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ARTICLES

THE RIGHT OF PRIVACY

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For three decades, the right to privacy has served as a constitutional limit on governmental power. Despite the importance of this doctrine and the attention that it has received, there is little agreement on the most basic questions of its scope and derivation. What does the right to privacy really protect? What principle underlies it? In this Article, Mr. Rubenfeld critically examines the prevailing approach to these questions, which is based on talk of "fundamental rights" and "personhood," and then advances an alternative approach. In Rubenfeld's view, privacy analysis must not look to what a law prohibits, which forms the starting point of prevailing analysis, but rather to what the law affirmatively brings about. A few legal prohibitions, such as that of abortion, have such profound affirmative consequences that their real effect is to direct a person's existence along a very particular path and substantially shape the totality of her life. Such laws, the author argues, are properly viewed as totalitarian in nature. They implicate the right to privacy not because the supposed "fundamentality" of the conduct they forbid, but rather because of the degree to which their actual consequences dictate the course of a person's life.

THIS Article is about the constitutional right to privacy, a right that many believe has little to do with privacy and nothing to do with the Constitution. By all accounts, however, the right to privacy has everything to do with delineating the legitimate limits of governmental power. The right to privacy, like the natural law and substantive due process doctrines for which it is a late-blooming substitute, supposes that the very order of things in a free society may on certain occasions render intolerable a law that violates no express constitutional guarantee.

Privacy doctrine supposes too that the judiciary is an appropriate body to determine whether a law transgresses these implicit limits. This is a proposition that notoriously divides conservatives and liberals; the side on which one will find either group depends, of course, on the particular decade and the particular legal issue one chooses to

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study. I will try to escape that debate in what follows. The judiciary has always gone beyond the literal constitutional text to strike down legislation and no doubt will continue to do so.¹ Whether this "activism" is to be explained by the irresistible urge of all officeholders to expand the power of their office, by the meaninglessness of the idea of a "literal" text, or by the Framers' original intent, we may leave the sociologists, the literary critics, and the Attorney General's office to determine. Moreover, rather than asking which political platform is most closely affiliated with the decisions of a particular time, we ought to ask another question: in its elaboration of implicit constitutional law, is the judiciary genuinely freeing the individual from overreaching state power? That is the self-conception with which the courts will justify their decisions; that is the political vision to which proponents of privacy lay claim.² Thus it is an apt criterion by which to evaluate their work.

The laws struck down under the rubric of privacy have had a peculiar tendency to gravitate around sexuality: the groundbreaking cases involved contraception, marriage, and abortion.³ The significance of this trend has been largely passed over in silence. Behind this silence may lie an intuition or tacit agreement that sexuality is an area of life into which the state has no business intruding. To those who imagined that the privacy doctrine could be explained by refer-

¹ "Despite claims to the contrary, there has never been a period of time wherein the Court did not actively enforce values which a majority of the justices felt were essential in our society even though they had no specific textual basis in the Constitution." 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW* § 15.7, at 79 (1986) [hereinafter *TREATISE*]. The magnitude of "non-textuality" in established constitutional law — supposing that a "textual"/"non-textual" distinction could be made coherent — extends of course far beyond the right to privacy. Freedom of association, for example, is nowhere mentioned in the constitutional text; nor are the prohibitions of irrational legislation and state legislation that burdens or discriminates against interstate commerce. Moreover, the application of the Bill of Rights to state governments is nothing less than pure "substantive due process," and the bedrock of all constitutional law — the power of the Supreme Court to strike down a law deemed constitutional by a state's highest court or by Congress — had itself to be inferred. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *infra* note 13. This Article does not seek to defend non-textual constitutional interpretation in general. The Conclusion, however, suggests a constitutional basis for the right to privacy.

² The expression of this vision quoted most often is that of Justice Brandeis:

The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *quoted in, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 n.10 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring); *cf. L. TRIBE, AMERICAN CONSTITUTIONAL LAW* § 15-1, at 1302 (2d ed. 1988) ("[P]rivacy is nothing less than society's limiting principle.").

³ See *infra* pp. 744-46.

ence to some such intuition, *Bowers v. Hardwick*⁴ has startlingly revealed the inadequacy of their position.⁵

Yet, even before *Hardwick*, few believed that the privacy doctrine could be interpreted solely by reference to a principle concerning sexuality. Instead the reigning explanatory concept has been "personhood." Our personhood must remain inviolate: that is what privacy protects; that is its principle.⁶ No serious critique of the personhood idea has yet appeared.

Three overlapping inquiries are thus presented. The first involves the validity of personhood as the principle by which to explain and articulate the privacy doctrine; the second, the relations among privacy doctrine, sexuality, and the limits of state power; and the third, the question of whether some principle other than personhood might underlie the constitutional right to privacy.

This Article will address these three inquiries as follows. Part I summarizes the development of the right-to-privacy case law. Part II offers a critique of the personhood principle. Part III advances a new way of conceiving, explaining, and applying the privacy doctrine.

Hardwick has exposed deep flaws in the prevailing jurisprudence and ideology of privacy. The constitutional ground has shifted; perhaps it is dissolving altogether. The changing membership of the High Court raises the possibility of a wholesale reconsideration of the privacy doctrine's propriety. Yet even when the doctrine was first ascendant, the Court never hazarded a definitive statement of what it was supposed to protect. At the heart of the right to privacy, there has always been a conceptual vacuum.

The reason for this, I will try to show, is that the operative analysis in privacy cases has invariably missed the real point. Past privacy analysis has taken the act proscribed by the law at issue — for example, abortion, interracial marriage, or homosexual sex — and asked whether there is a "fundamental right" to perform it.⁷ But the fundament of the right to privacy is not to be found in the supposed fundamentality of what the law proscribes. It is to be found in what the law imposes. The question, for example, of whether the state should be permitted to compel an individual to have a child — with all the pervasive, far-reaching, lifelong consequences that child-bear-

⁴ 478 U.S. 186 (1986).

⁵ In *Hardwick*, the Court upheld against a right-to-privacy challenge a state statute criminalizing homosexual sodomy. *See id.* at 195-96. The Court specifically rejected the position that the right to privacy protected all "private sexual conduct between consenting adults." *See id.* at 191.

⁶ *See infra* p. 752.

⁷ *See, e.g., Hardwick*, 478 U.S. at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . ."); *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

ing ordinarily entails — need not be the same as the question of whether abortion or even child-bearing itself is a “fundamental” act within some normative framework. The distinguishing feature of the laws struck down by the privacy cases has been their profound capacity to direct and to occupy individuals’ lives through their affirmative consequences. This affirmative power in the law, lying just below its interdictive surface, must be privacy’s focal point.

I. A GENEALOGY OF PRIVACY

The right to privacy discussed here must not be confused with the expectations of privacy secured by the fourth amendment⁸ or with the right of privacy protected by tort law.⁹ In the latter two contexts, the concept of privacy is employed to govern the conduct of other individuals who intrude in various ways upon one’s life. Privacy in these contexts can be generally understood in its familiar informational sense; it limits the ability of others to gain, disseminate, or use information about oneself. By contrast, the right to privacy that concerns us attaches to the rightholder’s own actions. It is not informational but substantive, immunizing certain conduct — such as using contraceptives, marrying someone of a different color, or aborting a pregnancy — from state proscription or penalty.¹⁰

The emergence of this substantive right to privacy, and hence the constitutional protection of the conduct to which it applies, is of very recent origin. The doctrine is only some twenty years old.¹¹ Its genealogy, however, extends as far back as constitutional law reaches in this country. Indeed its most venerable ancestor is the decision that rendered constitutional law itself possible: *Marbury v. Madison*.¹² *Marbury* is a progenitor of the right-to-privacy decisions because it too belongs to the diverse series of cases in which the Supreme Court has reached out beyond the express language of the Constitution and

⁸ See, e.g., *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁹ See, e.g., W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 117, at 849–69 (5th ed. 1984).

¹⁰ See Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424–25 (1974); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447, 1466–69 (1976); see also *Whalen v. Roe*, 429 U.S. 589, 599 n.24, 599–600 (1977) (distinguishing among privacy interests that the Constitution has been held to protect). It is worth noting that the seminal article by Brandeis and Warren concerned only freedom from unwanted publicity, not freedom to perform certain acts. See Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–97 (1890).

¹¹ The right to privacy was first announced in *Griswold v. Connecticut*, 381 U.S. 479 (1965). See *infra* pp. 744–45.

¹² 5 U.S. (1 Cranch) 137 (1803).

struck down on constitutional grounds some piece of federal or state legislation.¹³ A brief history of this family of cases follows.

A. Pre-Privacy Case Law

The earliest and most authoritative articulation of the idea that fundamental rights exist unspecified in the Constitution is of course in the ninth amendment, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁴ The earliest judicial statement of this idea followed soon after the Constitution was ratified. In *Calder v. Bull*,¹⁵ Justice Chase advanced the proposition that legislation might be held invalid under natural law even if the legislation does not violate any specific constitutional principles or provisions.¹⁶ Justice Iredell, however, disagreed,¹⁷ and his views have, at least ostensibly, prevailed.¹⁸ From the early 1800's to the present, the Court has generally paid lip service to the idea that it should not use

¹³ In *Marbury*, the Court had to go beyond the text of article III to derive its own power to hold an act of Congress unconstitutional. *See id.* at 176-77 (referring to the "original right" of the people and to the purposes of a written constitution). Ironically, some persist in seeing *Marbury* as having laid the foundation for "interpretivism" — the view that the Constitution must be construed solely by reference to its text and to the Framers' intent — because the Court also held that constitutional guarantees were to be applied by the courts of the United States just as they would apply any other laws. *See Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 786 (1983). To understand *Marbury* as support for interpretivist constitutional interpretation overlooks the primary act of non-textual interpretation involved in the Court's arrogation to itself of the power to be the final arbiter of constitutional law.

¹⁴ U.S. CONST. amend. IX. A considerable body of scholarship is devoted to showing that the ninth amendment does not really mean that there are rights of constitutional status outside of those specifically enumerated, or at least that it does not mean that the *judiciary* should attempt to enforce such rights. *See, e.g., Berger, The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 272-73 (1981). It seems extraordinary to what lengths "interpretivist" jurisprudence is prepared to go beyond the "text" of the ninth amendment in order to be able to assert that courts must cleave to the text of every other constitutional provision. *See generally Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

¹⁵ 3 U.S. (3 Dall.) 386 (1798).

¹⁶ Justice Chase wrote:

I cannot subscribe to the omnipotence of a state Legislature . . . although its authority should not be expressly restrained by the constitution An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

Id. at 387-88 (Opinion of Chase, J.).

¹⁷ "If . . . the legislature of any member of the union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice." *Id.* at 399 (Iredell, J., concurring).

¹⁸ *See* 2 TREATISE, *supra* note 1, § 15.1, at 27.

its constitutional power to invalidate legislation except where specific constitutional provisions supply the principle of invalidity.¹⁹

Yet the Court has never practiced what it preached. Through one device or another, the Court has always managed to read into the Constitution limits on legislative power that can hardly be gathered from within that document's four corners. In the antebellum period, the Court accomplished this task principally through ingenious interpretations of the contract clause,²⁰ one of the few constitutional provisions then applicable against the states. Thus, in *Trustees of Dartmouth College v. Woodward*,²¹ the Court struck down New Hampshire's attempt to gain legislative control over Dartmouth College; Dartmouth's corporate charter was a "contract" for constitutional purposes, the Court held, and the disputed law would have "impaired the obligations" thereof.²²

After the Civil War, the passage of the fourteenth amendment gave the Court a great deal more constitutional material to consider. Curiously, the provision of that amendment containing what appear to be the most explicit and potent substantive limitations on state legislative powers — the privileges and immunities clause²³ — proved too much for the Court to swallow. In a series of early post-War cases, the Court gave an extremely narrow reading to that clause,²⁴ and this reading remains in effect today. Instead, the Court seized on a much more unlikely provision — the due process clause²⁵ — for the strength to take on the state legislatures.

Although the phrase "due process" might seem to pertain only to procedural interests, the Court began to read substantive guarantees into the clause as well. From the late 1870's to the turn of the century, the Court formulated an interpretation of due process in which the predominant figure was a fundamental, potentially inviolate "liberty of contract" with which legislatures had no power to interfere.²⁶

¹⁹ See *id.* For examples of judicial language articulating this view, see the cases cited below in note 42.

²⁰ "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1.

²¹ 17 U.S. (4 Wheat.) 518 (1819).

²² See *id.* at 643-44, 650-53.

²³ "No State . . . shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1; cf. L. TRIBE, *supra* note 2, § 7-2, at 550 & n.15 (suggesting that several members of Congress expected that the privileges and immunities clause would be a substantial restraint on states' actions).

²⁴ See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873).

²⁵ "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

²⁶ See *Allgeyer v. Louisiana*, 165 U.S. 578, 589-91 (1897) (*dicta*); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

Armed with this "liberty of contract," guaranteed as a matter of substantive due process, the Court was prepared in this century to do considerable damage to state economic regulations. Thus, in *Lochner v. New York*,²⁷ the Court invalidated a maximum-hours law for bakers on the ground that it interfered with "the freedom of master and employee to contract."²⁸ On similar grounds the Court later condemned, for example, prohibitions of anti-union clauses in labor contracts,²⁹ price-fixing regulations of employment agencies,³⁰ and a fair-wage law for women.³¹

In the same period, the Court also relied on the due process clause to invalidate two state laws regulating the education of children. In *Meyer v. Nebraska*,³² the Court held that a state could not prohibit the teaching of foreign languages in elementary school, and in *Pierce v. Society of Sisters*,³³ the Court struck down a requirement that all children attend public school. Although *Meyer* and *Pierce* resemble the other *Lochner*-era cases in analytic form, in content they are closer to modern privacy case law.³⁴ Indeed, for reasons that will emerge more clearly below,³⁵ these two cases may be seen as the true parents of the privacy doctrine, and today they are frequently classified together with other privacy decisions.³⁶

The climax of the *Lochner*-era jurisprudence was President Franklin Roosevelt's retaliatory plan to increase the number of Justices on the Supreme Court. Although the plan did not succeed as designed, it apparently put sufficient pressure on the Court to change the course

²⁷ 198 U.S. 45 (1905).

²⁸ *Id.* at 64.

²⁹ See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

³⁰ See *Ribnik v. McBride*, 277 U.S. 350 (1928).

³¹ See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

³² 262 U.S. 390 (1923).

³³ 268 U.S. 510 (1925).

³⁴ In both *Meyer* and *Pierce*, the party bringing suit was not a parent or child but an economic actor with whose occupation or business the challenged law was allegedly interfering. This circumstance permitted the Court in both cases to advert to the liberty-of-contract jurisprudence. See *Meyer*, 262 U.S. at 400 (holding that the appellant's right "to teach and the right of parents to engage him" were protected by the fourteenth amendment); *Pierce*, 268 U.S. at 536 (emphasizing that the Court had often acted "to protect business enterprises against interference with the freedom of patrons"). Other language in the cases, however, indicates that the Court's essential concern was not so much for the liberty of contract as for freedom in upbringing or child-raising, issues much closer to those involved in modern privacy cases. See *Meyer*, 262 U.S. at 400, 401-02 (emphasizing parents' "right of control" over the education of their children); *Pierce*, 268 U.S. at 534-35 ("The child is not the mere creature of the state . . .").

³⁵ See *infra* pp. 785-87.

³⁶ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

of constitutional law.³⁷ In *West Coast Hotel Co. v. Parrish*,³⁸ the Court renounced its freedom of contract/substantive due process jurisprudence.³⁹ A year later, in *United States v. Carolene Products Co.*,⁴⁰ the Court held that state economic regulations were entitled to a presumption of constitutionality.⁴¹ In the ensuing decades, the Court repeatedly held that states were free to regulate "their internal commercial and business affairs, so long as their laws do not run afoul of some specific constitutional prohibition, or of some valid federal law."⁴²

Even while repudiating its substantive due process jurisprudence, however, the Court expressly noted that its newfound self-restraint might not extend beyond the economic realm.⁴³ Indeed, in an important line of cases involving individual liberties not overtly economic in nature, the Court has continued to strike down state laws found to violate fundamental rights nowhere specified in the Constitution. These cases elaborate the right-to-privacy doctrine.

B. The Privacy Cases

The great peculiarity of the privacy cases is their predominant, though not exclusive, focus on sexuality — not "sex" as such, of course, but sexuality in the broad sense of that term: the network of decisions and conduct relating to the conditions under which sex is permissible, the social institutions surrounding sexual relationships, and the procreative consequences of sex. Nothing in the privacy cases says that the doctrine must gravitate around sexuality. Nevertheless, it has.

The Court first announced the new privacy doctrine twenty-four years ago in *Griswold v. Connecticut*.⁴⁴ In *Griswold* the Court invalidated statutes prohibiting the use and distribution of contraceptive

³⁷ See B.F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 200-08 (1942). *But see* L. TRIBE, *supra* note 2, § 8-7, at 580-81 (arguing that the influence of the court-packing threat should not be overestimated).

³⁸ 300 U.S. 379 (1937).

³⁹ *See id.* at 391.

⁴⁰ 304 U.S. 144 (1938).

⁴¹ *See id.* at 152-54.

⁴² *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949); *see also* *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) ("[We] emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought.'" (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955))).

⁴³ *See, e.g., Carolene Products*, 304 U.S. at 152 n.4.

⁴⁴ 381 U.S. 479 (1965).

devices.⁴⁵ Eschewing an approach explicitly grounded in Lochnerian substantive due process,⁴⁶ the Court stated that a "right to privacy" could be discerned in the "penumbras" of the first, third, fourth, fifth, and ninth amendments.⁴⁷ This right included the freedom of married couples to decide for themselves what to do in the "privacy" of their bedrooms.⁴⁸

Two years later, in *Loving v. Virginia*,⁴⁹ the Court struck down a law criminalizing interracial marriage. The Court ruled that states could not interfere in that manner with an individual's choice of whom to marry.⁵⁰ On similar grounds, the Court also invalidated laws restricting the ability of poor persons to marry or to divorce.⁵¹

Although it remained possible after *Loving* to understand the new privacy doctrine as limited (for some unelaborated reason) to marital decisions, in *Eisenstadt v. Baird*⁵² the Court extended its *Griswold* holding to protect the distribution of contraceptives to unmarried persons as well. "If the right to privacy means anything," the Court stated, "it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamen-

⁴⁵ See *id.* at 485-86.

⁴⁶ See *id.* at 481-82.

⁴⁷ See *id.* at 484. The *Griswold* Court used the ideal of "privacy" both in its more intelligible, informational sense — an interest in keeping certain matters out of public view — and in its relatively more obscure, substantive sense — an interest in making one's own decisions about certain "private" matters. See *id.* at 482-85. This ambiguity, however, did not begin with *Griswold*. It is found, as well, in Justice Brandeis' concept of a "right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Brandeis & Warren, *supra* note 10, at 193. Because *Olmstead* was a fourth amendment case and Brandeis and Warren's article dealt with tort law, privacy in Brandeis' usage could be thought to be limited exclusively to the informational sense of a freedom from publicity or seclusion from public view. Yet a "right to be let alone" goes further: it suggests, as one commentator noted in trying to unravel *Griswold*, a "general freedom of action" as well. Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 204 (1965) (emphasis added). Whatever its origin, the ambiguity has now been clarified. The decisions following *Griswold*, as will be seen below at p. 749, have had to abandon the informational sense of privacy, because the activity at issue was already public in an informational sense (for example, interracial marriage) or conducted outside the home (for example, abortion), where the seclusion interest could have been said to merit special constitutional protection. For this reason, systematic academic efforts to define "privacy" often either exclude the *Griswold* line of cases from their analysis or look upon those cases as something of a curiosity. See, e.g., A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) ("Privacy is the claim . . . to determine for [oneself] when, how, and to what extent information about [oneself] is communicated to others."); Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 438-39 (1980).

⁴⁸ See *Griswold*, 381 U.S. at 485-86.

⁴⁹ 388 U.S. 1 (1967).

⁵⁰ Although the Court relied in part on the holding that the statute violated the equal protection clause, see *id.* at 12, the opinion rested on a privacy rationale as well, see *id.*

⁵¹ See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁵² 405 U.S. 438 (1972).

tally affecting a person as the decision whether to bear or beget a child."⁵³

The next year, the Court took a further step from the confines of marriage and delivered its most controversial opinion since *Brown v. Board of Education*.⁵⁴ Justice Blackmun, with only two Justices dissenting, wrote in *Roe v. Wade*⁵⁵ that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁵⁶ Subsequent cases have reaffirmed *Roe* in the context of state efforts to "regulate" abortions, but the Court's support of *Roe* appears to be rapidly diminishing.⁵⁷

The right to privacy was further expanded in the 1977 case of *Moore v. City of East Cleveland*,⁵⁸ in which the Court struck down a zoning ordinance that limited occupancy of dwelling units to members of a nuclear family — the "nominal head of a household," his or her spouse, and their parents and children. Although there was no majority opinion, the four-Justice plurality expressly relied on the *Griswold* line of cases, as well as *Meyer* and *Pierce*, emphasizing the "private realm of family life which the state cannot enter."⁵⁹

The Court's most important recent privacy decision was *Bowers v. Hardwick*,⁶⁰ in which a 5-4 majority held that a state could make homosexual sodomy a criminal offense without violating the right to privacy.⁶¹ The *Hardwick* decision deserves a more detailed treatment for two reasons. First, it may foretoken a considerable narrowing of

⁵³ *Id.* at 453 (emphasis in original); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding unconstitutional a state statute strictly limiting distribution and advertisement of contraceptive devices); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding, on equal protection grounds, that a statute authorizing forced sterilization of certain convicted felons was unconstitutional).

⁵⁴ 347 U.S. 483 (1954).

⁵⁵ 410 U.S. 113 (1973).

⁵⁶ *Id.* at 153.

⁵⁷ See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (5-4 decision); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The word "regulate" appears with quotation marks because these cases often seem to involve state attempts to discourage or prevent — rather than regulate — abortions. See *Akron*, 462 U.S. at 444 (asserting, with respect to information that was a prerequisite for abortions, that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether"). As this Article went to press, the Supreme Court announced that it would hear an appeal in another abortion regulation case, *Webster v. Reproductive Health Services*, 851 F.2d 1071 (8th Cir. 1988), in which the Court has been specifically asked to overturn *Roe v. Wade*. See *N.Y. Times*, Jan. 10, 1989, at B5, col. 1.

⁵⁸ 431 U.S. 494 (1977).

⁵⁹ *Id.* at 499 (Opinion of Powell, J.) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

⁶⁰ 478 U.S. 186 (1986).

⁶¹ See *id.* at 189.

the privacy doctrine. Second, it vividly illustrates the doctrine's current analytic difficulties.

C. *Bowers v. Hardwick*

Justice White, writing for the Court, began by announcing that the issue presented was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."⁶² So stated, the issue was for the majority literally a foregone conclusion. Justice White's formulation was an expression of the majority's constitutional instincts, and it served in this capacity as a premise or interpretive canon in the ensuing discussion. The Bill of Rights cannot be referring to *that*, after all, and therefore we must interpret its provisions and our precedents accordingly. In this way the Court's conclusion logically preceded its analysis.

The majority's first line of attack could portend dark days for the privacy doctrine. Calls for extension of the doctrine, Justice White stated, should be treated with great caution in order to avoid the mere "imposition of the Justices' own choice of values on the States."⁶³ Indeed, the majority suggested, in its past privacy decisions the Court had made fundamental normative decisions unmoored from any constitutional anchoring.⁶⁴ Justice White's clear intimation was that such an injudicious and unjudicial practice would not be continued here.

The difficulty with Justice White's way of putting matters is that the Court in *Hardwick* necessarily drew a line: the right to privacy stops *here*. That act of line-drawing was a quintessentially normative judgment. Unless and until the Court repudiates the privacy doctrine altogether, which it did not do in *Hardwick*, a decision to draw the line *here* is nothing more than a judgment that *this* particular activity is either less fundamental or more unsavory than the activities protected in prior cases. Moreover, the expression of this normative judgment in *Hardwick* is easy to find: it was the first thing uttered — in Justice White's statement of the issue presented, which so plainly expressed what I called his constitutional instincts. Thus the Court's opening salvo, a formulation of the issue calculated to shock the

⁶² *Id.* at 190.

⁶³ *Id.* at 191.

⁶⁴ Justice White wrote in *Hardwick*:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the due process clauses], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Id. at 194-95.

judicial conscience, directly compromised its first line of attack — the argument that the judicial conscience should be irrelevant.

Yet the majority knew very well that the case turned ultimately on value judgments. For this reason, despite briefly waving the standard of judicial objectivity, the majority proceeded to give two arguments concerning the normative status of homosexuality. First, cataloguing American criminal sodomy statutes from the eighteenth to the twentieth century,⁶⁵ the majority argued that homosexual sodomy is not supported by the country's historical and traditional values.⁶⁶ Second, Justice White suggested, homosexual sodomy cannot be distinguished for doctrinal purposes from other forms of sexual activity — adultery, incest, and so on — that no member of the Court is yet prepared to constitutionalize.⁶⁷ We shall return to these arguments in Part II.⁶⁸

The final aspect of the majority opinion to be noted here, and the most important for present purposes, is its treatment of the privacy precedents. Justice White stated that the Court's prior cases have recognized three categories of activity protected by the right to privacy: marriage, procreation, and family relationships.⁶⁹ According to Justice White, "homosexual activity" has "no connection" to any of these three categories, and is therefore presumptively outside the scope of the doctrine.⁷⁰ For our purposes, the significance of this argument lies in its evisceration of privacy's principle.

Justice White neither sought nor found any unifying principle underlying his three categories. It was as if the Court had said, "We in the majority barely understand why even these three areas are constitutionally protected; we simply acknowledge them and note that they are not involved here." There is thus no test derived from the precedents with which the Court need evaluate the case of homosexuality. There is no principle to be applied. In this sense, critics of Justice White's opinion have been correct to call it "unprincipled."⁷¹

⁶⁵ See *id.* at 192–93 & nn.5–6.

⁶⁶ "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (Opinion of Powell, J.), and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁶⁷ See *id.* at 195–96 ("[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes We are unwilling to start down that road.")

⁶⁸ See *infra* p. 757.

⁶⁹ See *Hardwick*, 478 U.S. at 190–91.

⁷⁰ See *id.* at 191.

⁷¹ E.g., Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 862 (1986) ("Justice White's claims of constitutional illegitimacy cannot be sustained, and indeed . . . paradoxically mask[] an argument that is itself unprincipled, and therefore illegitimate."); see also, e.g., Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J.

The device of compartmentalizing precedent is an old jurisprudential strategy for limiting unruly doctrines.⁷² The effect here is that, after *Hardwick*, we know that the right to privacy protects some aspects of marriage, procreation, and child-rearing, but we do not know why. By identifying three disparate applications ungrounded by any unifying principle, the majority effectively severed the roots of the privacy doctrine, leaving only the branches, which will presumably in short order dry up and wither away.

The dissenting opinions, unhappily, provided little reply to the majority's systematic assault. Justice Blackmun, writing for all four dissenters, first attempted to brush the majority's constitutional instincts aside. "This case is no more about 'a fundamental right to engage in homosexual sodomy,'" the dissent began, "than . . . *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth."⁷³ Justice Blackmun's intuition — that the majority's formulation of the issue somehow prejudged the outcome — was correct. His statement, however, was plainly wrong.

Katz involved fourth amendment privacy.⁷⁴ That sort of privacy does make the claimant's substantive conduct irrelevant; at issue is the government's manner of discovering the conduct. The new right to privacy, as observed earlier, is not at heart informational. It immunizes certain conduct regardless of whether or how it comes to be discovered.⁷⁵ To be sure, Justice Blackmun attempted to weave the two kinds of privacy — substantive and informational — together in his analysis of Georgia's sodomy statute.⁷⁶ His opening formulation, however, overlooked the critical point: in fourth amendment cases, a court must resist the temptation to steal a glance at the claimant's substantive conduct when deciding the constitutional issue; in privacy cases, a court must resist the temptation to avert its eye. The court has no choice but to look the conduct in its face — even if society as a whole is content to react with hypocritical denial or "instinctive" aversion — and take its measure. *Griswold* proved to be very much about a right to use contraceptives rather than a right to keep secret what one does in the bedroom, just as *Roe is* about the right to have an abortion and *Loving is* about the right to marry interracially.

215, 242 (1987) ("[I]f *Bowers* were our only example, it would be difficult to defend the ability of the judiciary to engage in a process of reasoned decisionmaking.").

⁷² Justice Brennan did the same thing, it may be recalled, in his well-known *Northern Pipeline* opinion. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (holding that Congress' grant of certain adjudicatory powers to bankruptcy judges violated article III).

⁷³ *Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting) (citation omitted).

⁷⁴ See *Katz v. United States*, 389 U.S. 347 (1967) (holding that the wiretapping of a public pay phone without a warrant violated the caller's fourth amendment rights).

⁷⁵ See *supra* p. 740 & note 47.

⁷⁶ See *Hardwick*, 478 U.S. at 209-10 (Blackmun, J., dissenting).

Justice Blackmun's initial hesitation is fatal; a court prepared to strike down laws against homosexual sodomy must first be prepared to look homosexuality in the eye.

Perhaps this hesitation accounts for the weakness of Justice Blackmun's dissent when it finally comes round to articulating a substantive privacy principle that would include the protection of homosexual sodomy. The opinion suggests that the state cannot bar any form of "sexual intimacy."⁷⁷ Such a holding would be obliged to distinguish cases such as adultery and incest, which Justice Blackmun tried gamely⁷⁸ — but rather unsatisfactorily⁷⁹ — to do. More importantly, however, such a holding would have to explain why sexual intimacy in its various forms rises to constitutional stature. What produces the "fundamental" nature of homosexual or any other kind of sex?

On this point the dissent is disturbingly cursory and vague. Justice Blackmun relied primarily on the role of sexual relations in a person's "self-definition."⁸⁰ Although the dissent gives this concept scant elaboration, "self-definition" offers, in the view of many, privacy's most promising principle. It is the "personhood" principle and the subject of Part II of this Article.

* * *

What, then, is the right to privacy? What does it protect? A number of commentaries seem to think that they have it when they add the word "autonomy" to the privacy vocabulary.⁸¹ But to call an individual "autonomous" is simply another way of saying that he is morally free, and to say that the right to privacy protects freedom adds little to our understanding of the doctrine. To be sure, the

⁷⁷ See *id.* at 208.

⁷⁸ See *id.* at 209 n.4.

⁷⁹ See *infra* notes 109–10.

⁸⁰ See *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting). Justice Stevens, dissenting separately, was perhaps even less clear on this point. He emphasized the liberty of individuals "to conduct their intimate relations" when "isolated from observation by others." See *id.* at 217 (Stevens, J., dissenting). This formulation relies on the "privacy" of the activity involved in the familiar sense of that word; thus it could hardly serve as an explanatory principle of the right to privacy in general, which, as we have seen, is by no means limited to activity conducted "in private." At the same time, Justice Stevens' formulation is not an explanation of the fundamentality of sexual activity; the suggestion seems rather to be that sexual activity "isolated from observation by others" is simply no one else's business. It is perhaps for this reason that Justice Stevens seemed himself a bit perplexed by the result of his constitutional principle, writing, "*Paradoxical as it may seem*, our prior cases thus establish that a State may not prohibit sodomy . . ." *Id.* at 218 (emphasis added).

⁸¹ See, e.g., Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446 (1983); Henkin, *supra* note 10, at 1425; Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 440 (1976).

privacy doctrine involves the "right to make choices and decisions," which, it is said, forms the "kernel" of autonomy.⁸² The question, however, is *which* choices and decisions are protected.⁸³

On this point the Court has offered little guidance. We are told that privacy encompasses only those "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'"⁸⁴ that it insulates decisions "important" to a person's destiny,⁸⁵ and that it applies to "matters . . . fundamentally affecting a person."⁸⁶ Perhaps the best interpretation of these formulations is that privacy is like obscenity: the Justices might not be able to say what privacy is, but they know it when they see it.⁸⁷ How else can one explain the Court's astonishing introduction of its pivotal holding in *Eisenstadt v. Baird*⁸⁸ with the phrase, "*If the right to privacy means anything, it means . . .*"⁸⁹

⁸² Feinberg, *supra* note 81, at 454.

⁸³ Proponents of autonomy recognize, of course, that they need a supplementary principle to circumscribe the scope of constitutionally protected conduct. Not all "choices and decisions" can claim constitutional protection. The most common move is to introduce a negative limitation based on harm: conduct is *not* protected if it harms others. *See, e.g., id.* at 455-56; Perry, *supra* note 81, at 440; Richards, *supra* note 71, at 837-38. The question of whether this harm-based limitation is analytically coherent will be pursued in Part II. *See infra* pp. 756-61. The question of whether it alone is sufficient to explain the case law may be disposed of here. Several Supreme Court cases have clearly undermined the notion that consensual conduct, which does not cause harm as defined by these commentators, is constitutionally protected. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986) (upholding a law criminalizing homosexual sodomy, and stating that "victimless" conduct may be criminalized, even when performed in the home); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (holding that there is no fundamental privacy right to watch obscene movies in theaters). *See generally* T. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* (1983) (collecting legal texts dealing with types of regulation that potentially conflict with the notion that collective power can legitimately be exercised only to prevent harm to others). The Court has repeatedly made clear that some criterion, imperfectly defined as yet, of "fundamentality" must be present in the conduct at issue before the right of privacy will apply. Feinberg himself concedes this point, acknowledging that the harm-based autonomy principle as such cannot be matched with the Court's precedents. *See* Feinberg, *supra* note 81, at 487-91. Thus, although a harm-based limitation may still be necessary to explain the scope of privacy doctrine, it is not sufficient to do so. Some *positive* component of individual autonomy must also be introduced, explaining which conduct is sufficiently "fundamental" to invoke the constitutional right.

⁸⁴ *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *see also Paris Adult Theatre I*, 413 U.S. at 65 (quoting *Roe*).

⁸⁵ *See Whalen v. Roe*, 429 U.S. 589, 600 (1977) (holding that no privacy right invalidates a law requiring establishment of a computerized prescription registration system).

⁸⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁸⁷ *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁸⁸ 405 U.S. 438 (1972).

⁸⁹ *Id.* at 453 (emphasis added). The full sentence is quoted above at pp. 745-46. This formulation is found in a number of privacy opinions. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) ("I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means . . ."); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[I]f

That a doctrine might have to wait for a principle to "catch up" with it is nothing new to common-lawmaking in general or to constitutional lawmaking in particular. Yet a complete absence of conceptualization cannot be maintained. To define "fundamental" rights as those that cover matters "fundamentally affecting persons" is less than entirely satisfactory. Can no more be said?

II. PERSONHOOD

Into this conceptual breach steps "personhood." The late Judge Craven attributed the term's usage in privacy jurisprudence to Professor Freund,⁹⁰ who in 1975 made the following observation:

The theme of personhood is . . . emerging. It has been groping, I think, for a rubric. Sometimes it is called privacy, inaptly it would seem to me; autonomy perhaps, though that seems too dangerously broad. But the idea is that of personhood in the sense of those attributes of an individual which are irreducible in his selfhood.⁹¹

It is worth recalling, however, that Brandeis and Warren traced their tort law right of privacy to an analogous but now archaic term: the individual's "inviolable personality."⁹² Whatever its genesis, "personhood" has so invaded privacy doctrine that it now regularly is seen either as the value underlying the right or as a synonym for the right itself.⁹³

appellee's right to procreate means anything at all, it must imply . . ."). The Court in *Roe v. Wade* similarly announced its holding without providing any underlying principle for privacy, stating only that "[t]his right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." See *Roe*, 410 U.S. at 153. The absence in *Roe* of an articulated principle was not missed by commentators at the time. See, e.g., Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) ("One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."); see also Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 932 n.79 (1973) ("Even reading the cases [*Roe*] cited 'for all that they are worth,' it is difficult to isolate the 'privacy' factor (or any other factor that seems constitutionally relevant) that unites them with each other and with *Roe*.").

⁹⁰ See Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, 702 n.15.

⁹¹ P. Freund, Address to the American Law Institute (May 23, 1975), quoted in AMERICAN LAW INSTITUTE, 52D ANNUAL MEETING 42-43 (1975).

⁹² See Brandeis & Warren, *supra* note 10, at 205, 207; see also *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (referring to the "dignity and personality" of individuals facing mandatory sterilization).

⁹³ See, e.g., L. TRIBE, *supra* note 2, §§ 15-1 to -3, at 1302-12; Craven, *supra* note 90, at 702-03; Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26 (1976); Wasserstrom, *Privacy: Some Arguments and Assumptions*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY 317, 322-23 (F. Schoeman ed. 1984); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1946-50 (1986); Note, *Personhood and the Contraceptive Right*, 57 IND. L.J. 579 (1982). The term has crept into the judicial privacy

Despite its ubiquity, "personhood" remains rather ill-defined. The word is meant, it seems, to capture some essence of our being — "those attributes . . . irreducible in [one's] selfhood"⁹⁴ — with which the state must not be allowed to tamper. Yet the concept has a certain opacity, greater perhaps than that of analogous but no less abstract terms such as "dignity" or "liberty." We imagine that we know what it means for someone to be without dignity or liberty; what is it to be deprived of one's personhood?

This much of the idea is easily stated: some acts, faculties, or qualities are so important to our identity as persons — as human beings — that they must remain inviolable, at least as against the state. Yet even this basic formulation is ambiguous. Our "identity as persons" might mean either our identity qua persons or our personal identity. Personhood in the former sense would focus on whatever it is that makes you *a* person — a human being. Personhood in the latter sense would focus on whatever it is that makes you *the* person you are. Although these two strands of personhood theory are not always distinguished in the literature, and although they may intertwine at a certain point, the notion of personhood advanced in support of privacy is plainly the second one.

Proponents of personhood forge a link between the privacy case law and individuals' personal identity:⁹⁵ the personhood thesis, as we shall pursue it here, is that a person must be free to "define himself." Certain decisions in life are so "central to the personal identities of those singled out"⁹⁶ that the state must not be allowed to interfere with them. The right to privacy is, then, to use Justice Blackmun's word, a right to "self-definition."⁹⁷

This conception of a fundamental freedom to define oneself emerges from the second strand of personhood theory: the concern for personal identity. The conception draws its vitality, however, from the first: the concern for our identity as persons. Indeed, to give

vocabulary as well. *See, e.g.,* Rynecki v. Connecticut Dep't of Social Servs., 742 F.2d 65, 66 (2d Cir. 1984); Gargiul v. Tompkins, 704 F.2d 661, 669 (2d Cir. 1983) (Oakes, J., concurring) (referring to the "constitutional right to privacy" as "a right I believe is part of a larger constitutional right of 'personhood'" (citations omitted)); Lovisi v. Slayton, 539 F.2d 349, 356 (4th Cir. 1976) (en banc) (Craven, J., dissenting).

⁹⁴ *See supra* p. 752.

⁹⁵ *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (stating that "[w]e protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition"); Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (referring to the "ability independently to define one's identity that is central to any concept of liberty"); *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 975 (E.D. Wis. 1980); L. TRIBE, *supra* note 2, § 15-2, at 1305-06; Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 274 (1977).

⁹⁶ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 15-13, at 943 (1st ed. 1978).

⁹⁷ *See Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting).

personhood its strongest formulation, it is at just this point — self-definition — that our “identity qua persons” and our “personal identity” intersect. For, it could be said, the definitive characteristic of human beings is precisely our capacity for self-conscious individuation: the ability to relate to one’s past and future as a single being and to construct out of the multiplicity of one’s experience and expectations an individual personality.⁹⁸ Thus, the freedom of self-definition would be the fundamental human right, of which, for example, the freedoms of thought and belief embodied in the first amendment would count as necessary but insufficient components. Thus might personhood simultaneously account for privacy’s constitutional status, its “derivation” from other, enumerated constitutional guarantees, and its moral and political exigency. Surely the state may not deprive us of that liberty on which our humanity fundamentally rests.⁹⁹

What follows is a critique of personhood that will be pursued in three stages. The first is called for convenience an “analytic” critique; its approach is essentially that of conventional analytic philosophy. By clarifying personhood’s normative position, the analytic approach will carry us into a second area — the domain of political philosophy, where personhood’s liberal premises will encounter republican objections. The republican critique, because it forces personhood to refine its position on the significance of sexuality in an individual’s identity, will in turn take us into a third field. Here, the challenge to personhood will be drawn from the work of Michel Foucault.

A. Analytic Critique

In demanding that personhood theory satisfy analytic criteria, we are going to subject it to traditional jurisprudential logic: fitting principles to cases, posing hypothetical counterexamples, and so forth. Such logic carries its own substantive premises about the structure, the function, and even the aesthetics of judicial reasoning.¹⁰⁰ I confess at the outset that I do not see how to avoid these premises. At any rate, they seem to me necessary in order to engage in legal discourse and not merely speak of it.

The personhood thesis is this: where our identity or self-definition is at stake, there the state may not interfere. The paramount analytical difficulty is one of limitation. Where is our self-definition *not* at stake? Virtually every action a person takes could arguably be said

⁹⁸ See, e.g., J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, bk. II, ch. XXVII, § 9, at 127–28 (P. Nidditch ed. 1979) (1st ed. London 1690); Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982); Williams, *Persons, Character and Morality*, in THE IDENTITIES OF PERSONS 197, 201 (A. Rorty ed. 1976).

⁹⁹ See, e.g., L. TRIBE, *supra* note 2, § 15-3, at 1308.

¹⁰⁰ See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567–76 (1983).

to be an element of his self-definition. Decisions seemingly insignificant for constitutional purposes may well be felt by some to be central to their self-definition. Should our tonsorial preferences, for example, be constitutionally protected?¹⁰¹

Clearly personhood must give us a conception of personal identity to show what acts are fundamental and hence constitutionally protected. The proponents of personhood, however, have not yet elaborated a conception of identity; and, for the moment, they have not yet had to do so. The reason for this lies in the emphasis on sexuality in the privacy case law. There has been a peculiar willingness simply to state or to assume — as if it required no explanation — that matters of sexuality go straight to the heart of personal identity.¹⁰² I shall have much more to say about this assumption below.¹⁰³ For “analytic” purposes, however, let us accept the idea that matters of reproduction, contraception, marriage partners, and so on are somehow fundamental to self-definition. A whole range of activity, long the subject of state prohibitions, must still be confronted. Are laws against prostitution, adultery, incest, and rape unconstitutional?

We must do personhood justice, if we can. There is no reason for personhood to assert that every sexual act is fundamental to an individual's identity. Rather the *intimacy* of a sexual relationship — the bond between two people — might be what is central.¹⁰⁴ Prostitution is sexual industry, not intimacy, it might be said; the parties are no more defining themselves through such transactions than are people who are having lunch at McDonald's.

Now it may well be that people *are* defining themselves when they have lunch at McDonald's. Yet even accepting the distinction between sexual activity traded for money and sexual activity more deeply tied to one's psychological and emotional life, we are still left with adultery, incest, and rape to consider. Adultery and incest may involve relations as “intimate” as marriage. And although there is no such intimacy in rape, rape still differs from prostitution in a way that personhood must confront. The rapist, from a psychological viewpoint, may be expressing and establishing his identity in the deepest sense through

¹⁰¹ See Craven, *supra* note 90, at 703–04 (discussing cases in which the Fourth and Fifth Circuits have grappled with this question); cf. *Kelley v. Johnson*, 425 U.S. 238 (1976) (finding no such protection for policemen under the fourteenth amendment).

¹⁰² See, e.g., L. TRIBE, *supra* note 96, § 15-13, at 943–44 (arguing that homosexuality should be constitutionally protected because “the conduct proscribed is central to the personal identities of those singled out by the state's law. This is so . . . by any defensible definition of personal identity.” (emphasis added)); Gerety, *supra* note 95, at 280 (“This is the conceptual minimum of any notion of privacy: an autonomy sufficient to bar state . . . regulation of the harmless intimacies of personal identity. By any standard of intuition or analysis, these intimacies begin with the body and its sexuality.” (emphasis added)).

¹⁰³ See *infra* pp. 771–80.

¹⁰⁴ See, e.g., Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 635 (1980).

his acts. Surely personhood theorists do not envision a rapist defending himself with the claim that he needs to violate women in order to "define himself."

An advocate of personhood has two responses to this rather obvious but important hypothetical. She might say that being a rapist — or an adulterer, a practitioner of incest, or for that matter a prostitute — is simply not the kind of identity to which the right she has in mind would offer any protection. It is a "bad" or "unhealthy" identity.¹⁰⁵ Alternatively, she might say that harm is the answer: the right to self-definition is not absolute, it could be said, and acts that cause harm to others are not constitutionally protected even if central to a person's identity.

The difficulty with the former approach is that, once the personhood theorist enters the realm of "good" and "bad" identities, she is in danger of losing the battle entirely. The *Hardwick* Court would have been delighted, no doubt, if it could have disposed of the right-to-privacy argument simply by saying that being a homosexual was not the sort of identity that the right was meant to protect. Thus the openly normative response appears to surrender what the personhood theorist must most strongly defend: the right to define oneself even in opposition to widespread, traditional, "normal" values.

In contrast, the harm response seems to offer a more solid, analytical distinction. It appears to avoid the abyss of subjectivity opened up by the yawning categories of "good" and "bad." We need not pass judgment on identities: as long as an individual does not harm others, he has a right to be whatever he chooses.

In this formulation, personhood is aligned with, and can draw support from, John Stuart Mill's well-known thesis concerning self-regarding acts. Mill conceived of an absolute privilege to perform those acts that have no effect on others or only such effects as have been consented to in advance.¹⁰⁶ Mill's principle was "jurisdictional" in nature: society has authority to regulate only activity that affects it, and self-regarding acts by definition do not affect society.¹⁰⁷ American jurisprudence has had a long flirtation with this simple but revolutionary idea. Several commentators have explicitly invoked the harm principle as the basis for a right to privacy.¹⁰⁸

¹⁰⁵ At least one personhood theorist has been lucid enough to come to grips with the problem of "bad" identities and has expressly adverted to a distinction between "healthy" and "unhealthy" identities. See Radin, *supra* note 98, at 968-70.

¹⁰⁶ See J.S. MILL, ON LIBERTY 142 (G. Himmelfarb ed. 1985) (arguing that, where "a person's conduct affects the interests of no persons besides himself . . . there should be perfect freedom, legal and social, to do the action and stand the consequences").

¹⁰⁷ "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it . . ." *Id.* at 141.

¹⁰⁸ See, e.g., Craven, *supra* note 90, at 706-07; Feinberg, *supra* note 81, at 455-56; Gerety, *supra* note 95, at 280.

Let us see whether Mill's logic can successfully limit the personhood thesis. Clearly a harm limitation would provide personhood with a coherent answer to the problem of rape. It is not so clear, however, that Mill's principle can achieve the desired results in the other contexts already mentioned. As to adultery, personhood's position could be that the potential emotional harm to one's spouse and children is sufficiently intense, confined, and foreseeable that it allows adultery laws to pass Mill's test, which ordinarily would be extremely skeptical about claims of "emotional harm." Or it could be said that, by marrying, the adulterer ceded to his spouse a right that ordinarily would not be legally cognizable. These arguments, although by no means air-tight, are serviceable enough; let us grant this point.¹⁰⁹

As to incest, the case is still more attenuated, provided we are speaking of incest not with a minor child but between adults. The former could be prohibited under Mill's logic even where both parties had "consented" on the ground that a minor's consent is not dispositive. The trick for personhood here is to categorize incest even between adults in the same fashion: the argument would be that consent to incestuous sex is always suspect because of the peculiar, mysterious pressures at work within the nuclear family. Untenable as this position may seem, it was in fact the argument that plaintiff's counsel advanced in *Hardwick* to distinguish incest from homosexuality, and the argument received the dissent's imprimatur.¹¹⁰ We shall let it pass as well.

¹⁰⁹ Although adultery could thus be said to constitute "harm" within Mill's logic, the argument for purposes of constitutional law is a good deal more complex. If the adulterer's extramarital sexual intimacy would otherwise be included in his right to privacy, then a law banning adultery on grounds of harm would be quite over- and under-inclusive. (Why should only married people be penalized? What if all parties consented?) Nor can the adulterer unproblematically be said to have "waived" some of his privacy rights by marrying, because the right to marry is itself constitutionally protected by the right to privacy. Hence, adultery laws would be conditioning the exercise of one "fundamental" right on the forbearance from exercising another — a situation usually deemed constitutionally unacceptable. Yet these were the two arguments — from harm and from contract — that Justice Blackmun used to distinguish adultery from homosexuality in *Hardwick*. See 478 U.S. at 209 n.4 (Blackmun, J., dissenting). The difficulty lies in the definition of marriage as monogamous: that would be the essential unconstitutional condition, if sexual intimacy were the principle of the right to privacy. For that reason it simply begs the question to say that the state is free to "define the contractual commitment necessary to become eligible for [marriage's] benefits," *id.*, or that it may "prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage," *id.* at 217 (Stevens, J., dissenting). The dissenters seem to be treating marriage as a "privilege" rather than a "right," having forgotten both that they oppose this distinction in constitutional law and that marriage is a "right" under the established precedent.

¹¹⁰ See *id.* at 209 n.4 (Blackmun, J., dissenting) ("With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted."). The problem with this formulation is that it proves too much. The "nature of familial relationships" makes "true consent" to all intrafamily transactions "problematical," yet adult offspring

Say, then, that personhood has staked its claim on Mill's principle and that the conduct it seeks to exclude from its protective ambit is that which affects or harms others in the necessary ways. There remains a much harder problem: that the conduct personhood seeks to include may affect others in the same way.

The difficulty with the notion of "self-regarding" acts has always been that there *are* none — or, at least, that the only really self-regarding acts are completely uncontroversial. The minute someone starts defending her actions against a storm of protest with the claim that she is only affecting herself, we may be certain that the opposite is true. First there is the offense caused to others; then there are the indirect, unintended effects that may usually be found if the causal sequence is carried far enough along; and finally there may be direct but overlooked consequences as well. Such arguments against Mill's principle have been rehearsed many times.¹¹¹ They are especially easy to apply to the particular conduct protected by the privacy doctrine, and readers will find these arguments set out in the note below.¹¹² These arguments, however, all retain the liberal vocabulary

are permitted to contract with their parents about all sorts of matters. Perhaps one might appeal to Freudian premises and say that consent to incest is more "problematical" than consent to non-sexual activity. Yet if such premises are relied upon, then of course the "nature of familial relationships" must be held to make "true consent" to *all sexual activity* "problematical." (Indeed if Freud were right, the decision *to* have incestuous sex would more likely express "true consent" than the decision *not* to have it.) To hold out incestuous sex as the only activity where consent is *so* problematic that a "blanket prohibition . . . is warranted" is probably just to reason from one's aversion to incest: it is as if to say, a normal person would not, after all, be likely to consent to *that*. Personhood clearly cannot afford such reasoning; the *Hardwick* majority, for example, could easily have turned the same sort of reasoning into an argument supporting a law against homosexual sex.

¹¹¹ See, e.g., 1 J. FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 12 (1984); C. TEN, *MILL ON LIBERTY* 10-41 (1980); Rees, *A Re-reading of Mill on Liberty*, 8 *POL. STUD.* 173 (1966).

¹¹² Consider abortion. Harm is arguably done, first of all, to society, which is deprived of the person that the fetus would have become, and second to the fetus itself, which may after a point be a sentient being even if not a person. As Dean Ely noted shortly after *Roe* came down:

[I]t has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person. Dogs are not "persons in whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.

Ely, *supra* note 89, at 926 (footnotes omitted). In addition, there is a very important consequence for the father, who may against his will be deprived of having a child. Indeed, if it is the decision whether or not to beget a child that is protected, and if that decision is said to be central to a person's identity, then the father's own "personhood" would appear to be violated whenever the mother has an abortion against his wishes.

One could also point to the offense that abortion, interracial marriage, and even apparently contraception may cause third parties. It will immediately be said that such offense is not the kind of "harm" to others that the doctrine of self-regarding acts respects. Yet that is mere

of "harm"; they do not depart from Mill's framework, but instead attempt to work within it. Their logic is unassailable, but they fail to capture what opponents of the right to privacy really challenge.

There is another way in which acts may not be "self-regarding" that is more difficult to articulate from a perspective that looks to the particular consequences of individual acts, but that offers a more profound challenge to Mill's principle. In personhood's own view, the right to privacy protects iconoclasm; it allows people to define themselves in defiance of certain widely held, deeply entrenched values. Iconoclasm throws into question such values, which make society cohere and which so often survive chiefly by their stamp of unchallengeability. Some opponents of the behavior that personhood seeks to protect firmly believe that their children's well-being and their society's disintegration may be at stake if their traditional values decline. What could more clearly constitute a potential harm to society, one might answer Mill, than that which portends society's disintegration?

The dissenters in *Hardwick* actually acknowledged a version of this objection. "Certainly," said Justice Blackmun, "some private behavior can affect the fabric of society as a whole."¹¹³ The dissent went on, however, to demonstrate a rather crimped notion of what might constitute a tear in the social fabric:

Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law."¹¹⁴

But the threat of rampant unscrupulousness or mayhem is not really at issue. Consider interracial marriage and miscegenation. This practice threatened not to destroy morality as such, but to rend the fabric of a society committed to racially segregated life. It threatened to remake communities, to undermine the institutions that assured many their security and superiority (and others their inferiority), to throw into question a whole set of social arrangements and practices that relied on the presupposition of a natural and absolute division between

definitionalism; offense is a "prejudicial effect" on others, to use Mill's terminology, and one may exclude it by fiat or with some normative principle, but one cannot exclude it through the simple logic of self- and other-regarding acts. See Ely, *Democracy and the Right to Be Different*, 56 N.Y.U. L. REV. 397, 403-04 (1981). Efforts to do so end up in tautology. See, e.g., *Hardwick*, 478 U.S. at 213 (Blackmun, J., dissenting) ("This case involves no *real* interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a *legally cognizable interest*" (emphasis added)).

¹¹³ *Hardwick*, 478 U.S. at 212 (Blackmun, J., dissenting).

¹¹⁴ *Id.* (quoting Hart, *Immorality and Treason*, in *THE LAW AS LITERATURE* 220, 225 (L. Blom-Cooper ed. 1961)).

racism. Can it possibly be argued that such a practice did not affect society?

It should be clear, I think, that personhood cannot escape its analytic difficulties by excluding conduct that affects others. The principle that society may not interfere with self-regarding acts cannot serve privacy's purpose. Yet this conclusion is hardly fatal; it is barely even unexpected.

Personhood's answer must be to relax the jurisdictional logic attempted above, to admit that the conduct it would protect has effects on others, and to acknowledge that society may have a considerable interest in such conduct. Personhood must abandon Mill — or rather, it must abandon the superficial construction of Mill encapsulated in the principle of immunity for self-regarding acts, in favor of a construction truer to Mill himself.

There is a subtle transition in *On Liberty* from the claim that society *has no right* to impinge upon certain freedoms, to the claim that society *does no good* in doing so. For example, Mill ultimately rests his defense of freedom of speech on the "progress" to which free speech leads rather than the self-regarding nature that it does not really have.¹¹⁵ After all, it is a constitution — albeit an unwritten one — that Mill means to be expounding. The real question for privacy, personhood might say along similar lines, is what would make a good political foundation, not what would make the cleanest syllogism.

In this way personhood can make our previous objections look superficial. The objective, it might be said on personhood's behalf, is to delineate the limits of legitimate state power — to say when government may intrude on matters fundamental to an individual's life and liberty. Would it really be acceptable to permit such intrusion on the sole ground that the individual had offended someone or in some ineffable way had threatened the social fabric?¹¹⁶

Taking this line, personhood can offer a familiar balancing test as its governing principle. The test would weigh the importance of certain conduct to an individual's identity against the importance of the state interests being served by the law restricting the conduct.¹¹⁷ Where the importance of the proscribed conduct to an individual's self-definition outweighs the particular harm threatened, the right to privacy would come into play to protect the individual. This test

¹¹⁵ See J.S. MILL, *supra* note 106, at 115–18.

¹¹⁶ Cf. Feinberg, *supra* note 81, at 455–64 (conceding that Mill's protected, "self-regarding" acts have *some* effects on others, but arguing that individual autonomy should prevail where the effects are "indirect" or "remote," because the principle of autonomy is more "important" than these indirect harms).

¹¹⁷ Judge Craven reaches a similar balancing test for personhood. See Craven, *supra* note 90, at 719.

arguably would explain the striking down of laws against abortion, miscegenation, and contraception, as well as the upholding of laws against adultery, incest, prostitution, and rape. At the same time, it could account for the absence of protection in cases involving hair-length or other matters deemed not fundamental to one's identity.

There is nothing like a good balancing test for avoiding rigorous argument. But balancing tests have premises too, and they may be rigorously challenged.

B. *The Republican Critique*

We have seen that personhood seeks to protect the freedom of individuals to define themselves in contradistinction to the values of the society in which they happen to live. The premise of such freedom is an individualist understanding of human self-definition: a conception of self-definition as something that persons are, and should be, able to do apart from society. Opposed to this individualist idea of self-definition stands the idea of political or communal self-definition. The latter idea is the nucleus of republicanism, a branch of political thought usually advanced as the chief opponent of, and alternative to, traditional liberalism. This "republican vision," which appears in the literature today with some frequency,¹¹⁸ presents a radical challenge to the personhood principle.

Liberalism and republicanism may be contrasted in a number of ways. One way is to see them as offering two competing understandings of self-government. Liberalism is grounded in a conception of *individual* self-government. Its institutions are designed primarily to secure individual autonomy: the freedom of each to choose and pursue his own ends, limited only by the principle that others must be free to do likewise.¹¹⁹ By contrast, the "self" that is to govern itself in the republican understanding is a political or communal entity. Republican political institutions are designed with a view to substantive popular participation; republicanism sees liberty as an active and

¹¹⁸ See, e.g., Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Horwitz, *History and Theory*, 96 YALE L.J. 1825 (1987); Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Sunstein, *Routine and Revolution*, 81 NW. U.L. REV. 869 (1987).

¹¹⁹ In Kant's words:

Man's freedom as a human being . . . may be expressed in the following formula. No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, as long as he does not infringe upon the freedom of others

See I. KANT, *On the Common Saying: "This May Be True in Theory, But It Does Not Apply in Practice"*, in KANT'S POLITICAL WRITINGS 74 (H. Reiss ed. 1970).

supra-individual condition, a distinctly human potential realizable only through participation in political self-government.¹²⁰

When liberalism and republicanism are contrasted in this way, it becomes possible to see personhood not only as a liberal principle but as *the* liberal principle. Grounded in personhood's right to self-definition, privacy serves the classically liberal goals of preventing government from legislating morality and ensuring that individuals are free to make critical value-choices for themselves. Viewed thus, personhood is subject to an immediate republican rejoinder. We recognized earlier that, if individuals define themselves in opposition to established values, this could have a diffuse but profound effect on social relations. We spoke, rather vaguely, of a threat to the "social fabric." Personhood capitalized on our vagueness by saying that individuals' identities should not be sacrificed to abstract concerns about society's warp and woof.

We can now put the argument more incisively. It is *society's identity* that is at stake. Iconoclasm throws into question what a society stands for; it threatens to disrupt or even to remake the particular identity that a society has chosen and defined for itself. Self-definition is therefore a double-edged sword.

Hardwick makes this abundantly clear. At bottom, both sides of the *Hardwick* Court claimed to be championing self-definition: the only difference was that one side made its claim on behalf of the individual, whereas the other did so on behalf of the legislating community. Thus, the *Hardwick* dissenters extolled the value of permitting individuals to differ from prevailing ways of life.¹²¹ The constant refrain of the Justices in the majority was the opposite: a state should be able to enforce moral precepts deeply rooted in those values defining us as a Western, Judeo-Christian people;¹²² moral beliefs are a sufficient basis for criminal laws.¹²³

¹²⁰ See ARISTOTLE, POLITICS bk. III, ch. 1, at 92-96 (E. Barker trans. 1958); J. ROUSSEAU, THE SOCIAL CONTRACT bk. III, ch. 15, at 93 (C. Sherover trans. 1984) ("The better the state is constituted, the more do public affairs outweigh private ones in the minds of the Citizens."); Sandel, *Introduction*, in LIBERALISM AND ITS CRITICS 5-7 (M. Sandel ed. 1984); see also Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 689 (1988) ("The foundation of communitarian political philosophy is the Aristotelian thesis that human beings are by nature political. This view holds that human beings are incomplete as individuals, because they can develop and exercise their distinctively human capacities only through their participation in a common life.") (citations omitted).

¹²¹ See *Hardwick*, 478 U.S. at 205-06, 211 (Blackmun, J., dissenting).

¹²² See *id.* at 196 (Burger, C.J., concurring) ("Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."). It is quite remarkable that a recent Chief Justice of the Supreme Court could imagine that he had cured the offensiveness of relying on "Christian" precepts in a constitutional decision simply by adding the prefix "Judeo-" thereto.

¹²³ See 478 U.S. at 196; *id.* at 197 (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.").

This republican interpretation of the *Hardwick* majority opinion puts personhood in a corner. In just those cases personhood considers most important, the individual identity sought to be protected can be seen as most clearly conflicting with the collective identity society seeks to maintain. On what ground can personhood uphold one person's right to define himself at the price of ignoring or even destroying an entire community's right to define itself?

Personhood's answer might be as follows. Republicanism errs in imagining a "community" as a thing with an existence beyond that of its constituents.¹²⁴ There is no such thing as a "collective identity" any more than there is a "popular will." Identity and will exist in persons, not communities, and it is only at the level of individuality that identity and will can be respected. We must never confuse majority rule — under which individuals consent to be governed by the decisions of the greatest number — with the idea of a "collective will" or a "collective identity," for those ideas are nothing other than disguises masking the extinction of individuality altogether.

The foregoing actually blends together two distinct claims, one ontological in nature and one purely normative. The first claim is that there is "no such thing" as a collective or communal identity. This assertion is far more problematic than it might at first appear. Its chief difficulty is that the very same argument it advances against collective identity — that is, that collective identity is merely a metaphenomenal abstraction — can be directed with equal force against personal identity.¹²⁵ At the same time, simply from an intuitive viewpoint, we commonly conceive of certain collectivities — a university, a town, a country — as bearing a quite definite character and identity over time. We might even speak of the death of a given community in this sense.

The ontic status of a community is not, however, essential to personhood's reply to republicanism. Personhood's second claim is that submergence in a "collective identity" is simply unacceptable from a moral or political perspective. Even if there were such a thing as a collective identity, permitting it to supersede individual identity would be to "extinguish individuality altogether."

To be sure, the latter claim is purely normative, and republicanism has a purely normative answer in which the value-neutral society is depicted as an increasingly valueless society, which, knowing no common good, begins to show in the form of rising crime and political apathy the signs of its disintegration. Liberalism's celebrated individualism, in this picture, is a corruption of civic virtue¹²⁶ profitable to

¹²⁴ See J. RAWLS, A THEORY OF JUSTICE 264 (1971) ("[W]e do not want to rely on an undefined concept of community, or to suppose that society is an organic whole with a life of its own distinct from and superior to that of all its members in their relations with one another.").

¹²⁵ See *infra* pp. 797–98.

¹²⁶ See N. MACHIAVELLI, THE DISCOURSES 157–64 (B. Crick ed. 1986) (1st ed. 1531) (arguing

a very few and failing even to produce true self-knowledge (a prerequisite of true autonomy) because such individualism strips away the shared self that self-knowledge ought to know.¹²⁷ When the debate turns in this direction, liberals soon begin insinuating that republicans are some sort of touchy-feely totalitarians, and the republicans retort that liberals are simply apologists for capitalist oppression and anomie.

The debate between liberalism and republicanism invariably arrives at some such impasse. If we could advance no further than this, the republican critique of personhood would amount to little more than a restatement of the conflicting claims of individuality and community, which, when presented as two polar alternatives, offer little hope of an enlightening resolution. There is, however, another way of looking at the debate between liberalism and republicanism that puts the republican challenge to personhood on a very different footing.

A second means of contrasting liberalism and republicanism is to say that the two political visions differ over the nature of human identity itself. Liberalism tends to view the individual as complete in himself, bearing an identity as an independent will or chooser of ends that precedes and underlies the particular objectives upon which he settles or relations into which he enters.¹²⁸ Republicanism, on the other hand, speaks of the individual as constituted at least in part by the society in which he lives.¹²⁹ In this view, a person's identity is understood not as prior to but rather as defined by his intimate relations, his community, and his deepest values.¹³⁰

To be sure, this means of contrasting liberalism and republicanism simply relocates the impasse between them at another level. Here, appealing to our self-reflection, liberalism and republicanism ask us which image of identity more fully accords with our moral and experiential sense of ourselves. At this level, however, it becomes immediately apparent that personhood is not fully committed to the liberal view. In personhood's view, decisions about marriage, child-

that a republican form of government is impossible in a corrupt society); Michelman, *supra* note 118, at 40 ("Corruption [in classical republican thought] is the subversion, within the political motivation of any participant, of the general good by particular interest.").

¹²⁷ Cf. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 180 (1982) (describing deontological liberalism and stating that "[w]here the self is unencumbered and essentially disposed, no person is left for self-reflection to reflect upon" (emphasis in original)).

¹²⁸ See, e.g., J. RAWLS, *supra* note 124, at 560 ("[T]he self is prior to the ends which are affirmed by it . . .").

¹²⁹ See, e.g., M. SANDEL, *supra* note 127, at 150 (describing a "strong" view of community in which individuals "conceive their identity . . . as defined to some extent by the community of which they are a part"); Michelman, *supra* note 118, at 27.

¹³⁰ See, e.g., M. SANDEL, *supra* note 127, at 179 (describing "those more or less enduring attachments and commitments which taken together partly define the person I am" and distinguishing these from "values I happen to have or aims I 'espouse at any given time'").

bearing, and sexual intimacy deserve constitutional protection because such decisions can be central to a person's identity. Thus personhood clearly embraces the proposition that individuals constitute their identities at least in important part through certain of their roles, values, and relationships. Here personhood is treading into republican territory, and for that reason, as we shall see, its logic necessarily falls into contradiction.

Consider again the case of laws banning homosexual sex. The intolerant heterosexual can claim, on personhood's own logic, that critical to *his* identity is not only his own heterosexuality but also his decision to live in a homogeneously heterosexual community. The republican argument against personhood now appears not as a conflict between an individual's and a community's identity, but rather as a conflict between individual identities. If such a conflict exists, personhood must resolve it. Otherwise, in the vocabulary of the balancing test that personhood adopted at the end of the last section, the personhood interests would weigh equally on both sides of the scale in precisely those cases personhood deems most important, where one individual in a community seeks to depart from a way of life that other members of the community consider deeply important to their own self-definition. Indeed, in such a balance, personhood would presumably weigh more heavily in favor of those appealing to tradition in their self-definition, for the simple reason that there are likely to be more of them.

Perhaps personhood will be tempted to reply that knowing who lives behind a neighbor's doors or what acts are being committed there is simply too remote or insubstantial to be part of a person's "self-definition." But this reply is wholly unsatisfactory. We know very well in this country that the racial, economic, or ethnic homogeneity of a community can be experienced by its members as essential to the life or the world they have created for themselves. So long as personhood is relying on a purely intuitive concept of personal identity, it cannot deny that membership in a given, well-defined community may be a central element in some persons' self-definition. One has only to think of the struggles that preceded and followed *Brown v. Board of Education*¹³¹ to confirm this perception. Thus personhood must confront a conflict within its own logic between the rights of those individuals for whom a certain iconoclasm is centrally important to their self-definition and the rights of those for whom the community's homogeneity is equally important to theirs.

This critical point can be illustrated by reference to Professor Klare's well-intended but unavailing attempt to advocate both personhood *and* communitarian principles simultaneously in favor of homo-

¹³¹ 347 U.S. 483 (1954).

sexual rights.¹³² The springboard of Klare's discussion is a pre-*Hardwick* case in which a federal district court held that the government could not discharge a person from the military reserve because of her homosexuality.¹³³ The court reached this conclusion expressly on personhood grounds: the right to privacy protects one's identity, the court stated, and sexual orientation is central to identity.¹³⁴ Klare applauded the court's holding but criticized its conception of personal identity as too narrow:

Ideally, the law should not only create zones of privacy and protect victimized employees, but it should also recognize a *public right of employees to work in a sexually pluralistic environment*. . . . This approach would therefore require employers to . . . facilitate sexual awareness and choice by combatting sexual prejudice and coercion and by establishing a workplace atmosphere that allows all people to explore and express their sexual identities. . . . [P]ersonal identity has an *interactive and communicative component*. The emancipatory potential of the case can only be fully realized when its logic is extended to the *communal* aspects of working life.¹³⁵

In this passage Klare correctly recognized that the "logic" of the personhood principle invites application of republican insights about the "communal aspects" of personal identity. Personhood could not claim that homosexual relations are potentially central to a person's identity if it were not willing to embrace the constitutive, associational components of identity that republicanism espouses. What Klare failed to recognize is that personhood therefore culminates in a perfect indeterminacy of result.

Klare's "sexually pluralistic" workplace does *not* follow from the principle that "personal identity has an interactive" or "communal" component. It might follow if it could be said for all individuals that full self-definition was consistent with or perhaps dependent upon an environment that permitted individuals "to explore and express their sexual identities." Armed with the very same principle, however, intolerant heterosexuals might insist that their identity (and therefore their right to privacy) would be violated by the presence, self-expression, and "explorations" of homosexuals. That is, their "heterosexual identity," *because* of its "interactive" and collective components, could be said to demand a sexually *homogeneous* workplace. Once personhood's logic is extended to the "communal aspects" of our identity, the right to privacy of the intolerant — or simply of those committed

¹³² See Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1386-88 (1982).

¹³³ See *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980).

¹³⁴ See *id.* at 974-75.

¹³⁵ Klare, *supra* note 132, at 1387-88 (emphasis added).

to prevailing values — will always conflict with the right to privacy of the iconoclast.

Thus the question of individual and communal identities reappears within the individualist logic of personhood itself. It should be emphasized that this argument is not intended by any means to suggest that the sodomy law in *Hardwick* could genuinely be justified by reference to the "personhood rights" of countless intolerant Georgians. The argument is simply that, if we defend *Hardwick's* position by reference to *his* personhood rights, then we have to answer to *theirs*.

Perhaps personhood will be tempted to appeal to the principle that individual autonomy may be limited if necessary to preserve a similar autonomy for all. Just as a person's right to swing his fist is limited by the location of another's chin, so a person's right to define himself may be limited if it will impinge upon others' self-definition. Forms of self-definition that are incompatible with others' identities can be ruled out on this ground, even if it means depriving the intolerant of their personhood.

The strength of this reply is that it preserves personhood's value-neutrality as between identities. The weakness is that it misses the point. As we have just seen, given personhood's constitutive view of identity, the identities that personhood strives most vigorously to protect are themselves likely to impinge upon others' self-definition. To the extent that a person's identity is constituted by his membership in a homogeneous community of some kind, the conduct of those seeking to disrupt that homogeneity is as incompatible with his identity as his identity is with theirs.

Nevertheless, personhood might say that the exclusion of intolerant identities is necessary to give every individual the *greatest degree* of freedom to define himself consistent with a like degree of such freedom for all. It is true, personhood might concede, that the preferred self-definition of some intolerant individuals would have to be forbidden, but even they would still be able to choose from innumerable tolerant identities. On the other hand, the argument might go, if *Hardwick*-style laws are permitted, then individuals may be left with few choices at all.

Here too personhood is seeking in vain to find a value-neutral means of excluding intolerant identities. First, this argument again ignores the implications of personhood's present difficulty, which lies in the conflict of one identity with another. Whichever of the two conflicting forms of self-definition personhood seeks to exclude, it is simply eliminating one choice from the available spectrum of potential identities. In any event, in its attempt to compare the quantum of self-definition possible in a society before and after it has passed a *Hardwick*-style law, personhood ignores the freedom of self-definition involved in the act of legislating. In passing such a law, individuals continue to make self-definitive decisions, even if these decisions are

mediated by elected representatives. Indeed, because such legislation (if permitted) enables people to choose among *all* forms of self-definition, it can be said to provide a *greater* degree of autonomy than that offered by personhood, which is now prepared to rule out certain identities in advance. Moreover, because the majority's preferred form of self-definition will in principle prevail, the possibility of such legislation not only creates a greater degree of autonomy, but also effectuates the personhood decisions of the greater number.

A second strategy for personhood would be to abandon the pretext of value-neutrality and retreat to an openly normative view of identity of the kind discussed earlier.¹³⁶ Personhood might then simply condemn prejudice and intolerance as qualities that do not deserve protection even if they form constituent parts of individuals' self-definition.

But this reply also fails. First, not all forms of self-definition based upon membership in a given sort of community can be so easily characterized as instances of prejudice or intolerance. Imagine a law passed by a republican-minded community requiring individuals to attend town meetings, hold public office for a period of time, and otherwise participate in the community's political life. Personhood would presumably be compelled to reject such a law, because it would not permit individuals to define for themselves a private, non-political identity if they so chose. A republican would then point out, however, once again drawing upon personhood's own constitutive view of identity, that his self-definition depended on his membership in a politically active, participatory polity, and that political apathy on the part of other members of his community directly impinged upon his personhood. Here, denunciations of prejudice and intolerance are not likely to enable personhood to escape its dilemma.

In any event, as we saw earlier, when personhood begins excluding certain identities on an openly normative basis, it leaves itself defenseless in a case like *Hardwick*: opponents of personhood are then free to insist that their values be imposed as an initial matter instead of those of the liberal-minded proponent of personhood. Finally, by foregoing value-neutrality, personhood is sacrificing the strongest justificatory ground it has yet adduced: the claim, rooted in liberal political philosophy, that personal identity requires protection in order to prevent the state from legislating morality.¹³⁷

¹³⁶ See *supra* p. 756.

¹³⁷ Professor Richards seems to have overlooked this problem in his attempt to support the right to privacy — and to criticize *Hardwick* — with the classically liberal principle that governments must never impose values on persons in the “essential moral spheres” of their “private life.” See Richards, *supra* note 71, at 843–45. Richards says that this principle would prevent a “majoritarian orthodoxy” of “intimate relations” from being enforced against individuals who might wish to differ. Quite so. But it also allows an orthodoxy of individual autonomy

Personhood might, however, attempt to rescue a pluralist principle of individual self-definition by abandoning its liberal foundations altogether. Instead personhood might seek its foundation in *republican* values. In this line of reply, personhood would insist that its preference for pluralism is this country's expressed preference. The analysis would become historical: our founding documents, it could be said, our political and economic institutions, and our social struggles all reflect an individualist creed and celebrate the values of pluralism. To be sure, this is a social vision being imposed on the citizenry; it is itself a form of intolerance. According to this argument, however, it is intolerance only of intolerance, and it is the American vision, and thus it should be enforced by the courts.¹³⁸

One weakness in this reply is that it can result only in a standoff, for republicans could doubtless produce their own version of our history to show that republican ideals were more influential than liberal ideals in revolutionary America.¹³⁹ In any event, personhood is now effectively conceding that the society's identity is superordinate to, and may override, individual identity. Having made this concession, personhood is in great difficulty, for how can it reject laws by which a community has attempted to define itself at the expense of certain individual identities? How can personhood open the door once for collective identity to assert itself and then slam it shut thereafter?¹⁴⁰ To be sure, personhood could take the position that this

to be imposed on majorities who might wish to differ. As we have seen, some conceptions of a good "private life" go beyond individual decisionmaking; they might require people to assume roles and obligations with respect to one another, or they might require a certain homogeneity of values and norms of social interaction within a community. Even if many of us would reject such visions of the "good life," to prohibit their realization on the ground that they impose values on others is self-contradictory.

Perhaps it will be said that the personhood principle in the form of a "right to differ from the majority" can be defended on "neutral" grounds such as the contractarian premises of Rawls' original position. It is quite difficult to see how this argument would work. Presumably the argument would be that persons in the original position would want to ensure the protection of their personhood. But we have already seen that permitting communities to enforce certain forms of homogeneity is as important to some individuals' personhood as the contrary principle is to others'. Thus no individual in the original position would have reason to choose either principle. Instead, a superordinate normative or political judgment would be necessary. Ely, for one, agrees that a "right to be different" cannot be neutrally derived. See Ely, *Democracy and the Right to Be Different*, 56 N.Y.U. L. REV. 397, 400-04 (1981).

¹³⁸ One commentator has argued that Justice Blackmun's dissent in *Hardwick* contained a version of this argument. See Goldstein, *History, Homosexuality, and Political Values: Searching for the Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1098-99 & n.164 (1988) (referring to "Blackmun's paradoxical claim that valuing individual liberty is one of our hallowed traditions" as an "attempt to shift the terms" of the debate between "classical liberalism and classical conservatism").

¹³⁹ See, e.g., B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); G.S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

¹⁴⁰ Cf. Unger, *supra* note 100, at 583-92 (noting and criticizing a possible distinction between

door was open during the constitutional conventions but shut by the Constitution itself. An appeal to the "Constitution itself," however, is not likely to favor personhood. The Constitution certainly does not refer to a right of self-definition in so many words, and if personhood begins inquiring into historical values and thinking, then — as *Hardwick* illustrates once more — it is going to be extremely difficult to mount a compelling case in favor of the conduct that personhood seeks to protect.

Hence, personhood remains trapped in the self-contradiction produced by its own premises concerning the nature of human identity. Personhood cannot exclude "intolerant" identities without abandoning its value-neutrality as between identities, and abandoning such value-neutrality undermines personhood's normative foundations. There is, however, one other avenue of escape available, if personhood dares to take it. From the first, we observed that personhood would eventually be obliged to deliver a conception of personal identity that could explain which decisions, being central to identity, deserve constitutional protection and which decisions, being peripheral or less significant, do not. Personhood must now take advantage of this necessity and attempt to refine the premises that have led it into self-contradiction.

No matter how exercised people get over their neighbors' skin color or sexual preferences, personhood may say, this intolerance is not genuinely constitutive of identity. The right to privacy really does ultimately come down to our private lives, and the neighbor's private life is precisely not one's own.

But what is this "private life" to which personhood now advert? It is, of course, the field of sexuality: marriage, contraception, child-bearing, and so on. Personhood finally comes to rest its case on the fundamental importance of sexuality: a person's sexual life (in the broad sense of the term) is simply more definitive of and more deeply rooted in who that person is than his neighbors' conduct can ever be. That is personhood's final defense.

C. The Critique from Foucault

Thus the forefather of privacy, from personhood's view, is not Brandeis, but Freud. Personhood can resolve the contradiction it confronted in the last section by adopting a Freudian conception of identity. In this view, sexuality occupies a psychologically (or even biologically) privileged stratum in the formation of our identity and, at the same time, delineates an inner boundary of the strictly personal that the state ought not to be able to cross. In sexuality lies the

the rules applicable to "foundational politics," when a people constitutes a polity, and those applicable to "ordinary politics," the institutional system established thereafter).

hidden truth of our identity, and for the sake of our identity, society must not be allowed to repress that truth or to prevent us from discovering it.

By taking this Freudian turn, personhood scores a number of points. It suddenly possesses an elaborate theory of human identity on which to draw, replete with "experts" to back it up. In addition, this theory of identity miraculously happens to match up with the main thrust of the extant privacy cases; that is, personhood now has an explanation of privacy's preoccupation with sexuality. Finally, personhood even gains an emancipatory vision with which to supplement its own: the Freudian vision of the individual freeing himself from socio-sexual repression.

Although it would not be profitable here to analyze Freudian theory in any depth, it is necessary at a minimum for us to challenge the widely accepted connection that it draws between sexuality and identity. To see this task through, we will enlist the aid of the late Michel Foucault. What follows does not demand a complete acceptance of Foucault's views any more than it demands a rejection of Freud's. We will try to draw out just enough of the argument to make the point that concerns us. Here, however, our concerns have become more complicated. We are now looking to answer the most important questions posed earlier: what accounts for the strange attraction toward sexuality of the right-to-privacy decisions? And is the force behind this attraction a liberating one?

1. *Foucault's History of Sexuality*. — Foucault's last work, *The History of Sexuality*, begins with a description of and a challenge to what he calls the "repressive hypothesis":¹⁴¹ the view that "define[s] the relationship between sex and power in terms of repression."¹⁴² In this view, our sexuality has been systematically repressed for some time by society, which has enjoined us not to speak of our true sexual desires, not to act upon them, and indeed not to know them.¹⁴³ From this repression a great host of maladies follows, but also a great hope:

¹⁴¹ I. M. FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 10, 17-49 (1980) [hereinafter *HISTORY OF SEXUALITY*]. The book begins: "For a long time, the story goes, we supported a Victorian regime, and we continue to be dominated by it even today. Thus the image of the imperial prude is emblazoned on our restrained, mute, and hypocritical sexuality. . . . On the subject of sex, silence became the rule." *Id.* at 3.

¹⁴² *Id.* at 6.

¹⁴³ See *id.* at 4. The issue of how long sexuality has supposedly been repressed is open to various interpretations. It was Freud's view that civilization has always, necessarily caused man to repress his true sexual desires. See, e.g., S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1962); S. FREUD, *THE FUTURE OF AN ILLUSION* 7-8 (1953). The view to which Foucault chiefly addresses himself is the neo-Freudian conception that accepts the basic psychoanalytic vocabulary of repressed sexuality but historicizes the phenomenon, treating the advent of such repression as concurrent with the emergence of "bourgeois" or "modern" society. See *HISTORY OF SEXUALITY*, *supra* note 141, at 3-6, 35.

that by liberating our sexuality, we will rediscover the truth about ourselves and simultaneously remake our society. "[T]he essential thing," as Foucault describes this uniquely modern way of formulating the "problem" of sexuality,¹⁴⁴ is "the existence in our era of a discourse in which sex, the revelation of truth, the overturning of global laws, the proclamation of a new day to come, and the promise of a certain felicity are linked together."¹⁴⁵

Personhood, at the moment it adopts a Freudian perspective on personal identity, partakes of the repressive hypothesis. First, it perceives in sexuality "the deeply buried truth . . . about ourselves,"¹⁴⁶ so that sexual relations must be accorded central self-definitive status within the category of protected conduct. Second, it perceives itself as part of a process of liberating individuals from the constraints of a powerful state by permitting each individual to express his own sexuality freely.

Foucault challenges both aspects of this view. The critical point for Foucault is to see in all the discourse about liberating sexuality nothing other than the creation of a society captivated by sexuality. According to Foucault, Freud did not stand, as the repressive hypothesis would have it, at the turning point between a Victorian age of sexual repression and a modern era of dawning sexual enlightenment.¹⁴⁷ To the contrary, the chief characteristic of psychoanalysis in particular and the repressive hypothesis in general is that they have continued — rather than broken with — the ongoing history of sexuality, which to Foucault has been a "centuries-long rise of a complex deployment for compelling sex to speak, for fastening our attention and concern upon sex."¹⁴⁸

¹⁴⁴ The very problematization of sexual behavior is of course problematic and becomes an explicit topic in the second volume of Foucault's work on sexuality. See 2 M. FOUCAULT, *THE HISTORY OF SEXUALITY: THE USE OF PLEASURE* 23-24 (1985) [hereinafter M. FOUCAULT, *THE USE OF PLEASURE*].

¹⁴⁵ *HISTORY OF SEXUALITY*, *supra* note 141, at 7.

¹⁴⁶ *Id.* at 69.

¹⁴⁷ Foucault's view is that Freud's revolutionary step in psychology was not his focus on "sexuality," but his theory of the "unconscious." Thus Foucault said in an interview:

Well, I would say that in the usual histories one reads that sexuality was ignored by medicine, and above all by psychiatry, and that at last Freud discovered the sexual aetiology of neuroses. Now everyone knows that that isn't true, that the problem of sexuality was massively and manifestly inscribed in the medicine and psychiatry of the nineteenth century, and that basically Freud was only taking literally what he heard Charcot say one evening: it is indeed all a question of sexuality. The strength of psychoanalysis consists in its having opened out on to something quite different, namely the logic of the unconscious. And there sexuality is no longer what it was at the outset.

M. FOUCAULT, *Interview — The Confession of the Flesh*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, at 194, 212-13 (C. Gordon ed. 1980) [hereinafter *POWER/KNOWLEDGE*].

¹⁴⁸ *HISTORY OF SEXUALITY*, *supra* note 141, at 158.

Marshalling a host of religious, educational, medical, juridical, and other texts, Foucault redescribes the eighteenth and nineteenth centuries as witnessing a “discursive explosion”¹⁴⁹ centering on sex. Sex was not systematically repressed: it was expressed in more and more contexts. “[T]here emerged a political, economic, and technical incitement to talk about sex. And not so much in the form of a general theory of sexuality as in the form of analysis, stocktaking, classification, and specification, of quantitative or causal studies.”¹⁵⁰

To be sure, much of this discourse on sex warned of its dangers and evils. Its result, however, was to locate sexuality at the center of child-rearing, psychology, deviant behavior, and so on.¹⁵¹ This discourse found in all sorts of social and personal pathologies — where none had ever seen it before — the manifestations of sex. Hence, instead of sexual repression, there was the “discovery” everywhere of hidden sexuality: a “sexualization” of diverse phenomena. Far from repressing sex and sexuality, the eighteenth and nineteenth centuries *created* “sex” and “sexuality” — in the sense of concepts that unified diverse and not necessarily reproductive or even sensual elements of our lives into the hidden, sexual kernel of our identities.¹⁵²

Foucault presents this “discursive explosion” as the culmination of a deep movement in Western societies, dating back to Christian confessional practices of the Middle Ages, by which we came to feel obliged to speak the truth about our “sexuality.”¹⁵³ According to Foucault, the repressive hypothesis is itself an artifact of this particularly Western form of self-understanding, which has devoted itself to discovering the truth about sex as if sex contained the truth about ourselves. “What is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the secret*.”¹⁵⁴

Thus Foucault denies that society has exercised its power to repress sexuality. Instead, he suggests, power has been employed to produce bodies of knowledge, discourse, and practice centering on the “problem” of sex:

The society that emerged in the nineteenth century — bourgeois, capitalist, or industrial society, call it what you will — did not confront

¹⁴⁹ *Id.* at 38.

¹⁵⁰ *Id.* at 23–24.

¹⁵¹ See *id.* at 27–31, 104–05.

¹⁵² See M. FOUCAULT, *Interview — The Confession of the Flesh*, in POWER/KNOWLEDGE, *supra* note 147, at 211.

¹⁵³ See HISTORY OF SEXUALITY, *supra* note 141, at 61–65; M. FOUCAULT, *Interview — The History of Sexuality*, in POWER/KNOWLEDGE, *supra* note 147, at 183, 186.

¹⁵⁴ HISTORY OF SEXUALITY, *supra* note 141, at 35 (emphasis in original).

sex with a fundamental refusal of recognition. On the contrary, it put into operation an entire machinery for producing true discourses concerning it. Not only did it speak of sex and compel everyone to do so; it also set out to formulate the uniform truth of sex. As if it suspected sex of harboring a fundamental secret . . . [I]n the West, . . . the project of a science of the subject has gravitated, in ever narrowing circles, around the question of sex.¹⁵⁵

What "ought to make us wonder"¹⁵⁶ is not how sex came to be prohibited in certain ways, but rather how "we were induced to apply all our skills to discovering its secrets" and "made guilty for having failed to recognize it for so long."¹⁵⁷ A day may come, Foucault suggests, when "people will no longer quite understand how . . . we became dedicated to the endless task . . . of exacting the truest of confessions from a shadow."¹⁵⁸

Foucault's revolutionary "history of sexuality" indicates two points of vulnerability for the personhood theory. First, it challenges the connection between sex and identity on which personhood now crucially relies. In Foucault's view, sexuality occupies no biologically or psychologically privileged status in our identities.¹⁵⁹ To the contrary, the belief that sexuality does play this privileged role is explained as a societal artifact or even a mystification. "The whole idea," as Charles Taylor has said, "turns out to be a stratagem of power."¹⁶⁰ Second, Foucault's view implicates — in a manner we have yet to explore fully — the emancipatory vision to which personhood lays claim.

I should like to be able to rest on the first point, saying that Foucault has undermined personhood's attempt to declare sexuality the fundamental determinant of identity. But that sweeping claim is unavailable. I may be persuaded by Foucault's critique of Freudianism, but I can hardly expect that the oversimplified synopsis of Foucault's position above will have also persuaded readers unfamiliar with his works.

¹⁵⁵ *Id.* at 69–70.

¹⁵⁶ *Id.* at 159.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* Foucault writes in the same section:

Perhaps one day people will wonder at this. They will not be able to understand how a civilization so intent on developing enormous instruments of production and destruction found the time and the infinite patience to inquire so anxiously concerning the actual state of sex; people will smile perhaps when they recall that there were men — meaning ourselves — who believed that therein resided a truth every bit as precious as the one they had already demanded from the earth, the stars, and the pure forms of their thought . . .

Id. at 157–58.

¹⁵⁹ See *id.* at 150–58.

¹⁶⁰ Taylor, *Foucault on Freedom and Truth*, in FOUCAULT: A CRITICAL READER 69, 78 (D. Hoy ed. 1986) [hereinafter CRITICAL READER].

Instead we must move to the second point, and we must try to make out a narrower Foucauldian argument fully capable of being played out within the confines of this Article. We will attempt to isolate a new difficulty for personhood, directly challenging not its linking of sexuality and identity, but rather the notion of liberation to which personhood, by means of that linkage, purports to aspire.

2. *Personhood's Liberating Potential.* — Foucault's critique of the Freudian (and by now almost universal) understanding of sexual repression is intimately connected with another theme central to Foucault's remarkable later works and indispensable here: a reformulation of the way that *power* operates in modern societies.¹⁶¹ Foucault's treatment of sexuality rejects the view that society's relation to sexuality is that of an external, essentially prohibitory force. Rather, as we have seen, Foucault's contention is that sexuality has been affirmatively and systematically insinuated into our lives in a variety of ways. For Foucault, this transition from a negative to an affirmative conception of societal power applies not only to the "deployment" of sexuality, but to power's operation in general.¹⁶²

We have too long adhered, Foucault tells us, to a conception of power tied to the image of a monarchical sovereign: a "purely juridical conception" that sees power as essentially prohibiting certain conduct.¹⁶³ This conception may once have been useful, centuries ago, when the exercise of monarchical power was confined largely to public punishments, sanctions, and forcible seizures.¹⁶⁴ Now, however, through expanded technologies and far more systematic methods of acculturation, the state's power works *positively* to watch over and shape our lives, to dispose and predispose us, and to inscribe into our lives and consciousnesses its particular designs:

¹⁶¹ Foucault discusses his critique of prevailing conceptions of power in most detail in two places. See HISTORY OF SEXUALITY, *supra* note 141, at 81-102; M. FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE, *supra* note 147, at 78, 87-108; see also Foucault, *Afterword — The Subject and Power*, in H. DREYFUS & P. RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208 (2d ed. 1983). Foucault's alternative conception is difficult and has been widely questioned. See, e.g., J. MERQUIOR, FOUCAULT 108-18 (1985); Fraser, *Foucault on Modern Power: Empirical Insights and Normative Confusions*, 1 PRAXIS INT'L 272 (1981); Taylor, *supra* note 160, at 93. For favorable analyses of Foucault's view, see, for example, H. DREYFUS & P. RABINOW, cited above, at 184-204; B. SMART, MICHEL FOUCAULT 71-105 (1985); Connolly, *Taylor, Foucault, and Otherness*, 13 POL. THEORY 365 (1985); Hoy, *Power, Repression, Progress: Foucault, Lukes, and the Frankfurt School*, in CRITICAL READER, cited above in note 160, at 123, 129-45; and Smart, *The Politics of Truth and the Problem of Hegemony*, in CRITICAL READER, cited above in note 160, at 157, 161-64, 166-69.

¹⁶² See HISTORY OF SEXUALITY, *supra* note 141, at 82-83.

¹⁶³ See *id.* at 102; M. FOUCAULT, *Interview — Truth and Power*, in POWER/KNOWLEDGE, *supra* note 147, at 109, 119; M. FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE, *supra* note 147, at 94-97; M. FOUCAULT, *Interview — the History of Sexuality*, in POWER/KNOWLEDGE, *supra* note 147, at 183, 187.

¹⁶⁴ See HISTORY OF SEXUALITY, *supra* note 141, at 86-87, 136.

What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression. . . . [F]rom the seventeenth and eighteenth centuries onwards, there was a veritable technological take-off in the productivity of power. Not only did the monarchies of the Classical period develop great state apparatuses (the army, the police and fiscal administration), but above all there was established at this period what one might call a new 'economy' of power, that is to say procedures which allowed the effects of power to circulate in a manner at once continuous, uninterrupted, adapted and 'individualised' throughout the entire social body.¹⁶⁵

Thus, the primary characteristic of power in the modern era, as Foucault describes it, is what he calls its "productive" capacity: not production in the sense of goods or services, but the production of individuals' lives. This new productivity is achieved in two ways. First, Foucault stresses the increasing state control over the material, quotidian conditions of everyday life. He describes a "proliferation of political technologies . . . investing the body, health, modes of subsistence and habitation, living conditions, the whole of existence."¹⁶⁶ Second, Foucault identifies a *normalizing* function exercised throughout the political and social apparatus, working to mold our identities into patterns designated as healthy, sane, law-abiding, or otherwise normal.¹⁶⁷

Both forces are evident in Foucault's rendering of the development of sexuality in the eighteenth and nineteenth centuries.¹⁶⁸ As mentioned above,¹⁶⁹ Foucault speaks of a "sexualization" during this period of childhood, of women, and of "deviant" behavior of various sorts. In this process, individuals in their daily habits and activities were directly observed, treated, disciplined, and subjected to various "corrective" regimens. At the same time it became common practice in medical, psychiatric, and ultimately popular circles to classify "abnormal" individuals according to sexual criteria: to *identify* them as homosexuals, hysterics, and so forth.¹⁷⁰ This mode of classification, according to Foucault, entailed:

¹⁶⁵ M. FOUCAULT, *Interview — Truth and Power*, in POWER/KNOWLEDGE, *supra* note 147, at 119.

¹⁶⁶ HISTORY OF SEXUALITY, *supra* note 141, at 143–44.

¹⁶⁷ See *id.* at 144; M. FOUCAULT, DISCIPLINE AND PUNISH 183, 199 (1977) [hereinafter DISCIPLINE AND PUNISH]; M. FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE, *supra* note 147, at 107.

¹⁶⁸ See B. SMART, *supra* note 161, at 103.

¹⁶⁹ See *supra* p. 773.

¹⁷⁰ See HISTORY OF SEXUALITY, *supra* note 141, at 42–43; M. FOUCAULT, *Interview — The Confession of the Flesh*, in POWER/KNOWLEDGE, *supra* note 147, at 220.

a new *specification of individuals*. As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life-form Nothing that went into his total composition was unaffected by his sexuality. . . . It was consubstantial with him, less as a habitual sin than as a singular nature. . . . The sodomite had been a temporary aberration; the homosexual was now a species.¹⁷¹

Such classifications work both conceptually and institutionally to exclude, disempower, and inferiorize in a variety of ways the individuals so identified.¹⁷²

A salient feature of these practices of invidious sexual identification is that they are often conducted in the name of helping the group at issue. Yet it is the very act of "helping" that creates the group at issue *as* the group at issue. Thus, in Foucault's description, the decision to give medical treatment to homosexuals, which became institutionalized medical practice in the nineteenth century, in fact created the "disease" of homosexuality. It generated a division between homosexuals and heterosexuals that had never been absolute before, and at the same time created new institutional practices through which individuals would more and more sharply identify themselves, be identified, and be processed as homosexuals.¹⁷³

A new and fundamental conceptual difficulty now arises for the personhood account of privacy rights. Personhood may reproduce the very evil that it purports to resist.

Let us look carefully at personhood's stance on homosexuality. The personhood position, as we have seen, is that homosexual sex should receive constitutional protection because it is so essential to an individual's self-definition — to his identity. This argument has appeared explicitly both in judicial opinions and in the literature.¹⁷⁴

There is, however, an ambiguity in the idea that homosexual sex is central to the identity of those who engage in it. Is homosexual sex said to be self-definitive simply because it is sex, or especially because

¹⁷¹ HISTORY OF SEXUALITY, *supra* note 141, at 42-43 (emphasis in original).

¹⁷² See *id.* at 104-05; see also DISCIPLINE AND PUNISH, *supra* note 167, at 199 (referring to other such disempowering classifications outside the domain of sexuality).

¹⁷³ As Professor Goldstein has noted:

[T]he word "homosexual" . . . was coined in the nineteenth century to express the new idea that a person's immanent and essential nature is revealed by the gender of his desired sex partner. The concept emerged around the time that sexuality began to seem a proper object of medical, as distinguished from clerical or judicial, concern.

Goldstein, *supra* note 138, at 1088 (footnote omitted).

¹⁷⁴ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting); *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 975 (E.D. Wis. 1980); L. TRIBE, *supra* note 96, § 15-13, at 943-44; Gerety, *supra* note 95, at 279-80.

it is *homosexual sex*? In fact, proponents of personhood appear to argue for the second proposition.¹⁷⁵ One reason for this is that the first version of the argument would be quite difficult to sustain. To begin with, it would present personhood with the problem discussed earlier — it would be required to claim that prostitution, for example, is an exercise of one's constitutional rights. (Personhood could, of course, choose to defend this position.) Moreover, it simply seems implausible to assert that the act of sex on any given occasion is necessarily fundamental in defining the identity of the person engaging in it.

Personhood could, however, once again reply that sex as such is not the critical thing for purposes of identity, but rather the intimacy that accompanies an ongoing sexual relationship. This reply could be used simultaneously to answer the prostitution objection and to provide personhood with a more intuitively plausible claim that it has located something central to a person's self-definition. Yet this formulation also appears untenable.

First, this line of reply begins to fall back into a mere intuitive conception of what constitutes self-definitive activity. We have already seen the pitfalls that await personhood if it takes this path. One might well find people who said that their intimacy with close friends — Platonic or otherwise — was of central importance to their identity; others, however, might well say that living in an all-white or all-heterosexual community was centrally important to their identity. It must be recalled that personhood escaped the irreconcilable conflict of the iconoclast's right of self-definition with the intolerant's right of self-definition only by accepting a conception of personal identity in which one's sexuality was accorded special significance, whereas such things as the neighbor's sexuality or skin color, no matter how important they might feel to a person, did not in fact occupy a centrally definitive status.

In any event, the law that personhood must seek to attack in this context is, as in *Hardwick*, a proscription of *homosexual sex*, not of *homosexual intimacy*. Surely personhood will not take the position that people are unable to achieve a true or deeply felt intimacy in the absence of carnal knowledge. The very intuition that would support personhood's focus on intimate relations as central to a person's identity would reject such a proposition. If, however, self-definitive intimacy is attainable in the absence of sexual relations, then the personhood argument in *Hardwick* becomes highly attenuated. By resting its case on intimacy, personhood may win a skirmish but will lose the war.

Thus the actual position personhood must take in a case such as *Hardwick* is the second version of its argument, in which the partic-

¹⁷⁵ See, e.g., L. TRIBE, *supra* note 96, § 15-13, at 943-46 & n.17.

ularly homosexual aspect of homosexual sex is said to be the critical element. Prohibiting homosexual sex, personhood can say, violates the right to privacy because homosexual sex is for homosexuals "expressive of innermost traits of being."¹⁷⁶ It "touches the heart of what makes individuals what they are."¹⁷⁷ This position appears to solve all of personhood's difficulties at once. It does not commit personhood to the claim that all sexual activity is fundamental to identity. It is, moreover, consistent with a conception of personal identity in which the orientation of one's sexuality is accorded central status. Finally, at least on its face, it seems perfectly plausible, because homosexual sex can almost tautologically be said to be a central element of the homosexual's identity.¹⁷⁸

Without doubt, personhood's arguments for homosexual rights are intended to show and to seek the highest degree of respect for those on behalf of whom they are made. Nevertheless, in the very concept of a homosexual identity there is something potentially disserving — if not disrespectful — to the cause advocated. There is something not altogether liberating. Those who engage in homosexual sex may or may not perceive themselves as bearing a "homosexual identity." Their homosexual relations may be a pleasure they take or an intimacy they value without constituting — at least qua *homosexual* relations — something definitive of their identity. At the heart of personhood's analysis is the reliance upon a sharply demarcated "homosexual identity" to which a person is immediately consigned at the moment he seeks to engage in homosexual sex. For personhood, that is, homosexual relations are to be protected to the extent that they fundamentally define a species of person that is, by definition, to be strictly distinguished from the heterosexual. Persons may have homosexual sex only because they have elected to define themselves as "homosexuals" — because homosexuality lies at "the heart of . . . what they are."¹⁷⁹ Thus, even as it argues for homosexual rights, personhood becomes yet another turn of the screw that has pinned those who engage in homosexual sex into a fixed identity specified by their difference from "heterosexuals."¹⁸⁰

¹⁷⁶ *Id.* at 945 n.17.

¹⁷⁷ *Hardwick*, 478 U.S. at 211 (Blackmun, J., dissenting).

¹⁷⁸ *See, e.g.,* L. TRIBE, *supra* note 96, at 944-46 (referring to homosexual sex as the "behavior that forms part of the very definition of homosexuality").

¹⁷⁹ *Hardwick*, 478 U.S. at 211 (Blackmun, J., dissenting).

¹⁸⁰ It has been suggested that the *Hardwick* majority was itself guilty of relying upon the relatively modern understanding of homosexuals as fundamentally different in identity from heterosexuals. *See* Goldstein, *supra* note 138, at 1086-89. Although I agree with Goldstein, *see supra* pp. 747-48, that a normative condemnation of homosexuality underlies the *Hardwick* majority opinion, I am unsure that the opinion betrayed this particular form of condemnation. In any event, what Goldstein surprisingly fails to observe is the much closer connection between the dissenters' treatment of homosexuality and the stigmatizing treatment of homosexuality as

Someone will say that a homosexual who denies his homosexual identity is merely capitulating to the socially engendered stigmatization of homosexuality. On the contrary, the danger of falling prey to the thinking that has stigmatized homosexuality is far more pronounced in the very assertion of a "homosexual identity," which accepts as its starting point an essential rift or definitive division separating those who engage in homosexual as opposed to heterosexual sex. The point is obviously not that homosexual solidarity is counterproductive, nor that a movement to create such solidarity is doomed to reproduce within the psyches of its constituents the chains that it seeks to break. The point is that valorizing a "homosexual identity" — an identity defined in opposition to heterosexuality — as the starting point of such a movement *would* run the risk of reproducing those chains.¹⁸¹

To put it another way, the idea of a "homosexual identity" has its origin in precisely the kind of invidious classification described earlier. Homosexuality is first understood as a central, definitive element of a person's identity only from the viewpoint of its "deviancy." Indeed, there is from the outset an imbalance: within its own self-understanding, heterosexuality is merely normality, and the heterosexual must make some further, more particular decisions — pursuing certain kinds of partners or forms of sexual pleasure — before he will be said to have defined his identity according to sexual criteria. To the extent that heterosexuality does understand itself as definitive per se, it does so only in the face of and in contradistinction to a homosexuality already classified as abnormal and grotesque. By contrast, the mere act of being homosexual is seen as definitive in itself precisely because of its supposed abnormality, and it remains categorically definitive regardless of what sort of partners or sexual encounters the homosexual pursues. In defending homosexuality because of its supposedly self-definitive character, personhood reproduces the heterosexual view of homosexuality as a quality that, like some characterological virus, has invaded and fundamentally altered the nucleus of a person's identity.

identity that began in the nineteenth century. Although Goldstein acknowledges that Justice Blackmun's dissent "treat[ed] homosexuality as an identity," she characterizes this as an "[a]lternate conception[]" to the nineteenth century view. *See id.* at 1089. Indeed, without discussing the apparent contradiction, Goldstein states that the dissenters' approach, which "recognize[d] the central part sexuality plays in life," was "inconsistent with the nineteenth-century notion that 'a homosexual' is fundamentally a different sort of person than 'a heterosexual.'" *Id.* at 1091. Putting the *Hardwick* opinions aside, it is at least clear that *personhood* presupposes the homosexuality-as-identity view.

¹⁸¹ This point has been made frequently in the gay rights literature and elsewhere. *See, e.g.,* D. ALTMAN, *HOMOSEXUAL OPPRESSION AND LIBERATION* 229–39 (1971); D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 921–22 (1986). Foucault made a similar point during an interview. *See* M. FOUCAULT, *Interview — The Confession of the Flesh*, in *POWER/KNOWLEDGE*, *supra* note 147, at 219–20.

A possible objection: the evil in discrimination, it might be said, lies not in the classification but in the subsequent inferiorization of one group with respect to another. To distinguish homosexuals from heterosexuals without doing more is harmless. Personhood merely attempts to do away with the ensuing stigmatization by ensuring that each group has identical legal standing and rights. The foregoing arguments confuse the moment of differentiation with the subsequent moment at which a hierarchy or an exclusion is established among differences.

These two "moments," however, are not really distinct. Or rather, if we call them distinct, the impulse toward hierarchy actually *precedes* and *produces* the differentiation in identities. Obviously, differences of sexuality, gender, and race exist among us. These are not, however, differences in *identity* until we make them so. Moreover, it is the desire to count oneself "superior" to another, or even to count oneself "normal," that converts such differences into those specified identities in opposition to which we define ourselves. To protect the rights of "the homosexual" would of course be a victory; doing so, however, because homosexuality is essential to a person's identity is no liberation, but simply the flip side of the same rigidification of sexual identities by which our society simultaneously inculcates sexual roles, normalizes sexual conduct, and vilifies "faggots."

Thus personhood, at the instant it proclaims a freedom of self-definition, reproduces the very constraints on identity that it purports to resist. Homosexuality is but one instance of this phenomenon. The same flaw can be shown in the context of interracial marriage: once again, for the parties directly involved, to say that the challenged conduct defines their identity, and therefore should be protected, assumes that marrying out of one's race is in some way the cataclysmic event its opponents pretend; it thus repeats the same impulse toward rigid classification presupposing the discrimination sought to be undone. Interracial marriage should be protected because it is no different from intraracial marriage, not because it is *so* different.

The same difficulty could be spelled out to some extent in the case of contraception.¹⁸² At bottom, however, *Griswold* involves discrimination only in an attenuated sense. Hence, to say that we "define ourselves" by using contraceptives does not so much repeat an invidious differentiation. It simply rings hollow. Yet even in this hollowness, there is a suspicious echo. If *Griswold* protects our sexuality because our identity is supposed to be at stake, then the Court is not so much interceding (as personhood would portray it) between a re-

¹⁸² To perceive the use of contraceptives as an action central to a person's identity makes sense only against a normative background in which engaging in sex for pleasure rather than reproduction was thought to be an action critically revealing of one's character or morals.

pressive state and the besieged individual, but rather adding its voice to the "deployment of sexuality" described earlier: the systematic demand, in one field after another, to find in a "private," "personal" sexuality the essence of our identity and the meaning of our lives. "The irony of this deployment," as Foucault wrote, "is in having us believe that our 'liberation' is in the balance."¹⁸³

* * *

We must reject the personhood thesis, then, not because the concept of "self-definition" is analytically incoherent, nor because it is too "individualistic," but ultimately because it betrays privacy's — if not personhood's own — political aspirations. By conceiving of the conduct that it purports to protect as "essential to the individual's identity," personhood inadvertently reintroduces into privacy analysis the very premise of the invidious uses of state power it seeks to overcome.

Perhaps the example of abortion can best serve to drive this point home. Personhood must defend the right to abortion on the ground that abortion is essential to the woman's self-definition. But underlying 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 for so long been maintained. Only if it were "natural" for a woman to want to bear children — and unnatural if she did not — would it make sense to insist that the decision not to have a child at one given moment was centrally definitive of a woman's identity. Those of us who believe that a woman has a right to abort her pregnancy must defend the position on other grounds. The 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.

Women should be able to abort their pregnancies so that they may *avoid being forced into an identity*, not because they are defining their identities through the decision itself. Resisting an enforced identity is not the same as defining oneself. Therein lies the real flaw of the personhood account of privacy — and therein the core of the alternative view of privacy advanced in what follows.

III. AN ALTERNATIVE FOR PRIVACY

Despite the maxim, it is always easier, as everyone knows, to dispose than to propose. But negation must come to an end, and

¹⁸³ HISTORY OF SEXUALITY, *supra* note 141, at 159.

criticism, however sharp its edge, must also have a point. What follows, then, is the point.

A. Method

The methodology heretofore universal in privacy analysis has begun with the question, "What is the state trying to forbid?" The proscribed conduct is then delineated and its significance tested through a pre-established conceptual apparatus: for its role in "the concept of ordered liberty,"¹⁸⁴ its status as a "fundamental" right,¹⁸⁵ its importance to one's identity,¹⁸⁶ or for any other criterion of fundamentality upon which a court can settle. Suppose instead we began by asking not what is being *prohibited*, but what is being *produced*. Suppose we looked not to the negative aspect of the law — the interdiction by which it formally expresses itself — but at its positive aspect: the real effects that conformity with the law produces at the level of everyday lives and social practices.

The derivation of this turn lies in the ideas discussed in the foregoing section. In Foucault's conception, the significance of a law does not reside in the interdiction itself, but in the extent to which the law interjects us in a network of norms and practices that affirmatively shape our lives. The critical methodological step is to look away from what the law would keep us from doing and instead look to what the law would have us do.

B. Substance

Consider the three principal areas in which the right to privacy has been applied: child-bearing (abortion and contraception), marriage (miscegenation laws, divorce restrictions, and so on), and education of children (*Meyer* and *Pierce*). According to the prevailing method of privacy analysis, certain decisions concerning these matters cannot be proscribed because they are "fundamental." But what is fundamental about these decisions? Are they fundamental in themselves? If, for example, the right to decide whom to marry is inherently fundamental, how is it, for example, that the proscriptions against incestuous and bigamous marriage do not offend it? In fact, a "liberty of fundamental decisions" cannot serve as a constitutional principle any more than could that quite similar quantity — the "liberty of contract" — that animated the *Lochner* jurisprudence. There *is* something fundamental at stake in the privacy decisions, but it is not the

¹⁸⁴ *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹⁸⁵ *See id.*

¹⁸⁶ *See Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting); *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

proscribed conduct, nor even the freedom of decision — it is not what is being taken away.

The distinctive and singular characteristic of the laws against which the right to privacy has been applied lies in their *productive* or *affirmative* consequences. There are perhaps no legal proscriptions with more profound, more extensive, or more persistent affirmative effects on individual lives than the laws struck down as violations of the right to privacy. Anti-abortion laws, anti-miscegenation laws, and compulsory education laws all involve the forcing of lives into well-defined and highly confined institutional layers. At the simplest, most quotidian level, such laws tend to *take over* the lives of the persons involved: they occupy and preoccupy. They affirmatively and very substantially shape a person's life; they direct a life's development along a particular avenue. These laws do not simply proscribe one act or remove one liberty; they inform the totality of a person's life.

The principle of the right to privacy is not the freedom to do certain, particular acts determined to be fundamental through some ever-progressing normative lens. It is the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state.

Someone might say, I suppose, that anti-abortion or anti-contraception laws do not force women to bear children because women can simply refrain from having sex. Similarly one might say that whites and blacks, confronted by laws forbidding interracial marriage, can simply decline to marry if they do not wish to live with members of their own race.

This is no answer at all. To begin with, it is no answer to the pregnant woman seeking an abortion. More fundamentally, it is no answer because it is merely another attempt to hide behind a factitious focus on the prohibitory aspect of the law. The practical consequence of obeying laws against contraception or interracial marriage is that people become pregnant or marry intraracially. Indeed these laws derive the depth of their affirmative force from the fact that they operate on drives and desires too strong or too subtle for most to resist.

The danger, then, is a particular kind of creeping totalitarianism, an unarmed *occupation* of individuals' lives. That is the danger of which Foucault as well as the right to privacy is warning us: a society standardized and normalized, in which lives are too substantially or too rigidly directed. That is the threat posed by state power in our century.

This threat is not unknown to our constitutional jurisprudence. Consider first Justice Jackson's words in *West Virginia State Board of Education v. Barnette*,¹⁸⁷ when, in the midst of the Second World

¹⁸⁷ 319 U.S. 624 (1943).

War, the Court struck down a law that required schoolchildren to salute the flag and profess their loyalty to the country:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As first and moderate attempts to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity . . . down to the fast failing efforts of our present totalitarian enemies.¹⁸⁸

The spectre of an insidious, thought-numbing standardization underlay the *Barnette* decision; one need only remember what the salute that West Virginia had demanded would have looked like. "What is now required is the 'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up"¹⁸⁹ At the time these words were written, the image of Hitler's youth parties must have come to mind.

With this image, however, we have left West Virginia's enforced flag-salute far behind. Or rather we have imagined that flag-salute systematized and ramified into numerous aspects of the child's daily life. We have imagined an existence totally informed or occupied, rather than a single act of enforced loyalty. This distinction is critical: it explains why *Barnette* is not, after all, a right-to-privacy case but rather a first amendment case.

Because of the signal role that speech plays in political freedom and because of the express constitutional guarantee, government in this country can hardly forbid or compel citizens to utter a single opinion without violating their rights. By contrast, in privacy cases, the government must go much further before it transgresses a constitutional limit. Consider now the cases of *Meyer*¹⁹⁰ and *Pierce*,¹⁹¹ which, as noted earlier,¹⁹² may be considered the true progenitors of the privacy decisions. Like *Barnette*, *Meyer* and *Pierce* also involved laws pertaining to the education of children — laws suggestive of a nationalism heightened by war. Yet the statutes struck down in *Meyer* and especially *Pierce* differed significantly from that in *Barnette*.

In *Meyer*, the law at issue prohibited the teaching of "modern" foreign languages to elementary schoolchildren.¹⁹³ In *Pierce*, the state

¹⁸⁸ *Id.* at 640-41.

¹⁸⁹ *Id.* at 628.

¹⁹⁰ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁹¹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹⁹² See *supra* p. 743.

¹⁹³ See *Meyer*, 262 U.S. at 400-01. Actually, as enacted, the statute in *Meyer* prohibited the teaching of all foreign languages. The Court noted in its opinion, however, that the statute had been construed to permit the teaching of Latin, Greek, and Hebrew. See *id.* at 401.

had prohibited private elementary schooling altogether, requiring all children between the ages of eight and sixteen to attend public schools.¹⁹⁴ In each of these statutes, the state had gone much further in the effort — using Justice Jackson's phrase — to “coerce uniformity”¹⁹⁵ than had West Virginia in enacting its flag-salute law. It is not that a greater degree of coercion was present; I am not referring to the potential consequences of violating the law. To the contrary, it was the potential consequences of *obeying* the law that mattered. The *Meyer* Court saw the state as attempting to “foster a homogeneous people with American ideals.”¹⁹⁶ The Court drew in this connection on images from ancient civilization:

For the welfare of his Ideal Commonwealth, Plato suggested a law which would provide: “That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.” In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.¹⁹⁷

Invoking the spectre of such extreme measures was perhaps an exaggerated reaction to a law that merely forbade the teaching of foreign languages in elementary schools. Yet to ban foreign languages from children's education is also, both in motive and in reality, par-

Probably not coincidentally, the party who had been convicted of violating the law in *Meyer* was a teacher of German at a Lutheran parochial school. See *id.* at 396. Decided the same day as *Meyer* were *Bohning v. Ohio*, 262 U.S. 404 (1923), and *Pohl v. Ohio*, 262 U.S. 404 (1923), in which the Court struck down a statute that unabashedly prohibited the teaching of German — and only German — in elementary schools.

¹⁹⁴ See *Pierce*, 268 U.S. at 530.

¹⁹⁵ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

¹⁹⁶ *Meyer*, 262 U.S. at 402. The Court equivocated slightly on the question of whether this goal was a legitimate state interest. At one point, the Court appeared to hold merely that “the means adopted” to achieve this objective were improper. See *id.* Elsewhere, however, the Court squarely held that the statute was “without reasonable relation to any end within the competency of the State.” *Id.* at 403 (emphasis added).

¹⁹⁷ *Meyer*, 262 U.S. at 401-02.

tially to ban "foreign thinking" and "foreign ideas" from their consciousness. The threat of the state using the public schools to inculcate one acceptable way of thinking — "our" way, as opposed to "foreign" ways — was genuinely present in *Meyer*.¹⁹⁸ It was a threat not of coercing uniformity from without, but of producing uniformity from within.

Pierce presented this threat even more starkly because there the state had prohibited all organized elementary education outside the public schools. That the Court was reacting to this threat — and not merely to a deprivation of the "liberty of contract" — cannot be doubted. In language that implicitly derived its force from the same sources on which the Court drew in *Meyer*, the Court struck down the law and held that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to *standardize its children*."¹⁹⁹

This concept of standardization as applied in *Pierce* is critical for our purposes. It includes both quantitative and qualitative components. The law struck down in *Pierce* — like the Platonic or Spartan regimes described by the *Meyer* Court, but unlike *Barnette's* flag-salute law — had the effect of affirmatively occupying a substantial portion of the material, day-to-day lives of those individuals subject to it. At the same time, this occupation potentially subjected these individuals to a narrowly directed existence: a regimen, a discipline, a curriculum in which the totality of their personhood or identity could be forcefully compressed into a particular mold.

These two elements — the affirmative occupation of one's time and the directedness of this occupation — are crucial in understanding why the mandatory public schooling law in *Pierce* implicated a constitutional concern, now called the right to privacy, even though no explicit constitutional guarantee could be said to forbid it. Privacy takes its stand at the outer boundaries of the legitimate exercise of state power. It is to be invoked only where the government threatens to take over or occupy our lives — to exert its power in some way over the totality of our lives.

In a few, rare instances this "totalitarian" intervention into a person's life may occur as a result of a single legal prohibition. The burden of elaborating a conception of privacy based on an anti-totalitarian principle is to perceive how a single law may operate positively to take over and direct the totality of our lives.

¹⁹⁸ In its argument, the state of Nebraska asserted that the purpose of the statute was: to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn the English language and observe American ideals. It is a well known fact that the language first learned by a child remains his mother tongue and the language of his heart.

Id. at 394 (summary of arguments of counsel).

¹⁹⁹ *Pierce*, 268 U.S. at 535 (emphasis added).

C. Application

Let us briefly revisit the past privacy cases. The purpose of this revisiting is twofold. We must first test the general principles suggested above against the actual decisions in order to assess their fit. In addition, we need to mix these general principles with concrete cases to give them more color and definition. If in the process we settle into some sort of "reflective equilibrium" — we will have only ourselves to blame.

1. *Abortion and Contraception.* — *Roe v. Wade*²⁰⁰ is probably the most important privacy case decided. Let us see whether our analysis can provide an adequate foundation for its result.

In what way, if any, do laws against abortion effect a standardization? Do they operate in any way to confine, normalize, and functionalize identities? Even if this is so, do anti-abortion laws operate in this way any more than do other laws?

The answer to these questions is a most emphatic yes. Considered solely in terms of their prohibition, anti-abortion laws are no more "standardizing" than laws against murder. There can be nothing totalitarian, it might be said, in an injunction against the taking of life or of potential life. Considered, however, in productive rather than proscriptive terms, the picture looks quite different.

Anti-abortion laws produce motherhood: they take diverse women with every variety of career, life-plan, and so on, and make mothers of them all. To be sure, motherhood is no unitary phenomenon that is experienced alike by all women. Nonetheless, it is difficult to imagine a state-enforced rule whose ramifications within the actual, everyday life of the actor are more far-reaching. For a period of months and quite possibly years, forced motherhood shapes women's occupations and preoccupations in the minutest detail; it creates a perceived identity for women and confines them to it; and it gathers up a multiplicity of approaches to the problem of being a woman and reduces them all to the single norm of motherhood.

The point at which the state is exerting its power in this context is important too, just as it was in *Pierce*. Education involves the shaping of minds. If state-controlled education necessarily involves certain dangers, in *Pierce* these dangers were exacerbated precisely because the education at issue there involved minds as yet unshaped. The particular danger of state-controlled elementary education lies in the exertion of power in the *formation* of identity, thereby preceding and preempting resistance.

Yet power need not be directed at the undeveloped mind to have this effect; it may also do so if directed at the fully-developed body. A person's life and identity may be shaped as forcefully through taking control over her body — as is done, for example, in some military or

²⁰⁰ 410 U.S. 113 (1973).

religious disciplines — as through the attempted control of her mind. Indeed, bodily control may be the more effective medium to the extent that thought cannot, as it were, meet such control head on, as it might when confronted by an idea that it is told to accept. The exertion of power over the body is in this respect comparable to the exertion of power over a child's mind: its effect can be *formative*, shaping identity at a point where intellectual resistance cannot meet it.

Now, it is quite clear that *Roe v. Wade* had something to do with control over the body; indeed, it has become conventional to interpret *Roe* as resting at least in part on women's right to "bodily integrity" or to "control their own bodies."²⁰¹ This supposed right of bodily control, however, has been either poorly articulated or simply misunderstood. The right to control one's body cannot possibly be a right to do as one pleases with it even where the state can rationally identify harms being caused thereby;²⁰² otherwise common law crimes or torts would be constitutionally immunized.²⁰³ Nor, however, should the bodily control theme in *Roe* be reduced to the woman's interest in deciding whether a certain surgical operation is to be performed upon her. In fact, anti-abortion laws produce a far more affirmative and pronounced bodily intervention: the compulsion to carry a fetus to term, to deliver the baby, and to care for the child in the first years of its life.²⁰⁴ All of these processes, in their real daily effects, involve

²⁰¹ See, e.g., *Goedecke v. State Dep't of Institutions*, 198 Colo. 407, 411 n.7, 603 P.2d 123, 125 n.7 (1979) (en banc); *Commonwealth v. Delverde*, 398 Mass. 288, 296, 496 N.E.2d 1357, 1362 (1986); *In re Baby M*, 109 N.J. 396, 449 n.13, 537 A.2d 1227, 1254 n.13 (1988); Frey, *The Guilty but Mentally Ill Verdict and Due Process*, 92 YALE L.J. 475, 483 & n.48 (1983); Note, *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 821 (1986).

²⁰² Some commentators who try to rest the abortion decisions on a woman's right to control her body give the impression that if *Roe* did not announce a right this broad, it should have. See, e.g., Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 638 (1986). Such interpretations of *Roe* render the case extremely vulnerable. See, e.g., Arkes, Book Review, *The Shadow of Natural Rights, or a Guide from the Perplexed*, 86 MICH. L. REV. 1492, 1498-99 (1988) (criticizing efforts to defend *Roe* on the basis of an absolute right to bodily integrity and demonstrating that established precedent precludes such a right). The Court in *Roe* stated:

In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right to privacy as previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.

Roe, 410 U.S. at 154.

²⁰³ Even physical intrusions into one's "bodily integrity" are constitutionally permitted in furtherance of important state interests. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966) (upholding the compulsory blood-test of an accused); *Jacobsen v. Massachusetts*, 197 U.S. 11, 26 (1905) (Harlan, J.) (upholding a compulsory vaccination law and rejecting a claimed "inherent right of every freeman to care for his own body").

²⁰⁴ It might be objected that at least the last-mentioned requirement — caring for the baby once it is born — is not compelled by anti-abortion laws because it is always possible for a woman to give up her child to adoption. Although logically correct, this argument is no better

without question the most intimate and strenuous exercises of the female body. The woman's body will be subjected to a continuous regimen of diet, exercise, medical examination, and possibly surgical procedures. Her most elemental biological and psychological impulses will be enlisted in the process. In these ways, anti-abortion laws exert power productively over a woman's body and, through the uses to which her body is put, forcefully reshape and redirect her life.

A further point of similarity between *Pierce* and *Roe* should be noted. The danger of standardization that the Court noted in *Pierce* can in part be understood as the danger of treating individuals as mere instrumentalities of the state, rather than as citizens with independent minds who themselves constitute the state.²⁰⁵ Instrumental-

from a practical or moral perspective than the argument that anti-abortion laws compel nothing because women could simply refrain from having sex. *See supra* p. 784. Some women, compelled to bear a child by an anti-abortion law, might no doubt take advantage of adoption services. Realistically, however, it is surely necessary to expect many women in such circumstances to wish to keep their children; and, from a moral or political view, it seems hardly acceptable to insist that a woman remains perfectly "free" to do what now would contradict her most elemental feelings of obligation to the child that she has been compelled to bear. The anti-abortionist cannot defend abortion laws on the basis of a woman's abstract freedom to give up the child when the real moral and practical constraints upon this decision have been created by the operation of the very laws in question.

Another related objection would be that a woman "consents" to all the potential reproductive consequences of sex at the moment she has sex, and therefore that anti-abortion laws compel nothing because "compulsion" presupposes the absence of consent. But, of course, in the act of having sex women do not necessarily consent to bear a child in any meaningful sense of the word "consent." Someone might insist that women *assume the risk* of child-bearing by having sex. This position would at least not be guilty of hiding its normative premises behind a specious concept of consent. These normative premises, however, are either absurd — like saying one assumes the risk of being hit by a car when one goes out in the street, in order to justify a law banning the victims of such accidents from seeking medical assistance — or else derive from a moral view of sexuality — which, perceiving some inherent sinfulness or self-indulgence in such conduct, considers it appropriate to saddle women with the consequences — that need not detain us.

Finally, it should be emphasized that I am not here dealing with the objection that a fetus is a human being and therefore that anti-abortion laws *justifiably* compel all that I have said they compel. Quite clearly, if one believes that a fetus is a human being, then abortion is tantamount to murder. I cannot attempt here to state fully a position on the human status of the fetus. I will say only this: whether the fetus is a "human being" is not a scientific question but a moral one. It is not an objective question that must precede our moral judgment but rather a conclusory proposition that *follows* the normative decision. (It is for this reason that there can be different answers to the question in the differing contexts of abortion, assault, inheritance, and so on, where the normative considerations vary.) Between the time when human gametes, prior to conception, are clearly not independent, rights-bearing individuals and the time when, after birth, they clearly are, there are stages at which no matter how complete our information about the fetus' development, the act of calling it a "human being" will inevitably be a matter of definition, not a matter of fact. This act of definition will entail moral and political judgments. The question of whether the fetus should be considered a "human being" *depends upon* all the moral and political issues discussed in the text; it cannot precede or dispose of these issues, as is commonly believed.

²⁰⁵ *See Pierce*, 268 U.S. at 535 ("The child is not the mere creature of the state.").

ization and the undermining of independence are also critically implicated in the abortion context. Women forced to bear children are compelled to devote both body and mind to their children. Many will, moreover, be thrown into positions of economic dependency from which it may be difficult ever to escape. Finally, all will be, by the act of reproduction itself, involuntarily drafted into the service of the state, the first requirement of which is the reproduction of its populace.

Thus it is difficult to imagine a single proscription with a greater capacity to shape lives into singular, normalized, functional molds than the prohibition of abortions. Even if the propensity of anti-abortion laws to exert power over the body and to instrumentalize women is discounted, it remains the case that such laws radically and affirmatively redirect women's lives. Indeed it is difficult to conceive of a particular legal prohibition with a more total effect on the life and future of the one enjoined. It is no exaggeration to say that mandatory childbearing is a totalitarian intervention into a woman's life. With regard to the occupation and direction of lives, the positive ramifications of anti-abortion laws are unparalleled. *Roe v. Wade* was, in this view, correctly decided.

Griswold is explicable along the same lines. At least at the time it was decided, when abortion was still generally prohibited, the ban on contraception was equivalent in its positive aspect to enforced child-bearing. The ban ensured, moreover, that sex would not only be a matter of individuals' pleasure; or rather it put individuals' sexual desire and sexual pleasure to use. At the same time, it operated within a normative regimen of sexual relations leading from chastity straight to marriage, which, no matter how beneficent its effects, stands as one of the clearest forms of social standardization possible. *Griswold* too is readily understandable in the terms we are developing here.

2. *Interracial Marriage*. — Explaining *Loving v. Virginia*²⁰⁶ according to an anti-totalitarian principle is relatively straightforward. The question is not, as the Court framed it,²⁰⁷ whether one has the right to marry whomever one chooses. Nor is it, except in conclusion, whether one has the right to marry a person with another skin color. The question is whether the state has the right to try to keep the races "pure." That is the plain, productive effect of miscegenation laws, to which our analysis would be directed.

The standardizing effect of miscegenation laws could not be clearer. They are calculated to segregate and hence to rigidify racial divisions in communities, cultural institutions, and various practices of everyday life. They drive individuals into invidiously differentiated

²⁰⁶ 388 U.S. 1 (1967).

²⁰⁷ See *id.* at 2.

racial identities and normalize the permissible relations between the "superior" and "inferior" groups thus defined. Furthermore, anti-miscegenation laws work on our bodies at a level even deeper perhaps than sexual pleasure: they work on our "blood," looking ultimately to the production of untainted, lily-white issue. Here also, through the enforced creation of distinct genetic types to be raised in equally distinct communities, such laws predispose and form individuals' lives from within.

Eugenics is a totalitarian project; nowhere are the possibilities for creating standardized individuals so clear. The real point of *Loving v. Virginia* is that substantial state direction of the production of children cannot be permitted. Yet even if *Loving* is considered solely from the point of view of a person compelled to marry within his own race, the degree to which such a person's life is taken over, directed, and standardized against his will is sufficient to render the *Loving* decision completely consistent with the principles developed here.

3. *Residential Occupation Regulations*. — In *Moore v. City of East Cleveland*,²⁰⁸ as described earlier,²⁰⁹ the Court struck down a law that limited occupancy of dwellings to members of an immediate family. The law in question here also had profound affirmative consequences, dictating the environment in which lives would be lived and children would be raised. Indeed, the Court in *Moore* specifically stated that the law would effect a "standardization" of lives that it considered unacceptable.²¹⁰

The structure of institutions and relations that form the home are without question among the most fundamental with respect to the formation of identity and character — not only of individuals, but also of the different cultures within our society. Extended families, for example, are often said to play a particularly important role in the homes of Black and Asian communities.²¹¹ Laws regulating who may and may not live in the home according to a single, narrow conception plainly have the effect of shaping diverse individuals and cultures into a particular mold. The holding in *Moore* is perfectly consistent with an anti-totalitarian conception of the right to privacy.

D. Distinctions

Thus laws against abortion, interracial marriage, non-nuclear family residences, and private education all involve a peculiar form of

²⁰⁸ 431 U.S. 494 (1977) (plurality opinion).

²⁰⁹ See *supra* p. 746.

²¹⁰ 431 U.S. at 506.

²¹¹ See, e.g., *Leong v. Takasaki*, 55 Haw. 398, 410–11, 520 P.2d 758, 766 (1974) (Asian and Hawaiian families); Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 927 n.231 (1984) (black families).

obedience that reaches far beyond mere abstention from the particular proscribed act. It is a form of obedience in which the life of the person forced to obey is thereafter substantially filled up and informed by the living, institutional consequences of obedience. The person finds himself in a new and sharply-defined, but also broadly encompassing institutional role. Because of their affirmative direction of individuals' lives, these roles — whether as mother, spouse, student or family member — have profoundly formative effects on identity and character.

This attribute of the laws discussed above distinguishes them from other proscriptions of unquestionable constitutional validity that might otherwise appear to fall within the ambit of the principles elaborated here. Consider laws against murder. Are such laws not “standardizing” in that they compel all of us to be non-murderers? Do they not operate “on our bodies” in that they work by forbidding us, for example, to pick up a knife and use it in a certain way? And do they not “instrumentalize” us by requiring us to serve the state’s interests insofar as we are made thereby to refrain from causing harm to society at large?

Every law could be called “standardizing” to the extent that it directs all of us to follow a particular command; every law could be said to operate “on the body” to the extent that it impinges upon some physical acts; and every law could be said to make us serve some social end. But this is not the sort of standardization that we have been discussing. When a person obeys the law against murder, or almost any other law, his life is constrained but not usually informed or taken over to any substantial degree with a set of new activities and concerns. He is not thrust into a set of new institutions or relations. The category of “non-murderer” is essentially a formal one; it is not a defined role or identity with substantial, affirmative, institutionalized functions. And although a person can refrain from murder only by refraining from certain physical actions, his body is in no affirmative way taken over or put to use.

Laws against murder foreclose an avenue; they do not harness us to a given seat and direct us down a single, regulated road. This formulation is not so much a conclusion from logic as from practical, material realities. One may always reformulate propositions to state negatives as positives. Refraining from murder, however, does not fill up one’s life in the same way as does bearing a child, attending public school, living with only one’s immediate family, or marrying only within one’s race. Forcing a person to do these latter things goes much further in thrusting him into socially defined, particularized practices and institutions.

This distinction between “negative” and “affirmative” effects of legal rules will no doubt be greeted with skepticism. Yet — to repeat the point — the distinction is not a matter of propositional logic; it is

essentially normative. Whether the obligation not to murder is called a negative or affirmative duty makes no difference. The question is the degree to which, and the ways in which, the law informs, shapes, directs, and occupies the actual day-to-day activities of the persons concerned. Power may be understood and experienced as a purely prohibitory force acting upon essentially independent individual lives; it may also, however, appear and act as a force producing those lives from the inside.

The same negative-affirmative distinction directly parallels the essential difference between the anti-totalitarian right to privacy elaborated here and the personhood version of that right. Formulated propositionally, the two principles seem almost like corollaries. The anti-totalitarian right to privacy, it might be said, prevents the state from imposing on individuals a defined identity, whereas the personhood right to privacy ensures that individuals are free to define their own identities. Is the anti-totalitarian theory of privacy nothing more in reality than a restatement of the personhood idea from another angle?

On the contrary: first, when personhood speaks of the "freedom to define oneself," it speaks for the most part of a chimera. We are all so powerfully influenced by the institutions within which we are raised that it is probably impossible, both psychologically and epistemologically, to speak of defining one's own identity. The point is not to save for the individual an abstract and chimerical right of defining himself; the point is to prevent the state from taking over, or taking undue advantage of, those processes by which individuals are defined in order to produce overly standardized, functional citizens.

Second, because personhood concentrates on the fundamentality of the act or decision at stake in a given case — whether to have a child, whom to marry, and so on — it will produce a different analysis and different results from the anti-totalitarian principle. Consider, for example, the so-called "right to die" — the right to be disconnected from artificial means of life-support — which a number of courts have held to be included in the right to privacy.²¹² The current doctrinal difficulty here, for personhood as well as for any form of prevailing privacy analysis, is to distinguish persons seeking to disconnect life-support machinery from "ordinary" suicides.²¹³ If the decision to live

²¹² See, e.g., *Rasmussen v. Fleming*, 154 Ariz. 207, 214–15, 741 P.2d 674, 682 (1987); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297, 301 (1986); *Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359, 360 (Fla. 1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 739, 370 N.E.2d 417, 424 (1977); *In re Quinlan*, 70 N.J. 10, 41–42, 355 A.2d 647, 664 (1976), *cert. denied*, 429 U.S. 922 (1977). *But see* Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375 (1988) (arguing that focusing on patients' rights is problematic and that courts should recognize a presumptive right of families to exercise discretion over treatment decisions).

²¹³ To be sure, a proponent of the right to die could argue that the right should embrace

or die is said to be so fundamental to a person that the state may not make it for him, then it is difficult to see on what plausible ground the right to make this decision could be granted to those on life-support but denied to all other individuals.²¹⁴

The principles developed here, however, suggest an answer to this painful riddle. The cases of "ordinary" suicides and of right-to-die patients look identical only from the formulaic perspective of an analysis that concentrates on the conduct proscribed — that is, the decision to end one's life, which is the same in both instances. With regard to what is produced, the two cases are utterly dissimilar. For right-to-die patients, being forced to live is in fact to be forced into a particular, all-consuming, totally dependent, and indeed rigidly standardized life: the life of one confined to a hospital bed, attached to medical machinery, and tended to by medical professionals. It is a life almost totally occupied. The person's body is, moreover, so far expropriated from his own will, supposing that he seeks to die, that the most elemental acts of existence — such as breathing, digesting, and circulating blood — are forced upon him by an external agency.

In contrast, the "ordinary" suicide suffers no such total occupation of his life or affirmative use of his body. An avenue of escape is foreclosed to him, and indeed he may suffer desperate unhappiness from being forced to live. The prohibition of suicide, however, does not, as a rule, direct lives into a particular, narrowly confined course.

suicide. However, most courts and legislatures that have favored the right to die have not been willing to accept this position. See, e.g., *Rasmussen*, 154 Ariz. at 218, 741 P.2d at 685 (upholding the right to refuse life-sustaining treatment, but distinguishing suicide); *Bowvia*, 179 Cal. App. 3d at 1145, 225 Cal. Rptr. at 306 (same); *Satz*, 362 So. 2d at 162-63 (same); *Saikewicz*, 373 Mass. at 743 n.11, 370 N.E.2d at 426 n.11 (same); *In re Gardner*, 534 A.2d 947, 955-56 (Me. 1987) (same); *In re Conroy*, 98 N.J. 321, 350-51, 486 A.2d 1209, 1224 (1985) (same); *In re Colyer*, 99 Wash. 2d 114, 123, 660 P.2d 738, 743 (1983) (en banc) (same); Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 354 & n.42 (1986) (observing that several states with right-to-die statutes also retain their statutes criminalizing the assistance of suicide).

²¹⁴ The courts that have endeavored to differentiate the right to die from suicide have employed distinctions that are not altogether persuasive. It has been said, for example, that declining medical treatment "may not properly be viewed" as attempted suicide because "if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury." *Conroy*, 98 N.J. at 350-51, 486 A.2d at 1224. This is rather like saying that throwing oneself from a high window is not attempted suicide because if death were to occur, it would be caused primarily by the underlying pavement rather than the act of defenestration. Courts also frequently say that patients declining treatment may not have a "specific intent to die"; "rather, they may fervently wish to live, but to do so free of unwanted medical technology, surgery, or drugs, and without protracted suffering." *Id.*, 98 N.J. at 351, 486 A.2d at 1224; see also *Gardner*, 534 A.2d at 955-56; *Saikewicz*, 373 Mass. at 743 n.11, 370 N.E.2d at 426 n.11. At bottom this is only to say that the patient, if he could escape his actual condition, would have no wish to die. No doubt healthy persons seeking to commit suicide might also, if they could escape their actual condition, have no wish to die. They too may "fervently wish to live, but to do so . . . without protracted suffering."

It does not produce specific, affirmative consequences — for example, remaining in a hospital bed connected to life-sustaining machinery — that largely direct the remainder of a person's life. Although a law barring suicide may or may not be a good law in general, it has obvious, special consequences when applied in right-to-die cases — consequences that are not lost on the privacy analysis that I have suggested.

For another, more difficult illustration of the doctrinal differences between a personhood account of privacy and the anti-totalitarian principle advanced here, imagine a law passed in the next century limiting families to two or three children each. If, as personhood would have it, the decision whether to bear a child is fundamental and must be protected, then this case is doctrinally straightforward. The hypothesized law restricts this “fundamental right” in precisely the same way that a law forbidding abortions does, and therefore, from personhood's perspective, it equally impinges on the right to privacy.²¹⁵ Personhood — and any other mode of privacy analysis that concentrates on the fundamentality of the proscribed decision — must look on such a law as doctrinally *identical* to a law forbidding abortion: both laws deprive the individual of the “fundamental right” to make her child-bearing decisions for herself.

Yet the two laws are in fact enormously different in their real, material effect on individuals' lives, and we should not be misled by their formal similarities. Recall our grounds for supporting *Roe*. Compelled child-bearing occupies a woman's life in the largest and subtlest respects, puts her body to use in the most extreme and intrusive ways, and forces upon her a well-defined and, to some degree, dependent role or identity. These factors are not present in a law prohibiting one from having a third or fourth child. The person's life is constrained in a way that might be deeply important to her, but not affirmatively taken over and directed as a result of the law.

To be sure, there is a disturbing standardization potentially effected by a law limiting families to two children. In the absence of a compelling state need, we might well feel that such a law was an outrageous governmental intrusion into our lives. Indeed, even on the anti-totalitarian principles developed here, there is an argument

²¹⁵ This conclusion would not — even in personhood's view — necessarily require striking down our hypothetical law, for the state that passed this law might conceivably be able to show that its statute was necessary to accomplish a compelling state objective. The right to privacy, like other constitutional rights, is not absolute. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (permitting regulation of abortion during the second trimester of pregnancy because of the state's interest in preserving the woman's health and permitting prohibitions of abortion during the third trimester because of the state's interest in the life of the fetus). The Court has made clear, however, that a state interest must be “compelling” in order to justify restriction on conduct otherwise within privacy's ambit. *See id.* at 155 (quoting *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969)); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977).

that the law should be struck down.²¹⁶ There is, however, clearly a chasm between a law (let us vary the comparison somewhat) *requiring* persons to have at least two children and a law *forbidding* them to have more than two children. The former enlists, directs, and takes over individuals' lives far more than does the latter. Yet because both laws equally impinge on the child-bearing decision, both would receive doctrinally identical treatment from a personhood account of privacy. According to our principles, however, whereas the former law would plainly violate the right to privacy, the latter law would at least present a very different question.

There remains a third and final differentiation to be made between personhood and the right to privacy as understood here. To speak of resisting state-imposed identities — as we have done — does not commit privacy to personhood's central premise: that each individual's defining his identity is an act of such value that it is of constitutional importance. Indeed the right to privacy as developed here may suggest a repudiation of personal identity altogether.

The concept of personal identity — that sense of a unitary, atomic self that we all tend to consider ourselves to "have" — is complex and difficult. It has an almost theological or metaphysical aspect, as if one's "identity" were a kind of hypostatic quantity underlying the multiplicity of his vastly different relations in the world and the mutability of his nature over time. The concept borders on hypostatization in the other sense as well, as if it were attempting to concretize under the name of "personhood" or "selfhood" something that had no existence without such reification. This conception of a unitary personal identity has been radically challenged again and again this century in various fields, including psychoanalysis,²¹⁷ literature,²¹⁸ and — most recently and surprisingly — analytic philoso-

²¹⁶ Cf. *Griswold v. Connecticut*, 381 U.S. 479, 496–97 (1965) (Goldberg, J., concurring) (hypothesizing a law "decree[ing] that all husbands and wives must be sterilized after two children have been born to them" and calling it "shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size").

²¹⁷ One of Freud's great theoretical innovations was his tripartite conception of the mind, in which the ego — the "I" of our apperception — is but one of the three strata of subjectivity within each individual. See generally S. FREUD, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 51–71 (J. Strachey trans. 1965) (describing the ego, the id, and the superego). Moreover, Freud advanced an almost archaeological view of the preservation of past psychological structures within individuals' minds, introducing the concept of fundamental temporal disunity into modern psychology as well. See, e.g., S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 15–20 (J. Strachey trans. 1961).

²¹⁸ It is a central theme of Proust's *Remembrance of Things Past* to disabuse us of the illusion of having a singular identity over time, in order (perhaps) for us to regain our past in an even more essential way. See, e.g., 3 M. PROUST, *REMEMBRANCE OF THINGS PAST* 499 (C. Moncrieff, T. Kilmartin & A. Mayor trans. 1981) ("In a composite mass, the elements may one by one, without our noticing it, be replaced by others, which others again eliminate, until in the

phy.²¹⁹ Personhood, reflecting an essentially liberal philosophy, is obliged to embrace and valorize the idea of a unitary personal identity; the right to privacy is not.

Nor, however, does privacy on our terms embrace a republican or communitarian conception of a supra-individual identity. To the contrary, it suggests a critique of republicanism as much as of liberalism, for both of these rest on the concept of a unitary identity. The republicans aspire to a well-defined and self-constructed identity as much as do the liberals; the difference is between a somewhat inchoate political identity on the one hand and an equally inchoate individual identity on the other.

It is for this reason that republicanism is always doomed to confront on the political level the problem that liberalism has never been able to resolve on the individual level: the conflict of identity with identity. The irresolvable clash of right against right, which liberalism is said to produce, finds its exact counterpart in the clash of differing visions of the good in the face of which republicanism eventually runs aground. For the same reason, the dialogue between republicanism and liberalism must always end in a perfect impasse: the antinomy between "social" and "individual" identity.

Liberalism and republicanism are not the diametrically opposed conceptions of right and good that they purport to be, but rather two sides of a single coin. Both political visions reflect the pursuit of self — that obscure desideratum forever beckoning, forever receding, and forever fragmenting before its pursuer. But this self-searching is at the same time a self-contradiction. The very aspiration toward a self that defines or governs itself — the goal of both conceptions — presupposes a self, or at least a "moment" of selfhood, that remains in its active essence disunified, undefined and ungoverned — and

end a change has been brought about which it would be impossible to conceive if we were a single person." In the seventh and final book, Proust writes:

Like the dress which a woman was wearing when we saw her for the first time, [books kept from childhood] would help me to rediscover the love that I then had, the beauty on which I have since superimposed so many less and less loved images, they would help me to find that first image again, even though I am no longer the 'I' who first beheld it, even though I must make way for the 'I' that I then was if that 'I' summons the thing that it once knew and that the 'I' of to-day does not know.

Id. at 923.

²¹⁹ Derek Parfit has made the most powerful arguments within analytic philosophy against the concept of a unitary "I" persisting over time. See generally D. PARFIT, *REASONS AND PERSONS* (1984) (looking to psychological connectedness, such as the degree of similarity of a person's psychological characteristics at different points in time, to reidentify a person and to distinguish among selves over time). For others' attempts to draw legal and moral conclusions from Parfit's views, see, for example, Parfit, *Later Selves and Moral Principles*, in *PHILOSOPHY AND PERSONAL RELATIONS* 137 (A. Montefiore ed. 1973); Rhoden, cited above in note 212, at 412-14; and Note, *The Limits of State Intervention: Personal Identity and Ultra-Risky Actions*, 85 *YALE L.J.* 826, 835-42 (1976).

hence free to define or govern itself. The liberal self that defines, in order to be free to continue defining itself in the future, must always partially escape its own definition, and a republican people in the multiplicity of their governedness will always be distinct from the common "self" that governs. Alienation — the hollow echo within the self that governs itself — is the irrevocable flaw at the core of both liberalism and republicanism in practice as well as in theory. The common weakness of the two philosophies lies in their inability to come to terms with the multiplicity within the "self" that they seek so sharply to define.

Republicanism has always assumed that the only alternative to liberalism's individual self was a resort to a "larger" self articulated in terms of political categories. In this assumption the possibility of "smaller" selves has been overlooked. Transcending the impasse between liberalism and republicanism requires a conception responsive simultaneously to "sub-political" bodies (and *not* "communities") within the body politic and to "sub-individuals" (and *not* "roles") within the individual body.

It is no coincidence that liberals and republicans each see the others' vision of freedom as a form of self-subjugation. At the root of this self-subjugation in both conceptions is the exaltation of self-definition: the impulse to locate those institutions or qualities "central to our identity" in which our truth is revealed and to which we must therefore be true. From this impulse arises both the reification of the self and the suppression of the self that each theory correctly attributes to the other. The right to privacy as described here embraces neither alternative.

E. Homosexuality

Finally, let us reconsider *Bowers v. Hardwick*²²⁰ in our new terms. We should perhaps have done so earlier when discussing cases already decided, but I have left *Hardwick* for the end because it is the one case with which our new principle for privacy conflicts.

The form of the analysis will by now be familiar to the reader. The privacy argument against laws forbidding homosexual sex cannot be rested on the claim that they deprive certain persons of something deeply important to them, crucial to their happiness, or even central to their identity. Nor can such laws be attacked on the ground that homosexual sex causes no one any harm, or that laws must not impose on individuals any majoritarian values impinging on their autonomy. We have already seen at length the deficiencies in these arguments.

Yet laws against homosexual sex have an effect that most laws do not. They forceably channel certain individuals — supposing the law

²²⁰ 478 U.S. 186 (1986).

is obeyed²²¹ — into a network of social institutions and relations that will occupy their lives to a substantial degree.

Most fundamentally, the prohibition against homosexual sex channels individuals' sexual desires into *reproductive* outlets. Although the prohibition does not, like the law against abortions, produce as an imminent consequence compulsory child-bearing, it nonetheless forcibly directs individuals into the pathways of reproductive sexuality, rather than the socially "unproductive" realm of homosexuality. These pathways are further guided, in our society, into particular institutional orbits, chief among which are the nuclear family and the constellation of practices surrounding a heterosexuality that is defined in conscious contradistinction to homosexuality. Indeed it is difficult to separate our society's inculcation of a heterosexual identity from the simultaneous inculcation of a dichotomized complementarity of roles to be borne by men and women. Homosexual couples by necessity throw into question the allocation of specific functions — whether professional, personal, or emotional — between the sexes. It is this aspect of the ban on homosexuality — its central role in the maintenance of institutionalized sexual identities and normalized reproductive relations — that have made its *affirmative* or *formative* consequences, as well as the reaction against these consequences, so powerful a force in modern society.

The use of sexual practices to define and inculcate social identities dates back to antiquity.²²² In our time, the use of the heterosexual/homosexual axis has achieved a paramount normalizing significance. The proscription is against homosexual sex; the products are lives forced into relations with the opposite sex that substantially direct individuals' roles in society and a large part of their everyday existence.

It is no answer to say that an individual interested in homosexual relations might simply remain celibate. The living force of the law is at issue, not its logical form, and the real force of anti-homosexual laws, if obeyed, is that they enlist and redirect physical and emotional desires that we do not expect people to suppress. Indeed, it is precisely the propensity of such prohibitions to operate on and put to use an

²²¹ The analysis assumes obedience for the following reason. It is tempting to analyze and criticize the laws we have been considering here in terms of their propensity to lead to disobedience. That is, anti-abortion laws (it could be said) only lead to back-alley operations; laws forbidding homosexual sex lead only to closet homosexuality; and so forth. All laws, however, are disobeyed. It could equally be said that theft laws only lead to back-alley muggings. We must therefore forgo the advantage of pointing out the hypocrisy of anti-homosexual laws or of condemning them because they merely result in persons doing the proscribed thing under the conditions of illicitness.

²²² See generally M. FOUCAULT, *THE USE OF PLEASURE*, *supra* note 144.

individual's most elemental bodily faculties that gives the exertion of power in this area such formative force. We tend to analyze these proscriptions today in terms of the propriety of punishing people for homosexual conduct. We tend, in measuring their morality, to form an image of either the homosexual imprisoned or the homosexual forced to give up his sexual acts. We ought, however, to give up the image of "the homosexual" in the first place and measure the law instead in terms of its creation of heterosexuals (and, in a different way, of homosexuals too) within the standardized parameters of a state-regulated identity.

It should be emphasized that conceiving of the right to privacy as protecting homosexuality for the reasons just discussed is not at all to convert the right to privacy into a general protection of "sexual intimacy," as Justice Blackmun suggested.²²³ The point is this: child-bearing, marriage, and the assumption of a specific sexual identity are undertakings that go on for years, define roles, direct activities, operate on or even create intense emotional relations, enlist the body, inform values, and in sum substantially shape the totality of a person's

²²³ See *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting). Consider, for example, intercourse between unmarried persons, adultery, and incest. As forms of "sexual intimacy," all such conduct must fall into the category of presumptively protected activity in a personhood view (and defending the prohibitions of some of this conduct would require personhood to accept certain distinctions the validity of which has been challenged above, see *supra* notes 109-10). In the view elaborated here, such conduct is protected only if proscribing it has the effect of affirmatively directing individuals' lives along highly particularized lines. Thus the analysis will differ among these various forms of sexual conduct and may even differ with respect to a given form of sexual conduct depending on the other laws in effect in the jurisdiction.

As to a prohibition against intercourse between unmarried persons, it seems clear that the right to privacy as I have sought to explain it would preclude such a law, for the reason that the law would compel individuals — in the sense of compulsion that I have used throughout — to marry. This, however salutary, plainly meets our criterion of forcibly inserting lives into a sharply defined and life-occupying institution. As to adultery, the case is much less clear. In the absence of an enforced law proscribing sex between unmarried persons, a state that barred adultery would not be standardizing its citizens into the single mold of monogamous marriage. Assuming the availability of divorce without undue obstacles, the state would not even be compelling married individuals to remain within the confines of marriage. In these circumstances, an anti-adultery law seems chiefly to have the effect of permitting individuals to enter a relationship in which they are legally bound to their monogamy as long as they choose to remain in such a relationship.

Finally, prohibiting incest does not seem to present a serious difficulty for the anti-totalitarian view of privacy, in the way that it does for a personhood view of privacy. Proscribing incest, in the personhood view, doubtless deprives individuals of the freedom to make a decision potentially central to their identity. Yet it is a very narrow path that is being excluded, rather than a narrow path being imposed; no particularized, affirmative consequences flow from this prohibition. Like the category of non-murderer, the category of non-incestuous person is essentially a formal one, lacking any well-defined institutional parameters. For this reason, the right to privacy understood as a right not to have the totality of one's life directed and occupied by the state would not be contravened.

daily life and consciousness. Laws that force such undertakings on individuals may properly be called "totalitarian," and the right to privacy exists to protect against them.

IV. CONCLUSION: THE CONSTITUTIONAL GROUNDING OF THE RIGHT TO PRIVACY

A. *Privacy and Lochner*

The right to privacy, in its constitutional incarnation, was discovered in the "penumbras" and "emanations" of other constitutional guarantees.²²⁴ The liberty of contract, in its day, was invoked as a matter of "substantive due process."²²⁵ A devious irony is at work in these phrases, as if a consciousness of the charade had inadvertently crept into the judicial language itself, announcing the one doctrine as mystification and the other as oxymoron. Yet what drove privacy into the penumbras, it should be recalled, was a perceived need to differentiate the privacy doctrine from the language of substantive due process.²²⁶ Unfortunately, this insecurity on privacy's part — an identity complex no doubt — resulted in the very thing feared; by resorting to shadows, the right to privacy has simply invited critics to expose it — and to brand it, of course, with the scarlet letter of *Lochnerism*.²²⁷

A guilty conscience, however, is not necessarily proof of the crime. To mock Justice Douglas' conjuring — as easy as that may be — is plainly insufficient if the goal is to prove that, beneath the magic words, privacy is *Lochner* all over again. There is too much implicit constitutional law for that. The freedom of association, the requirement that legislation be rational, the application of much of the Bill of Rights to the states, and, most fundamentally, the disability of the

²²⁴ See *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965).

²²⁵ See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) (stating that a person's "general right to make a contract in relation to his business" is protected by the due process clause of the fourteenth amendment); see also, e.g., *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."); *Twining v. New Jersey*, 211 U.S. 78, 110 (1908) ("We are not here concerned with the effect of due process in restraining substantive laws . . ."); *Chicago, Burlington, & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 235 (1897) (holding that the due process clause of the fourteenth amendment prohibited uncompensated takings) ("In determining what is due process of law regard must be had to substance, not to form.").

²²⁶ See *Griswold*, 381 U.S. at 482 (expressly repudiating the substantive due process analysis of *Lochner* and its progeny).

²²⁷ See, e.g., Ely, *supra* note 112, at 937–43. Indeed from the very first, *Griswold* drew forth the criticism that the decision was in reality a return to substantive due process. See *Griswold*, 381 U.S. at 517 n.10 (Black, J., dissenting); *id.* at 528 (Stewart, J., dissenting).

political branches to be the final arbiters of the scope of their own powers are all principles of implicit constitutional law, but they are not all *Lochner*.

Thus privacy's critics are obliged to argue that within the entire field of implicit constitutional law, the privacy doctrine and *Lochner* share some common flaw. For privacy's proponents, on the other hand, the point is to show what distinguishes privacy jurisprudence from the *Lochner* line of cases, and to show in the process, without resort to penumbras or emanations, what gives privacy its constitutional status.

One way to distinguish privacy from *Lochner* is to say that the overruled *Lochner* era cases involved economic regulations.²²⁸ The *Lochner* error, it might be said, was the failure to recognize that the Constitution does not enact any particular economic theory; thus the repudiation of *Lochner* means only that courts cannot sit as superlegislatures overseeing state or federal economic regulation. In the privacy cases, the courts do no such thing.

This distinction betrays a superficial understanding of both *Lochner* and privacy. The *Lochner* Court almost certainly did not understand itself to be sitting as a superlegislature for economic regulation, protecting American commerce or prosperity. In its own eyes, the *Lochner* Court was not regulating economics; it was protecting liberty — the liberty of contract. That a man was free to do as he pleased with his own property — that is, property in which he had a “vested right” — was axiomatic in the thinking of many at that time.²²⁹ From this point of view, *Lochner* did not involve mere “economics” but rather the most fundamental liberties of man against the state.

Some will reply, I suppose, that the *Lochner* Court's conception of liberty or of its own decisionmaking is irrelevant. The fact is, they will say, that the *Lochner* decisions *did* involve economic matters. Even if liberty was at issue as well, the lesson remains that liberty in the economic realm is simply not to be the subject of implicit constitutional law.

Here, however, privacy's would-be proponents are revealing a parallel misunderstanding of privacy doctrine itself. They are perhaps imagining that privacy doctrine is limited to purely “private” — perhaps simply sexual — matters. In fact, the right to privacy is fully applicable to the economic realm. Suppose, for example, that a law were passed for the purpose of rationalizing the economy, with unimpeachable empirical evidence backing up its intended efficiencies, that subjected persons at an early age to a complex battery of exams,

²²⁸ See, e.g., *Griswold*, 381 U.S. at 482.

²²⁹ See generally E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 58–115 (1948) (describing the rise of the antebellum conception of liberty and its focus on property rights).

the results of which were used to assign each individual to the most appropriate educational track and the most productive occupation. It seems certain to me that the right to privacy — clearly on an anti-totalitarian principle, but even on a personhood principle — would not permit the state to dictate its citizens' economic occupations. Our unsophisticated privacy proponents, conceding this result, might now wish to say: "But that's not economic regulation; it's a matter of protecting liberty." We have just seen, however, that the very same could have been said on behalf of *Lochner*. Thus the distinction between economic and non-economic matters cannot serve us here.

Instead consider the following: the rights protected by the *Lochner* doctrine were pre-political. Vested property rights and the liberty of contract did not have to be explicitly protected by the Constitution because, in the Lochnerian view, they existed outside the Constitution. They *pre-existed* the Constitution. Indeed, these rights antedated the formation of society itself. Property was the reason why men instituted government, and contract was the means by which they did so.²³⁰

There is nothing pre-political in the right to privacy. If the kind of creeping totalitarianism that I have described is a danger to us, it is so solely because of our commitment to democracy — to a set of political values. The right to privacy, as I have sought to elucidate it, became a right only at the moment when we constituted ourselves as a democratic polity. For this reason the right to privacy is not, like the rights protected under *Lochner*, extraneous to the Constitution. It does not purport to antedate the Constitution or to arise from a source, such as the "social contract," superior in authority to the Constitution. The right to privacy is a constitutional right because the Constitution is the document that establishes democracy in this country.

The right to privacy is a political doctrine. It does not exist because individuals have a sphere of "private" life with which the state has nothing to do.²³¹ The state has everything to do with our private life; and the freedom that privacy protects equally extends, as

²³⁰ This formulation refers to the classical liberal description of the emergence of civil society out of the state of nature. See T. HOBBS, *LEVIATHAN* ch. XVII, at 173–77 (J. Plamenatz ed. 1963) (1st ed. 1651); J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* chs. VIII–IX, at 49–66 (J. Gough rev. ed. 1976) (3d ed. 1698); see also *Chicago, Burlington, & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 238 (1897) (holding that due process required states to compensate for takings, and approvingly describing a precedent in which "it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain"); L. TRIBE, *supra* note 2, § 8-4, at 571 (observing that the *Lochner* decisions were animated by a view of the proper role of government as protecting "natural rights of property and contract").

²³¹ See, e.g., Richards, *supra* note 71, at 843–45 (arguing that the privacy doctrine exists to protect the "essential moral spheres" of one's "private life").

we have seen, into "public" as well as "private" matters. The right to privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives.

B. Totalitarianism and Constitutional Interpretation

A "transcendental" doctrine of constitutional law, in the Kantian sense of that word, would be a doctrine necessary to the very possibility of the particular form of government constituted in a given society. Under our form of government, constitutional democracy, there are, I believe, two such doctrines.

The first derives from the principle that the meaning of constitutional protections may not be finally established by those governmental actors against whom those protections are chiefly directed. If it were, the Constitution would in reality be without meaning. Its protections, in form unchanged, would in fact be wholly illusory. This is the principle on which the doctrine of *Marbury v. Madison* rests.

Accountability to the constitutional text, however, is but one of two necessary modes by which the state's power is ultimately limited in our form of government. The other is accountability to the people. Yet just as the political branches, in the absence of *Marbury*, could bend the Constitution into a serviceable and pliant shape, so government, in the absence of a privacy doctrine, could similarly shape the lives of its citizens. The very possibility of accountability to a people presupposes that the bodies and minds of the citizenry are not to be too totally conditioned by the state that the citizenry is meant to be governing. If they were, self-government, although it might continue to exist in form, would in fact be wholly illusory.

People do not meaningfully govern themselves if their lives are subtly but pervasively molded into standard, rigid, normalized roles. They simply reproduce themselves and their social institutions. A people may of course choose to reproduce their state; but they must be free in order to choose to do so. At a certain point, state control over the quotidian, material aspects of individuals' lives — even where the people have democratically imposed such control themselves — deprives them of this freedom. Thus, the second transcendental doctrine of our constitutional law is given by the anti-totalitarian principle with which I have tried to explain the right to privacy.

It will likely be replied that the laws invalidated by the right to privacy, as I have developed it, have no such thoroughgoing conditioning effects that would deprive people of the ability to exercise their democratic freedom. Laws against abortion, it will be said, in no way impede women from exercising their suffrage; nor do laws against homosexual sex impede homosexuals from doing the same.

To put things this way is similar to criticizing applications of the first amendment on the ground that proscribing a particular bit of speech will not genuinely threaten the democratic process or that permitting a particular governmental expression of faith will not genuinely establish religion. More than this, however, the laws implicated by the right to privacy do indeed have a discernible conditioning effect that should not be overlooked. The centuries-long prohibitions of contraception and abortion, precisely by assuring that women's lives would be substantially taken up with the functions of child-bearing, must have made it difficult, if not impossible, for many women to discover or to assert their political will and for men and women alike to reconceive women's societal role. Similarly, the prohibition of homosexual sex has contributed to our evolution into a society that looks upon "homosexuals" as a distinct species of person, as opposed to a society in which individuals have a less rigid sexual orientation. Hence, saying that *homosexuals* remain free to exercise their suffrage in an attempt to overturn anti-homosexual laws begs the question. A similar point could be made with respect to laws forbidding interracial marriage.

The same cannot be said, however, of the the laws struck down in the *Lochner* era, because these laws did not involve the forced, affirmative occupation and direction of individuals' lives. Modern *Lochner*ians may feel that minimum wage or maximum rent laws are an illegitimate taking of property;²³² they may even feel that such laws represent an outrageous deprivation of individual liberty. But these laws do not positively take over and redirect lives. They do not threaten forcibly to condition the totality of an individual's existence.

Finally, consider again our hypothetical law by which government would dictate the vocation of each individual. Imagine, for a moment, the unlikely but conceivable successes of such a law: the order it might produce, the sense of satisfaction each individual might obtain by knowing his place in society, the decrease in crime, and the nationwide gains in productivity. Despite all this, is there anyone who doubts that the Constitution must forbid such a law? The source of this "must," however, is far from clear. Perhaps one might invoke the thirteenth amendment or a right of "self-expression" embodied in the first amendment. But these gropings in the constitutional text would be disingenuous. It is the possibility of democracy itself that requires an anti-totalitarian principle.

In the eighteenth century, the Constitution applied almost exclusively to the federal government, and it was quite unclear to what

²³² See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 176-81 (1985) (arguing that rent control and land reform statutes are unconstitutional takings because they serve no public use).

extent the federal government would be able to operate directly on the daily lives of the citizenry. State governments were thought to be the chief holders of that power. It was, moreover, probably unthinkable at that time that governmental power could develop technologies and institutions of potentially total control over the shape and purposes of citizens' lives. Now the scope of federal legislative power has become clear; now the Constitution has come to be the protector of fundamental liberties against state governments as well; and now governmental power has so expanded that it affirmatively shapes our lives with the potential for total control. The effect of these developments has been to compel a new articulation — in the form of the right to privacy — of what is the most abecedarian tenet of self-government: that government must exist for the people, and the people must not become mere instruments of the state. This tenet necessitates, I have tried to show, a right to be let alone, if by "let alone" we understand the right not to have the course of one's life dictated by the state.