “deviant” incidents of their personalities, but in fact constitutive of their personhood,⁹¹ and prostitution is commonly thought of as a labor not of love, but of necessity. Bigamy and same-sex marriage are more difficult to distinguish. As I have discussed, marriage earns its status as a fundamental right under our jurisprudence precisely because it is “an association that promotes *a way of life*.”⁹² Not only is marriage almost explicitly excluded from *Lawrence*’s sweep, however, but it is problematic

⁹⁰ See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

⁹¹ Moreover, as Sunstein observes, there are no laws against masturbation. Sunstein, *supra* note 69, at 49.

⁹² *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (emphasis added); see notes 57-59, *infra*, and accompanying text.

to refer to bans on certain types of marriages as “punishment.” *Lawrence* does not demand (as resort to the Equal Protection Clause might) that the State not discriminate against gays at all, only that it not use its coercive power to criminalize their identities. Although criminal sanctions for particular cohabitational choices, say, may indeed raise *Lawrence* problems, refusing to extend formal state recognition to particular social arrangements is hardly analogous.

3. *On the Politics of Recognition*

Another way to understand the meaning of this new metaprivacy is in terms of William Eskridge’s taxonomy of identity-based social movements.⁹³ Eskridge describes three stages of such movements. At stage 1, a minority group “challenges consensus that its distinguishing trait (color, sex, sexuality) is a malignant variation from the norm.” At stage 2, society “revises consensus to allow that the minority trait is a tolerable variation, but not as good as the norm.” Finally, in stage 3, society again “revises consensus to recognize that the minority trait is a benign variation and that there is no single norm.”⁹⁴ On my reading, Justice Kennedy’s opinion is best read as moving gays from *stage 0* to stage 1, that is, from not being a constitutionally recognized identity group *at all* to being one whose standing as a member of the polity is recognized. As Justice Scalia argues vociferously in *Romer*,⁹⁵ this recognition is a precondition to the (John Hart) Elysian protection of gay political representation that Amendment 2 threatened, and that race-based and sex-based minority groups unquestionably enjoy.⁹⁶

Eskridge himself would contest the above characterization of the opinion. Calling the post-*Lawrence* landscape “nothing less than, but also nothing more than, a jurisprudence of tolerance,”⁹⁷ Eskridge argues that the phase shift that *Romer* and *Lawrence* represent for gays is analogous to the shift that *Brown v. Board of Education*⁹⁸ and *Loving v. Virginia*⁹⁹

⁹³ See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2065 (2002).

⁹⁴ William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. (forthcoming May 2005) (manuscript at 14, on file with author).

⁹⁵ *Romer*, 517 U.S. at 640-41.

⁹⁶ See Eskridge, *supra* note 28, at 1077 (discussing the value of “assur[ing] each clashing group an opportunity to persuade the community of its normative agenda”).

⁹⁷ Eskridge, *supra* note 28, at 1025.

⁹⁸ 347 U.S. 483 (1954).

⁹⁹ 388 U.S. 1 (1967).

represented for blacks, and that *Roe v. Wade*¹⁰⁰ and *Craig v. Boren*¹⁰¹ represented for women.¹⁰² In practice this means that the Court has reached stage 2, wherein it “accepts the norm that sexual variation is tolerable as a matter of fact and ought to be treated as presumptively irrelevant as a matter of law.”¹⁰³ In my view, Eskridge overstates the Court’s solicitude of gay claims in *Romer* and *Lawrence*. I think it significant that the Court refused to accept an express invitation to elevate sexual orientation to a suspect classification and therefore explicitly to apply heightened scrutiny to regulations that discriminate against gays.¹⁰⁴ The Court’s unwillingness even to confront the appropriate level of scrutiny at least undermines the claim that the particularized dignity of gays was the majority’s central animating concern.¹⁰⁵ Rather, I argue, the Court was using gay rights cases to reinforce first principles of representative government, that conduct rather than status must be the subject of criminal law. In any event, my differences with Eskridge on this score may be largely semantic. I agree with his bottom line, that “traditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals, but room remains for the state to signal the majority’s preference for heterosexuality, marriage, and traditional family values.”¹⁰⁶

Deeper are my differences with Eskridge on the role of social consensus. A key feature of his “politics of recognition” is the role of the gay rights movement itself in forcing the Court’s hand. Because Eskridge’s is a story of how constitutional change occurs on the ground, it is vital to his account that the discriminated-against group so characterize itself, and that it advance a political agenda. Writes Eskridge, “The key to understanding *Lawrence*—and all its doctrinal complexities—is the Supreme Court’s recognition that American democratic pluralism must

¹⁰⁰ 410 U.S. 113 (1973).

¹⁰¹ 429 U.S. 190 (1976).

¹⁰² Eskridge, *supra* note 28, at 1040; *see also* McGowan, *supra* note 40, at 1332-34 (arguing that *Lawrence* fits into Eskridge’s schemata).

¹⁰³ *Id.*

¹⁰⁴ Justice O’Connor would strike down the Texas sodomy law under the Equal Protection Clause, but because in her view it failed rational basis review. *See Lawrence*, 539 U.S. at 579 (O’Connor, J., concurring in the judgment). Laurence Tribe calls the Equal Protection route a “dead end,” arguing that relying on the Clause would have been inadequate to the task of protecting the dignity of gays. Tribe, *supra* note 45, at 1907-16. Tribe, however, implicitly accepts Justice O’Connor’s rational basis standard of review. *See id.* Justice Kennedy defends his recourse to the Due Process Clause by saying that reliance on the Equal Protection Clause would leave open the question of whether a gender-neutral statute would be constitutional. *Lawrence*, 539 U.S. at 575.

¹⁰⁵ *But see* Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447 (2004) (arguing that gay rights cases are making tiers-of-scrutiny analysis anachronistic).

¹⁰⁶ Eskridge, *supra* note 28, at 1025.

meet the lesbian, gay, bisexual, and transgendered (LGBT) rights movement at least halfway.”¹⁰⁷

For Eskridge, then, the self-definition of the group itself necessarily motivates the social consensus. Although it is difficult to dispute that only a sufficiently robust movement can generate the political conditions necessary for the kinds of regime shifts with which Eskridge is concerned, there is no indication within the *Lawrence* majority opinion itself that such agitation forms part of the doctrinal test. *Lawrence*, that is, does not source its emerging awareness within the gay rights movement. Social consensus as employed in *Lawrence* is not necessarily operationalized by recognizing a movement, but rather by recognizing an individual’s claims to autonomy.¹⁰⁸

* * *

The *Bowers* majority issued a challenge to those who would extend fundamental decision privacy to homosexual sodomy: “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.”¹⁰⁹ *Lawrence* attempts to answer the challenge by settling on control of one’s metaphysical destiny. Where conduct is elemental to self-definition, the State may not criminalize that conduct based on moral approbation. *Lawrence* did not, then, “decree[] the end of all morals legislation.”¹¹⁰ It did, however, enunciate a principle susceptible to extrapolation beyond the four walls of the bedroom. This is, depending on one’s perspective, either heartening or dangerous territory.

II. METAPRIVACY & CRIMINAL SENTENCES

Lawrence is, of course, a case about punishment, but most commentary on its import focuses on the threshold question of which rationales, if any, justify using the criminal law to regulate “primary” conduct.¹¹¹ This Part argues that the conclusions reached apply equally to the question of which rationales justify incremental punishment. Section III.A discusses the

¹⁰⁷ *Id.* at 1025.

¹⁰⁸ Given that the encounter in *Lawrence* was a one-night stand, *see* Tribe, *supra* note 45, at 1904, emphasizing his responsiveness to the gay rights movement also would have won Kennedy neither rhetorical nor political points.

¹⁰⁹ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

¹¹⁰ *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

¹¹¹ I borrow my terminology from Justice Harlan. *See* *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part).

constitutional framework for evaluating excessive punishment. Section III.B demonstrates that this framework cannot countenance a character-based retributive rationale for capital punishment.

A. *The Constitutionality of Excessive Punishment*

It is difficult to break new ground in any analysis of the Supreme Court's treatment of the constitutionality of a given punishment regime. Several fundamental ground rules seem well-established. The State faces three broad doctrinal roadblocks before it can punish. First, the State is bound by free-standing constitutional commitments that prevent it from punishing certain types of conduct. It cannot, for example, punish for ordinary speech, for thoughts,¹¹² or for "status."¹¹³ On the narrowest reading of *Lawrence*, it also cannot punish an individual for engaging in consensual homosexual sodomy in the home, though I have heretofore argued for a stronger reading that, in effect, regards such punishment as itself a form of status punishment. The second obstacle from the government's perspective is procedural: It cannot convict without providing the accused with, *inter alia*, a speedy trial,¹¹⁴ access to counsel,¹¹⁵ the option of a trial by jury,¹¹⁶ and due process of law more generally.¹¹⁷ The "free-standing" due process requirement has been interpreted to require, for example, that a defendant be competent to stand trial,¹¹⁸ and that the prosecution disclose to the accused exculpatory evidence in its possession.¹¹⁹ The third barrier the State faces is in the penalty phase, for which the Eighth Amendment is the prime source of constitutional guidance. Its overriding instruction, to be

¹¹² See *United States v. Balsys*, 524 U.S. 666, 714 (1998) (Breyer, J., concurring) (writing that "the First Amendment protects against the prosecution of thought crime"); *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (remarking that the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts"). But see *United States v. Gamache*, 156 F.3d 1, 8 (1st Cir. 1998) (suggesting that the constitutionality of a "thought crime" prosecution may be an open question).

¹¹³ See *Robinson v. California*, 370 U.S. 660 (1962).

¹¹⁴ U.S. CONST. amend. VI; see *Doggett v. United States*, 505 U.S. 647 (1992).

¹¹⁵ U.S. CONST. amend. VI; see *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing the right of indigent defendants to appointed counsel); see also *Strickland v. Washington* 466 U.S. 668 (1984) (establishing the constitutional standard for ineffective assistance).

¹¹⁶ U.S. Const. amend. VI; see *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the right to jury trial against the states).

¹¹⁷ U.S. CONST. amends. V, XIV; see Jerold Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001) (discussing the Court's use of the free-standing due process doctrine).

¹¹⁸ *Drope v. Missouri*, 420 U.S. 162 (1975).

¹¹⁹ *Brady v. Maryland*, 373 U.S. 83 (1963).

interpreted by reference to “evolving standards of decency,”¹²⁰ is that the ultimate punishment the State inflicts may not be “cruel and unusual.”¹²¹ These evolving standards “should be informed by ‘objective factors to the maximum possible extent,’” the most “reliable” of which is state legislation.¹²² This much is clear.

Less clear is the Court’s position on the content of “cruel and unusual.” A thick exegesis of the constitutional meaning of that phrase is beyond our scope, but we will nonetheless want to know how punishments are evaluated doctrinally. To wit, the Section will discuss to what extent “excessive” punishment is constitutionally distinct from “cruel and unusual” punishment, and whether that distinction is relevant. It will then explore the potential sources of the constitutional meaning of excessive punishment.

1. *When Is Excessiveness Unconstitutional?*

In applying the Eighth Amendment, the Supreme Court maintains that it owes legislatures deference in their choice of punishments, though the degree of deference has wavered over time and between Justices. “In assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity,” Justice Stewart wrote nearly thirty years ago in *Gregg v. Georgia*. “We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.”¹²³ Outside the context of criminal punishment, whose jurisprudence tends not to speak in such terms, Justice Stewart’s Eighth Amendment reviewing standard would be viewed as akin to a “rational basis” test. It does not require narrow tailoring; it merely asks that the punishment not be cruel or unusual, the punishment analog to “arbitrary” in the levels-of-scrutiny context. Moreover, the test Justice Stewart articulates does not, on its face, prohibit “excessive” punishment; such a prohibition would indeed require that the legislature select the least severe penalty possible.

¹²⁰ See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

¹²¹ U.S. CONST. amend. VIII. (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

¹²² *Atkins*, 536 U.S. at 312 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991)).

¹²³ *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

The Court has since repudiated this reading, at least as applied to capital cases. In the Court's most recent high-profile death penalty case, *Roper v. Simmons*, Justice Kennedy wrote for the majority that "[t]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions."¹²⁴ A ban on "all excessive punishments"¹²⁵ necessarily applies a heightened standard of scrutiny, since it requires a heightened degree of proportionality between the offense and the punishment.¹²⁶ It might well be argued that the standard is akin to the "strict scrutiny" standard that attends state classifications on the basis of race.¹²⁷ Indeed, the Court has required an individual inquiry into the character of an offender before he is sentenced to death in order to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."¹²⁸ This inquiry into mitigating factors is based on the judgment in *Woodson v. North Carolina* that "the penalty of death is qualitatively different from a sentence of imprisonment, however long."¹²⁹

Allowing that "death is different" has cloven the Court's review of punishments into separate inquiries for ordinary imprisonment versus the death penalty. In non-capital cases, the "heightened scrutiny" that prevents excessive punishment is neutered, at best, to what Justice O'Connor has called a "narrow proportionality principle."¹³⁰ The existence of this principle was established in *Solem v. Helm*, the only case in which the Supreme Court has held a prison sentence unconstitutionally lengthy,¹³¹ but it does not now command a Court majority. In *Ewing v. California*, which upheld California's mandatory recidivist statute, Justices Scalia and Thomas maintained that the Eighth Amendment does not contain any proportionality principle, the very idea of proportionality being inexorably linked to one particular penological theory: retribution.¹³² Justices Stevens, Souter, Ginsburg, and Breyer contended in dissent that the Eighth Amendment contains a basic proportionality principle even in non-capital cases that may be applied judicially by reference to all of the many

¹²⁴ 125 S. Ct. 1183, 1190 (2005).

¹²⁵ *Atkins*, 536 U.S. at 311 n.7.

¹²⁶ *See id.* at 311 ("[I]t is a precept of justice that punishment for crime should be graduated and apportioned to the offense.").

¹²⁷ *See, e.g., The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 168-69 (1987) (stating unequivocally that the Supreme Court applies strict scrutiny to capital punishments).

¹²⁸ *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

¹²⁹ 428 U.S. 280, 305 (1976).

¹³⁰ *Ewing v. California*, 538 U.S. 11, 20 (2003) (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991)).

¹³¹ *Solem v. Helm*, 463 U.S. 277 (1983).

¹³² *Id.* at 31 (Scalia, J., concurring in the judgment).

justifications for punishment: “namely, deterrence, incapacitation, retribution and rehabilitation.”¹³³ Whatever its functional proportionality principle, *Ewing* upheld a sentence of twenty five years to life for stealing three golf clubs. This is not nearly the kind of heightened scrutiny mandated for capital cases in *Woodson*.

A full account of the relationship between metaprivacy and excessive punishment would ask whether this difference is salient because “constitutional” or because “prudential.” That is, does the Court’s reluctance to engage in an excessiveness inquiry in non-capital cases result from a determination that excessive prison sentences are unproblematic constitutionally, or is it rather a matter of deference to legislative judgments, a recognition that a court simply lacks the competence to determine whether a prison sentence is too long? Justice Scalia seems to imply the latter when he says that his reason for not adhering to *Solem*’s view that the Eighth Amendment contains a proportionality principle is because he is unable to “intelligently apply it.”¹³⁴ To be sure, Justice Scalia makes clear that his belief that the Eighth Amendment lacks a proportionality principle is not purely prudential in *Harmelin v. Michigan*, in which the Court upheld against an Eighth Amendment challenge a mandatory life sentence for possession of 672 grams of cocaine.¹³⁵ Still, Justice Scalia’s *Harmelin* opinion provides a useful articulation of the prudential argument against constitutionalizing a proportionality principle in cases reviewing the lengths of prison terms: “While there are relatively clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are ‘cruel and unusual,’ proportionality does not lend itself to such an analysis.”¹³⁶ The length of a prison sentence is a continuous variable, and so the difference between one term and the next is not susceptible to controlled analysis that references agreed-upon principles. But because “[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind,” the legislative analysis that begets it is more amenable to judicial scrutiny.¹³⁷

This prudential (at least) distinction between the justiciability of the length of a prison term and the “mode” of punishment checks the Eighth Amendment jurisprudence. The first case to consider the constitutionality of a criminal statute under the Eighth Amendment was *Weems v. United States*, in which the Court invalidated a Philippines statute that imposed a

¹³³ See *id.* at 35 (Stevens, J., dissenting).

¹³⁴ *Ewing*, 538 U.S. at 31 (Scalia, J., concurring in the judgment).

¹³⁵ *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (plurality opinion).

¹³⁶ *Id.*

¹³⁷ *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

fifteen-year prison sentence, a \$4,000 fine and costs for the crime of falsifying a public document.¹³⁸ The imprisonment in *Weems* was itself atypically draconian, involving “a chain at the ankle and wrist of the offender,”¹³⁹ and, in the words of the statute itself, “hard and painful labor [with] no assistance whatsoever from without the institution.”¹⁴⁰ It is at least arguable that the *Weems* Court was concerned more with the mode of punishment than the length itself, particularly since it took pains to describe the conditions of confinement in what it called “graphic” detail.¹⁴¹ Similarly, a Court plurality declared in *Trop v. Dulles*, which overturned a statute that stripped wartime deserters of their American citizenship,¹⁴² that “[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any *technique* outside the bounds of these traditional penalties is constitutionally suspect.”¹⁴³ The Court relied explicitly on the length-mode distinction in *Rummel v. Estelle*, in which the Court upheld a Texas recidivist statute.¹⁴⁴ Then-Justice Rehnquist wrote that, unlike “unique” punishments such as the *Weems* statute and the death penalty, “the length of the sentence actually imposed is purely a matter of legislative prerogative.”¹⁴⁵

This paper need not take a position on the historical debate over the original understanding of the relationship between the Eighth Amendment and excessive punishment.¹⁴⁶ Let it suffice that the doctrine expressly

¹³⁸ *Weems v. United States*, 217 U.S. 349 (1910).

¹³⁹ *Id.* at 366.

¹⁴⁰ *Id.* at 364.

¹⁴¹ *Id.* at 366.

¹⁴² *Trop v. Dulles*, 356 U.S. 86 (1958).

¹⁴³ *Id.* at 100 (emphasis added).

¹⁴⁴ *Rummel v. Estelle*, 445 U.S. 263 (1980).

¹⁴⁵ *Id.* at 274 (1980).

¹⁴⁶ Justice Scalia’s view in *Harmelin* is contested. Justice Powell’s majority opinion in *Solem v. Helm* found historical support in the Magna Carta, English common law, and the Bill of Rights of 1689 for the view that the Eighth Amendment prohibited excessive punishment. See *Solem v. Helm*, 463 U.S. 277, 284-85 (1983); see also Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,” 57 CALIF. L. REV. 839 (1969) (arguing that the English Bill of Rights meant to prohibit excessive punishments). The Eighth Amendment is essentially boilerplate from the English version of one hundred years earlier. Granucci, *supra*, at 840. At least two additional considerations potentially weigh in favor of Justice Powell’s view in *Solem*. First, there’s the obvious structural consideration that the framers evidently thought excessive fines and excessive bail oppressive enough to constitutionalize their prohibition; it would be strange indeed if they nonetheless thought excessive punishment unobjectionable. The more sensible reading would be that a ban on excessive punishment was assumed, and that the “cruel and unusual” language was an additional qualifier. Surely it is possible for punishment to be cruel and unusual without being excessive. See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 236-37 (1999) (discussing the origins of the English Bill of Rights in the case of Titus Oates, whose whipping punishment for perjury was described as “cruel” even though floggings

applies an excessiveness test to “modes” of punishment, including capital punishment, the idea being that governing principles do avail themselves. The important question for our purposes is what those principles should be.

2. *Evaluating Excessiveness*

The *Roper* and *Atkins* Courts dutifully reiterated that the sine qua non of judicial review for excessiveness under the Eighth Amendment is the “evolving standards of decency” inquiry first announced in *Trop v. Dulles*.¹⁴⁷ Under the doctrine in capital cases, the Court is to look first at “objective indicia of consensus” that a punishment is disproportionate, and then “determine, in the exercise of [its] own independent judgment” whether there is reason to question the revealed consensus.¹⁴⁸ This statement of the doctrine is incomplete, however. In *Skinner v. Oklahoma*, the Court unanimously invalidated an Oklahoma statute that provided for the sterilization of those thrice convicted of “crimes ‘amounting to felonies involving moral turpitude.’”¹⁴⁹ The *Skinner* Court struck the statute down on Equal Protection grounds because it drew what the Court regarded as arbitrary lines between similarly situated classes of individuals, denying to one “one of the basic civil rights of man.”¹⁵⁰ For example, Justice Douglas wrote for the majority, “A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler [and therefore exempt from sterilization].”¹⁵¹ *Skinner* demonstrates, among other things, that the Eighth Amendment is not the last word on the constitutionality of a particular mode of criminal punishment.¹⁵² Punishment statutes may well implicate fundamental rights other than the simple “right to life;” when they do so, those statutes are subject to heightened scrutiny. The answer to whether a

were the norm). Second, excessive punishment arguably implicates ordinary principles of due process. Cf. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (applying the due process clause to sentencing enhancements). As Akhil Amar writes, “[r]ightly understood, the Constitution contains a good many provisions that are best read as declaratory and clarifying.” Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998).

¹⁴⁷ See *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

¹⁴⁸ *Roper*, 125 S. Ct. at 1192; see also *Atkins*, 536 U.S. at 313-16.

¹⁴⁹ *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

¹⁵⁰ *Id.* at 538-39, 541.

¹⁵¹ *Id.* at 539. Of course, if he is an embezzler, he is also more likely to be white.

¹⁵² In the post-*Griswold* era, *Skinner* has been converted into a substantive due process case. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U.L. REV. 359, 389 (2000) (describing *Skinner* as a privacy case).

capital punishment regime is excessive, then, will be informed not only by community consensus or (potentially) the subjective views of the Justices themselves, but must answer as well to the substantive rights protected elsewhere in the Constitution.

This doctrinal qualifier, obvious perhaps but rarely stated, parallels the Court's treatment of convicts serving ordinary prison sentences. Though not always so historically, it is now axiomatic that "prisoners do not shed all constitutional rights at the prison gate."¹⁵³ The Court has repudiated decisively the view that the fact of conviction grants to the State license to punish arbitrarily. The Court has noted, for example, that the protections of the Free Exercise Clause, the Due Process Clause, and the Equal Protection Clause all apply to prisoners as well as to the general population.¹⁵⁴ Indeed, current doctrine strongly implies that the *only* extra-constitutional deprivations that may be visited upon prisoners are those that "effectuate[] prison management and prisoner rehabilitative goals."¹⁵⁵ The typical formulation requires that prison-imposed burdens on most constitutional rights be reasonably related to "legitimate penological objectives."¹⁵⁶ Being convicted of a crime naturally diminishes the convict's rights against the State, but it does so only incident to the necessities of carrying out the initial sentence.

Relatedly, the Court has stressed that the broad inquiry into aggravating and mitigating factors in the penalty phase of a capital trial cannot be so broad as to threaten independent constitutional imperatives. A state may not, for example, "characterize the display of a red flag, the expression of unpopular political views, or the request for trial by jury as an aggravating circumstance."¹⁵⁷ Neither may it "attach[] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing

¹⁵³ *Sandin v. Conner*, 515 U.S. 472, 485 (1995).

¹⁵⁴ *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); *see also* *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam) (applying the Free Exercise Clause to a Buddhist inmate).

¹⁵⁵ *Sandin*, 515 U.S. at 485; *see* *Wolff*, 418 U.S. at 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

¹⁵⁶ *See, e.g.,* *Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989) (setting the constitutional guidelines for the regulation of publications sent and received by prisoners). The *Apprendi* line of cases also supports a broader notion that the full range of punishment, and not merely the predicate of a given conviction, is subject to the procedural cousin of "strict scrutiny," that is, proof beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) ("Merely using the label 'sentencing enhancement' to describe [additional time imposed for a racial motive] surely does not provide a principled basis for treating [it] differently [from the underlying offense]."). *But see* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 816 (1994) (challenging the idea that the reasonable doubt standard can be meaningfully compared to strict scrutiny).

¹⁵⁷ *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

process, such as for example the race, religion, or political affiliation of the defendant.”¹⁵⁸ The State’s obligation to adhere to the limitations of metaprivacy is, of course, no exception. *Limon v. Kansas* is instructive in this regard. Recall that *Limon* concerned whether the State of Kansas may punish homosexual sodomy of a minor more severely than heterosexual sodomy.¹⁵⁹ The Kansas Court of Appeals initially held that the discrepancy was permissible.¹⁶⁰ The Kansas Supreme Court denied review, but the U.S. Supreme Court granted certiorari, reversed, and remanded in light of *Lawrence*.¹⁶¹ Although the Kansas Court of Appeals ruled on remand that the differential is justifiable,¹⁶² the Court’s remand suggests that the principles of *Lawrence*, as with all other independent constitutional principles, informs judicial review of a sentencing enhancement.

Capital punishment is, of course, the ultimate sentencing enhancement. The death penalty, on Camus’s elegant formulation, “definitively eliminates the condemned man.”¹⁶³ As I have discussed, this distinguishing feature facilitates an external inquiry into whether the penalty is excessive. With respect to ordinary prison sentences, a reviewing court could not know, as a matter of elemental logic, where to begin an inquiry into excessiveness, at least not where that inquiry must be made not simply by reference to some social consensus but also by reference to fundamental principles. The only difference between a sentence of 100 months and a sentence of 105 months, after all, is five months. The remainder of this Part evaluates whether imposing capital punishment for retributive purposes is excessive by asking whether doing so vindicates constitutionally permissible values.

B. *Metaprivacy & Retribution*

This Section argues that a character-based retributive rationale is constitutionally inadequate as an institutional justification for capital punishment. Two analytic moves are necessary to make out the argument, and a third is prudent to defend it. First, I must demonstrate that the retributive rationale necessarily relies on a judgment about the character of the accused. Second, I must demonstrate that this judgment is personal in a

¹⁵⁸ *Id.*

¹⁵⁹ *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004).

¹⁶⁰ *State v. Limon*, 41 P.3d 303 (Kan. Ct. App. 2002) (unpublished opinion).

¹⁶¹ *Limon v. Kansas*, 539 U.S. 955 (2003).

¹⁶² *Limon*, 83 P.3d at 229. The case is presently on appeal at the Kansas Supreme Court.

¹⁶³ ALBERT CAMUS, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 173, 210 (1961).

constitutionally impermissible way. Finally, I will respond to a number of anticipated objections.

1. *Our Retribution Is Character-Based*

Retributive punishments, oversimplified, rely on the idea that punishment should be deserved. The obvious attraction of retribution is that it conforms nicely to our intuitions about the morality of punishment.¹⁶⁴ Although many gradations of retributive punishment might be identified,¹⁶⁵ retributive theories can be broadly segregated into act-based and character-based models. An act-based model assigns moral value to particular acts, holding that “[a] person who deserves punishment deserves it because, and only because, she has performed a culpable wrongdoing.”¹⁶⁶ By contrast, a character-based model holds that “[a] person who deserves punishment deserves it because, and only because, she has a bad moral character.”¹⁶⁷

In the realm of capital punishment, the character-based theory of retribution not only is dominant but is, in a sense, constitutionally required. The overriding command of the Court’s death penalty jurisprudence in the years following *Gregg v. Georgia* is that capital punishment must be appropriately individualized.¹⁶⁸ Writing for a five-Justice majority in *Penry*

¹⁶⁴ The retributive rationale is in the midst of a philosophical renaissance. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 23-24 (2003) (describing the “philosophical revival of retributivism” as “the most important Anglo-American movement of the last forty years or so”); Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 NW. L. REV. 843, 845 (2002) (calling retributivism “all the rage”).

¹⁶⁵ Michael Moore’s work in this area has been particularly innovative. See MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 83-189 (1998).

¹⁶⁶ STEPHEN KERSHNER, *DESERT, RETRIBUTION, AND TORTURE* 15 (2001). For examples of act-based retributive theories, see, e.g., *id.* at 27 (“[A] bad character is neither necessary nor sufficient for deserved punishment [and] the punishment that a wrongdoer deserves [does not] track the badness of her moral character.”); and ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 53 (1985) (“If the state is to carry out the authoritative response to [wrongful] conduct . . . then it should do so in a manner that testifies to the recognition that the conduct is wrong.”).

¹⁶⁷ KERSHNER, *supra* note 166, at 15-16. For examples of character-based theories, see, e.g., KANT, *supra* note 6, at 106 (arguing that only the death penalty appropriately corresponds to the ‘inner wickedness’ of a murderer); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 383 (1981) (suggesting that punishment is only appropriate for acts “attributed to a defect of character”); and Frederic R. Kellogg, *From Retribution to “Desert”: The Evolution of Criminal Punishment*, 15 *CRIMINOLOGY* 179 (1977) (arguing that a report by the Committee for the Study of Incarceration reflects a concern with the individuation of punishment that finds relevant the offender’s moral character).

¹⁶⁸ See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina* 428 U.S. 280 (1976).

v. Lynaugh, Justice O'Connor argued that "it is precisely because the punishment should be directly related to the personal moral culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."¹⁶⁹ Indeed, character evidence introduced at the sentencing phase of a capital trial is quite often designed to be mitigating, good traits speaking as well as bad to an individual's moral character. The theory behind allowing evidence of good works or community involvement is that a convict should be permitted to rebut the judgment that his crime completely determines his moral worth. As Russell Covey writes, defendants must be allowed to introduce mitigating evidence "to prove that their crime was not consistent with, or a manifestation of, a morally defective or dangerous character."¹⁷⁰ Consistent with this understanding, one theory in support of a constitutional prohibition on the execution of juveniles is that the character of a juvenile has not been sufficiently concretized.¹⁷¹ Justice Kennedy embraced this theory in *Roper*, writing that "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."¹⁷² This inquiry into an individual's fundamental moral character thus is a central feature of our death penalty jurisprudence.

Actual statutory aggravators and mitigators reinforce this doctrinal focus. For the sake of economy, we will use as an example Texas, the state that accounted for more than thirty-five percent of all executions nationwide from 1977 to 2003.¹⁷³ A murder qualifies as capital murder under the Texas Penal Code if any of the following conditions applies: the victim is known to be a peace officer or a fireman in the course of duty; the murder is intentionally committed in the course of committing another felony; it is a contract killing; it is in the course of a prison escape; the defendant is incarcerated and the victim is a prison employee; it is prison-

¹⁶⁹ 492 U.S. 302, 327-28 (1989) (holding that, though the Eighth Amendment did not prevent the execution of mentally retarded convicts, evidence as to mental retardation could not be excluded as a mitigating factor), *overruled in part by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁷⁰ Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 212 (2004).

¹⁷¹ See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 834 (2003) ("[L]ike the adult actor who establishes mitigation, it can be said that the adolescent's harmful act does not express his bad character; indeed, it does not manifest 'character' at all, but something else—in this case, developmental immaturity.").

¹⁷² *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005).

¹⁷³ U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2003, at 9 (2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>.

gang related; there are multiple victims; or the victim is a child under the age of six.¹⁷⁴ At the sentencing phase of a capital murder trial, the State must prove intent to kill and it must show that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”¹⁷⁵ If the State carries its burden, the jury is further instructed to answer whether life imprisonment should be imposed instead of death, “taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant.”¹⁷⁶ The Texas Code of Criminal Procedure additionally reiterates that the jury “shall consider mitigating evidence that a juror might regard as reducing the defendant’s moral blameworthiness.”¹⁷⁷

To summarize, the class of crimes to which Texas applies its capital murder statute appear to be those that seem particularly socially injurious (e.g., murder of a police officer, murder in the course of a prison escape) or particularly heinous (e.g., murder of a small child). Although it is difficult to disaggregate the different rationales, we can say broadly speaking that the former category reflects a deterrence rationale and the latter reflects some form of a retribution rationale. The deterrence rationale is further vindicated by the instruction that there must be a probability of recidivism, and the retribution rationale is further vindicated by the inquiry into character and moral blameworthiness. The view of the Texas statutes is intensely personal: identical crimes may be differentially punished based on the presence of a malevolent disposition within the offender.

It is possible, of course, to argue that the inquiry into character is not grounded in retribution at all, but rather serves the purposes of specific deterrence. Covey, for example, writes that:

the doctrine of individual consideration and the decision to permit future dangerousness to be argued at the penalty phase both grow out of a philosophical belief that capital sentencing decisions should turn on non-retributive, offender-based evaluations of the defendant’s character.¹⁷⁸

¹⁷⁴ TEX. PENAL CODE ANN. § 19.03 (Vernon 2005).

¹⁷⁵ TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(b) (Vernon 2005).

¹⁷⁶ *Id.* § 3(e).

¹⁷⁷ *Id.* § 3(f)(3).

¹⁷⁸ Covey, *supra* note 170, at 209. Covey argues that this philosophical belief is the progeny of the utilitarian views of Herbert Wechsler, who helped draft the Model Penal Code. *See id.* at 207-24.

Whatever its historical pedigree, the argument that the character inquiry speaks only to future dangerousness is both implausible and constitutionally problematic. The spectrum of positive character traits permitted under *Lockett v. Ohio* is far broader than a focus on future dangerousness would allow. As Stephen Garvey points out,¹⁷⁹ mitigators have ranged, either in dicta or in practice, from being “a fond and affectionate uncle,”¹⁸⁰ to assisting one’s father with painting,¹⁸¹ to winning a choreography prize,¹⁸² to having a “peaceful nature.”¹⁸³ In Texas, whose capital sentencing scheme we just discussed, a defendant’s parole eligibility was not even admissible at the penalty phase until 1999;¹⁸⁴ three years earlier, a Texas jury sentenced to death a convict suffering from AIDS whose life expectancy was three years.¹⁸⁵ Common sense suggests that the purpose of the character inquiry is not entirely or even primarily to assess future dangerousness but rather to establish a link between conduct and character, to “make the defendant’s whole career and soul the subject of the penalty trial”¹⁸⁶ for the purpose of judging the extent to which he has internalized norms of ethical conduct.

To the extent that prosecutors do adduce character evidence at capital trials in order to assess future dangerousness, they run into potential constitutional difficulties. As discussed, the Court has repeatedly and recently applied a heightened standard of review to capital sentencing schemes, holding that the imposition of the death penalty cannot be “excessive.”¹⁸⁷ To suggest that execution is the least restrictive means of specific deterrence for anyone below an exceedingly rarified stratum of impulsively violent people fails the laugh test.¹⁸⁸ Clearly some value is at play beyond preventing future crimes by the convict.

¹⁷⁹ Stephen P. Garvey, “*As the Gentle Rain from Heaven*”: Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1026 & n.145 (1996).

¹⁸⁰ *Lockett*, 438 U.S. at 604.

¹⁸¹ *Payne v. Tennessee*, 501 U.S. 808 (1991).

¹⁸² *Boyde v. California*, 494 U.S. 370, 382 n.5 (1990).

¹⁸³ *California v. Brown*, 479 U.S. 538 (1987).

¹⁸⁴ See TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(2)(B) (Vernon 2005).

¹⁸⁵ See Janet Morrow & Robert Morrow, *In a Narrow Grave: Texas Punishment Law in Capital Murder Cases*, 43 S. TEX. L. REV. 979, 984-85 (2002) (discussing *Dickerson v. State*, No. 71,920 (Tex. Crim. App. Dec. 4 1996)).

¹⁸⁶ Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 335. In his empirical study of how capital jurors react to actual and potential aggravators and mitigators, Stephen Garvey found that while factors relating to future dangerousness are indeed highly aggravating, so too is the defendant’s lack of remorse. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1560-61 (1998).

¹⁸⁷ See *supra* text accompanying notes 124-129.

¹⁸⁸ One controversial approach to incurably violent inmates has been confinement in supermax prisons, which have been characterized as having “dynamics of domination, control,

2. *The Constitutionality of Character-Based Retribution*

Even if I have established that the retributive theories we rely upon in sentencing individuals to death are “personal,” I have not established that they are personal in a constitutionally impermissible way. There are obvious differences, to say the least, between convicted homosexual sodomists and convicted murderers. As I have written, a convincing view of *Lawrence* is that it simply recognizes some social consensus that engaging in homosexual conduct does not violate a public duty, whereas murder certainly does. This distinction conforms to the moral intuitions of many, but is unsatisfying for two reasons. First, I have argued that the only way to understand *Lawrence* as a creature of the doctrinal tradition, rather than as a *sui generis* determination that writing moral approbation of gays into statutes is unconstitutional, is to recognize the principle that self-definitional conduct is protected by substantive due process in a way that other conduct is not. Second, this distinction does not in itself explain why bad character may be a but-for cause of a capital sentence.

Imagine the Texas legislature enacts the following amendment to its capital murder statute:

Capital Murder Sodomy. A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) under the following conditions:

- (a) the person commits the murder while committing sodomy against a minor; and
- (b) the person and the minor are of the same sex.

subordination, and submission [that] are fundamentally different from those in regular maximum security prisons.” Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 390 (2001). Little empirical research has emerged on the effectiveness of supermax prisons at reducing violence, but for one study’s take, see Chad S. Briggs, Jody L. Sundt, & Thomas C. Castellano, *The Effect of Supermaximum Security Prisons on Aggregate Levels of Inmate Violence*, 41 CRIMINOLOGY 1341 (2003) (finding that supermaxes in Illinois, Arizona, and Minnesota could not be justified as a means of increasing inmate safety but finding mixed results as to staff safety). See also Richard L. Lippke, *Against Supermax*, 21 J. APPLIED PHILOSOPHY 109, 113 (2004) (arguing that proponents have not carried their burden of demonstrating that supermax facilities are more effective than ordinary solitary confinement). The fact that states themselves are the typical proponents of the argument that supermax prisons reduce violence should itself raise red flags as to the appropriateness of the future dangerousness inquiry at its present level of generality.

Such a statute would pose obvious difficulties under *Lawrence*, and the Supreme Court suggested as much in *Limon v. Kansas*.¹⁸⁹ Yet *Lawrence* does not on its own terms furnish any grounds upon which to distinguish “gay” people from “inwardly wicked” or otherwise morally blameworthy people. Justice Kennedy expressly eschews “mandate[ing] [his] own moral code,”¹⁹⁰ and yet many Americans believe that homosexuality reflects deep character flaws, and moreover that these flaws are particularly likely to manifest themselves as crimes of moral turpitude. If we are to take Justice Kennedy’s words seriously, they must mean that the Court must be, to borrow from the First Amendment jurisprudence, content-neutral.¹⁹¹

If this is so, the crucial question is content-neutral with respect to what? Again, a tempting option is to say that the Court must be content-neutral within the category of acts that individuals have the moral freedom to engage in. One does not, of course, have a liberty right to engage in criminal conduct, but no a priori principle excludes homosexual sodomy from the family of criminal conduct. Without a theory of the instrumental value of same-sex sexual relations, anti-sodomy laws are just another example of “laws representing essentially moral choices.”¹⁹² The theory articulated in *Lawrence*, I have argued, is that anti-sodomy laws breach the status-conduct divide by punishing for who someone is rather than for what they do. And yet the retributive rationale upon which our death penalty doctrine appears largely to rely does the same, for it attaches penological relevance to the substance of an individual’s ontological commitments.

Although *Lawrence* is perhaps our most obvious jurisprudential paean to this kind of content-neutrality in punishment, it is not our only one. The Court expressed a similar idea more than forty years ago when it held in *Robinson v. California* that punishing “status” crime violates the Eighth Amendment.¹⁹³ As Justice Douglas wrote in concurrence, “[T]he principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.”¹⁹⁴ It will be objected that the morally depraved is “sick” not in the medical but in the colloquial sense. Whereas sickness or addiction is simple bad luck, a mentally competent person, even one with bad “constitutive” luck,¹⁹⁵ commits a heinous murder as an act of will.¹⁹⁶ Even without

¹⁸⁹ 539 U.S. 955 (2003); see *supra* text accompanying notes 159-162.

¹⁹⁰ *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

¹⁹¹ See, e.g., *United States v. Grace*, 461 U.S. 171 (1983) (subjecting time, place, and manner restrictions on speech in public forums to content-neutrality and heightened scrutiny).

¹⁹² *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

¹⁹³ *Robinson v. California*, 370 U.S. 660 (1962).

¹⁹⁴ *Id.* at 676 (Douglas, J., concurring).

¹⁹⁵ See THOMAS NAGEL, *Moral Luck*, in MORTAL QUESTIONS 24, 28 (1979).

engaging the determinist's response to this objection,¹⁹⁷ it will suffice to note that *Lawrence* does not expressly rely on a judgment about whether the status defined by the conduct was willful or not.

The illiberality of punishing someone for having a disfavored constitution also finds expression in the Bill of Attainder clauses. Those clauses were meant to embody the idea that it is wrong for a criminal statute "to designate[] *criminals* rather than *crimes*."¹⁹⁸ Writes Akhil Amar, "Both legislation and adjudication must be suitably impersonal. Neither legislators nor judges may punish me simply because they do not like me."¹⁹⁹ Neither, I argue, can they enhance your sentence for that reason. It is in this spirit that *Lawrence* declared "we don't like you" an ad hominem, not a principle of criminal liability. Amar suggests that one's "intent and predispositions" may be relevant to "punishment and deterrence" once a person "has violated a legitimate criminal law."²⁰⁰ Post-*Lawrence*, at least, I suggest that one's predispositions are relevant only to the extent that they help the State to effectuate legitimate penological objectives such as sentence length, correctional classification, and rehabilitative regimen. To say, without more, that one must die because he is morally depraved ignores the command of impersonality.

3. *Responding to Objections*

I have already attempted, through a clarification of my methodology, to answer the overriding objection to my thesis, that *Lawrence*, like many substantive due process decisions before it, is simply *sui generis* extension of fundamental rights. I can anticipate at least four additional grounds for skepticism. First, my argument seems deeply counterintuitive, in that it appears to suggest that the more committed the criminal, the less he may be punished. Second, social consensus may not play the same role in criminal sentencing as it plays in *Lawrence*, and in any event seems a weak ground on which to rest a right to avoid the death penalty. Third, my thesis may appear to require that belief in free will be read out of the Constitution, which is inconsistent with any reasonable theory of judicial restraint. Finally, the role mitigation evidence plays in my scheme is uncertain, if the State is to take seriously the mandate of content-neutrality. I address each objection in turn.

¹⁹⁶ See MOORE, *supra* note 165, at 217.

¹⁹⁷ See Subsection II.B.3.c, *supra*.

¹⁹⁸ Amar, *supra* note 18, at 211.

¹⁹⁹ *Id.* at 210.

²⁰⁰ *Id.* at 218.

a. *On Intuition*

Plainly, our moral intuitions do not support the claim that connecting criminal conduct to bad character should *decrease* the range of available punishments. Indeed, many have argued that retribution is the moral basis for our intuitive disgust at excessive punishment.²⁰¹ The concept of “desert,” being inherently normative, seems defeated if we reject our moral intuitions as to who merits particular punishments.

I offer two responses to this argument. First, on my account, connecting criminal conduct to bad character does not decrease the range of available punishments; it merely fails to increase it. The argument is not that bad character makes one less morally culpable, but rather that bad character is simply not relevant to the State’s imposition of criminal punishments.²⁰² The inquiry, where conducted for improper purposes, simply exceeds the legitimate power of the State. This restated argument remains counterintuitive (if less so), but—and this amounts to the second response—much of our constitutional doctrine fails to conform to our moral intuitions. Our Constitution does not require that punishment be just; it requires that certain protected liberty interests be respected by the State. Consider, to take but two examples, the exclusionary rule and the double jeopardy clause. Both reject dominant moral intuitions about just outcomes but vindicate other values that the polity deems significant.

The principles of *Lawrence*-style metaprivacy hold that one’s interest in metaphysical autonomy is one such protected value. The State may neither impose nor increase one’s punishment based on a moral judgment about the commitments that that autonomy entails. I will have more to say in Part III about our intuitions about competing theories of value, but let it suffice for now to say that *Lawrence* emphasizes and reinforces a theoretically controversial doctrinal position, that that autonomy is “presumptive,”²⁰³ and neither prostrates before a community’s contrary moral claims nor vanishes at the prison gate.

b. *Social Consensus Redux*

²⁰¹ See, e.g., COREY LANG BRETTSCHEIDER, PUNISHMENT, PROPERTY AND JUSTICE 33 (2001).

²⁰² I table for the purposes of this paper whether bad character may be relevant to non-retributive rationales for punishment.

²⁰³ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); Henkin, *supra* note 271, at 1411; see text accompanying note 352.

We have seen that social consensus plays a role in delineating the protected interests in *Lawrence*, namely in identifying self-definitional conduct.²⁰⁴ There are at least two potential problems in extending this logic to criminality. First, even if we accept the command of content-neutrality, it is not obvious that the requisite determination has even been made in the criminal context. Writes Jed Rubenfeld:

When a person obeys the law against murder, or almost any other law, his life is constrained but not usually informed or taken over to any substantial degree with a set of new activities and concerns. He is not thrust into a set of new institutions or relations. The category of “non-murderer” is essentially a formal one; it is not a defined role or identity with substantial, affirmative, institutionalized functions.²⁰⁵

Criminals may actualize their autonomy through criminal behavior, or they may not. Moreover, our evidence of such actualization—the character evidence introduced at the sentencing phase of a trial—may not indicate the kind of metacommitment thought relevant in *Lawrence*.

This objection proves too much. Participating in homosexual sodomy does not necessarily reflect an attempt at self-actualization, either, and indeed, Justice Scalia was deeply skeptical of any distinction between homosexual sodomy and nudism in their respective substantiations of self-defining conduct.²⁰⁶ The question is whether having a moral character tied to criminal behavior is, from the vantage point of social consensus, more like nudism or more like homosexual sodomy. That is, does social consensus indicate that the criminal behavior of, say, Todd Rizzo, is incidental to his being, or that it is constitutive of it?

The inquiry has two parts: First, I must demonstrate that social consensus is the instrument of decisionmaking. Then, I must show that the judgment made by social consensus in the criminal sentencing context is like the judgment referenced in *Lawrence*. The first issue is essentially answered by stipulation. A statute listing moral blameworthiness and bad character as aggravators is itself a powerful demonstration of social consensus. In a capital sentencing trial, a legislature in essence delegates to the jury its role as an instrument of that consensus.

²⁰⁴ See *supra* text accompanying notes 88-90.

²⁰⁵ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 793 (1989).

²⁰⁶ *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

The answer to the second issue is more difficult. For assistance, I turn to the Supreme Court case of *Dawson v. Delaware*.²⁰⁷ In *Dawson*, the State of Delaware sought to rebut mitigating “good” character evidence of the defendant’s kindness and prison good time credits with “bad” character evidence that Dawson belonged to an avowedly racist gang, the Aryan Brotherhood.²⁰⁸ The Court refused to allow the evidence on the grounds that the First Amendment prevents a state from “employing evidence of a defendant’s abstract beliefs at a sentencing hearing *when those beliefs have no bearing on the issue being tried*.”²⁰⁹ Certainly, belonging to a racist gang might indicate “bad” moral character, but only the fact that the evidence was not demonstrably relevant to Dawson’s criminal tendencies prevented it from being used.²¹⁰ A jury weighing aggravating factors is not asked to judge whether a convict may happen to be a bad person incidental to being a criminal, but rather whether he is a criminally bad person, one whose moral commitments tend towards the criminal activity for which he has been convicted. The judgment being made is whether criminal activity is a manifestation of a deeper identity. Withholding an enhanced punishment but for the presence of this identity is inconsistent with *Lawrence*, just as withholding enhanced punishment but for the presence of abstract beliefs and political affiliations is inconsistent with First Amendment doctrine.

There is, however, a second objection related to social consensus. It may seem morally inappropriate to accord so prominent a role to social consensus in delineating so important a right as the right to life. This complaint is misplaced. We rely on social consensus for decisions of life and death all the time, most explicitly in the Eighth Amendment,²¹¹ but also, as I have noted, implicitly in the Anglo-American jury system itself. It may indeed be morally improper to grant so much weight to evolving social standards, but convention plays at least as powerful a role in our constitutional law as moral philosophy.

c. *On Free Will*

If this paper’s argument requires that the State adopt a determinist position on human agency, that may be sufficient reason to reject it. One

²⁰⁷ 503 U.S. 159 (1992).

²⁰⁸ *Id.* at 167-68.

²⁰⁹ *Id.* at 168 (emphasis added).

²¹⁰ See *id.* at 167 (“Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson’s part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible.”).

²¹¹ See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *supra* notes 147-148 and accompanying text.

explanation for the principle of content-neutrality that this paper has sketched would be that someone with a criminal constitution cannot be held responsible for his criminal actions. On this view, *Lawrence* rested on the idea that gay identity is not freely chosen, and therefore the conduct associated with gay identity should not be criminalized. If one also cannot choose to be a committed criminal, it would follow that punishing on this basis is also impermissible. Imputing to the Constitution so controversial a philosophical view would be so aggressively radical that we would have to reject it on its face.

A determinist explanation is not the only one, however. An alternative position is an epistemological one. Even if criminals are exercising their free will in committing crimes, how is one ever to know? Evidence of inherent bad character may demonstrate a decreased likelihood that a bad act is freely chosen. A third position is that *Lawrence*-style metaprivacy does not accept any determinist account, but simply requires that the State take no position, as retributive punishment may,²¹² on whether people with criminal character are exercising free will in committing crimes. Finally, *Lawrence* may have nothing whatsoever to do with free will, and may just be a case about the appropriate limits of the State's power to judge identities. This list does not exhaust the possibilities, but it makes the point, namely that my argument makes no necessary assumption about the constitutional legitimacy of believing in free will.

d. *On Mitigation*

If this paper's argument is correct, and the State must indeed be content-neutral, does it mean that, contrary to *Lockett v. Ohio*,²¹³ a capital jury no longer may hear evidence at the penalty phase that, say, church attendance, random acts of kindness, or a generally pacific nature demonstrate that a defendant deserves to live? One might be tempted reflexively to say no, on the grounds that *Lawrence* is about making only pejorative moral judgments about constitutive character. Since mitigation evidence is not used as a form of punishment, it falls outside the scope of the principles of metaprivacy. But anytime the State decreases a punishment based on mitigating evidence, it necessarily creates a differential between people who possess the trait in evidence and those who do not. Those convicts for whom mitigation evidence is unavailing are

²¹² But see NOZICK, *supra* note 167, at 393 (arguing that a belief in determinism is not inconsistent with retributive punishment).

²¹³ *Lockett v. Ohio*, 438 U.S. 586 (1978).

executed, though the presence of sufficient mitigating character evidence would have spared them. Content-neutral this is not.

The position this paper takes, then, as it must, is that certain mitigating evidence is equally capable of violating the principles of *Lawrence*. Where such evidence is adduced to vindicate a belief that certain personal metacommitments are deontologically more worthy of enhanced punishment than others, it must be excluded.

* * *

Even if the principles of metaprivacy prohibit a particular form of retributive punishment, as outlined above, the constitutionality of capital punishment generally remains an open question. The Supreme Court has reiterated recently that the Constitution “does not mandate adoption of any one penological theory,”²¹⁴ though the Court has cited only deterrence and retribution as acceptable rationales for capital punishment.²¹⁵ It will be fruitful to examine whether the death penalty can withstand scrutiny under wholly non-retributive rationales for punishment,²¹⁶ but that inquiry is beyond the scope of this paper. Rather, the remainder of this paper examines the extent to which the relationship between metaprivacy and punishment that I have sketched comports with the existing legal framework. If not, it would constitute an objection more general, and potentially more fatal, than any I have heretofore considered.

²¹⁴ *Ewing v. California*, 538 U.S. 11, 25 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

²¹⁵ *Roper v. Simmons*, 125 S. Ct. 1183, 1196 (2005). An additional potential rationale that remains unexplored doctrinally is an “expressive” rationale. See, e.g., Joel Feinberg, *The Expressive Function of Punishment*, in *PHILOSOPHY OF LAW* 761, 762 (Joel Feinberg & Jules Coleman eds., 2004) (“Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”).

²¹⁶ It may be useful to ask, for example, what deference is owed to any legislative evidence supporting a general deterrence rationale, especially in light of the Court’s recent interest in scrutinizing legislative fact-finding in federalism cases. See, e.g., William W. Buzbee & Robert A. Shapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001) (discussing *Garrett*, *Lopez*, *Morrison* and *City of Boerne*). Virtually all will agree that the empirical debate is inconclusive at best. See Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 8 (1996) (finding that eighty percent of criminologists believe that according to present literature the death penalty has no significant deterrent effect). But see Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003) (suggesting that executions may save eighteen lives on average). At a higher level of generality, it may be necessary to consider the extent to which general deterrence itself represents a competing moral claim that cannot trump an individual’s right to metaprivacy.

III. ON CONSTITUTIONAL FIT

Ronald Dworkin has famously described the analytic process a principled judge goes through in adjudicating hard cases. He argues that she must observe the doctrine of “political responsibility.”²¹⁷ That is, the principle that gives rise to her rule of decision must “fit” settled legal rules and practices; it must be “shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in . . . hypothetical circumstances.”²¹⁸ Then, if multiple decisional rules fit the existing legal landscape, the jurist chooses the normative theory that best justifies the present body of law.²¹⁹ I have thus far been relatively inattentive to these external interpretive constraints. This Part aims to palliate, if not quite cure, this lingering rhetorical ailment by demonstrating that my interpretation of the relationship between metaprivacy and punishment is neither a departure from settled rules nor even a departure from extant understandings of settled rules. Section III.A situates my interpretation of *Lawrence* within the broader privacy and First Amendment doctrine. Section III.B examines and demonstrates this paper’s comity with extant understandings of this doctrine, understandings that ultimately must deny a place for the State to draw distinctions between the personal ethical commitments of the individuals within its polity.

A. *Doctrinal Fit*

This Section discusses the emergence of the right to privacy as a distinct doctrinal category. Subsection III.A.1 lays out the contours of the privacy doctrine as it has developed in three incarnations: tort privacy, Fourth Amendment privacy, and fundamental decision privacy. I argue that the principle of metaprivacy has lingered beneath each incarnation, and has become progressively more dominant over time. Subsection III.A.2 argues that enunciating a principle of *Lawrence* as metaprivacy helps to harmonize the latent conflict between First Amendment hate speech and expressive association doctrines.

1. *Constitutional Privacy*

²¹⁷ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 87 (1977).

²¹⁸ *Id.* at 88.

²¹⁹ *See id.* at 106-07.

The meaning of the right to privacy is hardly self-evident. Whatever the success of the many efforts to give the right substance and consistency,²²⁰ these efforts have not wholly infiltrated Supreme Court doctrine and the common law. The privacy right as understood in American jurisprudence encompasses a potpourri of distinct if related concepts: the freedom not to have one's name or likeness appear in advertisements without consent;²²¹ the freedom from government intrusion into one's home and personal effects;²²² the freedom to hold a meeting without a government mole present;²²³ the freedom to use contraceptives;²²⁴ the freedom to marry;²²⁵ and the freedom to have non-commercial sexual relations with consenting adults²²⁶ all have been defended under the same banner. The privacy doctrine can be segregated into at least three broad categories: tort privacy, Fourth Amendment privacy, and fundamental decision privacy.²²⁷ To elucidate the thread that runs through these doctrinal species of privacy, I briefly discuss each in turn.

a. *Tort Privacy*

Privacy has a quotidian meaning that we all essentially understand, even if it escapes precise definition. Our right to privacy protects us from the nonconsensual prying of others into matters we consider to be personal or intimate. Thus it protects us from peeping Toms, both literal and metaphorical. When Samuel Warren and Louis Brandeis wrote their seminal 1890 article, *The Right to Privacy*,²²⁸ they had this quotidian meaning in mind. According to William Prosser, Warren was upset at the aggressive coverage the Boston newspapers had been giving to his wife's high society parties, particularly the recent wedding of the Warrens'

²²⁰ See, e.g., Charles Fried, *Privacy*, 77 YALE L.J. 475 (1967) (emphasizing privacy's value as a necessary instrument to the achievement of fundamental interpersonal relationships); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFFAIRS 26 (1976) (casting doubt on Fried's view as, inter alia, too market-oriented, and instead grounding the fundamentality of privacy in its role in staking a claim to personhood); Rubinfeld, *supra* note 205 (elaborating an "anti-totalitarian" conception of privacy).

²²¹ See, e.g., *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905).

²²² See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

²²³ See *NAACP v. Alabama*, 357 U.S. 449 (1958).

²²⁴ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to single people).

²²⁵ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978).

²²⁶ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

²²⁷ Some have argued for more. See, e.g., Ken Gormley, *One Hundred Years of Privacy*, 1992 WISC. L. REV. 1335 (identifying "First Amendment" privacy and "state constitutional" privacy as additional categories).

²²⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

daughter.²²⁹ Warren's revenge was to conspire with his former law partner Brandeis to declare, in the pages of the *Harvard Law Review*, a "right to be let alone."²³⁰ Each individual, they argued, has a right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others,"²³¹ to decide, that is, "whether that which is his shall be given to the public."²³² According to Warren and Brandeis, the palpable injury to the individual caused by unwarranted invasions of this right is and should be actionable. While Warren and Brandeis did not invent the privacy tort, theirs represents the first attempt to define its contours comprehensively.

Over the next decade, several courts also began to recognize a common law right to determine the uses of one's image by others.²³³ Among the most notable early cases is *Pavesich v. New England Life Insurance Co.*, in which the Georgia Supreme Court held that a plaintiff artist, Paolo Pavesich, could invoke his privacy rights in suing an insurance company for the use of his endorsement and his image in an advertisement without his consent.²³⁴ During an extensive discussion of the development of the right of privacy since the Warren and Brandeis article, Justice Cobb wrote for the Court that "[w]hen, as here, there is an alleged invasion of some personal right, or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief."²³⁵ Some blowback occurred,²³⁶ but rarely had an academic work so immediately and palpably affected the development of common law rights and duties.

²²⁹ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960).

²³⁰ Warren & Brandeis, *supra* note 228, at 195 (quoting THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888)). The anecdote has some holes. As Ken Gormley notes, the Warrens' daughter was six years old in 1890. See Gormley, *supra* note 227, at 1349.

²³¹ Warren & Brandeis, *supra* note 228, at 198.

²³² *Id.* at 199.

²³³ See, e.g., *Corliss v. E.W. Walker Co.*, 64 F.280, 282 (C.C.D. Mass. 1894) (declaring in dicta that "the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced"); *Marks v. Jaffa*, 26 N.Y.S. 908, 909 (N.Y. Sup. Ct. 1893) (enjoining the use of the plaintiff actor's name and photograph in a newspaper popularity contest); *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240 (N.Y. Sup. Ct. 1891) (enjoining the use of a doctor's name in an advertisement for certain medicinal pastilles); *Schuyler v. Curtis*, 15 N.Y.S. 787 (N.Y. Sup. Ct. 1891) (enjoining the erecting of an unauthorized statue to commemorate the philanthropy of the plaintiff's deceased family member); *Manola v. Stevens* (N.Y. Sup. Ct. 1890), in *N.Y. Times*, June 15, 18, 21, 1890 (enjoining a photographer from publishing a photograph of an actress wearing tights on stage).

²³⁴ *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905).

²³⁵ *Id.* at 78.

²³⁶ See, e.g., *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902) (denying injunctive relief to a plaintiff who objected to the unauthorized use of her portrait in flour advertisements because "the so-called 'right of privacy' has not yet found an abiding place in our jurisprudence."). The *Roberson* case was much criticized, so much so that a member of the panel

The twentieth century saw the right to control the use of one's image in public establish itself still more firmly at common law,²³⁷ under a handful of state statutes,²³⁸ and in the Restatement of Torts.²³⁹ In 1960, Prosser advanced the legal community's understanding of "private" privacy rights by identifying four distinct torts: 1) "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs"; 2) "[p]ublic disclosure of embarrassing private facts about the plaintiff"; 3) "[p]ublicity which places the plaintiff in a false light in the public eye"; and 4) "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."²⁴⁰ What these four categories have in common is that their recognition allows individuals to protect their public personae from unauthorized appropriation. One hears in Warren and Brandeis, however, echoes of a broader philosophical claim, even if they advance it only instrumentally. The right to privacy, they write, is "part of the more general right to the immunity of the person, —the right to one's personality."²⁴¹ A right to "personality" is by no means self-defining, though the right to private control of one's public image is one of several options. I consider other contenders below.

b. *Fourth Amendment Privacy*

The Brandeis legacy is, of course, much larger than the privacy tort. Brandeis's views on privacy must be read *in pari materia* with his general view of the appropriate relationship between individuals and the social and political institutions that threaten to dominate their lives. Brandeis was averse to the commodification of our social life and what he referred to as "the curse of bigness" both in the private sector and in government.²⁴² For Brandeis, writes David Levy, "[t]he explosion of heavy industry seemed to carry with it unlimited possibilities for blind materialism, political corruption of the worst sort, class warfare and hatred, quite unacceptable

found it necessary to write a law review article to defend the decision. See Prosser, *supra* note 229, at 385 (discussing Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902)).

²³⁷ By 1960, only four states courts—in Rhode Island, Nebraska, Texas, and Wisconsin—had expressly rejected a common law privacy right. Prosser, *supra* note 229, at 388.

²³⁸ See, e.g., Act of Apr. 6, 1903, ch. 132, §§ 1-2, 1903 N.Y. Laws 308 (making appropriation of one's "name, portrait or picture" for the purposes of trade or advertising is a misdemeanor and providing a cause of action in equity); Utah Code Ann. §§ 76-4-8, 9 (1953) (making appropriation a misdemeanor); Va. Code Ann. § 8.01-40 (1950) (providing for a suit in equity or for damages).

²³⁹ See RESTATEMENT OF TORTS § 867 (1939).

²⁴⁰ Prosser, *supra* note 229, at 389.

²⁴¹ Warren & Brandeis, *supra* note 228, at 207.

²⁴² See PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 72-99 (1993).

limitations on human freedom, the death of initiative and healthy competition, the gravest threat to traditional standards of democracy itself.”²⁴³ Like Mill’s, Brandeis’s individualism was civic-minded; he believed that the political dialogue necessary for a healthy democratic state presupposed a respect for individual liberty.²⁴⁴

Naturally then, Brandeis’s concern for privacy rights was not limited to the private sphere. As *Justice* Brandeis, he articulated, in dissent in *Olmstead v. United States*,²⁴⁵ the Court’s first comprehensive recognition of a right to privacy against the State:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. Every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.²⁴⁶

As Brandeis recognized, the Fourth Amendment represents the Constitution’s most evident application of the spirit of the privacy tort to the public sphere.²⁴⁷ It asks, in effect, under what circumstances and subject to what limitations government agents may invade an individual’s private

²⁴³ See David W. Levy, *Brandeis and the Progressive Movement*, in *BRANDEIS AND AMERICA* 99, 111 (Nelson L. Dawson ed., 1989). Brandeis’s aversion to “bigness” manifested itself in, for example, a suspicion of technology. He was a copious letter-writer who used telephones only when necessary. Brandeis wrote at least 2,500 letters to his wife and daughter alone over a fifty-year period, Melvin I. Urofsky, *The Brandeis Agenda*, in *BRANDEIS AND AMERICA* 99, 133 (Nelson L. Dawson ed., 1989), and kept his horse and buggy until it was banned from the streets of Washington, D.C. in the 1920s, see Levy, *supra*, at 103.

²⁴⁴ See STRUM, *supra* note 242, at 2.

²⁴⁵ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

²⁴⁶ *Id.* at 478.

²⁴⁷ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) (commenting that the “global command” of the Fourth Amendment “that all government searches and seizures be reasonable sounds not in criminal law, but in constitutional tort law”); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 51 (declaring that the Fourth Amendment protects “interests in bodily integrity, mental tranquility, and freedom of movement traditionally protected by tort actions”).

space and search her belongings against her will. The Fourth Amendment does not mention “privacy” in express terms. The right it speaks of, that “of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ,”²⁴⁸ appears to sound more in property than in privacy.²⁴⁹ In the years since *Olmstead*, however, the Court has attempted to give definition to the meaning of the word “persons” in the search-and-seizure context.

The Court’s earliest effort at Fourth Amendment interpretation came in *Boyd v. United States*, a challenge to a government subpoena of an invoice for allegedly illegally imported plate glass.²⁵⁰ Even though the case did not involve a literal, physical search or seizure, the Court held that the compelled production of such “private papers” violated the Fourth Amendment. Referring to the great English case of *Entick v. Carrington*,²⁵¹ in which Lord Camden voided the seizure of John Entick’s private papers in a seditious libel investigation against him, Justice Bradley wrote for the Court that:

[i]t is not the breaking of [Entick’s] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence²⁵²

The Fourth Amendment protected far more than just the security of the people in their “persons, houses, papers, and effects;” these, the Court suggested, were but a shorthand for “the sanctity of a man’s home and the privacies of life.”²⁵³

Two of *Boyd*’s many take-home points are especially relevant to our discussion of constitutional privacy doctrine. First, *Boyd* applied, at least to private effects, the nineteenth-century analogue of a heightened scrutiny test. An individual’s right to her private personal items is described as “indefeasible,” what the modern Court would call “fundamental.” Second, and relatedly, Lord Camden’s *Entick* opinion relies heavily on the supposition that “[t]he great end for which men entered into society was to

²⁴⁸ U.S. Const. amend. IV.

²⁴⁹ See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 562 (1996).

²⁵⁰ See *Boyd v. United States*, 116 U.S. 616 (1886).

²⁵¹ 19 Howell’s State Trials 1029 (C.P. 1765).

²⁵² *Boyd*, 116 U.S. at 630.

²⁵³ *Id.*

secure their property.”²⁵⁴ Although *Boyd* arguably announced a more broadly applicable principle than that a man’s home is his castle, this is essentially the proposition for which it stands.²⁵⁵ As Morgan Cloud writes, “*Boyd* is the Fourth Amendment’s analogue of *Lochner*, employing the same kind of natural law-based reasoning linking liberty and property rights to strike down a statute.”²⁵⁶ History has been more kind to *Boyd* than to *Lochner*, but only barely.

Three Supreme Court cases merit particular mention in exploring the doctrinal segue from *Boyd* to the themes of greatest relevance to this paper. The first is *Olmstead*, a challenge to a federal wiretap. The *Olmstead* majority limited *Boyd*’s expansive Fourth Amendment protections, ruling that they applied only to either “an official search and seizure of [one’s] person, [or] papers [or] tangible material effects,” or “an actual physical invasion of [one’s] house ‘or curtilage’ for the purpose of making a seizure.”²⁵⁷ Neither a wiretap nor any other form of electronic surveillance fit this Spartan definition.²⁵⁸ The majority opinion contained none of the symbolic language about “the privacies of life,” prompting Brandeis’s suggestion that the Court was placing an “unduly literal construction” upon the Fourth Amendment.²⁵⁹

A pair of Warren Court decisions would partially vindicate Brandeis but, in so doing, would substantially contribute to the confusion in this area. First, in *Warden v. Hayden*,²⁶⁰ a case involving a warrantless search that yielded various personal items of a man eventually convicted of armed robbery, the Court held that the search was valid even though the items obtained were “mere evidence” rather than “instrumentalities, fruits, or contraband.”²⁶¹ The reason the so-called “mere evidence” rule was no longer applicable, Justice Brennan wrote, was because the protections of the Fourth Amendment attached not to particular categories of property but to

²⁵⁴ *Boyd*, 116 U.S. at 627 (quoting *Entick*, 19 Howell’s State Trials at 1066).

²⁵⁵ See, e.g., *Payton v. New York*, 445 U.S. 573, 582 n.17 (1980) (citing *Boyd* for the notion that “[a]t the core of the Fourth Amendment . . . is the fundamental concept that any governmental intrusion into an individual’s home or expectation of privacy must be strictly circumscribed”); Amar, *supra* note 247, at 788 (calling *Boyd* a relic of “*Lochner*-era property worship”); Cloud, *supra* note 249, at 578 (describing the “property-based concepts” of *Boyd* as “a fundamental part of Fourth Amendment doctrine” for the next eighty years).

²⁵⁶ Cloud, *supra* note 249, at 560-61 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

²⁵⁷ *Olmstead v. United States*, 277 U.S. 438, 466 (1928). “Curtilage” is the enclosed land surrounding a house.

²⁵⁸ A conversation is now considered “tangible” for Fourth Amendment purposes. See *Berger v. New York*, 388 U.S. 41, 52 (1967).

²⁵⁹ *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

²⁶⁰ 387 U.S. 294 (1967).

²⁶¹ *Id.* at 300.

individuals: “We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”²⁶²

Seven months later the Court expanded upon its newfound Fourth Amendment privacy conception in *Katz v. United States*,²⁶³ which held that the exclusionary rule applied to an FBI recording of a conversation on a device placed outside a telephone booth. “[T]he Fourth Amendment protects people, not places,” wrote Justice Stewart. “What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”²⁶⁴ The test of whether a situation or location is one sought to be preserved as private that emerged from *Katz* is spelled out largely in the concurrence of Justice Harlan.²⁶⁵ He articulated a two-part requirement, “first that a person [exhibit] an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”²⁶⁶

Significantly, the reasonable expectation of privacy test that *Katz* birthed is not a measure of the general issue, whether a governmental intrusion is unreasonable—for this inquiry, probable cause will suffice—but is rather a test of whether a warrant or any other qualification is even required in the first place. Had the FBI agents only taken the trouble to seek a warrant, the *Katz* Court suggests that they would have obtained one and the search would have been constitutional.²⁶⁷ “[I]n substituting reasonable expectations of privacy for property rights as the focus of fourth amendment protection, the Court was not substituting one inviolable interest for another,” one commentator writes. “It appears that the Court now believed that the sole function of that amendment is to ensure that privacy is not invaded in an arbitrary manner, rather than to ensure that privacy receives absolute protection against invasion.”²⁶⁸ The effect of this shift is to convert the Fourth Amendment inquiry into a probable cause test. This is not quite what the *Boyd* Court had in mind when it called the right

²⁶² *Id.* at 304.

²⁶³ 389 U.S. 347 (1967).

²⁶⁴ *Id.* at 351.

²⁶⁵ See, e.g., *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654 (1995); *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

²⁶⁶ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

²⁶⁷ See *id.* at 354-55.

²⁶⁸ Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 203 (1977).

protected by the Fourth Amendment “indefeasible,”²⁶⁹ nor what Justice Brandeis had in mind when he called the right to be let alone, as against the government, “the right most valued by civilized men.”²⁷⁰

With *Hayden* and *Katz*, the Court achieved Brandeis’s vision of unmooring the Fourth Amendment from fetishistic property protection, but did not concomitantly maintain the heightened scrutiny that both the *Boyd* Court and Brandeis considered essential to the review of rights they thought fundamental.²⁷¹ Thus, a doctrinal void was formed. Justice Stewart recognized as much when he wrote in *Katz* that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy. . . .’ Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.”²⁷² Heightened protection of man’s “spiritual nature”²⁷³ would be left to other constitutional provisions and their attendant jurisprudence.

c. *Fundamental Decision Privacy*

The development of a more transcendent constitutional right of privacy, of the sort envisioned by Brandeis in his *Olmstead* dissent, would come in 1963, in *Griswold v. Connecticut*,²⁷⁴ though it was a long time in the making. Indeed, as early as 1914, Margaret Sanger had begun agitating for a woman’s right to control her own fertility, in a self-published monthly magazine called *The Woman Rebel*.²⁷⁵ An obvious thread within the Warren and Brandeis conception of privacy as sovereignty over one’s public image views being “let alone” not as an end in itself but as a means to personal autonomy. *The Woman Rebel* took as its subtitle “No Gods No Masters,”²⁷⁶ because privacy in its most transcendent form is about control. Woman, that is, should be the mistress of her own destiny, and repeal of the anti-birth-control laws was necessary to her emancipation from a form of economic

²⁶⁹ *Boyd*, 116 U.S. at 630.

²⁷⁰ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

²⁷¹ See Tracy Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199 (1993) (suggesting that present Fourth Amendment doctrine most closely parallels rational basis review); see also Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974) (suggesting that fundamental decision privacy does not necessarily protect the more obvious invasions of privacy encompassed within the Fourth Amendment).

²⁷² *Katz*, 389 U.S. at 350.

²⁷³ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

²⁷⁴ 381 U.S. 479 (1965).

²⁷⁵ DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 10 (1994).

²⁷⁶ *THE WOMAN REBEL*, Mar. 1914, at 1, reprinted in *WOMAN REBEL* 1 (Alex Baskin ed., 1976) [hereinafter Baskin].

slavery. Wrote Sanger in an editorial in the magazine's first issue, "No plagues, famines or wars could ever frighten the capitalist class so much as the universal practice of the prevention of conception."²⁷⁷

The application of the privacy right to contraception was the brainchild of Fowler Harper, a Yale Law School professor and anti-government gadfly.²⁷⁸ As counsel for the plaintiffs in *Poe v. Ullman*,²⁷⁹ the second of three direct legal challenges to Connecticut's anti-birth control laws,²⁸⁰ Harper devoted a section of his merits brief to the privacy rights of married people. He quoted Justice Brandeis's *Olmstead* dissent and argued that the Connecticut statute was a "colossal irrelevancy to any proper concern of the legislature of the State of Connecticut."²⁸¹ The State, Harper urged, had an obligation to accord equal respect to the "conscience and beliefs" of those who believe in and wish to use contraceptives "in the privacy of the home."²⁸² Although the Court dismissed *Poe* on standing grounds,²⁸³ Justice Douglas's dissent laid the seeds for a vast expansion of constitutional rights against the government. After quickly dismissing the justiciability issue as chimerical, he outlined the thick liberty interest for birth control patients that would soon command a majority. On Justice Douglas's view, the liberty of which the Due Process Clause speaks "is a conception that sometimes gains content from the emancipation of other specific guarantees or from experience with the requirements of a free society."²⁸⁴ On this view, *Lochner*'s fatal flaw was not that it attempted to inject substantive values into the due "process," but that it injected the wrong ones, namely economic rights.²⁸⁵ Certain other rights, those implicit in the language of other constitutional guarantees, should be guarded against state interference.

²⁷⁷ Editorial, *THE WOMAN REBEL*, Mar. 1914, at 8, reprinted in Baskin, *supra* note 276, at 8. The Malthusian undertones of this rhetoric were self-conscious. See Clara Newcome, *Neo-Malthusianism—What Is It*, *THE WOMAN REBEL*, May 1914, at 2, reprinted in Baskin, *supra* note 276, at 26.

²⁷⁸ In 1944, Fowler resigned from the Indiana University Board of Trustees on suspicion of being a communist sympathizer. While at Yale, he had persuaded 22 of his colleagues to sign an open letter calling for the abolition of the House Un-American Activities Committee. See GARROW, *supra* note 275, at 148-51.

²⁷⁹ 367 U.S. 497 (1961).

²⁸⁰ The first was *Tileston v. Ullman*, 26 A.2d 582 (Conn. 1942), which the Supreme Court dismissed on standing grounds, 318 U.S. 44 (1943) (per curiam).

²⁸¹ Brief for Appellant at 28, *Poe v. Ullman*, 367 U.S. 497 (1961).

²⁸² *Id.*

²⁸³ The Court held that given that the only known prosecution under the anti-birth control statute was *State v. Nelson*, 11 A.2d 856 (Conn. 1940), no actual case or controversy was before the Court. *Poe v. Ullman*, 367 U.S. 497 (1961).

²⁸⁴ *Poe*, 367 U.S. at 517 (Douglas, J., dissenting).

²⁸⁵ *Id.*

Privacy, Justice Douglas wrote, is one such right. A statute forbidding use of contraceptives requires “an inquiry into the relations between man and wife” and therefore “is an invasion of the privacy that is implicit in a free society.”²⁸⁶ Although Justice Douglas did suggest that the Connecticut statute was inconsistent with the spirit of the Third Amendment,²⁸⁷ he did not cull his support primarily from constitutional text. He cited instead to a long passage from an article in a journal called *Natural Law Forum*:

One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. . . . In a democratic political order, the megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.²⁸⁸

It hardly seems fitting to describe a statute that has been enforced once in eighty-one years in such Orwellian terms, but Justice Douglas’s program was broader than one little blue law. To be sure, his particular account of the appropriate relationship between citizen and democratic government did not accurately describe the United States in 1960. Seven years before *Loving v. Virginia*,²⁸⁹ much of America could well be called “megatherian,” and indeed the understanding of “social good” Justice Douglas would himself endorse thirteen years later in *Roe v. Wade* was not obviously democratic. But the anti-totalitarian, anti-control normative aspiration Justice Douglas’s dissent represents captures much of what had motivated Sanger, and carries considerable purchase even today.²⁹⁰

When *Griswold* finally came down in 1965, then, it was anything but spontaneous. Justice Douglas’s opinion for the majority made clear, if nothing else, that the right to privacy could not be cabined within a single constitutional norm. The First Amendment protections of associational rights, the Third and Fourth Amendment protections against government intrusion upon one’s home and personal effects, and the Fifth Amendment

²⁸⁶ *Id.* at 521.

²⁸⁷ *Id.* at 522. The Third Amendment states: “No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III.

²⁸⁸ *Poe*, 367 U.S. at 521-22 (Douglas, J., dissenting) (quoting Robert L. Calhoun, *Democracy and Natural Law*, 5 NAT. L.F. 31, 36 (1960)).

²⁸⁹ 388 U.S. 1 (1967).

²⁹⁰ Justice Harlan dissented separately in *Poe*, but his opinion more directly invoked the doctrinal connection with the Fourth Amendment. *Poe*, 367 U.S. at 548-51 (Harlan, J., dissenting).

protections of one's inner thoughts conspire to create "zones of privacy."²⁹¹ Since *Griswold*, the Court has found that the constitutional right to what has come to be known as "fundamental decision" privacy protects the use of contraceptives by single people²⁹² and minors;²⁹³ the ability of prisoners or those behind in their child support to marry;²⁹⁴ the possession of pornography in one's home;²⁹⁵ and, most controversially, a woman's decision to have an abortion.²⁹⁶ But the right does not, for example, extend to the decision to ask a physician to end one's own life,²⁹⁷ a family's decision to impose euthanasia without clear consent of the patient,²⁹⁸ or a parent's decision to send her child to a segregated school.²⁹⁹

In attempting to distinguish between those activities that are protected by the right to fundamental decision privacy and those that are not, the essential question is, what is the substance and scope of the ultimate end being protected? Margaret Sanger, Justice Douglas and, to a lesser extent, Justice Harlan articulated an anti-totalitarian vision concerned with the State's ability to control the lives of its constituents. On this view, certain rights, such as the family's inherent right to sovereignty, are less appropriately subject to political regulation than others. Fowler Harper embraced a more Lockean approach that, while not excluding the anti-totalitarian view, emphasizes a woman's right to controvert the morals of the community as an exercise of her liberty of conscience.

In examining the extent to which these conceptions of privacy have survived doctrinally, the abortion cases give us considerable guidance. The holding of *Roe v. Wade* is complex and contestable,³⁰⁰ but its relevance to this paper is its declaration in clear terms remarkably similar to *Lawrence* that a woman's right to have an abortion is a constitutionally protected privacy right "founded in the Fourteenth Amendment's concept of personal liberty."³⁰¹ The decision whether to terminate one's pregnancy was deemed fundamental because of the impact childbirth can have on the mother's future life plans. Not only might pregnancy carry medical risks, but

²⁹¹ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

²⁹² *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²⁹³ See *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60 (1983).

²⁹⁴ *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

²⁹⁵ *Stanley v. Georgia*, 394 U.S. 557 (1969).

²⁹⁶ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

²⁹⁷ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²⁹⁸ *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

²⁹⁹ *Runyan v. McCrary*, 427 U.S. 160 (1976).

³⁰⁰ *Roe* is more criticized than not by constitutional scholars, but for a particularly cogent critique, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (calling *Roe* "bad constitutional law, or rather . . . not constitutional law").

³⁰¹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

“[m]aternity, or additional offspring, may force upon the woman a distressful life and future,” due to psychological stress, the burdens of child care, social stigma and the like.³⁰² Presenting an abortion ban as working a kind of Hobson’s choice illustrates *Roe*’s connection both to *Griswold* and to *Lawrence*. As Sanger argued, a prohibition on contraceptives effects a form of slavery on women that forces them to choose between abstinence and child-bearing. As I argue in Part I, a prohibition on sodomy forces gays into a choice between criminality and the closet.³⁰³

Early in his *Roe* opinion, Justice Blackmun quotes Justice Holmes’s celebrated *Lochner* dissent, in which Holmes says that the Constitution “is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment”³⁰⁴ This use of Holmes highlights the fact that applying his words to morals legislation actually supports striking down the challenged statute. Balanced against a decision deemed fundamental because of its profound impact on the life of an individual, the moral qualms of the community seem cruel and trifling.

The most significant attempted restatement of *Roe*’s animating principles came in *Planned Parenthood v. Casey*, in which a Court plurality changed *Roe*’s categorical tripartite framework into an “undue burden” balancing test.³⁰⁵ Of most interest to my analysis is the sweeping language the plurality used to justify its reaffirmation of fundamental decision privacy as applied to the abortion decision. As with opinions past, the Court described the protected zone of privacy as “a realm of personal liberty which the government may not enter.”³⁰⁶ But just as *Griswold* construed that realm as transcending the physical curtilage of the home and reaching certain private choices by individuals, *Casey* extended *Roe*’s protective net into more abstract space. In one of its most cited passages, the Court wrote that the issues to which a privacy right had been extended:

involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of

³⁰² *Id.*

³⁰³ See text accompanying notes 59-60.

³⁰⁴ *Id.* at 117.

³⁰⁵ 505 U.S. 833 (1992).

³⁰⁶ *Id.* at 847.

personhood were they formed under compulsion of the State. . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.³⁰⁷

Fundamental decision privacy, on this formulation, is not about “privacy” at all, at least not as conventionally understood. Until *Casey*, it was possible to view the Court’s privacy decisions through a fictional prophylactic lens. Consider the following reading: The constitutional right of privacy protects against unwarranted physical invasions of the home. A statute barring the use of contraceptives, barring the viewing of pornography, or barring abortions cannot properly be enforced without a physical invasion of the home. Although *Roe*’s language about the impact of child-bearing on the mother’s life course undermines such a formalistic reading of the fundamental decision cases, such a reading still could serve to moor these cases to traditional notions of privacy grounded in physical space, and provide guidance in future decisions. *Casey*, however, linked fundamental decision privacy explicitly to concepts of autonomy, personal conscience, and self-definition.³⁰⁸

Bowers v. Hardwick had already been decided six years prior to *Casey*, which no doubt provided additional cover for the *Casey* plurality’s open-ended claims about the nature of constitutional privacy. *Bowers* had drawn a line in the sand. To those who thought that the incremental logic of common lawmaking demanded a close examination of the asserted state interest in regulating private, consensual, non-commercial sexual conduct, Justice White’s statement of the issue presented was more than mildly discouraging.³⁰⁹ The *Bowers* Court construed the doctrinal definition of fundamental rights—those “implicit in the concept of ordered liberty,”³¹⁰—as limiting acts protected by substantive due process to those that were expressly permitted historically. But *Lawrence* vindicated the vision of privacy that Justice Blackmun stated succinctly in dissent:

³⁰⁷ *Id.* at 851. This portion of the opinion was joined by Justice Blackmun and Justice Stevens and thus commanded a majority.

³⁰⁸ Because *Casey* upheld controversial restrictions on abortion rights, political economy allowed and perhaps compelled the Court to speak in such far-reaching terms. See generally GARROW, *supra* note 275, at 700 (describing the reaction to *Casey* as follows: “Some pro-choice groups . . . self-defeatingly tried to insist that ‘*Roe v. Wade* is dead,’ while right to life activists castigated the O’Connor-Kennedy-Souter trio as ‘backstabbing’ members of a ‘wimp bloc.’”)

³⁰⁹ See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (calling the issue “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”).

³¹⁰ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

This case is no more about ‘a fundamental right to engage in homosexual sodomy’ . . . than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about ‘the most comprehensive of right and the right most valued by civilized men,’ namely, the right to be let alone.’³¹¹

The majority framed the case as about the freedom to engage in sodomy. The dissent framed the case as about freedom to make fundamental personal decisions. The prophylactic fiction discussed above facilitated this debate by minimizing the individual interest to the interest of a gay person in having sex in his home, which is susceptible to interpretation as either more or less important than the community’s interest in policing morals.

After *Casey*, however, privacy interests were expressly defined as the interests of all people in a measure of autonomy and self-definition. Thus stated, the form that self-definition takes is more obviously irrelevant to the constitutional analysis. The related anti-totalitarian view of privacy rights, which I have associated with Margaret Sanger and Justice Douglas, sees privacy as control of one’s destiny. Understood in this way, privacy is instrumental to the prospective identity of the individual, not merely to her recreational choices.

2. *Hate Speech and the First Amendment*

The measure of the metaprivacy principle’s fit with constitutional doctrine extends beyond the privacy cases. Justice Kennedy’s rhetoric about freedom of conscience and belief, both in *Lawrence* and as a member of the *Casey* plurality, suggests a further connection between metaprivacy and the First Amendment. If First Amendment doctrine draws distinctions between criminal commitments and the ethical commitments of abortion-seekers and gays, then those distinctions should inform my analysis of metaprivacy. At the very least, it should make me wary of glossing over any potential distinctions within the privacy line of cases.

Viewpoint discrimination remains paradigmatically offensive to the First Amendment.³¹² Within a public forum, the State may no more disfavor

³¹¹ *Id.* at 199 (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (other citations omitted).

³¹² See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding unconstitutional a public after-school program that prohibited a Christian group from using school facilities); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) (holding that the statutory

criminal advocacy than gay rights advocacy, abortion-rights advocacy, or black power.³¹³ Indeed, even a Ku Klux Klan member shouting racist invective and agitating for “revengeance” before a burning cross to a group of armed followers cannot be convicted unless it can be shown that his advocacy not only “is directed to inciting or producing *imminent* lawless action,” but that such advocacy “is likely to incite or produce such action.”³¹⁴ If the character of the committed murderer is precisely analogous to the words of the committed inciter, then a character-based penalty phase inquiry not intended to adduce a likelihood of imminent danger is inappropriate.

But the committed murderer is not, of course, analogous, at least not precisely. Our First Amendment doctrine historically has attempted to distinguish, as it must, between expressive speech and expressive conduct. Thus, in *R.A.V. v. St. Paul*, the Court struck down as unconstitutionally overbroad and content-based a St. Paul, Minn., ordinance that criminalized the display of a “symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender”³¹⁵ While conceding for decisional purposes that the statute was aimed at “fighting words,” a category of regulable speech,³¹⁶ the Court concluded that the ordinance was invalid because it “applies only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’” Indeed, it was precisely because fighting words constitute a category of regulable speech rather than a form of communication “entirely invisible” to the First Amendment that the ordinance was struck down.³¹⁷

Contrast this approach with the Court’s approach in *Wisconsin v. Mitchell*, in which a unanimous Court upheld a Wisconsin statute that enhanced the sentence of any criminal convict who intentionally selected his victim on account of “race, religion, color, disability, sexual orientation, national origin or ancestry.”³¹⁸ The defendant, who was black and had

requirement that the National Endowment for the Arts take “decency and respect” into consideration does not “engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face”); *R.A.V. v. St. Paul*, 505 U.S. 377, 84 (1992) (“[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”).

³¹³ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³¹⁴ *Id.* at 447 (emphasis added).

³¹⁵ 505 U.S. 377, 380 (1992).

³¹⁶ See *id.* at 381.

³¹⁷ See *id.* at 383-85.

³¹⁸ 508 U.S. 476, 480 (1993).

robbed and beaten a white boy apparently selected because of his race, argued that the statute impermissibly “punishes bigoted thought and not conduct.”³¹⁹ The Court disagreed, arguing that the statute “is aimed at conduct unprotected by the First Amendment.”³²⁰ The fact that the statute took motive into account made it no different than Title VII of the Civil Rights Act,³²¹ not to mention a host of ordinary criminal statutes. Accounting for motive does not alter the conduct-based character of the targeted action. As in the antidiscrimination context, the First Amendment is no defense to criminal conduct.

A robust speech-conduct distinction would provide a daunting obstacle, grounded in doctrinal integrity, to any argument for a metaprivacy defense to a character-based retributive death sentence. The distinction does not, however, adequately explain the doctrine, for the First Amendment in fact provides a defense to generally applicable laws regulating conduct, in the form of the right to expressive association.³²² In *Boy Scouts of America v. Dale*, the Court upheld Boy Scouts of America’s right to an exemption from New Jersey’s public accommodations laws on the grounds that retaining an avowedly gay scoutmaster “would significantly burden the organization’s right to oppose or disfavor homosexual conduct.”³²³ Such a burden could only be justified through a searching strict scrutiny test satisfied only when enforcing the statute “would not materially interfere with the ideas that the organization sought to express.”³²⁴ *Boy Scouts* seems to imply a new constitutional defense to Title VII,³²⁵ unless its bona-fide occupational qualification defense miraculously dovetails with the newly thickened right to expressive association. If some principle distinguishes *R.A.V.* and *Mitchell* under the post-*Boy Scouts* constitutional order, it would not appear to be speech versus conduct.

Lawrence as metaprivacy recommends a way out of this doctrinal confusion. Like *Boy Scouts*, *Lawrence* allows an exemption from generally applicable, otherwise constitutional laws that regulate conduct. And like

³¹⁹ *Id.* at 483.

³²⁰ *Id.* at 487.

³²¹ *Id.*

³²² See Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1157-58 (2002).

³²³ 530 U.S. 640, 659 (2000).

³²⁴ *Id.* at 657. Chief Justice Rehnquist argued in *Boy Scouts* that the Court was simply reaffirming a right it recognized in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), which allowed the organizers of Boston’s St. Patrick’s Day Parade to avert Massachusetts antidiscrimination laws to prevent a gay-rights group from marching. *Boy Scouts*, 530 U.S. at 653-54.

³²⁵ See David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83 (2001).

Boy Scouts, the exemption appears to be grounded not in a speech-conduct distinction but in an incidental-definitional distinction.³²⁶ The *Boy Scouts* Court took pains to inquire into the significance of the burden that allowing an openly gay scoutmaster would have on the Boy Scouts' expressive rights.³²⁷ A charitable reading of the case is that heterosexual propaganda is an essential part of the organization's message, and therefore that subjecting the organization to the state's antidiscrimination laws would defeat its right to self-definition. A right to expressive association may thus be re-characterized as a corporate right to metaprivacy.

I do not wish to overemphasize the links between metaprivacy and the First Amendment expressive association doctrine. My more modest objective has been to demonstrate that an open-ended tolerance for the most deeply unpopular of ethical commitments is consistent with the First Amendment, and that the fact that convicted criminals have engaged in conduct rather than speech does not defeat this consistency.

B. *The Presumptive Autonomy Ideal*

In the discussion thus far, I have consistently defended the view that, from the perspective of metaprivacy doctrine, no principled distinction may be drawn between sodomy and certain other forms of a priori criminal conduct. But before I commit myself to so controversial a view, I must consider whether principles of judicial legitimacy implore us to read a theoretical limitation into the doctrine even if the case law does not itself provide much satisfying instruction. There is, after all, an immense literature on the line of demarcation between legitimate and illegitimate normativity. Although here is not the place for a theoretical discursis on the range of acceptable ethical views, it may be useful to consider at least one defensible distinction, if only to provide a template for an alternative conception. We might, for example, define an ethical view as a fundamental moral claim that has an answer to what Christine Korsgaard calls "the normative question."³²⁸ On this view, though it may be definitionally necessary that ethical claims "issue in a deep way from our sense of who we are,"³²⁹ it is not sufficient. An ethical view must be more than simply held; it must be justified.

³²⁶ See *supra* text accompanying notes 89-90.

³²⁷ *Boy Scouts*, 530 U.S. at 650-56.

³²⁸ Christine M. Korsgaard, *The Normative Question*, in *THE SOURCES OF NORMATIVITY* 7, 9-10 (Onora O'Neill ed. 1996).

³²⁹ *Id.* at 18.

Korsgaard's four-part taxonomy of modern answers to the normative question will be helpful in illustrating what is meant by an ethical view. She divides theories of the sources of our ethical obligations into voluntarism, realism, reflective endorsement, and the appeal to autonomy.³³⁰ Where the voluntarist justifies normativity by its origin in superior authority;³³¹ the realist does so through the irreducible fact of the existence of obligations;³³² and the proponents of reflective endorsement and the appeal to autonomy through forms of self-conscious introspection.³³³ All of the above accounts share an obvious and important feature. Though Hobbes and Kant, say, differed dramatically as to the source of our obligations towards others—one thought it extrinsic, the other quite the opposite—both allowed that we have them.

Now consider the claims of gays versus those of committed murderers. The first thing to recognize is that both are underdetermined as ethical claims. Neither the fact that an individual wishes to engage in sodomy nor the fact that one wishes to murder tells us very much about the individual's answer to the normative question. One may argue, however, that there is a

³³⁰ *Id.* at 19.

³³¹ See, e.g., THOMAS HOBBS, *LEVIATHAN* 98 (Richard E. Flathman & David Johnston eds., 1997) (1651) ("It is true that they that have sovereign power, may commit iniquity; but not injustice, or injury in the proper signification."); SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 17 (Basil Kennett trans, 4th ed., 1729) ("For, since honesty (or moral necessity) and turpitude are affections of human deeds, arising from their agreeableness or disagreeableness to a rule, or a law; and since a law is the command of a superior, it does not appear how we can conceive any goodness or turpitude before all law, and without the imposition of a superior.").

³³² Writes Thomas Nagel, illustrating the Occam's razor-like quality of realist argumentation:

If I have a severe headache, the headache seems to me to be not merely unpleasant, but a bad thing. Not only do I dislike it, but I think I have a reason to try to get rid of it. It is barely conceivable that this might be an illusion, but if the idea of a bad thing makes sense at all, it need not be an illusion, and the true explanation of my impression may be the simplest one, namely that headaches are bad, and not just unwelcome to the people who have them.

THOMAS NAGEL, *THE VIEW FROM NOWHERE* 145-46 (1986); see also W.D. Ross, *THE RIGHT AND THE GOOD* 40 (1930) ("[W]hat we are apt to describe as 'what we think' about moral questions contains a considerable amount that we do not think but know, and . . . this forms the standard by reference to which the truth of any moral theory has to be tested . . ."); H.A. PRICHARD, *Does Moral Philosophy Rest on a Mistake?*, in *MORAL OBLIGATION: ESSAYS AND LECTURES* 1, 7 (1949) ("The sense of obligation to do, or of the rightness of, an action of a particular kind is absolutely underivative or immediate.").

³³³ See, e.g., IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 67 (Lewis White Beck trans., 1959) (1797) ("What else then can freedom of the will be but autonomy, that is, the property of the will to be a law to itself?"); JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971) (suggesting that the principles of justice be determined by "the choice which rational men would make in [a] hypothetical situation of equal liberty"); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 117 (1985) ("[C]ritical reflection should seek for as much shared understanding as it can find on any issue, and use any ethical material that, in the context of the reflective discussion, makes some sense and commands some loyalty.").

difference in that the claim of the committed homosexual is not inconsistent with an ethical view, while the claim of the committed murderer is. We might characterize the depravity inquiry at the penalty phase as, in effect, an effort to determine whether the convict considers himself to have obligations towards others. As Canadian psychologist Robert Hare has said, “There are some people for whom evil acts—what we would consider evil acts—are no big deal.”³³⁴ It is not implausible that an individual who can be so characterized has not satisfied the threshold of an ethical claim—that he accord some minimal level of moral respect to the claims of others—and therefore is not entitled to have his views respected. On this view, the committed murderer does not make a debatable claim, but rather makes none at all. Such an individual is to conduct as the obscene is to speech: “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”³³⁵ Does not a similar distinction in the realm of conduct better comport, if not with the constitutional doctrine, then at least with the theoretical assumptions of American law?

This Subsection argues that imputing such a distinction would be inappropriate. An attempt to articulate the limitations on claims to ethical autonomy that a government must respect begs the question. In order to reach what those limits are, one must first defend the proposition that there is a limit. A State in which all ethical claims are presumptively respected but may be overcome by protective concerns is not a fanciful aspiration. The task will be to explore how closely the aspirations implicit within our constitutional structure approximate this hypothetical State. I have argued that similar ideas lurk within the interstices of our privacy and First Amendment doctrines. The remainder of this Section looks to theory. I contend that the presumptive autonomy ideal that metaprivacy anticipates has considerable pedigree within the privacy literature. The burden is for the doctrine, prospectively, to prove these accounts and my own wrong.

Owing to *Griswold* and its progeny, the 1960s and 1970s were the heyday of privacy scholarship. As discussed in the previous Subsection, the case failed to announce a holistic theory of privacy. Rather, each of the *Griswold* opinions attempted to argue from doctrine why the right of married persons to use contraceptives was, in a sense, already constitutionally protected. In this way, *Griswold* was consistent with our common law juridical tradition of grounding both rules of decision and modes of analysis within a body of precedents. This tradition is part of what

³³⁴ See Carey, *supra* note 7.

³³⁵ Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

squares judge-made law with the democratic process: Cabining judicial decisionmaking within a universe of settled rules and principles perpetuates the fiction that judges are agents of constitutional law rather than its principals. When courts “announce” new rights, they tacitly invite conscientious observers to apply the principles that generate those rights to other contested areas of jurisprudence. Thomas Grey wrote in 1983 that “[f]rom the first, the Court’s development of a right to privacy has suggested to philosophically minded commentators the possible elevation to constitutional status of Mill’s principle of liberty.”³³⁶ This principle is the view that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”³³⁷ Constitutionalizing Mill’s principle would have raised profound questions about the legitimacy of laws against drug use, prostitution, and a host of other arguably victimless crimes, and would have precipitated endless debate over the meaning of a “self-regarding act.”³³⁸ One can safely say, however, that *Bowers* shut the door on the harm principle. As doctrines mature, the rights-generating principles that spawned them crystallize into something closer to rules, and the scope of their ancillary application narrows.

Every now and again, however, a case like *Lawrence* comes along, in which the doctrine leaps to a new orbital, and a fresh set of commentary is spawned. This Subsection links *Lawrence*’s constitutionalization of a principle of official neutrality with respect to self-defining conduct to previous privacy scholarship and to the larger philosophical debate about the nature of State power. I argue that, far from *sui generis*, *Lawrence* cements into doctrine one slice of a philosophical tradition whose adherents include Louis Henkin, Joel Feinberg and Jed Rubenfeld.

In order to place into perspective the body of privacy scholarship that best embraces *Lawrence*-style metaprivacy, it will first be helpful to discuss briefly some competing conceptions. One particularly inventive approach that remains influential is Charles Fried’s idea of privacy as a form of social currency. Fried wrote his seminal article on the topic in 1968, three years after *Griswold* and one year after *Katz*, when privacy had “become the object of considerable concern.”³³⁹ Like Justice Kennedy, Fried views

³³⁶ THOMAS C. GREY, THE LEGAL ENFORCEMENT OF MORALITY 26 (1983).

³³⁷ MILL, *supra* note 15, at 80.

³³⁸ Compare, e.g., Joel Feinberg, *Offensive Nuisances*, in PHILOSOPHY OF LAW 278 (Joel Feinberg & Jules Coleman eds., 2004) (highlighting nuisance as a problematic for Mill’s principle), with HART, *supra* note 38, at 42 (arguing for a strong public-private distinction in delineating self-regarding acts). One problem for both Mill and Hart is that they do not adequately explain why community sensibility, even with respect to private acts, cannot serve as a source of public duties.

³³⁹ Fried, *supra* note 220, at 475.

privacy as central to self-definition. The difference is that, for Fried, privacy is purely, but uniquely, instrumental to self-definition. Privacy preserves for the individual a sphere of exclusive personal knowledge. Fried treats this personal knowledge as a form of entitlement that the individual uses, in essence, to purchase the fundamental social bonds of love, friendship, and trust.³⁴⁰ Says he, “Privacy is not merely a good technique for securing these fundamental relations; rather without privacy they are simply inconceivable.”³⁴¹ Fried does not argue that his is the only way of understanding privacy, only that his is the only way that justifies the lofty status of the right to privacy.³⁴²

A “market conception of personal intimacy,”³⁴³ to the surprise of none, also emerges in Richard Posner’s work in this area. Posner, though, views privacy not as an inflexible moral right but as a tradable entitlement best assigned to the party that will use the private information most efficiently.³⁴⁴ Neither Fried’s nor Posner’s “economic” view of privacy rights captures Justice Kennedy’s concerns in *Lawrence*. Posner would subject privacy rights to the vagaries of the “market” for such rights. Fried’s conception places restrictions on the valuable uses of privacy that *Lawrence*-style metaprivacy eschews. *Lawrence* prizes an autonomy of self-definition that is “transcendent,” plausibly extending beyond love, friendship, and trust. Moreover, Fried’s conception is overinclusive, in that it assigns a meaning to the alienation of one’s privacy entitlement that may not always be present.³⁴⁵ In any event, it is safe to assume that the *Lawrence* majority would reject the commodification of the right it seeks to protect.³⁴⁶

Lloyd Weinreb, on the other hand, connects privacy explicitly to human autonomy. In this way, his conception seems more closely to approximate the metaprivacy ideal. He does not, however, believe that any rights necessarily follow from this conception. Weinreb writes that “privacy might be regarded as the face that autonomy presents to others similarly situated in the same community, merely one side of the abstract dichotomy between

³⁴⁰ See *id.* at 484.

³⁴¹ *Id.* at 477.

³⁴² See *id.* at 484.

³⁴³ Reiman, *supra* note 220, at 32.

³⁴⁴ See Richard Posner, *An Economic Theory of Privacy*, REGULATION, May-June 1978, at 19.

³⁴⁵ See, e.g., Reiman, *supra* note 220, at 33 (“One ordinarily reveals information to one’s psychoanalyst that one might hesitate to reveal to a friend or lover. That hardly means one has an intimate relation with the analyst.”).

³⁴⁶ For a broad-ranging critique of this kind of rhetoric, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

public and private: Whatever is public is not private, and whatever is private is not public.”³⁴⁷ Taking as axiomatic that humans have something called “autonomy,” and that it is this autonomy that enables them to be called individuals, Weinreb believes that privacy is a conventional label for this abstract notion. In this sense, neither privacy nor autonomy have any content nor *can* have any content. Rather, the public-private distinction is “scarcely more than [a] reminder[] that human beings are at one and the same time constituted as persons within a human community and autonomous.”³⁴⁸ If, as *Lawrence* seems to suggest, we believe that guaranteeing a limited freedom to engage in self-defining conduct is a public policy goal worth pursuing, then Weinreb’s view suggests that we should simply pursue that goal directly. A recourse to a “right to privacy” gets us nowhere except, perhaps, rhetorically.

Fried, Weinreb, and others who do not view privacy rights as an independent value-holder are responding to an older intellectual tradition that sees privacy as both unique and valuable in many of the same ways as Justice Kennedy appears to. Privacy as autonomy is not a new idea. Adding “self-definition” to the definition borrows from those strands within the literature that connect privacy to “personhood.” Roscoe Pound, for example, is an early proponent of the idea that the law of torts should protect an individual’s “personality” interests, which include a right to physical integrity and personal liberty, a reputational right to personal honor, and a right to belief and opinion.³⁴⁹ Similarly, Jeffrey Reiman has advanced the proposition that privacy represents “a social ritual by means of which an individual’s moral title to his own existence is conferred.”³⁵⁰ That is, a thick sense of personal entitlement to one’s thoughts, body and actions is necessary to the formation of “self.”³⁵¹ Whether conceptualized in terms of “personality” or “selfhood,” it is easy to see how “privacy” rights applied against the government could eventually produce opinions like *Roe* and *Lawrence*. I do not deny that the privacy as “personhood” conception influences those opinions profoundly. I do want to suggest, though, that the

³⁴⁷ Lloyd L. Weinreb, *The Right to Privacy*, in *THE RIGHT TO PRIVACY* 25, 31 (Ellen Frankel Paul et al. eds., 2000).

³⁴⁸ *Id.* at 34.

³⁴⁹ See Roscoe Pound, *Interests in Personality*, 28 *HARV. L. REV.* 343, 355 (1915).

³⁵⁰ Reiman, *supra* note 220, at 39.

³⁵¹ *Id.*; see also Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 156 (Ferdinand David Schoeman ed., 1984) (arguing that public scrutiny creates conformity and thus makes us less differentiated as people); Rubinfeld, *supra* note 205, at 752 n.93 (collecting sources that equate privacy with “personhood”).

intellectual origins of *Lawrence*-style metaprivacy nest more precisely in the privacy as “autonomy” literature.

Louis Henkin offered one of the earliest defenses of the position that the legal concept of privacy post-*Roe* represents the moral freedom of an individual to pursue her own projects and plans. Writing in 1974, Henkin argued that the Supreme Court’s recognition of privacy protected not “freedom from intrusion”—privacy’s ordinary meaning—but “something farther-reaching, an additional zone of autonomy, of presumptive immunity to governmental regulation.”³⁵² Henkin traces the fundamental primacy of the individual lying behind substantive due process to our constitutional ideal of limited government.³⁵³ The “liberty” protected by the Fifth Amendment, Henkin says, echoing Justice Douglas’s position in *Poe*,³⁵⁴ “did not mean Adam Smith but did mean John Stuart Mill.”³⁵⁵ Henkin was not troubled by the constitutionalization of an open-ended, *prima facie* freedom from governmental regulation for certain ill-defined fundamental rights.³⁵⁶ He saw it, rather, as a mandate to explore the “compelling state interest” side of the inevitable balance between private rights and public good. Instead of focusing all of our intellectual attention on defining the contours of the right, a potentially fruitless exercise, we should have a robust discourse about the ends for which society ever can intrude upon our individual autonomy.³⁵⁷

Joel Feinberg took the notion of privacy as autonomy a step further than Henkin. “If the privacy principle already attributed to the Constitution is not identical to personal sovereignty,” he goes so far as to ask, “what can it be?”³⁵⁸ Feinberg argues that the Supreme Court’s invocation of “privacy” is in fact the constitutionalization of what philosophers call “personal autonomy” or “self-determination,” meaning “the sovereign authority to govern oneself, which is absolute within one’s own moral ‘boundaries.’”³⁵⁹ These boundaries of personal sovereignty, Feinberg suggests, extend not just to the limits of the physical body but extend as well to “the right to

³⁵² Henkin, *supra* note 271, at 1411.

³⁵³ *See id.* at 1412-13. Many would tether a constitutional respect for the natural rights of the individual to the stillborn Privileges or Immunities Clause of the Fourteenth Amendment rather than to substantive due process. *See, e.g.,* Saenz v. Roe, 526 U.S. 489, 525 (1999) (Thomas, J., dissenting); AKHIL REED AMAR, *THE BILL OF RIGHTS* 163-80 (1998); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 22-30 (1980).

³⁵⁴ *See supra* note 285 and accompanying text.

³⁵⁵ *Id.* at 1417.

³⁵⁶ *See id.* at 1427.

³⁵⁷ *See id.* at 1431.

³⁵⁸ Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?*, 58 NOTRE DAME L. REV. 445, 492 (1983).

³⁵⁹ *Id.* at 446-47.

decide how one is to live one's life, in particular how to make the critical life-decisions."³⁶⁰ Like Henkin, Feinberg connects this idea of privacy explicitly to the philosophy of John Stuart Mill. He argues that Mill's sphere of self-regarding acts is a good rough cut at the limits of personal autonomy that the jurisprudential definition of privacy is attempting to substantiate:³⁶¹ "respect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interest of others need protection from him."³⁶² Feinberg laments, however, that the Justices have too cavalierly recognized state power to counteract certain fundamental rights through morals legislation that "enforce[es] the requirements of decency;"³⁶³ he would prefer a more absolute embrace of Mill.

Feinberg was writing before *Bowers*, *Casey*, and *Lawrence*, and so his positive description of American law comes with a significant caveat. We get farther with Jed Rubenfeld's conception of privacy. On Rubenfeld's account, privacy is best understood not as an individual right to personhood, autonomy or some other fundamental entitlement, but as a prophylactic against state tyranny.³⁶⁴ Writing three years after *Bowers* (but, presciently, three years before *Casey*), Rubenfeld found the analysis of both the majority and the dissents in that opinion lacking, namely because both called for arbitrary judicial decrees of the limits of the privacy principle under discussion.³⁶⁵ Why, for example, does fundamental decision privacy protect the right to engage in homosexual sodomy but not the right to engage in adultery or incest?³⁶⁶ Neither the "privacy as personhood" nor the "privacy as autonomy" strands of the academic literature satisfactorily explain, for Rubenfeld, "which choices and decisions are protected."³⁶⁷ He offers the following conception in response:

Anti-abortion laws, anti-miscegenation laws, and compulsory education laws all involve the forcing of lives into well-defined and highly confined institutional layers. At the simplest, most quotidian level, such laws tend to *take over* the lives of the persons involved: they occupy and preoccupy. They affirmatively and substantially shape a person's life; they direct a life's development along a

³⁶⁰ *Id.* at 454.

³⁶¹ *Id.* at 487.

³⁶² *Id.* at 464.

³⁶³ *See id.* at 488-89.

³⁶⁴ *See* Rubenfeld, *supra* note 205.

³⁶⁵ *See id.* at 747-50.

³⁶⁶ *See id.* at 750.

³⁶⁷ *Id.* at 751.

particular avenue. These laws do not simply proscribe one act or remove one liberty; they inform the totality of a person's life.³⁶⁸

Although Rubenfeld explicitly rejects the application of metaprivacy to criminal commitments,³⁶⁹ I want to suggest that his totalitarian conception of privacy in practice effectuates the limited autonomy conception we see in *Lawrence*. Rubenfeld suggests that the novelty of his conception lies in the sharp distinction he draws between an inquiry into what the State is trying to forbid versus an inquiry into what the State is producing.³⁷⁰ Rather than trying arbitrarily to limit the conduct the State may regulate, he argues, we should instead reject governmental attempts to control the lives of citizens. As I argued in Section I.B, the most consistent justification Justice Kennedy offers for the majority position in *Lawrence* is that “[t]he State cannot demean [petitioners’] existence or *control their destiny* by making their private sexual conduct a crime.”³⁷¹ Because the conduct at issue was self-definitional, regulating it necessarily subordinated gay Americans’ lives to the interests of the State—this was the linchpin of its unconstitutionality.

This idea is the centerpiece of Justice Douglas’s *Poe* dissent.³⁷² Rubenfeld’s Orwellian state is the megatherian conception Douglas so feared.³⁷³ “By all accounts,” says Rubenfeld, “privacy has everything to do with delineating the legitimate limits of governmental power.”³⁷⁴ Also coded within this idea is the quasi-First Amendment notion that we should be free to embody even unpopular conceptions of the good. Ruth Gavison has written that privacy crucially provides a context within which we can deliberate about potentially deviant ideas free from social pressure.³⁷⁵ Rubenfeld alludes to this freedom implicitly when he calls privacy “the fundamental freedom not to have one’s life too totally determined by a progressively normalizing state.”³⁷⁶

Acting alone, the presumptive autonomy ideal provides only limited guidance to a judge deciding a hard case. Rubenfeld hopes that, by reconceptualizing privacy rights along anti-normativity lines rather than along fundamental-rights lines, he can escape Mill’s and Feinberg’s

³⁶⁸ *Id.* at 784.

³⁶⁹ See *supra* text accompanying note 205.

³⁷⁰ *Id.* at 783.

³⁷¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added).

³⁷² *Poe*, 367 U.S. at 521-22 (Douglas, J., dissenting).

³⁷³ See *supra* text accompanying note 288.

³⁷⁴ Rubenfeld, *supra* note 205, at 737.

³⁷⁵ Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

³⁷⁶ Rubenfeld, *supra* note 205, at 784.

jurisprudential problem. But even if Rubinfeld succeeds at capturing the common thread between laws against home schooling, abortion and sodomy—each “involve[s] a peculiar form of obedience that reaches far beyond mere abstention from the particular proscribed act”³⁷⁷—his principle does no better than Mill’s at deciding actual cases and controversies. *Lawrence* offers a solution to this problem through convention. Social consensus around the self-definitional nature of proscribed conduct triggers the presumptive protection against morals regulation to which Henkin, Feinberg and Rubinfeld attach normative value.

* * *

The doctrine may have an answer to the open-ended conception of metaprivacy that this paper has sketched. If presumptive autonomy means nothing else, though, it is that the doctrine bears the burden of articulating that answer. I began Section III.B with the briefest of snapshots of some theoretical answers to the normative question. The ethical theories that those answers represent are subtle and difficult. I discussed above what doctrine asks of its principles;³⁷⁸ navigating these subtleties is what principles ask of the doctrine that sustains them. It does not *seem*, after all, as if the inquiry into character at the penalty phase of a capital trial is designed to adduce whether the defendant’s ethical views are consistent with the collective reflective equilibrium of mankind. It seems rather that society simply thinks it better that individuals with uncommonly and demonstrably vile character be dead than be alive. The doctrine must tell us why a legislative determination to give effect to this desire is sufficient for some conduct but not other conduct.

It is possible, finally, that gays are essentially constitutionally *sui generis*, that they are simply the sole members of the class of individuals granted the autonomy to engage in conduct prohibited by otherwise constitutional laws. For the Court to so declare would, however, require two traits neither of which its members possess in great abundance. The Justices would need the political courage to declare common law constitutionalism a fraud, and the deep sense of irony required to announce that gays share their constitutional singularity with the Boy Scouts of America.

³⁷⁷ *Id.* at 792-93.

³⁷⁸ See *supra* text accompanying note 90.

CONCLUSION

An eighteenth-century Englishman could have been hanged for “stealing property worth a shilling or more, setting fire to a heap of hay, breaking down the head of a fish pond so that the fish might escape, defacing Westminster Bridge [or] cutting a hop-bind in a hop plantation.”³⁷⁹ There are at least three reasons for this apparent brutality. First, prisons were far less developed then than now, and so capital punishment had fewer rivals.³⁸⁰ Second, it should be noted that the death penalty was used far less than it was authorized to be used: “[F]or most offenses, capital punishment was there primarily to serve as a deterrent and . . . only a limited number of executions were necessary to bring this point home to the public.”³⁸¹ Where alternatives to capital punishment are limited, that is, it is sensible to make all crimes capital but only punish a few. James Whitman highlights a third reason for the high number of capital crimes, but his is timeless: “Punishment,” he notes, “puts people in their place.”³⁸² Whitman’s (anthropological) claim is that “degradation in punishment is, and always has been, closely related to traditions and practices of social status.”³⁸³ On this view, punishment acts as means of asserting social superiority.

Accepting Whitman’s thesis makes it easy to see that prisoners and identity-based social movements share a common foe: the libidinal need to assert one’s own moral superiority. The more we recognize this tendency, the more we must take care that law exercise its ordered violence to protect us, and not to sate us. Robert Cover reminds us that the “deliberate infliction of pain in order to destroy the victim’s normative world and capacity to create shared realities we call torture”³⁸⁴ as well as law. H.L.A. Hart reminds us, in this regard, that the Nazis believed that “anything is punishable if it is deserving of punishment according ‘to the fundamental conceptions of a penal law and sound popular feeling.’”³⁸⁵ The impulses to degrade Jews, gays, and prisoners, though obviously distinct in their particulars, are all influenced, heavily perhaps, by an inherent human desire to engage in ontological discrimination. Exorcising the fruits of this desire from law, as Mill and Brandeis recognized, is the great challenge of liberalism. *Lawrence* is a salvo in that struggle.

³⁷⁹ JOHN BRIGGS ET AL., CRIME AND PUNISHMENT IN ENGLAND: AN INTRODUCTORY HISTORY 73 (1996).

³⁸⁰ See *id.* at 82.

³⁸¹ *Id.* at 76.

³⁸² WHITMAN, *supra* note 164, at 22.

³⁸³ *Id.* at 26.

³⁸⁴ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1603 (1986).

³⁸⁵ HART, *supra* note 338, at 12 (quoting Act of June 28, 1935).

I have argued in this paper that *Lawrence*'s doctrinal contribution is to constitutionalize official neutrality between substantive metacommitments, whether those commitments are to "gayness" or to a "depraved consciousness." Indeed, many will say these are one and the same, and have seen fit to legislate to that end. We can deploy the law's coercion as a response to antisocial conduct, of course, but to punish for dangerous character threatens to confuse normativity with homogeneity. I have not argued that the death penalty is per se unconstitutional. Proponents of judicial restraint will note that neither have I argued that *Lawrence* was correctly reasoned or even correctly decided. Had the case been decided on Equal Protection grounds, for example, this paper could not have been written. Part of my project, then, is to demonstrate the logical consequences of speaking in broad terms of an identity group to whom one is not prepared to extend the respect of heightened scrutiny.

This paper, then, is a challenge, not a conclusion. Each of its three Parts raises a number of difficult questions worthy of far more extensive treatment than a synthetic work of manageable scope can provide. I hope, at the very least, to have persuaded the reader that when we look past the political context in which *Lawrence* was written and pause to reorient its "historical mess,"³⁸⁶ we recognize a tension. Our jurisprudence is both notionally committed not to punish disfavored status and fundamentally committed both in practice and in theory not just to personal responsibility, but to personal blame, stubbornly insisting on the legal relevance of the content of one's character. The tension thus identified, the next move is the Court's.

³⁸⁶ See UNGER, *supra* note 16, at 68.