From Sphere to Boundary: Sexual Harassment, Identity, and the Shift in Privacy

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I. INTRODUCTION

The public/private dichotomy has long been a dominant theme in the narrative of Western legal culture. As a descriptive account of society, this theme appears in three versions: state/civil society, state/market, and society/household.[1] As a normative interpretation of the meaning of a bifurcated society, the public/private theme relies on notions of access/non-access, freedom/coercion, and interference/non-interference.[2]

The plausibility of both the descriptive and the normative conceptions of the public/private divide has traditionally rested on an opposition between sameness and difference. The public is construed as a realm of similarity: public ideals of equality, universality, and civic action are premised on the notion that citizens *qua* citizens are all the same. To guarantee the freedom of each as a citizen, to ensure citizens' access to the means and channels of public democratic participation, government interference and regulation is deemed just and necessary. The private sphere has been understood as one of particularity. Just as the household is the terrain of feminine specificity, so is the market configured as a space of individuality, an arena for conflict and struggle among agents oriented toward their own particular goods. In the private realm, moreover, dominance is admissible, whether configured as "natural," "chosen," or one of the risks of freedom. Attempts to regulate this dominance are often construed as interfering with the "free" and "natural" interactions of particular persons in their private lives.[3]

Over the past several decades, feminist critiques of the public/private dichotomy have exploded these underlying assumptions of sameness and difference.[4] By drawing attention to the forms of hierarchy and dominance, the impact of exclusion, and the prevalence of particular gendered and racialized norms throughout the public sphere, they have challenged both the

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1. *See, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

2. *See, e.g.*, CAROLE PATEMAN, *The Fraternal Social Contract*, *in* THE DISORDER OF WOMEN 33, 47 (1989); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 6-9 (1992).

3. For a general discussion, see Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

4. For a comprehensive discussion of feminist critiques of the public sphere, see Jodi Dean, *Including Women: The Consequences and Side-Effects of Feminist Critiques of Civil Society*, 18 PHIL. & SOC. CRITICISM 379 (1992).

descriptive and the normative presumptions of sameness. With the claim "the personal is political," feminists and theorists of the margins have subverted the presumption of difference in the private sphere. Just as Marx long ago drew our attention to the commonality of experience of workers in the market, so feminists have stressed the similarities among women's experience of domination in the domestic sphere. Furthermore, recent varieties of identity politics[5] rely on the supposition of areas of sameness, of overlapping commonalities, which permit the generalization of private experiences of oppression and exclusion, often linked to race or sexual orientation, in order to ground efforts to transform the public. In short, as the critique of public and private spheres challenges the dominant assumptions characterizing each sphere, it shifts our attention to the place and movement of the *boundary* between them.

My reading of the critiques as highlighting the notion of boundary rather than as simply addressing the characteristics of each sphere requires that we situate the debate over the public/private dichotomy in the context of contemporary constitutional democracy.[6] Rather than descriptive or even normative spheres capable of being defined in terms of sameness or difference, notions of public and private depend upon political determinations regarding the boundaries of behavior of persons, groups, and the government itself.

This democratic context differs from the traditional liberal story of public and private spheres in that the latter relies on a preexisting opposition between nature and culture.[7] In the traditional liberal story, the state is the construct of reason, the product of rational cooperation. What is designated as private remains natural, beyond the scope of reason. Thus the tension in the liberal story rests on the function of this private realm, for the rational character of the public is discernable only in opposition to it. The public or state, in other words, takes its meaning and definition from that which remains outside it.

From the perspective of the democratic constitution, what is private is itself the product of politics, whether politics is understood as rational debate or as

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5. The Combahee River Collective provides one of the earliest articulations of "identity politics." The Collective writes:

> Our politics evolve from a healthy love of ourselves, our sisters and our community which allows us to continue our struggle and work. This focusing upon our own oppression is embodied in the concept of identity politics. We believe that the most profound and potentially radical politics come directly out of our own identity, as opposed to working to end somebody else's oppression.

Combahee River Collective, *A Black Feminist Statement*, *in* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 210, 212. (Cherríe Moraga & Gloria Anzaldúa eds., 1983). *See also* SHANE PHELAN, IDENTITY POLITICS: LESBIAN FEMINISM AND THE LIMITS OF COMMUNITY (1989); Todd Gitlin, *The Rise of "Identity Politics,"* DISSENT, Spring 1993, at 172.

6. This approach presupposes that the meanings of the public and the private are, at least in part, products of the democratic discussions (and conflicts) of citizens. For a reading of democracy as such an open and comprehensive debate, see CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY 9-20 (David Macey trans., 1988).

7. The contract theories of Hobbes and Locke, with their focus on the rational creation of both a civil state and a state of civility, are the primary locus of the traditional liberal story. For both, the rational agreement of free and equal men provides the way out of the irrational and violent state of nature. For an interesting feminist critique of these stories, see CAROLE PATEMAN, *supra* note 2, at 46-50.

competitive struggle. Indeed, the insight that the boundary that the private represents is a political creation is what really lies at the heart of the claim "the personal is political." This claim rests on the assumption that through political action we determine the meaning and scope of those experiences we refer to as private. Stressing the democratic context of identity politics, then, allows us to view privacy as the way we, as participants in a democracy, choose to demarcate the limits of democratic contestation; it enables us to move away from the notion of the private as a sphere in which we are placed to conceive of privacy as a boundary that we create.[8]

My emphasis on the shift in privacy from sphere to boundary, however, comes up against two major problems. First, the language of spheres, or the zonal conception of privacy, continues to influence our understanding of privacy.[9] Some who argue against the continued validity of privacy focus their efforts on its patriarchal interpretation—a man's home is his castle.[10] Second, for those who remain excluded from the democratic debate, or those who exist at the margins, privacy may remain a barrier to the inclusion of their concerns. It may imply hiddenness, invisibility, and secrecy.[11] To address these two problems, I take up the place of privacy in sexual harassment law in Part Two. In Part Three I discuss the more general notion of a right to privacy as it appears in debates over abortion and lesbian and gay rights.

In both discussions I focus on the "interpretive constraints"[12] delimiting and informing interpretations of privacy. While interpretive constraints enable us to collect and order the "facts of the matter" or a description of the situation at hand in accordance with commonly accepted beliefs, they often end up providing barriers to the inclusion of new descriptions and interpretations.[13]

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8. For a discussion of privacy as a political right in the context of republican constitutionalism, see generally Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

9. Kendall Thomas provides a helpful overview of the zonal conception of privacy and also addresses two other influential conceptions, the relational and decisional notions of privacy. *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443-48 (1992). An interesting example of the way the zonal conception overshadows the decisional conception, which tends to be rooted in the notion of autonomy, can be found in Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 223 (Ferdinand D. Schoeman ed., 1984). Benn stresses that "since the family and the family home are the focal points of important and very generally significant personal relations, these must be immune from intrusion, at least beyond the point at which minimal public role requirements are satisfied." *Id.* at 236.

10. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED 93, 93-102 (1987) [hereinafter FEMINISM UNMODIFIED].

11. *See* Thomas, *supra* note 9, at 1455 (Thomas discusses "privacy" as a problematic concept for lesbians and gay men: "[G]ays and lesbians recognize the . . . need for some legal protection, which will enable them to avoid being forced out of . . . 'the closet.' . . . [T]he closet is less a refuge than a prisonhouse.")

12. By interpretive constraint I mean the domination of a particular vocabulary or mode of discussion, a crystallization of meaning and interpretation which establishes the parameters for understanding a legal concept or principle. An interpretive constraint determines which terms can be used to interpret legal rules and what these terms mean. It installs the standards for the admissibility of arguments, the criteria of truth and falsity.

13. Duncan Kennedy writes:

> It is impossible to think about the legal system without some categorical scheme. We simply cannot grasp the infinite multiplicity of particular instances without abstractions. Further, the

By situating my account at the level of interpretation, I address the meaning of privacy as it applies to sexual harassment and as it appears in the debates over abortion and gay rights, offering and defending the notion of privacy as a boundary. To this extent, my account of the shift in privacy is more normative and interpretive than descriptive.

My discussion of sexual harassment cases centers on the "red herring" of the reasonable-person standard. I argue that reasonableness conceals the operation of presumptions of privacy and publicity in sexual harassment law. Once these presumptions are revealed, we are able to read recent decisions as resting not on the standard of the reasonable person (man or woman), but on the interplay of assumptions regarding the private sphere and the boundary of privacy. More specifically, my focus on privacy in sexual harassment cases enables me to address the problem of understanding the relation between spheres and boundaries, for as courts rely on the boundary privacy presents in the more public arena of the workplace, they problematize assumptions regarding the private sphere. Sexual harassment provides an ideal context for considering a change in the notion of privacy precisely because it concerns a violation of a person who is not at home. By looking at the tension between privacy as a sphere and privacy as a boundary in sexual harassment law, then, I seek to defend the idea of privacy as it protects women's interests and concerns by demarcating a *boundary* between acceptable and unacceptable actions or performances.

I continue my investigation of privacy by looking more specifically at the right to privacy.[14] Focusing on the debates surrounding abortion and the rights of lesbians and gay men, I argue that when the right to privacy is defended as protecting practices, choices, or relationships necessary for identity, it remains caught in the logic of the patriarchal private sphere and is rendered unable to do justice to the claims it purports to protect. Instead, it ends up protecting the presumptions of masculinity and heterosexuality long associated with the traditional subject of individual rights. As long as supporters of the right to abortion and the rights of lesbians and gay men continue to focus on defining the sphere of privacy, they reiterate these presumptions. Privacy then seems to represent a right in conflict with democratic deliberation, seeking to place itself outside of the discussion, rather than itself a product of deliberation.

> edifice of categories is a social construction, carried on over centuries, which makes it possible to know much more than we could know if we had to reinvent our own abstractions in each generation. It is therefore a priceless acquisition. On the other hand, all such schemes are lies. They cabin and distort our immediate experience, and they do so systematically rather than randomly.

Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 215 (1979), *reprinted in* CRITICAL LEGAL STUDIES 139, 142 (Allan C. Hutchinson ed. 1989).

14. There is a vast literature on the right to privacy of which I have scratched only the surface. For a good general collection of the philosophical debates, which includes the seminal discussion by Warren and Brandeis, see PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 9.

To move beyond this conflict and stress the way in which privacy is a response of persons already connected in a political community, I emphasize that publicity is always part of any identity. This enables us to conceive of privacy as a boundary constituted by the mutual recognition of legal persons that they are each and all more than legal persons; they are concrete persons with projects and dreams beyond the scope of law. It allows us, in the words of Patricia Williams, to turn privacy "from exclusion based on self-regard into regard for another's fragile mysterious autonomy."[15] This discussion, then, seeks to address the second problem of the compulsion to secrecy often present in the idea of privacy. My goal is to break the connection between privacy and identity in order to allow the boundary of privacy to protect rather than hide those at the margins.

II. SEXUAL HARASSMENT AND REASONABLENESS

By the late 1970s, federal courts of appeals had acknowledged sexual harassment as a form of sex-based discrimination proscribed by Title VII of the Civil Rights Act of 1964.[16] With the Supreme Court's holding in *Meritor Savings Bank, FSB v. Vinson*[17] in 1986 and the EEOC's establishment of guidelines for impermissible conduct in 1990,[18] the harm of sexual harassment came to be recognized as undermining women's equality in the workplace.

Nonetheless, courts have had problems figuring out what kind of behavior is harassment. Since *quid pro quo* (sex for favors) and retaliatory harassment are relatively straightforward, most of the problems occur in hostile environment cases. In *Meritor* the Court proposed the following test: in order to succeed under the hostile environment theory, a claimant must establish that the alleged behavior was "unwelcome" and that it was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment."[19] Deciding that the behavior in question in *Meritor* was clearly sufficiently severe and pervasive, the Court focused on welcomeness.[20] Lower courts, then, were left to establish the tests and standards by which to judge the actual abusiveness of the workplace—to what

15. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 164 (1991).

16. Much of the success in this area can be attributed to the work of Catharine A. MacKinnon. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); *Sexual Harassment: Its First Decade in Court*, *in* FEMINISM UNMODIFIED, *supra* note 10, at 103-116.

17. 477 U.S. 57, 63-73 (1986)(holding that "hostile environment" harassment is a form of sex discrimination in violation of Title VII).

18. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1993).

19. *Meritor*, 477 U.S. at 67, 68 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). A number of feminist commentators have pointed out the similarity between the consent standard in rape law and the unwelcome requirement in sexual harassment law. For critical discussions of the "unwelcome" requirement, see Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 801-10 (1988); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 826-34 (1991); Ann C. Juliano, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 (1992).

20. *Meritor*, 477 U.S. at 67-68.

extent it was altered by harassing behavior. The standard they chose was one familiar to tort law, that of the reasonable person.[21]

Yet, as the dissent in *Rabidue v. Osceola Refining Co.*[22] pointed out, the reasonable person standard "fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men" and thus implicitly articulates the masculinity of the reasonable person.[23] Indeed, the *Rabidue* court ruled that a reasonable person would not find a work environment hostile and abusive in which a woman was repeatedly referred to as "whore," "cunt," "pussy," or "tits," and in which her supervisor remarked, "All that bitch needs is a good lay."[24] Explicitly rejecting this reasonable person approach, the Court of Appeals for the Ninth Circuit adopted the reasonable woman standard in *Ellison v. Brady*.[25] It argued that the reasonable woman standard would not only put women on more "equal footing" with men by taking into account their different experience of rape and assault, but that such a standard would also "shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee . . . ."[26]

Feminist legal theorists have raised substantial criticisms of both standards.[27] While generally agreeing that the reasonable person as currently conceived reinforces the male perspective of the status quo, they have stressed a number of problems in the reasonable woman standard. These critiques tend to fall into two broad categories: those which focus on application, on the standard's inability to accommodate difference, and those which target the conceptual problems within the notion of "reasonableness." Those critics who emphasize application usually support a revised notion of the reasonable woman, while critics concentrating on conceptual problems often reject the reasonableness standard entirely. My claim is that whereas the application critique mistakenly worries about the determinations installed by a standard which challenges the masculinity of the reasonable person, the conceptual critique completely fails to attend to the problem of gender. The conceptual critique overlooks the place of the public/private distinction in sexual harassment law and thus dismisses reasonableness for the wrong reasons. Once

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21. *See* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. L. & FEMINISM. 41, 57-65 (1989).

22. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

23. *Id.* at 626 (Keith, J., dissenting).

24. *Id.* at 624 (Keith, J., dissenting).

25. 924 F.2d 872, 879 (9th Cir. 1991).

26. *Id.* at 879.

27. *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1197-1214 (1989); Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1004 (1992); Deborah S. Brenneman, *From a Reasonable Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281 (1992); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990); Estrich, *supra* note 19, at 843-47.

this understanding is uncovered, we can grasp the way recent decisions, rather than relying on reasonableness, both employ and problematize a notion of the private sphere.

Three basic arguments characterize the application critique. First, application critics point out that the same lawyers, judges, and juries who perpetuated the reasonable person standard apply the reasonable woman standard. As Eileen Blackwood remarks:

> Given that men and women experience sexuality differently, how then can decision makers determine how a reasonable woman would have reacted without resorting to male defined culturally biased perspectives? They will have to draw on their own experiences and views of what conduct is reasonable for a woman. The current need for sexual harassment law demonstrates that men and women do not agree on what is reasonable. It seems naive to assume that the legal decision makers will be different.[28]

This strand of criticism holds that the reasonable woman is indistinguishable from the reasonable man.[29] Second, application critics argue that the reasonable woman standard "does not accommodate the experiences of all women."[30] Women differ among themselves as to what sorts of behavior they find harassing.[31] Third, application critics have maintained that the reasonable woman standard risks reinstating the stereotype of the delicate, passive victim in need of protection from the coarse world of the workplace.[32] These expectations of the reasonable woman are that she will not be exposed to explicit images or coarse behavior. As the embodiment of virtue, she establishes the limits and boundaries of respectable behavior. She is the Lady or Madonna caught in the world of whores. For these critics, the reasonable woman thus becomes a static symbol, the complexity of her experiences and desires negated by a standard which demands perfection. Ultimately, all three of these arguments address the inability of the reasonable woman standard to acknowledge difference. These critics claim that when applying the standard, courts risk underestimating the importance of difference in three dimensions: the differences between men and women, the differences among women, and the differences within each woman. For the application critics, then, the goal is to find an appropriate way to include difference and specificity.

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28. Blackwood, *supra* note 27, at 1021.

29. *See* Estrich, *supra* note 19, at 846; *see also* Abrams, *supra* note 27, at 1202; .

30. *See* Cahn, *supra* note 27, at 1416.

31. Not surprisingly, this line of argument often finds itself caught in a train of identifications, wondering if the next step will be the standard of the reasonable Chicana lesbian or that of the single, Anglo mother. *See, e.g.*, Blackwood, *supra* note 27, at 1023; Cahn, *supra* note 27, at 1403.

32. *See* Cahn, *supra* note 27, at 1415-16; Finley, *supra* note 21, at 64.

By focusing on the proper formulation of the reasonable woman standard, the application critics become enmeshed in the dilemmas of difference plaguing identity politics.[33] Underlying their arguments is the idea that law has the potential to recognize concrete differences. They suggest that the legal meaning of the recognition of difference is not an abstract guarantee of respect, but the concrete acknowledgement of specificity. They are forced into this position, however, because of the intransigence of a masculine interpretation of reasonableness. When the reasonable person appears to be the reasonable man, opening up the standard to include women seems to direct us to a reasonable woman standard. But this standard, the critics maintain, installs its own set of exclusions.

In one sense the critics are right: seeking to overcome the determinations of one standard through yet another set of determinations can only lead to further exclusion. Yet, if we focus on the remedy the standard seeks to provide—on the reasonable woman as a critical perspective on a masculinely determined notion of reasonableness—we can read the call for the recognition of difference as a call for *less* specificity, as a challenge and response to all interpretive constraints. Unfortunately, as my discussion of the conceptual critique will show, reasonableness hinders our ability to challenge such sedimented understandings because it conceals the idea of the private at work in sexual harassment law.

The conceptual critique of reasonableness addresses the operation of interpretive constraints on the very idea of reasonableness. It argues that neither the reasonable woman standard nor the reasonable person standard can successfully address the problem of sexual harassment because reasonableness presupposes a notion of consensus ultimately incapable of accommodating difference.[34] Nancy Ehrenreich has offered a particularly rich and nuanced version of this position. Constructing her argument by means of an analogy between the function of reasonableness in the private law concept of negligence and public anti-discrimination law, Ehrenreich asserts that

> (unfounded) pluralist assumptions support the courts' use of the reasonable person concept to define discrimination in the sexual harassment setting. Such assumptions allow reasonableness to be seen as mediating a fundamental contradiction between liberty and security in liberal legal thought—a contradiction expressed in this context as the conflict between our desire to promote social diversity by providing autonomy to individual groups and our need to protect vulnerable

33. For a compelling discussion of the "dilemma of difference," see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19-97 (1990).

34. *See* Blackwood, *supra* note 27, at 1022.

> groups from discrimination by coercing a certain amount of conformity to general standards of conduct.[35]

For Ehrenreich, then, a "pluralist ideology" underlies both negligence and antidiscrimination law. This ideology is characterized by the following beliefs: diversity is a positive good, a guarantee of democracy insofar as it prevents any one perspective from gaining dominance; diversity is an accurate description of existing American society, which means that the commonly-held belief in pluralism serves as a unifying, overarching value in America; and, the role of government is to preserve heterogeneity and maintain a neutral stance vis-a-vis diverse groups.[36] Since the courts must remain neutral, they use the reasonableness standard as a guide for intervention, as a way of "identifying a point along a continuum of conduct that separates (prohibited) discrimination from (protected) freedom."[37] Reasonableness is thought to provide such a standard because of its indeterminacy, because what is reasonable cannot be defined once and for all. Indeed, reasonableness is itself the product of pluralism, the result of a preexisting societal consensus. The courts are said to be neutral, then, because they are applying a test which owes its legitimacy to its origins in the free discussions of a pluralist society.

Ehrenreich uses *Rabidue v. Osceola Refining Co.*[38] to show the inability of reasonableness to perform this mediating function. She addresses three aspects of the majority decision: "its 'privatization' of the plaintiff, its recasting of the group conflict in this case, and its equation of reasonableness with consensus."[39] First, the majority opinion privatized Vivian Rabidue's complaint by describing her as "an overly sensitive obnoxious woman" and by stressing her voluntary entry into the workplace. This erased her group membership, constructing her as an atypical, unreasonable woman who had chosen to work in an obscene environment and who must consequently bear the responsibility for this choice. With this act of privatization, the court avoided "visualizing the case as a conflict between men and women" and "undermined the legitimacy of the plaintiff's claim by making it seem not to implicate pluralist concerns (since she did not represent the interests of women as a group)."[40]

Second, having effectively eliminated the possibility of a conflict between men and women, the court recast the issues at stake in *Rabidue* as involving class conflict—the values of "American workers" versus those of some vague but powerful elite. Douglas Henry's verbal abuse of Vivian Rabidue (which led her to file the sexual harassment complaint) was not the particular and

35. Ehrenreich, *supra* note 27, at 1178-79.
36. *Id.* at 1188-89.
37. *Id.* at 1191.
38. 805 F.2d 611 (6th Cir. 1986).
39. Ehrenreich, *supra* note 27, at 1198.
40. *Id.*

idiosyncratic behavior of a lewd employee, but a general characteristic of working class culture as a whole. As such, tolerance of diversity would demand that this culture be protected against the incursions of the powerful. Third, in determining the content of the social consensus regarding reasonable behavior, the majority "equated societal consensus with prevailing social practices."[41] They reasoned that since "pictorial erotica" is widespread in America, to be found on newsstands, in the movies, and on television, sexually graphic images in the workplace cannot reasonably be viewed as having significantly harmful effects.[42] To be sure, one of the posters in question in *Rabidue* "showed a prone women who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.'"[43] Nonetheless, because of the pervasiveness of such derogatory images in American society, the majority held that this poster would not impair a woman's equal participation in her place of employment. With this reading of *Rabidue*, Ehrenreich concludes that, far from mediating the divide between diversity and conformity, reasonableness conceals and displaces it.[44]

Given Ehrenreich's critique of reasonableness, it is not surprising that she views the reasonable woman standard as being as problematic as that of the reasonable person. It too relies on a distinction between prohibited discrimination and protected freedom via the opposition between the regulable behavior of the "neurotic" woman—"the rare hyper-sensitive employee"—and the legitimate concerns of the "reasonable" woman. In addition, the notion of the reasonable woman similarly relies on the assumption that there is a preexisting consensus regarding reasonableness which can supply a neutral standard.[45]

While much of Ehrenreich's critique is both illuminating and provocative, it nonetheless misreads the problem of the public/private distinction in *Rabidue*. Because she draws her conception of the private sphere from negligence law, Ehrenreich fails to recognize the different notion of the private at work in sexual harassment cases. In fact, Ehrenreich's conception of the divide between the public and private spheres conceals the domestic and sexual view of the private present in *Rabidue* (and in sexual harassment cases generally). Consequently, she fails to distinguish between a valid consensus and a merely existing consensus, between one which is culturally or societally presumed to be held and one which *deserves* to be held because it reflects the interests of all concerned.[46] By relying on a voluntarist notion of the private sphere, by concealing the importance of sex and domesticity in sexual

41. *Id.* at 1206.
42. *Rabidue*, 805 F.2d at 622.
43. *Id.* at 624 (Keith, J., concurring in part, dissenting in part).
44. Ehrenreich, *supra* note 27, at 1206-07.
45. *Id.* at 1216-17.
46. *See generally* JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 116-194 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990).

harassment cases, Ehrenreich fails to see the potential of privacy as a shifting, negotiable boundary. She is prevented from accounting for the unstated ideal which emerges in recent cases, an ideal which moves beyond an empirically given consensus and points toward a valid one.

As she builds from her analogy with negligence law, Ehrenreich relies on a conception of the private sphere as characterized by freedom of contract and unfettered interaction. In contrast to the public sphere which regulates and protects such "natural" exchanges, the private sphere is a consent-based realm of individual freedom.[47] Beginning with this view of the private, Ehrenreich can move quite easily to her critique, which resembles familiar Marxist critiques: such a realm is neither free nor voluntary, but fundamentally hierarchical. Any gain on behalf of one group is necessarily a loss for another.[48] Since interactions remain strategic, we (and the courts) are left with strategic choices regarding whose interests will be served or protected. The reasonableness standard is thus unable to serve as a neutral mechanism by which courts distinguish protected exercises of freedom from regulable interferences with collective security. According to this reading, *no* norm or standard can provide a mediation capable of bridging the divide from private to public. The relational and hierarchical construction of groups in American society entails that "[p]art of each group's identity is its awareness of its position in a hierarchy of groups. Because groups are mutually defined in this way, it is simply impossible to accommodate one group without in some way affecting others."[49] Ehrenreich's conception of the public/private distinction thus prevents her from moving beyond an agonistic vision of competing identities and interests.

Although an important reminder to feminists who often forget about the continued impact and use of a market notion of privacy,[50] this analogy between negligence and antidiscrimination law fails to adequately describe the notion of the "private" in sexual harassment law. Sexual harassment law is designed to locate and eliminate conduct that negatively alters the plaintiff's work environment, unreasonably interfering with her ability to work. This conduct is viewed as being based on sex—both on the sex of the plaintiff and on the sexualized character of the interaction.[51] As they identify and punish sexualized conduct, courts rely on a particular conception of appropriate

47. Ehrenreich, *supra* note 27, at 1188-89, 1199-1200.

48. *Id.* at 1223.

49. *Id.* at 1224.

50. I am indebted to Karen Engle for this point.

51. To be sure, the understanding that sex is at the basis of sexual harassment has tended to be overlooked in the focus on "welcomeness," see Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), and on the reasonableness of the victim's claims, see Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)). Nonetheless, I contend that it is precisely the element of sex which operates underneath decisions in sexual harassment cases and which must be brought to the fore.

performance.[52] Decisions in sexual harassment cases hinge on how plaintiffs' and defendants' performances are interpreted. How a court constructs this interpretation depends on how it uses the notion of privacy. In other words, since the issue is sexualized performances, or the way in which particular performances sexualize and are sexualized, how the court reads the boundary established by privacy determines its decision. The private is the boundary marking the admissibility/permissibility of performances.

With this understanding of privacy as a boundary, we are able to grasp what is at stake in sexual harassment cases: namely, the problem of women and sex. If women are viewed from the outset as sexual, then privacy cannot provide a boundary marking sexualized performances as inadmissible. Instead, women are confined to the traditional private sphere of domesticity, sexuality, and intimacy. But when women are not pre-installed in a private sphere, privacy provides a more free-floating boundary between their performance as employees and workers and their performance as particular persons. Once freed from the traditional private sphere, women are able to use privacy as a protection, as a boundary establishing the appropriateness of particular performances.

The tension between this boundary notion of privacy and traditional interpretations of the private sphere becomes clear when we look at some of the conceptual difficulties present in the idea of the reasonable person (or the man from whom this person derives). The reasonable person or man cannot mediate between the public and private spheres because he brings with him the typical trappings of masculinity. As Ehrenreich explains, the image of the reasonable man used in negligence literature is often "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirtsleeves."[53] Situated between the traditional domestic and public spheres, this man becomes the boundary marking admissible performances as he moves from his position as head of household into the workforce and back. In fact, his placement at home, yet outside, establishes his ability to shift freely from one domain to the other; his capacity to demarcate with his movement the perimeter and assumptions of each. So, he takes his magazines at home, bringing the outside world of paid labor into the domestic sphere and inserting an element of publicity into the realm of intimacy. Similarly, he takes with him into the workplace his attributes of paternal and masculine dominance. By bringing with it these connotations of male superiority, the boundary established by the reasonable man fails to provide women with relief in sexual harassment cases: harassing behavior simply repeats traditional male expectations of sexual access to women. Sexual harassment, appearing as

52. For a discussion of the way in which gender is performed, that is, the ways in which masculinity and femininity are themselves repetitive enactments and stylizations of behavior, see JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990).

53. *Id.* at 1210 (quoting GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 23 n.94 (1985)).

private behavior for the "reasonable" man, becomes appropriate male/female interaction.

The image of the "man in his shirtsleeves" also shows us why the standard of the reasonable woman fails to mediate between the domestic and public realms. The reasonable woman herself eludes representation, for how would we depict her? Is she a homeowner when vast numbers of American women live below the poverty line? Is she also white, as the gloss over the race of the reasonable man leads us to believe? Is someone attending to her intimate and sexual needs, perhaps a maid or house-husband, when most women bear the weight of child-rearing as well as wage-earning? If she is the concealed wife of the reasonable man, the reasonable woman is configured as heterosexual. As a wife she remains confined indoors, perhaps nagging her husband to mow the lawn. Her privacy is not a boundary, it is a sphere: her only bridge to the outside world is him, the bringer of the magazines. If reasonable, she does not enter the public sphere of the workplace. Indeed, precisely because she remains caught in the domestic private sphere, already enmeshed in various coded meanings, the privacy of the reasonable woman cannot but fail to reinstate women within the private sphere.

Returning to *Rabidue*, we find this tense and ambiguous reading of the private informing the court's reasoning. Its narrative begins with a recollection: Vivian Rabidue was first employed at Osceola Refining Company as an executive secretary. Later, she advanced to the position of administrative assistant.[54] By recalling her past with Osceola, the court casts Rabidue in a supportive role. Her occupational performance suggests that of a housewife. Her duties were to attend the telephone, purchase office supplies, make contacts with customers[55]—the caretaking and social responsibilities of the good wife and mother. But in the story told by the court Rabidue was not a good wife; she could not work harmoniously with others.[56] Instead she was an "independent, ambitious, aggressive, intractable, and opinionated individual."[57] Furthermore, she "disregarded supervisory instruction and company policy whenever such direction conflicted with her personal reasoning and conclusions."[58] By bringing in Rabidue's occupational history, constructing it in domestic terms, and showing how Rabidue failed to perform her given role, the majority relied on a gendered reading of the boundary established by privacy: it is the boundary provided by the reasonable man as he moves from the domestic to the public sphere.

Not surprisingly, this reading enables the majority to view Douglas Henry as performing appropriately. The majority's conception of the boundary of privacy domesticates and sexualizes Rabidue. Therefore, the court fails to

54. *Rabidue*, 805 F.2d at 614.
55. *Id.* at 614-15.
56. *Id.* at 615.
57. *Id.*
58. *Id.*

perceive Henry's behavior itself as an act of sexualization, as an effort to place Rabidue in the private sphere. Only the dissent acknowledges that Rabidue was prevented from taking customers to lunch because of her sex: the company's Vice President felt that it was "improper" for a woman to take out male clients.[59] While the majority faults Rabidue for an aggressive and independent performance—thus implicitly endorsing Henry's (and the company's) efforts to keep a wayward wife in line—the dissent recognizes that pornography and obscenity serve to remind women of their status as sexualized objects and punish them for daring to perform a role not assigned to them. In fact, what becomes clear in the dissent is Osceola's inability to escape from a domesticized/sexualized conception of Rabidue's role despite the requirements of her job. Although the company felt that she was too abrasive and aggressive, she was "not forceful enough to collect on slow-paying jobs"; although she was required to improve efficiency, her efforts were consistently undermined.[60] The dissent thus draws attention to the tension between the role Rabidue was supposed to perform as an employee and the sexualized role Osceola and the majority assigned to her as a woman. After Rabidue left Osceola, the company reconciled this tension by replacing her with a man, one whose sex would measure up to the demands of performance.

In contrast, the majority in *Ellison v. Brady*[61] begins with an understanding of the plaintiff, Kerry Ellison, as performing the role of employee. The court states, "Kerry Ellison worked as a revenue agent for the Internal Revenue Service. . . ."[62] The defendant, Sterling Gray, is situated in the home, as a parent: the court tells us that the one time Ellison agreed to have lunch with Gray, they stopped by his house to pick up his son's forgotten lunch.[63] Having thus cast both plaintiff and defendant, the court sees Gray's actions as efforts (whether intentional or not) at sexualization, as attempts to encode an identity onto Ellison apart from her position as employee. The opinion describes the way that, despite Ellison's attempts to avoid Gray, and her requests that he leave her alone, Gray persisted in sending her bizarre love letters in which he described watching and experiencing her from afar.[64] Adopting the perspective of the reasonable woman, the *Ellison* court concluded that such behavior is harassing.

While most commentators have emphasized the court's use of the reasonable woman standard, what is striking to me about the *Ellison* decision is not that it depicts Gray's conduct as "sufficiently pervasive and severe," but that it acknowledges how Gray's behavior alters the conditions of employment. His performance is viewed as masculine; he is sexualized. By pursuing Ellison,

59. *Id.* at 624 (Keith, J., dissenting).
60. *Id.*
61. 924 F.2d 872 (9th Cir. 1991).
62. *Id.* at 873.
63. *Id.*
64. *Id.* at 873-74.

Gray attempted to bring modes of behavior perhaps acceptable in a restrictively sexualized private sphere into a more diverse public sphere.[65] Although Gray's conduct was not violent and abusive it did alter the workplace, changing it from a site of work into a site for his pursuit of his own pleasure. The court construed this behavior as harassing. In doing so, the court was not relying on a conception of reasonableness, on a gendered conception of public and private spheres; rather, the court relied on privacy as the boundary for admissible performances.

By implicitly employing the notion of privacy as a boundary, the *Ellison* decision suggests the importance of respecting the feelings of another even when they may be different from our own. The court explains that even well-intentioned compliments can provide the basis for a cause of action if a reasonable victim views them as sufficiently severe so as to alter the conditions of employment and create an abusive working environment. The very oddness of this remark—for why would a reasonable victim take offense at well-intentioned compliments—displaces reasonableness and calls our attention to the changed working conditions. Moreover, the court concludes: "When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged."[66] Yet, the court did not articulate a standard of workplace conduct. It simply stressed the importance of the victim's, or reasonable woman's, perspective in determining when working conditions are altered. This unstated standard thus points toward an ideal workplace in which sexualized and sexualizing performances are prevented from playing an influential role. Importantly, such performances are deemed inappropriate when they violate the boundary of another—when they encroach upon her privacy.

My reading of *Ellison* suggests that the impetus behind the court's decision lies less in the notion of a reasonable woman than in a shift in the understanding of privacy. The Supreme Court's unanimous holding in *Harris v. Forklift Systems*[67] supports this reading. As in the *Ellison* case, the Supreme Court begins with Theresa Harris' occupational status as manager, thereby viewing her first as an employee rather than as a woman whose proper place is at home.[68] Similarly, it describes the actions of Forklift's president, Charles Hardy, in profoundly sexual terms. For example, the opinion notes an instance when Harris was arranging a deal with a customer, and Hardy asked her in front of other employees "What did you do, promise the guy .

65. The majority writes: "Analyzing the facts from the alleged harasser's viewpoint, Gray could be portrayed as a modern-day Cyrano de Bergerac wishing no more than to woo Ellison with his words. There is no evidence that Gray harbored ill will toward Ellison. He even offered in his "love letter" to leave her alone if she wished." *Id.* at 880 (footnote omitted).

66. *Id.* at 881.

67. 114 S.Ct. 367 (1993) (holding that conduct need not seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury to be actionable as "abusive work environment harassment").

68. *Id.* at 369.

. . some [sex] Saturday night?"[69] So, despite Justice O'Connor's rhetoric of "objectively hostile or abusive work environment" and reasonableness, and despite the "middle path" the Court sought to take between conduct that is "merely offensive" and conduct that causes "tangible psychological injury,"[70] the Court's decision does not actually attempt to mediate between diversity and conformity, freedom and protection. In fact, the Court refrained from articulating determinate standards of abusiveness, projecting instead the vision of an ideal workplace altered through harassment.[71]

The failure of reasonableness in sexual harassment cases stems from its connection to a traditional domestic and sexual conception of the private. The notion of the private in sexual harassment law creates a bounded space. When it includes gendered assumptions of masculine activity aided by feminine support, this traditional private sphere remains beyond the scope of public norms of reciprocal equality and mutual respect. Indeed, the *sine qua non* of sexual harassment disputes, the Clarence Thomas-Anita Hill exchange, illustrates the inability of a woman as ostensibly reasonable as Hill to escape from this private sphere. Her attackers repeatedly entrapped her in the private, constructing her as that "other" of the reasonable woman—the rare hypersensitive hysteric, turning her into a psychotic, a spurned lover, Thomas's discarded helpmate and subordinate.[72] Once a woman is encased in this private sphere, reasonableness cannot protect her. She has to be crazy, since no reasonable woman would choose to endure what goes on in the public sphere.[73] Yet when the private is no longer a sphere, when women are seen as participants in the workplace, then the idea of a boundary protecting personal and sexual concerns helps to secure their equality. Their harassers are the ones performing sexually, impermissibly seeking to privatize an already public interaction. Relying on the boundary of privacy thus enables the Court to refrain from articulating a determinate standard of workplace conduct, to avoid responding to one set of determinations with yet another set, and suggest an as yet unrealized ideal of mutual accountability and respect.

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69. *Id.*

70. *Id.* at 370.

71. In his concurring opinion Justice Scalia objected to this indeterminacy:

> "Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard--and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person's" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness . . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.

Id. at 372.

72. An excellent overview of this topic can be found in the essays collected in RACE-ING JUSTICE, EN-GENDERING POWER (Toni Morrison ed., 1992). *See, e.g.*, Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels*, *in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra*, at 251, 263-65; Christine Stansell, *White Feminists and Black Realities*, *in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra*, at 323, 340-42.

73. *See supra* text accompanying notes 53-54.

I claimed above that Ehrenreich fails to distinguish between a valid and a merely existing consensus.[74] This failure is linked to her (mis)reading of the public/private distinction at work in sexual harassment cases. As we have seen, she does not separate the domestic sphere from the arena of paid employment; instead, she blends them together within a voluntarist notion of the private.[75] Yet sexual harassment law separates these two worlds.[76] The unstated standard of workplace interaction in *Ellison* and *Harris* also leads to this conclusion. Because it is unstated, it can suggest an ideal of interaction in terms of mutual respect and responsibility rather than merely offer a simple description of already existing interactions. Were the *Ellison* court to remain content with a factual account of conditions in the workplace, it might have endorsed the *Rabidue* decision. Instead, it relied on the notion of an ideal workplace impermissibly altered by harassment, not on an empirical workplace in which harassing behavior may be subject to regulation on the basis of societal consensus.[77] And although the Court in *Harris* suggests that a hostile environment is one which detracts from employees' job performance, discourages employees from remaining on the job, and keeps them from advancing their careers, it states that "even without regard to these tangible effects" discriminatory conduct creating an abusive work environment "offends Title VII's broad rule of workplace equality."[78]

Ehrenreich writes:

> In equating "reasonableness" with societal consensus (that is, in defining discrimination as deviation from the status quo), the *Rabidue* court (like all courts using this definition of reasonableness) necessarily assumes that the status quo itself is egalitarian, pluralist, and nondiscriminatory. This in turn shifts the focus to the individual, obscuring the possibility of structural inequalities and creating the impression that only a small number of deviant people fail to conform to society's pluralistic norms (that is, engage in discrimination).[79]

My argument is that *despite* the *Ellison* court's use of the reasonable woman standard and the *Harris* Court's appeal to the reasonable person, both escape reliance on the status quo by suggesting an *ideal* of equality, pluralism, and non-discrimination. The decision in each case rests not on reasonableness, but

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74. *See supra* text accompanying note 46.

75. *See supra* text accompanying notes 46-49.

76. To be sure, by reading the law in terms of such a separation, I have displaced the element of public exchange present in a strategic form in Ehrenreich's account. What my reading of differentiated spheres suggests, however, is not the elimination of this exchange but its reconceptualization in terms of the public as public discourse. *See generally* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Thomas Burger trans., 1989); JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984).

77. *See Ellison*, 924 F.2d at 878, 880.

78. *Harris*, 114 S. Ct. at 371.

79. Ehrenreich, *supra* note 27, at 1205.

on the conception of privacy as a boundary which protects women from sexualizing performances in the workplace.[80] Paradoxically, this boundary enables women to be seen as employees in a relatively public sphere. Protected privacy enables them to perform a public role. In contrast, as they attempt to violate women's privacy in public, the harassers themselves are privatized, sexualized, but not protected. By allowing the boundary of privacy to shift, the courts suggest the possibility of an ideal of mutual respect and responsibility in the workplace, an ideal informed by a focus on our shared accountability for each other's privacy. Far from the "merely existing" consensus of the status quo, this ideal represents the potential outcome of a valid consensus.

By focusing on the reasonableness standard feminist critics have followed a false line, failing to see either the impact of a domestic and sexual conception of the private sphere or the potential of the boundary of privacy in sexual harassment law. Reasonableness cloaks the interplay of assumptions of privacy in the public world of the workplace. It remains tainted by its traditional connotations of the "man in his shirtsleeves who takes the magazines at home."[81] In *Ellison* and *Harris* the notion of privacy, although still sexual, is no longer gendered: male harassers are depicted as attempting to privatize the interactions of women in public. Here, privacy becomes the boundary which determines acceptable workplace interaction. As my analysis of *Ellison* shows, the plaintiff was able to recover because she, although in public, was being privatized. Her harasser, through his effort to privatize her, transgressed the boundaries of the public. "Reasonableness," "objectivity," and a "middle path," then, had nothing to do with the decisions in *Ellison* and *Harris*. Both began by situating the plaintiffs as employees and then projected standards for governing an ideal, hypothetical workplace. Further, these standards implicitly evoked respect for the privacy of employees, by emphasizing the importance of boundaries for participation in public.

Having examined the potential of privacy as a boundary protecting personal and sexual concerns in public, I now turn to the concept of privacy as it appears in debates over abortion and the rights of lesbians and gay men. I continue my account of the shift in privacy, focusing on the way this shift has led to a connection between privacy and identity which prevents us from understanding that publicity is always part of identity. Thus, by stressing the public recognition already present in the notion of a right to privacy, I buttress the boundary conception of privacy. To this end, I interpret this boundary as the recognition by legal persons that they are each and all more than legal persons, that they are individuals with projects and concerns extending beyond the purview of law.

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80. *See supra* text accompanying notes 50-53.

81. Ehrenreich, *supra* note 27, at 1210 (quoting CALABRESI, *supra* note 53, at 23 n.94).

III. PRIVACY AND THE PROBLEM OF IDENTITY

The emergence of "new privacy rights" in the wake of *Griswold v. Connecticut*[82] seemed to indicate that the Court was willing to reconsider the potential of substantive due process after the *Lochner* era,[83] and ready to establish a terrain of individual difference and autonomy safe from community eyes and expectations. Indeed, *Griswold's* progeny—*Eisenstadt v. Baird*[84] and *Roe v. Wade*[85]—gave the impression that choices regarding sexuality and procreation would be protected from unnecessary state intervention. Yet after the Court upheld the Georgia law criminalizing sodomy in *Bowers v. Hardwick*,[86] the actual freedoms secured by a right to privacy came to rest upon ever more shaky ground. Further, the Court's willingness to chip away at the rights embodied in *Roe* have placed even abortion in doubt.[87]

Some commentators and critics think that the backlash against privacy indicates the need for a different legal defense of abortion rights and the rights of lesbians and gay men.[88] Others, however, have reacted by reendorsing privacy.[89] They have called for a new understanding of the concept of privacy in an effort to shore up privacy through the careful articulation of the rights deemed to be at stake. In this Part, I examine this new work on privacy to see whether it can protect difference in contemporary, pluralistic societies. I conclude that identity-based arguments for privacy fail either to address the concerns of privacy's defenders or to protect difference.

The debate around privacy tends to get entangled in issues of choice and issues of difference. Choice issues are constructed in terms of an opposition between freedom and connection. Difference is itself set up against a notion of sameness. Thus, pro-choice feminists often conceive privacy as protecting

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82. 381 U.S. 479 (1965) (holding that Connecticut birth control law violates right of marital privacy).

83. *See* Lochner v. New York, 198 U.S. 45 (1905). The Lochner era was characterized by the active intervention of the judiciary. More specifically, courts in this period used the Due Process clause to strike down economic regulation. For a general overview of the Lochner Era, see CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 11-46 (1990).

84. 405 U.S. 438 (1972) (holding that Massachusetts law prohibiting dispensing of contraceptives to single persons violates Equal Protection Clause).

85. 410 U.S. 113 (1973) (invalidating Texas law banning abortion except where necessary to save the woman's life).

86. 478 U.S. 186 (1986) (holding that Constitution does not establish fundamental right to engage in homosexual sodomy).

87. *See, e.g.*, Webster v. Reprod. Health Serv., 492 U.S. 490, 520 (1989) (plurality opinion) (finding that abortion is only a liberty interest protected by the Fourteenth Amendment, not a fundamental right). *But see* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

88. *See* RUTH COLKER, ABORTION AND DIALOGUE (1992); ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE (1990); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Thomas, *supra* note 9; Norman Viera, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181 (1988);

89. *See* Jean L. Cohen, *Redescribing Privacy: Identity, Difference, and the Abortion Controversy*, 3 COLUM. J. GENDER & L. 43 (1992); Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15 (1990-1991); Morris B. Kaplan, *Autonomy, Equality, Community: The Question of Lesbian and Gay Rights*, 11 PRAXIS INT'L 195 (1991); Michelman, *supra* note 8; Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

choice or decisional autonomy.[90] Privacy, they claim, secures the possibility of making choices necessary for one's identity. Implicitly, these pro-choice feminists are also relying on an idea of sameness: like men, women, too, are and should be legally recognized as self-determining. What they do with this argument, however, is to construct the pro-life position in a particular way. By claiming that privacy protects decisional autonomy, pro-choice feminists construct their pro-life opponents as those who do not view privacy as protecting choice, but instead see the private sphere in terms of traditional understandings of woman's role and duty. Pro-life opponents are placed on the side of difference, where women's capacity for pregnancy renders them fundamentally different from men. For defenders of the right to abortion, then, privacy involves freedom and sameness. Many of these defenders see their opponents as committed to the view that privacy involves relationships of intimacy and belonging in which women differ from men. Finally, the defenders of privacy understand their opponents as wanting to secure these relationships with recourse to the traditional values of the patriarchal family.

For example, Rhonda Copelon's privacy justification for abortion involves a defense of women's freedom against traditional feminine duties within the patriarchal family. By juxtaposing choice and independence against duty and servitude, her argument relies on a sexually encoded opposition between sameness and difference. Copelon claims that, "At least in principle, [*Roe*] acknowledged the power of women to be self-determining, to refuse to be the object of someone else's desire for procreation, whether that desire is that of the state, the husband, the progenitor, or the self-styled guardians of embryonic life."[91] Elsewhere she states: "When pregnancy is finally viewed as a *voluntary* gift of life to another rather than a *woman's duty*, the abortion debate will cease to turn on conception or viability."[92]

But the views of pro-life advocates are often more complex than those of the "opponents" evoked in some pro-choice writings.[93] Many pro-life feminists accept the idea of privacy, but read it in terms of the separation between a masculine public and a feminine private sphere. They criticize what they see as a masculine encoding of autonomy and independence that seeks at best to deny and at worst to exploit and commercialize human dependency. These pro-life feminists do not set up duties and roles against self-

90. *See, e.g.*, PETCHESKY, *supra* note 88; Copelon, *supra* note 89.

91. Copelon, *supra* note 89, at 41.

92. *Id.* at 45 (emphasis added).

93. *See generally* FAYE D. GINSBURG, CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY (1989); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); Maggie Gallagher, *The New Pro-Life Rebels*, NATIONAL REVIEW, Feb. 27, 1987, at 37, 37-39. Although Ginsburg does not describe the women in her study as feminists, she points out that many women incorporate feminist analyses into their rejection of abortion. Indeed, what is striking about Ginsburg's research is her account of the critique of masculinity as it appears among pro-life women. This critique is strikingly similar to that used by Feminists for Life. Linking themselves with those nineteenth century feminists who stressed that women's superiority stemmed precisely from a capacity to love and a close relationship with children, these pro-life feminists view abortion as a male act of violence upon the feminine body.

determination. Instead, they view the goal of self-determination as itself subverting a collective need for nurturance. They conclude that the interdependency of identities means that we cannot simply choose who we are and want to be in the absence of a consideration for those around us.

As they have adapted to post-*Roe* society, some pro-life advocates have redefined the problems involved in sexual relationships, pregnancy, and motherhood as tests of female identity. Faye Ginsburg explains that "[p]regnancy is now understood simultaneously as a decision not to abort, a kind of heroic passage in which [women's] capacity for nurturance has been tested."[94] Confronted with the images, stories, and "scientific facts" that portray the fetus as an innocent child, the pregnant woman in the pro-life narrative faces the challenge of "saving" (with its connotations of redemption) an innocent life and realizing her role as mother. Invested with religious metaphors of salvation, redemption, birth and rebirth, her role becomes glorified (sanctified) as a choice to suffer for the good, the life, of innocents. So pregnancy is a voluntary gift *and* the discussion still centers around viability and conception as they set the stage for the struggle between life and death. Again, duties and roles are not the reverse of self-determination. They are the *result* of self-determination, an achievement which gives meaning to female identity. Women who choose to nurture have not only passed the test of female identity, but have also engaged in a profoundly feminist act of rejecting the masculine exploitation of dependency and vulnerability. Although women remain different from men because of the choices available only to them, the act of choosing takes on the character of an affirmation, an endorsement of an identity which values care and connection.

While the discussion of privacy for lesbians and gay men involves a different configuration of autonomy and connection, sameness and difference, the association between privacy and identity operates in a manner similar to the abortion debate. When proponents of the rights of lesbians and gay men defend a right to privacy, they often stress a notion of "the private" drawn in terms of intimacy and security.[95] Their opponents are thus positioned as viewing "the private" in terms of choice (which explains the continued appeal of essentialist arguments for homosexual identity as a counter to these opponents). But, unlike the abortion debate, notions of sameness and difference are more free-floating in this context. At times the defense of privacy is a defense of difference, an argument for the protection of gay men and lesbians as an oppressed minority. When this is the case, opponents take the position that only individuals and relationships identical to the traditional heterosexual family are protected under the right to privacy. Only choices that are "natural," that involve heterosexual practices of marriage and procreation,

94. GINSBURG, *supra* note 93, at 110.

95. *See generally* RICHARD MOHR, GAYS JUSTICE (1988); Morris B. Kaplan, *Intimacy and Equality: The Question of Lesbian and Gay Marriage*, XXV PHIL. F. 333 (1994).

count as choices. Here, both the meaning and the restricted domain of choice involve a decision whether or not to engage in conduct described as criminal, unnatural, or immoral. Yet when the defense of privacy is constructed as a defense of sameness, as an argument showing how homosexuals are "just like everybody else," opponents urge us to think of homosexuals as radically different, as "others" beyond or undeserving of the protection of privacy. So, as the right to privacy sometimes appears in the debate surrounding the rights of lesbians and gay men, the issue boils down to the proper placement and meaning of identity: is it a matter of intimacy or choice, and is it the same as or different from heterosexual identity?[96]

This aspect of the conflict of privacy stands out in the majority and dissenting opinions in *Bowers v. Hardwick*.[97] Writing for the majority, Justice White presented the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[98] Since the Georgia law applied to homosexuals and heterosexuals alike, White's framing tactic inscribed a strict marker of difference onto Michael Hardwick. For Hardwick to prevail, either his difference would have to be protected or his choice would have to be shown to be the same as other choices protected as private. White's interpretation of the history of sodomy laws and moral prohibitions against homosexual behavior blocked off the first possibility. And, re-reading the privacy cases in terms of marriage and procreation, the Court found no connection between sodomy and the protected rights grounded in traditional notions of the family. From the majority's position, then, Hardwick had no choice worthy of protection. He could only choose to behave immorally or illegally.[99]

Writing for the dissent, Justice Blackmun rejected the majority's limited view of the Georgia statute. His reading of the Georgia law addressed its inclusion of heterosexuals: "Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens."[100] When the privacy needs of homosexuals are viewed as the same as those of heterosexuals, they deserve protection. This view of sameness allows Blackmun to disregard the relationship between identity and choice: human personality and existence in general require associations of intimacy and belonging. His dissent appeals to

96. For an interesting discussion of the variety of conceptions of identity in discrimination law, see Dan Danielson, *Representing Identities: Legal Treatment of Pregnancy and Homosexuality*, 26 NEW ENG. L. REV. 1453 (1992).

97. 478 U.S. 186 (1986).

98. *Id.* at 190.

99. As Nan Hunter points out, "Opponents of the rights claim [of lesbians and gay men] have focused on the volitional nature of sexual conduct." Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 549 (1992) (citations omitted).

100. *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

those central parts of an individual's life—emotional enrichment and sexual relationships—which privacy is supposed to protect.

Blackmun weaves a second conception of identity into his dissent, now construed in terms of choice. Here he urges that an acceptance of difference is involved in the recognition of the freedom to choose. Relying on *Wisconsin v. Yoder*,[101] he draws an analogy between homosexuals and the Amish: "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[102] In this second line of argument, Blackmun suggests an understanding of privacy that protects the choices constitutive of identity, the choices which render an identity different.[103]

A comparison of the pro-choice feminist emphasis on the right to privacy with that of proponents of the rights of gay men and lesbians leads us to a rather odd, contradictory conclusion: privacy is important because it protects choice and because it protects something we do not and cannot choose. Similarly, privacy is dangerous because it breaks intimate connections and because it conceals our free choices. This contradiction is not accidental; it is intrinsic to the idea of privacy as it has emerged in the American legal context—privacy has been interpreted as a protection of individual self-determination and as a protection of interpersonal relationships.[104] Notably, both self-determination and intimacy play important roles in the emergence of individual identities.

Not surprisingly, then, defenders and opponents of the rights ostensibly protected by privacy are united in the view that privacy is deeply connected with personal identity, whether that identity is essential, chosen, or constructed. The defenders' arguments suggest that the mere association of identity and privacy should be enough to secure the identity-constituting practice, association, or choice at issue. The position of the opponents, however, boils down to the fear that certain types of identities serve to disrupt community, endangering already fragile intimate ties. Opponents thus focus on guiding and regulating private activity in order to prevent the legitimation of those particular identities or practices which they find detrimental to a moral and well-ordered society.

Opponents of abortion and the rights of lesbians and gay men have been able to use identity politics to their advantage. Committed to the view that the personal is political, they actively campaign against abortion and homosexual

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101. 406 U.S. 205 (1992).

102. *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting) (citation omitted).

103. *See also* Brief *Amicus Curiae* for Lesbian Rights Project et al., Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), *reprinted in* 14 N.Y.U. REV. L. & SOC. CHANGE 953 (1986) (constructing a privacy argument in terms of choice and sameness).

104. *See* Thomas, *supra* note 9, at 1445-48. In addition to the relational and decisional models of privacy, Thomas provides an overview of the zonal conception privacy. *Id.* at 1443-45. This third model, which lies beyond the scope of my discussion, can be summed up by the phrase, "a man's home is his castle." In this model, privacy protects particular spaces from government intrusion.

rights and in behalf of those "family values" which they deem vital to the development of personal identity. Indeed, their concerns reflect a keen awareness that what is at stake in the battle over privacy is the shape of American public life. Fought on the terrain of privacy, a terrain upon which both sides seem to agree, the point of disagreement—what constitutes community—is concealed. This concealment is enacted by a set of interpretive constraints which overly determine both the decisional and relational aspects of privacy. Both are gendered: choice takes on a particularly masculine connotation of independent and unattached agency, and relation becomes associated with heterosexual understandings of marriage and family.

Accordingly, when birth control and abortion are defended as private choices for women, the masculine encoding of privacy remains intact. By building on assumptions of a stable masculinity, the inclusion of women's reproductive choices takes the form "choice X is essential to my identity" and displaces an inquiry into the presumptions of masculinity upon which privacy rests. Paradoxically, this displacement stabilizes masculinity so that masculinity becomes what is private, while femininity is publicly exposed. Finally, although homosexuality has been denied the protection of privacy,[105] insofar as it must be revealed publicly to be denied its very exposure ends up securing the privacy of heterosexual relationships. Thus, the disagreement over what constitutes community is concealed through the privacy debate itself: its terms work to protect traditional notions of masculinity and heterosexuality, the ostensible objects of discussion.

Birth control has long been viewed as a women's issue. When faced with an unwanted pregnancy, a woman encounters an opposition between autonomy and role—will she make a choice based on her own understanding of her needs or will she follow the dictates of society and sacrifice herself for the good of her unborn child? Located at the intersection of this opposition, the body of the pregnant woman becomes a contested and contestable site. Conversely, men, although they may choose to take responsibility for fathering a child, are rarely understood as defining their identities with regard to reproductive choices. Their choices, like their identities and their bodies, remain purely private matters, outside the scope of law, within their control. Indeed, this "outsideness" for men is one of the ways in which law empowers them, assuring their authority.[106] Yet, for a woman, the decision to carry a child to term is seen as determining who she is and wants to be. Her identity is at stake. Privacy, for her, can become a protection only after it is rendered

105. Bowers v. Hardwick, 478 U.S. 186 (1986).

106. *Cf.* Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, *in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143, 149-50 (Dorinda G. Dallmeyer ed., 1993) (critiquing use of public/private distinction to exclude women from the protection of international human rights laws).

public, only after a public claim is raised on behalf of an action or choice which exposes the female body, and reveals the femininity of her identity.[107]

In the public debate about the privacy of abortion, the discussion of women's roles and bodies helps to anchor a set of assumptions regarding the meanings of masculinity and femininity. Jed Rubenfeld explains that "[t]he claim that an abortion is a fundamental act of self-definition is nothing other than a corollary to the insistence that motherhood, or at least the desire to be a mother, is the fundamental, inescapable, natural backdrop of womanhood against which every woman is defined."[108] Conversely, privacy protects men because it places their sexuality outside the public discussion of the meaning of reproduction. The privacy defense of abortion rests on a masculine encoding of privacy and therefore fails to challenge it. Men's sexual right, their personal autonomy so certain as to need little guidance and less attention, is taken as a given. The Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[109] suggests as much, as it allows for women's "autonomy" to be "guided" through informational requirements and a twenty-four hour waiting period.[110]

The articulation of women's right to choose as an identity need is a response to this encoding. It is a construction occasioned by interpretive constraints which prohibits inquiry into straight male sexuality. Indeed, such an identity-based defense of privacy assumes that because this sexuality is given, part of the "nature of things," we can only build on it and from it, continuing to determine our notions of privacy by "adding in" a stunted notion of female sexuality construed as a choice for or against maternity. Privacy for women has rested on the "X is essential to identity" argument because the masculine presuppositions of privacy exclude women. "X" marks women's difference. Thus, the context of meaning in which privacy as choice remains embedded inscribes a specific practice of feminine identity onto the female body. Women's identity needs are at stake in abortion. Women determine who they are through such a choice. To this extent, the language of privacy constructs feminine identity as the outcome of an existential choice, thus mirroring the attitude of pro-life feminists.

Consequently, the inscription of a limited account of femininity onto masculinist presumptions has led to an exclusively heterosexual interpretation of privacy. In *Bowers v. Hardwick*[111] the Court viewed the issue presented as a right to homosexual sodomy. Beginning with background assumptions regarding traditional notions of family and gender, the Court did not construct

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107. Rubenfeld, *supra* note 89, at 782 ("[U]nderlying the idea that a woman is *defining her identity* by determining not to have a child is the very premise of those institutionalized sexual roles through which the subordination of women has so long been maintained.").

108. *Id.*

109. 112 S. Ct. 2791 (1992).

110. *Id.* at 2822-26.

111. 478 U.S. 186 (1986).

Michael Hardwick as making a choice about his identity. His identity was beyond or outside the range of choice. If privacy protects choices necessary for identity and intimate, familial concerns, then identities which cannot be chosen remain at the margins—secret, but not private and worthy of protection. Indeed, the way in which Justice White's majority opinion (mis)interpreted the Georgia statute shows precisely how "that which cannot be chosen"—homosexuality—is beyond the scope of privacy. Although the Georgia sodomy law outlawed sodomy in general, the Court denied standing to the heterosexual couple seeking to challenge the law.[112] As Janet Halley explains, this move

> generates a class of homosexuals *within*, even as it excludes that class *from*, an unmarked class of human persons all subject to the Georgia sodomy statute. . . . Potentially felonious under the actual statute before the Court in *Hardwick*, the class of heterosexuals is allowed to drop silently out of the picture. Indeed, "dropping silently out of the picture" becomes a, perhaps *the*, salient characteristic of the class.[113]

Because the behavior of the heterosexual couple did not appear before the Court, it could remain private and protected. So, by creating and revealing Michael Hardwick as a homosexual, by assigning him an identity rather than allowing him even the option of a choice (for indeed the very possibility of choosing would dissolve the majority's fragile distinction between homosexuality and heterosexuality), the Court was able to reaffirm the association of relationship and intimacy with heterosexuality.

The assumption that choice, action, or practice "X" must be articulated as an identity need in order to be protected by privacy results from the continuous impact of masculinely-encoded interpretive constraints. As long as privacy relies on a backdrop of expectations which constitute the meaning of reproductive choices for *women*, and requires definitional anchoring in the link between such decisions and identity, it will fail to secure either the ideals of self-determination or the hope for intimacy on which it purports to rest. The masculine presuppositions of privacy construct feminine identity as the outcome of a choice. Similarly, an identity-based conception of privacy cannot do justice to the scope of concerns confronting lesbians and gay men. The heterosexual presuppositions of privacy construct homosexuality as "that which cannot be chosen." Both femininity and homosexuality become public, but while choice enables privacy to protect women (even as it constrains possible understandings of feminine identity), the construction of homosexuality inserts

112. *Id.* at 188 n.1 (citing GA. CODE ANN. § 16-6-2 (1984)).

113. Janet E. Halley, *The Construction of Heterosexuality*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 82, 90 (Michael Warner ed., 1993).

gay men and women into the public as the vulnerable and exposed Others of safely privatized heterosexuals.[114]

The restrictiveness of traditional determinations of privacy becomes clearer when we examine the different meaning of privacy for lesbians and gay men. In Kendall Thomas's words, "For them the claim of privacy always also structurally implies a claim to secrecy."[115] Victims of violence and discrimination in domains recognized as public, lesbians and gay men are neither protected nor respected when their rights to love and intimacy are justified in terms of a concept of privacy which both exposes them further and relies on a restrictive concept of identity. Thus, the masculine and heterosexual determination of privacy reveals why opponents of abortion and gay and lesbian rights often fight their battles on the terrain of privacy; the determinations already constraining the debate are reiterated and secured through the debate over privacy itself.

This analysis suggests the need for a defense of privacy that confronts its opponents directly. It challenges us to stop offering laundry lists of contingent identity needs and asserts the public and political importance of privacy.[116] Of course, the Court has implicitly rejected using a right to privacy as a vehicle for recognizing an equal right to difference. By upholding Georgia's sodomy law in *Bowers*[117] and chipping away at the right to an abortion,[118] it has refrained from employing privacy as a means for reconstituting the public sphere, continuing to use it instead to inscribe particular definitions of personal identity. But, if privacy itself is seen as a boundary resulting from a public decision, as the mutual recognition of legal persons of their inalienable difference and fundamental concreteness, at least the terms of the debate are altered. Rather than being merely a means for reconstructing the public sphere, privacy is already part of that sphere.

Understanding the publicity of privacy requires that we shift our focus from the choices, characteristics, and actions deemed essential for identity, and stress instead the public recognition of the right *to have* an identity already present in the notion of a *right* to privacy. We have to reject the assumption that privacy protects the patriarchal family and reinforces an atomistic conception of the rights-bearing individual and instead view privacy as the

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114. As Cindy Patton writes:

> Homosexuals' attempts to gain protection to practice sex as private has produced a legal paradox: to insert privacy in the already accepted package of civil rights (to political participation, equal access, protection from discrimination) requires establishing lesbians and gay men as a publicly inscribed class. In the most immediate sense, a gay person must "come out" in order to get the right to privacy.

Cindy Patton, *Tremble, Hetero Swine*, *in* FEAR OF A QUEER PLANET, *supra* note 113, at 143, 170.

115. Thomas, *supra* note 9, at 1455.

116. *See* Michelman, *supra* note 8, at 1534-35 (noting that pro-choice supporters often criticize Supreme Court's decisions which are based on right to privacy for taking problem of women's subordination outside public or political domain).

117. 478 U.S. 186 (1986).

118. *See supra* note 87 and accompanying text.

public recognition of a boundary. Building on Jean Cohen's reconstruction of the right to privacy, my idea of privacy as a boundary envisions privacy as securing "decisional autonomy, inviolate personality, and bodily integrity . . . when matters central to one's personal identity are at stake."[119] The difference between privacy as a boundary and identity-based defenses of privacy is that these "matters" necessarily remain indeterminate. Rather than being fixed upon some unitary conception of identity, these "matters" depend on "shifting cultural self-understandings and shifting perceptions of threats to individual integrity which must be articulated and resolved in the public spheres of civil and political society."[120] What is central to personal identity is a public concern. It is constructed in and through the discourses and debates already part of civil society. The boundary designated by privacy thus shifts as legal persons recognize different "matters" as necessary for having an identity.

By emphasizing decisional autonomy, inviolate personality, and bodily integrity, the boundary conception of privacy views privacy as providing a set of protections necessary for self-realization and self-determination. Privacy is what secures our capacity to develop and change as concrete persons already connected with others. To this extent, privacy depends on a notion of equality, on the idea that each of us is equally enabled by the protections of privacy. As Kenneth Karst explains, from the constitutional standpoint sexual and procreative issues are entitled to special consideration because the values at stake therein involve respect and participation.[121] He argues that the right to reproductive choice rests most securely on an interest in status and dignity and on a public commitment to equality.[122] "The choice to be a spouse or a parent, is among other things, a choice of social role and self-concept. For the state to deny such a choice is for the organized society to deny the individual so incapacitated the presumptive right to be treated as a person, one of equal worth among citizens."[123] The stress on equality reminds us, then, of *the right* "to be" in public that the right to privacy already signifies. Privacy rights enable persons to move among the variety of discursive spheres in civil society.[124] Rather than hiding the public dimension of privacy, by using a

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119. Cohen, *supra* note 89, at 59.

120. *Id.* at 113 n.212.

121. Kenneth Karst, *The Supreme Court 1976 Term—Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 32 (1977).

122. *Id.*

123. *Id.*

124. As Jean Cohen points out:

> The personal dynamics of shifting involvements among separate spheres, roles, and commitments required by life in a highly differentiated modern society create the need and the possibility for each individual to develop a strong sense of self, along with the ability to form, affirm, and express *her unique identity* as it develops and changes over time in an open multiplicity of contexts.

Cohen, *supra* note 89, at 99.

focus on equality the boundary conception moves the dimension to the fore as part of legal persons' recognition of the right to have an identity.

The boundary conception of privacy thus takes seriously the continued importance of privacy in political struggle. Appeals to privacy are responses to perceived threats to individual integrity. Indeed, this threat is what motivates the effort to construe privacy in terms of identity. But rather than confining us to a rigid notion of identity, the boundary conception allows us to acknowledge the potentially destabilizing effects of privacy claims by addressing the way in which privacy rights are often exercised in public spaces. The body of the pregnant woman is visible. Decisions about abortion are already situated in various public arenas, from the doctor's office, to partners involved in the decision, to the various political and ethical discourses informing a woman's decision. Similarly, lesbian and gay identities are not simply sets of private sexual practices but are also public ways of acknowledging self, others, and communities. Far from reinforcing some ideological divide between public and private spheres, privacy rights—thus conceived—destabilize it, calling into question the very privileges and categories which have rendered the needs and concerns of women and homosexuals invisible. Indeed, because privacy rights are exercised in public, masculinity is also unveiled for discussion and critique. For just as those hidden "others" acquire visibility, so too are concealed assumptions of masculinity and heterosexuality revealed as being mere privileges exercised in the public domain. It is the public exercise of the right to privacy that allows us to see how its indeterminacy disrupts the very interpretive constraints upon which it has been based.

This disruptive potential appears more strongly when we recognize that the conflict over privacy has revolved around decisional autonomy and personal integrity in "'the zone of intimacy'—marriage, divorce, sexual relations, procreation, child-rearing, abortion, etc."[125] The "etc." reminds us that the domain of the private is indeterminate and up for renegotiation in our discourse about democracy. What is private is not revealed or guaranteed by law; it is formed and constructed by it. Precisely because the right to privacy can no longer be justified by recourse to a preexisting domain, and precisely because it remains open to the interpretive efforts of those who raise claims in its name, privacy serves an important critical function. Privacy provides a means for challenging a variety of intrusions and violations of our personal boundaries and efforts at self-formation. I have already discussed one potential outcome of this dimension of privacy: the recent rulings in *Ellison* and *Harris* rely on the critical juxtaposition of public and private. Similarly, Patricia Williams defends privacy from an African-American standpoint, arguing that privacy secures a boundary of distance and respect, a remedy against the intrusive

125. *Id.* at 48.

familiarity of their treatment by white society.[126] Finally, in his defense of privacy Morris Kaplan writes: "lesbian and gay marriages, domestic partnerships, the reconceiving of family institutions as modes of intimate association among free and equal citizens, are all efforts to appropriate, extend, and transform the available possibilities."[127]

In addition to its critical role in political struggle, the boundary conception of privacy is symbolically important. Prior to the New Deal, property symbolized the limits of governmental authority, establishing a boundary to the exercise of public political power and providing an anchor for individual liberty.[128] But since the fall of the property paradigm, the values embodied by this notion of property—individual freedom and personal inviolability—come under increasing risk from the incursions of a regulatory state. As Cohen writes: "Without a symbolic center for personal liberties, without a way to render the discrete list of personal liberties coherent, the activist regulatory state will encounter few principled limits to its reach into the most intimate details and most important decisions of all individuals."[129] For Cohen, privacy, because of its continued connection with the principles and values at the heart of property, presents itself as a new symbolic core.

I agree with Cohen's analogy between privacy and property. Property has always symbolized the right to a public presence within the civil community.[130] I would urge, however, that we replace the rhetoric of "core" with that of "boundary." Constructing privacy as a "core" prevents it from doing justice to the very principles it symbolizes—decisional autonomy, bodily integrity, and intimacy in a variety of open and fluid domains. Conceived as a boundary protecting individuals and relations throughout civil society, privacy is better able to shed its old patriarchal connotations, its traditional interpretive constraints, and integrate multiple discursive processes as it provides a medium for a particular sort of legal recognition. Furthermore, it helps to avoid a misplaced oppositional reading of a regulatory state over and against a somehow non-regulated and pre-existing private sphere.

The advantages of the boundary conception of privacy become clear when we recall that the link between property and individual liberty was an outgrowth of the philosophy of the subject: once power moved from the body of the sovereign to the sovereignty of the body politic,[131] the latter had to be sustained. Whether it was used to designate the members of a collectively

126. WILLIAMS, *supra* note 15, at 146-65.
127. Kaplan, *supra* note 95, at 354.
128. Cohen, *supra* note 89, at 105.
129. *Id.* at 112.
130. Michelman makes a similar point:
> Just as property rights—rights of having and holding material resources—become, in a republican perspective, a matter of constitutive political concern as underpinning the independence and authenticity of the citizen's contribution to the collective determinations of public life, so is it with the privacies of personal refuge and intimacy . . . .

Michelman, *supra* note 8, at 1535 (citation omitted).
131. *See* Dean, *supra* note 4, at 380-382.

acting citizenry (the republican model) or those individual agents whose market-like interactions and private preferences would be protected and maintained (the liberal model), property *as a symbolic core* served as the locus for the shift of power from one center to another.[132] In other words, property buttressed the idea of a political power centered in the state, whether that state was monarchical, republican, or administrative. If we take seriously the notion of a decentered state, we have no need for a symbolic core, for our understanding of political power itself shifts to the various intersubjective discursive processes flowing throughout civil society and the institutions and administration of law. There is no need for a symbolic transference of power and right, because neither the state nor the citizenry exist as a conceptual center. Instead, a variety of rights secure the discursive liberties and forms of association necessary for democratic participation and the maintenance of solidarity, that is, for both self-determination and self-realization. We should read the right to privacy, then, as the boundary protecting and integrating these liberties and forms of associations.

The boundary conception of privacy points to the important limiting role of privacy rights. Situated in and among a multiplicity of groups, our opportunities for self-realization and self-presentation require protection. As Cohen argues, privacy is crucial here because it gives the individual "a sense of control over her self-definitions . . . ."[133] By "control" Cohen seems to mean a right not to have to give publicly acceptable reasons for one's choices.[134] The limiting role of privacy thus refers to the way in which people raise different sorts of claims in different fora. As members of a variety of types of associations, our communicative interactions involve us with different sorts of audiences, with whom we engage for different intents and purposes. Privacy establishes a boundary which allows us to determine when and under what conditions we will enter a particular sort of discourse.

The limiting argument for privacy helps to secure the discursive ideal of open and unrestricted communication important to democracy by allowing for non-discourse. If we take seriously the postmodern insight that meaning depends on non-meaning,[135] we have to allow for the possibility of non-

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132. *See* Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1 (1994). Habermas writes:

> Discourse theory altogether jettisons certain premises of the *philosophy of consciousness*. These premises either invite us to ascribe the praxis of civic self-determination to one encompassing macro-subject or they have us apply the rule of law to many isolated private subjects. The former approach views the citizenry as a collective actor that reflects the whole and acts for it; in the latter, individual actors function as dependent variables in system processes that move along blindly. Discourse theory works instead with the *higher-level intersubjectivity* of communication processes that flow through both the parliamentary bodies and the informal networks of the public sphere.

Id. at 8.

133. Cohen, *supra* note 89, at 100.

134. She writes: "A privacy right entitles one to choose with whom one will attempt to examine one's need interpretations and to whom one will choose to justify one's existential choices." *Id.* at 102-03 n.169.

135. *See* MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 123 (1992).

discourse. By securing those spaces where we may not all want, need, or even be able to achieve a consensus, privacy rights buttress democratic participation. They provide the boundary to permissible probes and inquiries into our psychic and physical spaces. Of course this boundary is neither fixed nor one-dimensional: the concept of discourse in discourse ethics includes not only moral discourses but a variety of pragmatic, political, ethical, aesthetic, and therapeutic discourses, thereby escaping a rigid divide between meaning and non-meaning. Once we acknowledge the variety of types of discourse, we come to understand that the meaning of any appeal or claim to a right to privacy depends on the context within which it is raised.[136] When taking seriously the variety of discourses already part of civil society, we need not and cannot draw a line demarcating once and for all one particular sort of communicative interaction as a limit. In fact, the effort at line-drawing is what tends to undermine an emphasis on privacy insofar as it reifies the space delimited by the boundary of privacy. Always part of public discourse, any line will remain provisional, the contingent result of prevailing practices and attitudes.

The boundary conception of privacy thus corresponds to Habermas' distinction between public and private autonomy.[137] Public autonomy refers to our role as participants in a discursive procession of self-legislation. Engaged in a communicative effort to come to a consensus on matters of common concern, participants are legal persons who accept the reciprocal rights and obligations necessary for discourse. Private autonomy designates our activity as subjects of the law. It is the acknowledgement by legal persons of their freedom to withdraw from public debate, to refrain from accepting discursive obligations, to choose not to give others reasons for our decisions, actions, and plans. This conception of private autonomy relies neither on a preconceived domain of intimacy nor on a determined set of needs and capacities deemed essential to identity. Instead, it acknowledges that as multiply situated and constituted persons, any activity can be seen as constitutive of our identity. Further, the idea of private autonomy does not require that the actual choice to refrain from public discourse be called into account, for any attempt to compel discursive participation undermines the meaning of a discursive community. Instead, it allows for a variety of different privacies, each emerging as a right to limit one's discursive interaction in a particular context. Thus, the boundary of privacy provides a means of critique, a legally encoded form of recognition, and a forum for the recognition and protection of vulnerable relationships and identities.

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136. For example, privacy might protect the therapeutic interactions between patient and analyst. Yet, the right to psychic integrity which privacy protects could require that these very interactions be opened up to public and legal scrutiny—as, for example, in the recent attention given to "recovered memories" of abuse.

137. JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 152-54 (1992).

IV. CONCLUSION

I have tried to show how an identity-based defense of privacy fails to include the differences at the margins because it is structured so as to reiterate the assumptions of masculinity and heterosexuality many defenders of privacy want to contest. Breaking through these interpretive constraints, by lesbians, gay men, and straight women, will require exposing the presumptions of publicity—the capacity to be recognized and respected in the public arena (a right long enjoyed by white men as property-owners and heads of families)—and claim this as part of a right to privacy. Indeed, the claims of those at the margins for recognition and respect ultimately challenge our interpretations of the very rights and principles through which these claims are raised.

Accordingly, I have urged that we resist the urge to defend privacy on the grounds that it protects practices, choices, or relationships essential to our identity. Since both defenders and opponents of the rights which privacy is evoked to protect agree that privacy is connected with identity, we cannot do justice to suppressed identities by continuing to argue in these terms. When we do, we fail to acknowledge the inextricable elements of publicity already part of claims to privacy and protections of it. Further, we risk reaffirming and reifying precisely the most questionable dimensions of traditional interpretations of privacy. In effect, we fall into the trap of thinking that the rights at stake are not aspects of our public life as consociates within a community of those who respect the difference of each other.

To be sure, the boundary concept of privacy I have defended is formal; I have not provided it with a content, instead viewing it as a legal form of mutual recognition. This notion of privacy, moreover, shifts and changes depending on its context. Thus, I have sought to address the meaning of privacy for citizens in a democracy, hoping to render the concept more fluid and use this fluidity itself as part of the justification for privacy. As we have seen, once we conceptualize privacy as the mutual recognition of legal persons that each is more than a legal person, thus grasping the contestability of the domain of privacy, we break through traditional interpretive constraints. Replacing these constraints with others would undermine the very idea of privacy as a boundary. The boundary privacy establishes—the protections of bodily integrity, decisional autonomy, inviolate personality, and intimacy—must be viewed as the product of democracy in order for it to change and shift as it extends throughout our various discursive spheres and practices.