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Stephen J. Schnably

University of Miami School of Law, schnably@law.miami.edu

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BEYOND *GRISWOLD*: FOUCAULDIAN AND REPUBLICAN APPROACHES TO PRIVACY

Stephen J. Schnably*

I. INTRODUCTION

A. Griswold's *Ambiguities*

IF there is one image that lingers most from *Griswold v. Connecticut*,¹ it is the prospect of the police searching "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives"²—a prospect the Supreme Court decisively rejected. Doubtless the image derives some of its immediacy from its sheer repugnance.³ But its power also reflects the way that it epitomizes two ideas that have long characterized discussion of the constitutional protection of privacy. The first idea can be summed up under the rubric of "personhood," which has come to be the dominant conception of privacy.⁴ The second, at its broadest, concerns the role of the courts in elaborating fundamental social values.

Personhood carries with it a distinctive conception of private life as

* Associate Professor of Law, University of Miami Law School. I am grateful to Lili Levi and Marc Fajer for their insightful criticisms, suggestions, and encouragement. The article also profited from generous comments by Ken Casebeer, Mary Coombs, Steve Diamond, Michael Fischl, Lisa Iglesias, Jennifer Jaff, Martha Mahoney, Rob Rosen, Liz Schneider, and Steve Winter. Tucker Ronzetti gave useful suggestions and Luis Garcia provided able research assistance.

1. 381 U.S. 479 (1965).

2. *Id.* at 485 (Douglas, J.).

3. *See id.* at 486 (calling the prospect "repulsive").

4. In this respect, I follow Jed Rubenfeld's use of the term. *See* Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739 (1989) (the "reigning explanatory concept" of privacy has become that "[o]ur personhood must remain inviolate"). *See also, e.g.* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15 (2d ed. 1988); Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699; Fentiman, *Privacy and Personhood Revisited: A New Framework for Substitute Decisionmaking for the Incompetent, Incurably Ill Adult*, 57 GEO. WASH. L. REV. 801, 813-18 (1989); Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 41-44 (1976); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 216 (1986); *cf.* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 965 (1979) (privacy is concerned with "the central developmental task of becoming a person").

a haven from state power. In this view, our personal lives, particularly our explorations of sexuality, are the most important sites of individual self-realization.⁵ Justice Douglas's reference in *Griswold* to the marital bedroom as sacred resonates with this conception's sense of a close connection between private life and the discovery of the deepest truths about ourselves. Precisely because so much is at stake, moreover, individuals need protection from undue state interference. Thus, in *Griswold*, the Court set itself up as a shield between individual and state, leaving couples to explore their inner selves through shared intimacy free of governmental interference.⁶

Griswold's forceful declaration of a right to use contraceptives reflects the second aspect of constitutional privacy theories: the role of the courts in elaborating basic social values. *Griswold* can be taken to represent the Supreme Court's willingness to respond directly to reasoned arguments with a creative interpretation of the Constitution. In this reading, the Court's amenability to such interpretations rests in part on the assumption that there are certain widely held, fundamental values—such as a commitment to privacy—that define us as a society, and that have a discernible structure. Indeed, without that assumption, *Griswold's* reliance on penumbras would make little sense.⁷ The

5. Rubenfeld, *supra* note 4, at 770-71. See also, e.g., Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 280 (1977) ("This is the conceptual minimum of any notion of privacy: an autonomy sufficient to bar state intrusion, observation, or regulation of the harmless intimacies of personal identity. By any standard of intuition or analysis, those intimacies begin with the body and its sexuality."); Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 845 (1986) ("For many, much of the value of life is centered in the personal and ethical fulfillment of private life; moral independence in the conduct of that life is foundational in the lives of free people"); Richards, *supra* note 4, at 999-1009; L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 185 (1986) (suggesting that obscenity may pose particularly difficult issues for free speech because the law "cannot casually dismiss the claim . . . that sexual instincts . . . lie at the core of an individual's, and presumably a community of individuals', identity"); Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1176-78 (1974). See generally R. SENNETT, *THE FALL OF PUBLIC MAN: ON THE SOCIAL PSYCHOLOGY OF CAPITALISM* 3-27 (1977) (describing and criticizing conception of private life as arena of greatest personal authenticity and self-discovery).

6. Cf., e.g., Ortiz, *Privacy, Autonomy, and Consent*, 12 HARV. J.L. & PUB. POL'Y 91, 92 (1989) ("Like the related concept of property, privacy defines a sphere of individual dominion into which others cannot intrude without the individual's consent or some other sufficient justification.").

7. *Griswold*, 381 U.S. at 484 ("specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance"). See generally Greely, *A Footnote to "Penumbra" in Griswold v. Connecticut*, 6 CONST. COMMENTARY 251 (1989) (criticizing Justice Douglas's use of the term). Justice Goldberg's reliance on the ninth amendment would make equally little sense without such an assumption. See *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (asserting that determination of which rights are fundamental

Court's openness to a more creative role could also be taken to rest on a certain empathy with the burdens on those who were subject to the Connecticut statute.⁸ Without that empathy, the sense of horror embodied in Justice Douglas's rejection of police searches of marital bedrooms would be hard to fathom.

One way to look at *Griswold*, then, is as an emblem of the Court's commitment to protect from undue state intrusion what we as a society take to be the fundamental aspects of personal development and self-realization. It is, at the same time, a sign of the Court's willingness not only to respect particular socially defining values, but also to consider empathetically the more general structure underlying those values.

The significance of this understanding of *Griswold* can best be grasped by considering its implications for *Roe v. Wade*⁹ and *Bowers v. Hardwick*,¹⁰ the two most controversial developments in privacy law since 1965. It seems particularly appropriate to consider the three cases as a trilogy. Although *Griswold* was surely an important development in the emergence of the modern constitutional right of privacy, had it not been for *Roe* and *Bowers* it seems doubtful that we would regard it as sufficiently important in its own right to deserve sustained attention today.¹¹

under a ninth amendment inquiry will not turn simply on judges' personal values). Cf. *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting) (protection of married couple's right to contraceptives "emanates from the totality of the constitutional scheme under which we live"); Brief for Appellants at 79, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496) ("The Constitution nowhere refers to a right of privacy in express terms. But various provisions of the Constitution embody separate aspects of it. And the demands of modern life require that the composite of these specific protections be accorded the status of a recognized constitutional right.").

8. On the burdens created by the statute, see Roraback, *Griswold v. Connecticut: A Brief Case History*, 16 OHIO N.U.L. REV. 395, 396 (1989) (noting that the Connecticut statute resulted in the closing of Planned Parenthood clinics, and that consequently "[t]he persons most disadvantaged by the legal situation in Connecticut were poor women whose only sources of medical advice and service were public or private clinic facilities"). *Griswold*, it should be noted, represented more the possibility than the actuality of empathy insofar as the suffering of poor women was concerned. See Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915 (1990). On the role of empathy in legal decision-making generally, see Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987). Cf. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2277-79 (1989) (concerning empathy in "transformative argument").

9. 410 U.S. 113 (1973).

10. 478 U.S. 186 (1986).

11. Although it has been criticized by some conservative academics, see, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7-11 (1971); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 190-96, *Griswold* generated nothing like the political controversy that *Roe* has generated for close to two decades, or that *Bowers* would likely have generated if then-Justice Powell had not tipped the balance in favor

By the reading set out so far, *Roe v. Wade* is the direct heir of *Griswold*.¹² Indeed, *Roe* could be viewed as a more telling application of *Griswold*'s principles than *Griswold* itself, because abortion was more controversial than contraception. In *Roe*, according to this reading, the Court recognized that the particular decision at issue—whether to bear a child—was a deeply personal one, and was deserving of protection for precisely that reason. It thus stepped in to shield individuals from state intrusion. In so doing, the Court articulated the principles underlying particular constitutional provisions and so helped shape them. Undergirding this effort was an assumption—bolstered perhaps by an appreciation of the plight of women denied abortions¹³—that it is meaningful to say at a fairly high level of generality, that, whether directly or through our commitment to the Constitution, we all share a commitment to privacy with sufficient strength to override state anti-abortion statutes.¹⁴

This same reading would present *Bowers* as a near repudiation of *Griswold*. The *Bowers* Court failed to shield the individual from a highly damaging state intrusion: state prohibition of the very conduct that, personhood would assert, goes to the core of one's identity. In its

of Georgia with his "mistake." Agneshwar, *Powell Concedes Error in Key Privacy Ruling; Vote to Sustain Sodomy Law at High Court Called "Mistake,"* N.Y.L.J., Oct. 26, 1990, at 1. Nor did the issue of contraceptives itself ignite anything like the intense emotions that surround today's political debate over abortion and gay rights. Indeed, the issue of adults' rights to use contraception is still controversial only insofar as opponents of abortion rights assert that certain contraceptive methods should be treated as abortifacients. See *About-Face over an Abortion Pill: France vs. the Right to Lifers*, TIME, Nov. 7, 1988, at 103; MacFarquhar, *The Case of the Reluctant Drug Maker*, U.S. NEWS & WORLD REP., Jan. 23, 1989, at 54. But see Bopp & Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157, 168 n.58 (1989) (arguing that overturning *Roe* would not threaten legality of abortion methods that prevent implantation of fertilized ovum).

12. See generally, e.g., Dellinger & Sperling, *Webster v. Reproductive Health Services: Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 93-97 (1989) (arguing that the Court cannot undermine *Roe* without calling *Griswold* into question as well); Transcript of Oral Argument for Appellee, Apr. 26, 1989, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (arguing that overturning *Roe* would "unravel the whole cloth of procreational rights," including *Griswold*), reprinted in 8 A DOCUMENTARY HISTORY OF THE LEGAL ASPECTS OF ABORTION IN THE UNITED STATES: *Webster v. Reproductive Health Services* 429 (R. Mersky & G. Hartman eds. 1990) [hereinafter DOCUMENTARY HISTORY OF ABORTION].

13. See *Roe v. Wade*, 410 U.S. at 153. Cf. *Webster v. Reproductive Health Services*, 492 U.S. at 537, 556-60 (Blackmun, J., dissenting) (showing greater appreciation of the impact of anti-abortion statutes on women); Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 724 & n.47 (1983) (concerning transformative impact of *Roe* on Justice Blackmun, author of the Court's opinion in that case).

14. See, e.g., B. SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 43-65 (1990) (arguing that framers intended the Constitution to be interpreted at a high level of generality); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 133-37 (1978) (same).

cold-hearted dismissal of Hardwick's claim as "facetious,"¹⁵ the Court displayed no interest in articulating underlying, widely shared ideals. Indeed, the majority opinion in *Bowers* is imbued with a sense of skepticism about assertions of socially shared ideals and values.¹⁶ It did not portray the prohibition of sodomy as implicating some deep social value; rather, it expressly rejected the proposition that *any* such value was implicated by the Georgia statute.¹⁷

The line from *Griswold* to *Roe* is not, however, the only one that could be drawn.¹⁸ There is another reading of *Griswold* in which *Bowers* is *Griswold's* true heir; *Roe* is the deviation—a deviation that *Webster*¹⁹ and other recent decisions²⁰ indicate the Court stands poised to correct. Taken together, one could read *Griswold* and *Bowers* to recognize the right of individuals to realize their sexuality within the confines conventionally recognized by society. After all, the *Griswold* Court went out of its way to emphasize that it was recognizing the right, not just of heterosexuals, but of *married heterosexuals*, to be free from state intrusion, and placed great emphasis on the need to respect tradition from unjustified legislative interference.²¹ By this perspective, the *Bowers* Court rightly refused to act where it was unnecessary to protect traditional social values from legislative interference.²²

15. *Bowers*, 478 U.S. at 194. See also Henderson, *supra* note 8, at 1638-49 (describing *Bowers* as a failure of empathy); West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 700 (1990) (similarly describing *Bowers*).

16. *Bowers*, 478 U.S. at 194-95.

17. *Id.* at 191-92.

18. See generally, e.g., Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 372-81 (1979) (noting ambiguity of *Griswold* and other privacy cases).

19. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

20. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990).

21. *Griswold*, 381 U.S. at 486. See also *id.* at 495 (Goldberg, J., concurring) (marital intimacy lies at base of our society); *id.* at 496 (at stake is a value "as old and as fundamental as our civilization"); *id.* at 499 (specifically excluding "[a]dultery, homosexuality and the like" from privacy protection). Cf. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (in striking down zoning regulation that prevented grandmother from living with both her grandchildren, the Court stated it must protect "the sanctity of the family . . . deeply rooted in this Nation's history and tradition"); Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1171 (1988) (arguing that due process clause "has frequently been understood as an effort to restrict short-term or short-sighted deviations from widely held social norms; it has an important backward looking dimension").

22. The facts themselves may well suggest that the Court's aim is to protect tradition rather than personal conduct. It is especially noteworthy that what happened in *Bowers*—police intrusion into Hardwick's bedroom, followed by charges arising from his sexual conduct—was strikingly similar to the kind of police intrusion that repelled Justice Douglas in *Griswold*. See generally

In *Griswold*, according to this reading, the value our society has traditionally placed on marital sex was at stake; in *Bowers*, homosexual sodomy clearly did not qualify as a traditional value placed in jeopardy by a shortsighted legislature.²³ Thus, *Bowers* and *Griswold* could be read together to indicate that the Court will strike down a statute if it conflicts with a particular, established traditional value. If, on the other hand, the alleged conflict between a statute and some asserted social value exists only at a high level of abstraction, the plea to take a more active and creative role in the articulation of social values through constitutional adjudication will be met with the brusque dismissal that the Court accorded Hardwick's claim.²⁴ In this understanding of *Griswold*, one would expect judicial empathy to be reserved for those in the mainstream.

By this perspective, *Roe* would make sense only if one assumed (wrongly, in this view) that the scope of the right is determined simply by what is important to the individual. In contrast to *Griswold*, a critic might add, there was no need in *Roe* to protect traditional values from legislative assault: there was no social consensus or long tradition making abortion a personal decision.²⁵ On the contrary, abortion was largely stigmatized at the time, and still is today to an important degree.²⁶

Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655 (1987) ("The critical constitutional question in *Hardwick* was not what Michael Hardwick was doing in his bedroom, but rather what the state of Georgia was doing there.").

23. Interestingly, both *Griswold* and *Bowers* display a sense that society's judgment on the values at stake is obvious, and that the issue is accordingly straightforward. The Connecticut statute was, even in the view of one of the dissenters, "uncommonly silly," *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting); the argument that the Georgia statute violated a deeply-rooted traditional value was, in Justice White's view, "facetious," *Bowers*, 478 U.S. at 194. Cf. *Poe v. Ullman*, 367 U.S. 497, 502 n.3 (1961) (plurality opinion) (prosecution of spouses for using contraceptives would be "inherently bizarre").

24. Cf. Bopp & Coleson, *supra* note 11, at 167 ("the fundamental rights test set forth by the Supreme Court in *Bowers v. Hardwick* mandates that a proposed right be as narrowly defined as possible before being subjected to the history and tradition test for fundamentality") (footnote omitted).

25. E.g., Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 167-68. In fact, modern anti-abortion statutes in the United States dated back only to the late years of the nineteenth century and the early years of this century, as doctors led a campaign to curtail abortion. See generally J. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978).

26. See, e.g., E. MESSER & K. MAY, *BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA* (1988) (describing secrecy, stigma, and danger that surrounded women's abortion experiences before legalization); Kolata, *Under Pressures and Stigma, More Doctors Shun Abortion*, N.Y. Times, Jan. 8, 1990, at 1, col. 1.

In short, the competing claims of *Bowers* and *Roe* to *Griswold's* legacy highlight the dual ambiguities of privacy. With regard to personhood, what exactly, we might ask, is protected by the right to privacy? Is it sexual intimacy experienced as fundamental by individuals in whatever form? Or is it heterosexual expression within confines laid down by society? To put the question another way, is the Court there to shield the individual whenever the state threatens to intrude into matters that she considers fundamental to her own self-realization? Or is it the Court's function to shield bedrock social traditions from legislative tampering? *Griswold's holding* could not, of course, definitively resolve the ambiguity concerning what the right of privacy protects, because the particular expression of sexuality on which the Court focused—sex between a husband and wife—was highly conventional. Protecting individual privacy coincided there with protecting basic values as the Court saw them.²⁷

Griswold is equally ambiguous as to the second idea that has characterized the right to privacy: the role of the courts in elaborating fundamental social values. The decision leaves us to wonder to what extent the exercise of reason rather than the simple recounting and following of historical fiat can play a role in the judicial articulation of the values that mark our public life. Are our traditional values part of a coherent and overarching system? If so, then fundamental social values can be framed at a high level of generality, and, inevitably, the courts must exercise some judgment and even creativity and empathy in applying them. Alternatively, are our basic social values more like particular tastes and choices? Is it, perhaps, even meaningless for a court to talk about such values at all? If so, any judicial attempt to generalize will

27. It should be added that the holding in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), that unmarried persons also have the right of access to contraceptives does not necessarily resolve this tension. Of course, as commentators have noted, the case did eliminate any doubts as to whether the right to sexual privacy is limited to married couples. See, e.g., L. TRIBE, *supra* note 4, at § 15-10, at 1339; Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 223-25 (1988); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1184-85 (1980) [hereinafter *The Constitution and the Family*]. But *Eisenstadt* could not resolve the ambiguity to which I refer: is the scope of the privacy right determined by what the individual believes is fundamental, or by reference to social traditions and conventions? It could not resolve *this* ambiguity for the very simple reason that, even as to unmarried couples, heterosexual relations are highly conventional in our society, and were in 1972. The fact that the statute at issue in *Eisenstadt* forbade unmarried persons from obtaining contraceptives to prevent pregnancy, 405 U.S. at 442, says nothing to the contrary about the conventionality of sexual relations between unmarried men and women. As *Griswold* itself shows, the class of sexual activities that fall within conventional confines may not be quite the same as the class of activities permitted by the legislature.

be arbitrary; ideally the courts will simply follow society's particular commands as set out in the Constitution. By this reading, those who assert claims for judicial protection based on new understandings of basic social values—particularly claims asserted by the marginalized and excluded—will inevitably fail. Once again, *Griswold* can support either reading, because its holding can be understood either as the protection of the particular value that society has traditionally ascribed to marital sex, or as the recognition of a general social commitment to an overarching system of values that includes personal privacy.

B. *Griswold's Prospects*

Griswold's ambiguities suggest dangers in relying on personhood theories to protect reproductive and sexual freedoms. These dangers might impel one who is concerned to protect those freedoms to look elsewhere for support. We might, for example, attempt to base claims for reproductive freedom primarily on an antistatutory analysis that emphasizes the goal of gender equality.²⁸ Similarly, in the area of gay rights, it might be better to concentrate on equal protection arguments rather than the right to privacy.²⁹

We might also question the role of the courts in articulating basic social values. Perhaps it is simply too easy for a court to overlook dissenting voices in articulating fundamental values, particularly if it looks to consensus to support its holding.³⁰ Courts are elite bodies in any event, but the judicial legacy of the Reagan administration makes

28. E.g., C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989). See generally Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (reinterpretation of equal protection doctrine in "anti-subordination" terms). Perhaps more typical are analyses that, while not entirely averse to the privacy rationale, suggest a greater focus on gender equality as the issue. E.g., Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375 (1985); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977). For a useful overview of the debate over privacy and equality as foundations for abortion rights, see Z. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 184-90 (1988).

29. See, e.g., Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 221-35; Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297-1309 (1985). See also *Watkins v. United States Army*, 875 F.2d 699, 711 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment) (arguing that Army regulation barring re-enlistment on ground of homosexuality violates equal protection), *cert. denied*, 111 S. Ct. 384 (1990).

30. See, e.g., Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989); Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1723-26 (1990).

a sympathetic hearing of those who are marginalized and disempowered even less likely.³¹ Moreover, the use of tradition to elucidate fundamental social values might well be questioned; our traditions, after all, include a long history of racism and sexism.³² Finally, primary reliance on a strategy of seeking protection from the courts all too easily presumes rather than ameliorates a profound political passivity and lack of popular mobilization. At the very least, the galvanizing effect of *Webster* on the pro-choice movement³³ raises serious questions about strategies of social change that rely too heavily on judicial activism.³⁴ Perhaps the intended audience for arguments about equality and reproductive freedom should be a more avowedly political one, less tied to the past.³⁵

31. See B. SCHWARTZ, *supra* note 14, at 222-49; Roberts, *Reagan's Legions of Nominees Put His Own Stamp on the Judiciary*, N.Y. Times, Oct. 9, 1988, § 4, at 5, col. 1.

32. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 60-63 (1980); M. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 149-50 (1990); Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) ("When the Founding Fathers used . . . [the] phrase ['We the People'] in 1787, they did not have in mind the majority of America's citizens," denying both women and slaves basic rights). See also R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976).

33. See, e.g., Estrich & Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 121-22 (1989).

34. In addition, there is good reason to fear that in framing arguments in a way that they might be accepted by conservative courts as a compelling interpretation of an eighteenth-century document, the ideals themselves will be distorted. See generally, e.g., Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1990). Cf. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1877-87 (1987) (on the constitutive nature of rhetoric).

Even if the ideals are not distorted, shaping the argument to appeal to courts can have the effect of implicating the litigants in the very practices they are challenging. It is striking, for example, that the Brief for Respondent filed in *Bowers v. Hardwick* never refers to Hardwick as gay, and refers only obliquely (and usually in footnote) to the fact that his sexual partner was another man. See Brief for Respondent at 2 n.1, 8 n.14, 23 n.44, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140). The brief's reticence presumably reflects a tactical decision to do everything possible to present the case as one involving sexual privacy rather than gay rights. See *id.* at 10 (referring to "sexual intimacy, even between unmarried persons and for purposes other than procreation"). Whether it was worth keeping Hardwick in the metaphorical closet is subject to debate; after all, he did come very close to winning. But in no event should we overlook the cost that such a strategy entails. For an insightful account of those costs, see Alfieri, *Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

Of equal concern is the possibility that future litigants seeking to expand privacy protection will "experience a strong temptation to limit . . . [*Bowers*'] precedential effect by distinguishing themselves from homosexuals, perhaps even on the basis that homosexuality has 'always been abhorred.'" Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1101 (1988).

35. See West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 650

These considerations make clear that a straightforward celebration of *Griswold* would be a dubious endeavor. A searching critique and reconsideration of personhood and its concomitant conception of the role of the courts would be more appropriate. I would like to suggest, however, that privacy as an ideal continues to have sufficient merit to warrant reconsideration rather than outright rejection. I will pursue this reconsideration by using the issues raised in *Roe v. Wade* and *Bowers v. Hardwick* to develop alternatives to *Griswold's* ambiguous conceptions of personhood and the role of the courts.

As an alternative to personhood, I suggest a reconception of privacy in terms that connect it explicitly to our political life in two ways.³⁶ First, a reformulated right to privacy could be the vehicle for applying democratic norms, particularly equality, to aspects of personal life. Rather than ask how individuals can be shielded from the exercise of state power, we should ask how state power might be invoked to restructure aspects of personal life in order to eliminate distorting factors in people's own interactions and personal decisionmaking. For example, the right to abortion should not be understood to rest on a conception of isolated, atomistic women making choices within a zone of privacy; nor should the right be sharply separated from the morality of abortion. On the contrary, the right rests in large part on the historically specific fact of men's power over women's bodies (a power supported by the state), and the way that unequal power inevitably hinders any effort by a woman, alone or with a partner, to come to her own judgment about the morality of abortion.

Second, a reformulated privacy theory could provide a vehicle for enriching our public life with notions of self-transformation and revision that have tended to be confined to the private sphere. Rather than argue that certain aspects of personal identity are irrelevant to one's public identity and functioning, we should seek to enrich our public life in ways that will help transform our conception of individual and social identity. For example, protection against discrimination based on sexual orientation should not rest exclusively on a claim that what two individuals do in bed is irrelevant to whether they can function effectively as, say, school teachers. Rather, it should rest on the assertion that public recognition of a number of sexual identities besides the "official" heterosexual one will enrich our understanding of people and

(1990) (calling for a constitutional jurisprudence that looks primarily to Congress rather than the Court).

36. See *infra* Section IV.

sexuality, and introduce a desirable element of diversity into our public life.³⁷

Griswold's second ambiguity—concerning the role of the courts in elaborating social values—points us to a more modest role for the courts than is commonly accorded them in privacy theories.³⁸ Nevertheless, efforts to disengage progressive thought and political action entirely from the courts seem impractical and undesirable; the challenge is to place arguments to courts, and their responses to those arguments, in a broader programmatic context. The most important form of persuasion of the courts is, I will argue, a “mediated” one. By this term I mean a strategy that relies upon efforts to change the institutional contexts of personal and social life in a way that lends progressive arguments plausibility. *Griswold* and *Roe* present an image of a more “immediate” form of persuasion, by which the Court directly responds with empathy and intellectual creativity to the reasoned appeals of individuals for the protection of privacy. That image is attractive but, in the end, profoundly misleading.

Clearly, laying out an entirely new alternative to personhood and the role of the courts would be a major undertaking. We need not, however, start afresh. Two substantial efforts to rethink privacy have already been made: Frank Michelman's republican critique of *Bowers*³⁹ and Jed Rubenfeld's Foucauldian analysis of privacy.⁴⁰ I will explore their theories in detail in Section II. Briefly put, Michelman argues that the courts should protect privacy in order to facilitate people's participation in republican dialogue; sodomy statutes like the Georgia law at issue in *Bowers*, for example, preclude gays from full and authentic participation in the political process by which we govern and define ourselves as a society.⁴¹ Rubenfeld contends that the courts should prohibit exercises of state power that have the effect of taking over and directing individuals' lives. Statutes prohibiting abortion, for example, are totalitarian; they do not merely foreclose a particular option, Rubenfeld argues, but force women to become mothers, thereby deter-

37. By diversity, I mean to make a substantive point about sexuality: it can be morally embodied in some forms other than strictly heterosexual ones. What those forms are is a normative matter. In that sense, support for diversity is not equivalent to advocacy of an absolute tolerance in which anything goes. See *infra* Section IV.

38. See *infra* Section IV.

39. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

40. Rubenfeld, *supra* note 4.

41. Michelman, *supra* note 39.

mining the totality of their lives.⁴²

The analyses that Michelman and Rubenfeld present are, both at first glance and on deeper consideration, different in important respects. Underlying both, however, is a concern to connect the protection of privacy with a conception of democratic citizenship—a concern to which both republican and Foucauldian theories direct our attention.⁴³ The effort to make the connection is, in my view, entirely worthwhile, and Michelman's and Rubenfeld's efforts take us well along the way of providing a more satisfactory understanding of privacy than does *Griswold*. Both attempts suffer from serious flaws, however.

The most critical shortcoming common to both is a perspective that emphasizes immediate persuasion of courts in particular cases rather than mediated persuasion through progressive social change. That is, although their theories are openly normative in their foundations, both Michelman and Rubenfeld seek to formulate a standard that the courts can apply in a relatively uncontroversial way to determine when they need to intervene to protect individuals from the state. Thus, Michelman calls upon the courts to act when a law would in fact tend to preclude participation in the republican dialogue by members of marginalized or excluded groups.⁴⁴ Rubenfeld makes judicial enforcement of the right of privacy turn on a factual assessment of the impact of a law: the courts should strike down a law if, in fact, it virtually takes over and determines people's lives.⁴⁵

There is a price to be paid for the emphasis on formulating a doctrine that aims, at the crucial point of its application, to prescind from the deep moral and political controversies that gave rise to the case in the first place. That price, I will argue, is a strong tendency to minimize popular struggle and dissent. For all their concern about democracy and community, both Michelman and Rubenfeld ironically assume in their theoretical stances a remarkably passive citizenry, one incapable of resisting the exercise of power. The political conflicts over abortion and gender roles belie that assumption. Women have always resisted anti-abortion statutes, although the form that their resistance has taken has varied over time. Moreover, it is women's capacity to resist the kind of totalitarian effect Rubenfeld fears that best accounts

42. Rubenfeld, *supra* note 4.

43. *See id.* at 804 ("The right to privacy is a political doctrine."); Michelman, *supra* note 39, at 1535 (privacy is "a political right").

44. Michelman, *supra* note 39, at 1528-33.

45. Rubenfeld, *supra* note 4, at 783-87.

for the recognition of abortion rights.⁴⁶ Similarly, the social and political gains that gays and lesbians have won today rest primarily on their own demands for recognition, rather than on any judicially bestowed ticket to the republican dialogue.⁴⁷

The failure to take adequate account of struggle and resistance—a shortcoming common to much legal theorizing, which often looks to consensus and tradition as guides⁴⁸—certainly diminishes the historical comprehensiveness of the accounts that Michelman and Rubinfeld offer. But the absence of recognition of resistance has a more fundamental effect on their theories. In the end, Michelman and Rubinfeld use republican and Foucauldian theories to ask rather conventional questions.

Both theories lead us to ask, for example, whether the government should be able to deny women access to abortion. What we ought to do, however, is ask the questions that feminist theories raise: What are

46. See *infra* Section III.

47. See *infra* Section III.A. Any discussion of sexual preference issues raises questions of terminology, questions that are inevitably political. See, e.g., Stanley, "Gay" Fades as Militants Pick "Queer," N.Y. Times, April 6, 1991, at 9, col. 1 ("It is an in-your-face kind of thing—that's what I liked about it," said Liz Powers, 34 years old, of Queer Nation, a group formed a year ago to combat gay-bashing. "Using a word that is so offensive is a way of showing your anger."). I follow what has become the conventional academic practice of refraining from using the word homosexual as a noun, in order to avoid the implication that individuals are completely identified with their sexual conduct. See, e.g., Comment, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A.L. REV. 1055, 1059 (1990).

The terms "gay" and "lesbian" have tended to become identified with men and women, respectively, undercutting somewhat the status of the word "gay" as a gender-neutral term for describing those whose primary sexual preference is towards others of the same gender. To some extent, that is entirely appropriate, for, as I will argue in Section IV, the argument for privacy-based protection of lesbians is not quite identical to that for gay men. Nevertheless, I would resist any effort to restrict the term "gay" to men alone, and not only because the consequent necessity of always referring to "gays and lesbians" would be awkward and repetitive. For one thing, the implication of a strict separation between gays and lesbians would, in my view, be mistaken. Gay men and women may not have identical concerns, but neither are their privacy-based claims unrelated to each other. Moreover, there is something to be said for a degree of terminological looseness and uncertainty in this area. In light of the argument that I will make in Section IV for recognition of a sexual morality that goes beyond the current tendency to hypostatize straight and gay sexuality as radically different, it would be strange indeed to present a neatly packaged set of terms that does the same thing for gays and lesbians. For a good discussion of terminology and its relation to gay and lesbian identities, see E. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 17-18, 36-39 (1990).

48. E.g., Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975) (arguing that much of constitutional law can be understood to rest on "basic shared national values"); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1040 (1979) ("values deeply embedded in . . . [our] society"); *The Constitution and the Family*, *supra* note 27, at 1178-79 (tradition).

"women"? And what is "abortion"? The political battles over abortion rights, I will argue in Section III, are not solely contests over access to abortion (though access is an important issue); they are also efforts to constitute what abortion and women *are*. Advocates on both sides of the dispute have sought to embed their conflicting visions of abortion in a set of material practices. That is, they have sought to shape the actual practice and experience of abortion in conformity with their visions of what abortion is and should be. Briefly put, in the eighteen years since *Roe v. Wade* was decided, anti-abortion advocates have attempted to constitute the abortion experience as a necessarily damaging and degrading one, an unnatural experience that by its nature traumatizes a woman for years to come. These attempts have been manifested in a range of responses to *Roe*, from statutes that prohibit safer and less intrusive methods of abortion in favor of more intrusive means, to regulations that restrict or prohibit abortion counseling, to terminations of public funding of abortions.⁴⁹

The struggles to constitute abortion, moreover, are part of a larger contest over women's roles (and, by implication, men's). Suppose abortion were constituted as a tragic option that could barely be mentioned in public, chosen only at great financial cost, and carried out through the most intrusive procedures in a hospital or hospital-like setting after crossing picket lines of protesters calling the woman a baby-killer. The experience of abortion so constituted, I will argue, would help bolster the sense that any deviation from motherhood was an unnatural rejection of the woman's most appropriate role. It would also tend to reinforce notions of sexuality as naturally tied to marriage and reproduction. The political struggles over abortion rights, in other words, are in part efforts to constitute women in a particular way.

These efforts have not gone uncontested. Because right-to-life advocates have held the offensive until recently, much of the pro-choice program since *Roe* has consisted of little more than opposition to restrictive abortion legislation. Even so, a largely defensive program is itself constitutive. The more abortion is widely and routinely available, publicly funded, and free from legal restrictions and direct obstruction, the more likely women will come to experience abortion as an instance of their control over decisions on childbearing and as an instance of a partial escape from the state's and men's power over their bodies.⁵⁰ In

49. See *infra* Section III.B.1.

50. The escape would be partial because reproductive freedom ultimately requires a thorough attack on pervasive structures of gender discrimination.

turn, abortion so constituted would tend to undercut any sense of motherhood as the role for which women alone are naturally and uniquely suited; it would also tend to weaken the notion that sexuality is intrinsically tied to the heterosexual institutions of marriage and family.⁵¹

A similar rethinking of the issues at stake in claims for gay rights is in order. The question is not only what the rights of gays and lesbians should be with regard to sexual conduct and protection from discrimination. The battles over gay rights are also efforts to constitute sexuality in a particular way and to determine what gays and lesbians are.⁵²

In short, the political struggles over privacy issues are always, necessarily, attempts to deploy state power one way or the other in the constitution of our personal and public selves. Consequently, privacy theory needs to make a decisive break from the idea of cordoning individuals off from state power. That ideal is a chimera. Rather, as I will argue in Section IV, a theory of privacy needs to ask how the power of the state *should* be deployed both to foster individual responsibility and freedom in decisionmaking and to make the politics that directs the deployment of state power more democratic. It is, finally, these constitutive struggles over the terms of personal and social life that provide the most powerful model of republican dialogue, an exemplar far more worthy of our aspirations than the characteristic activities of litigants and judges.

II. PRIVACY AND DEMOCRATIC CITIZENSHIP

A. *Critiques of Privacy and Politics*

Since *Griswold* was decided in 1965, there has been a rethinking of personhood's central contention that private life is the natural arena of personal growth and development, and so stands in need of protection by the courts from unwarranted state interference. One source of this rethinking has been Michel Foucault's work on sexuality.⁵³ The notion that in sexuality lies the key to self-realization is a historically determinate one, he argues, not some essential part of human nature. Foucault's history does not present a picture of continuing gains in per-

51. See *infra* Section III.C.

52. See *infra* Sections III.B.2 & III.C.

53. 1 M. Foucault, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (1980) [hereinafter M. Foucault, *THE HISTORY OF SEXUALITY*]; see also 2 M. Foucault, *THE HISTORY OF SEXUALITY: THE USE OF PLEASURE* (1985) [hereinafter M. Foucault, *THE USE OF PLEASURE*]; 3 M. Foucault, *THE HISTORY OF SEXUALITY: THE CARE OF THE SELF* (1986).

sonal freedom as artificial restraints on sexual expression have been lifted; rather, sexuality is a historical construct, a discourse in which people have increasingly implicated themselves.⁵⁴ Undergirding this attack on the "repressive hypothesis"⁵⁵ is a new conception of power that questions the very idea of shielding individuals from its exercise. Power, in Foucault's view, is not something that simply commands or prohibits: it is constitutive, helping to make individuals what they are through a whole range of professional and social disciplines in which people become enmeshed through their everyday lives and practices.⁵⁶ In part, this recognition stems from the politicization of seemingly private matters like birth control and sexual preference. It also stems from the relentless extension of bureaucratic power—state and corporate—over many aspects of life.⁵⁷

The exaltation of the home as a sanctuary from power has come under attack from theorists of gender roles as well. In the area of gay rights, there has been some questioning of the idea that whatever two consenting adults do at home has no place in public debate. Such a conception all too easily lapses into the "quarantine" idea: that gays and lesbians must maintain a discreet public silence about their sexuality.⁵⁸ The bedroom can be a closet as much as a sanctuary. It can also be, as feminists have demonstrated, a place of coercion, an arena in

54. M. Foucault, *THE HISTORY OF SEXUALITY*, *supra* note 53, at 105. Cf. S. Ewen, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* (1988) (similar critique of the appearance of freedom that consumer culture provides).

55. M. Foucault, *THE HISTORY OF SEXUALITY*, *supra* note 53, at 10.

56. See *id.*, at 36-49, 81-91; Foucault, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, at 78 (C. Gordon ed. 1980) [hereinafter *POWER/KNOWLEDGE*]; Foucault, *Truth and Power*, in *POWER/KNOWLEDGE*, *supra*, at 109, 118-25. See also N. Rose, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* (1990); Fraser, *Foucault on Modern Power: Empirical Insights and Normative Confusions*, 1 *PRAXIS INT'L* 272 (1981).

57. See generally A. Fraser, *THE SPIRIT OF THE LAWS: REPUBLICANISM AND THE UNFINISHED PROJECT OF MODERNITY* 155-64 (1990); J. Keane, *PUBLIC LIFE AND LATE CAPITALISM: TOWARD A SOCIALIST THEORY OF DEMOCRACY* (1984).

58. See, e.g., Altman, *Sex: The New Frontline for Gay Politics*, *SOCIALIST REV.* No. 65, at 75, 80 (Sept./Oct. 1982) ("When conservatives say that they recognize our right to be left alone in private they are really arguing that we should become, once again, invisible."); S. Pharr, *HOMOPHOBIA: A WEAPON OF SEXISM* 33-34 (1988); Michelman, *supra* note 39, at 1534; Note, *Homosexuality and the European Convention on Human Rights: What Rights?*, 11 *HASTINGS INT'L & COMP. L. REV.* 447, 466-74 (1988); Comment, *supra* note 47, at 1122-23. See also *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 855 (D. Md. 1973) (observing that, in upholding the removal of an openly gay teacher from the classroom, "[t]here exists . . . not only a right of privacy, . . . but also a duty of privacy"), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

which men dominate women.⁵⁹ These critiques of privacy as an ideal have given rise to a reconsideration of intervention as the key question in debates over the state's relation to family life, a reconsideration that complements Foucault's expanded conception of power.⁶⁰ The respect our culture accords the privacy of the home can act powerfully to *dis-empower* women and reinforce their subordination.⁶¹ Even when—indeed, precisely when—the state fails to intervene, it may bolster men's power over women. To the image of the police invading the sacred precincts of the marital bedroom we might counterpose the example of the police officer refusing to get involved in a domestic dispute just to protect a battered wife.⁶²

If dissatisfaction with personhood's notion of private life as a haven from power has been the hallmark of more recent discussions of privacy, so has unease over the state of public life marked recent discussions of democracy in constitutional theorizing. The prevailing pluralist conception of democracy is, at base, an electoral one; yet rates of voting participation remain anemic.⁶³ Moreover, even to the extent that

59. See Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); M. MINOW, *supra* note 32, at 272. See also M. BARRETT & M. MCINTOSH, *THE ANTI-SOCIAL FAMILY* 56-59 (1982) (using the phrase "privacy as imprisonment" to describe some women's experiences of family life).

60. E.g., Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. RE. 835, 837 (1985) ("Because the state is deeply implicated in the formation and functioning of families, it is nonsense to talk about whether the state does or does not intervene in the family."); M. MINOW, *supra* note 32, at 269-71.

61. See C. MACKINNON, *supra* note 28, at 193 ("It is probably not a coincidence that the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of privacy doctrine's coverage."); Jaff, *supra* note 27, at 236 ("[T]he 'traditional family' is . . . a bastion of male dominance, hierarchy, racism and sexual oppression."); MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991). Cf. *Griswold v. Connecticut*, 381 U.S. 479, 484 (extolling "the sanctity of a man's home" as protected by the Bill of Rights) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)) (emphasis added).

62. See D. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 238-39 (1989). Cf. *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989) (holding that state's failure to protect child from domestic violence did not give rise to a due process claim); C. MACKINNON, *supra* note 28, at 194 (rather than protecting women, "[p]rivacy law keeps some men out of the bedrooms of other men"). Cf. McMahon, *Race Kept Cry for Help from Being Heard, Some in Milwaukee Say*, Chicago Trib., July 28, 1991, at 12 (noting Milwaukee police officers' refusal to protect fourteen year old Asian boy found naked and bleeding in the street after being persuaded by his attacker that it was just a domestic dispute between gay lovers); *id.* (charges that failure to intervene reflected racism); Blau & Griffin, *Serial Killers' Pickings Often Easy*, Chicago Trib., July 28, 1991, at 1 (prejudice against gays).

63. See F. PIVEN & R. CLOWARD, *WHY AMERICANS DON'T VOTE* 3-25 (1988); Burnham, *The 1980 Earthquake: Realignment, Reaction, or What?*, in *THE HIDDEN ELECTION: POLITICS AND ECONOMICS IN THE 1980 PRESIDENTIAL CAMPAIGN* 98, 100-03 (T. Ferguson & J. Rogers eds.

people do vote, the central role that our system of campaign finance accords to private wealth makes it questionable how much it matters.⁶⁴ Concern over the so-called countermajoritarian character of judicial review—a common feature of challenges to the Court's privacy rulings⁶⁵—begins to seem hollow, but for the worst reason: the political branches' own claim to democracy seems increasingly tenuous.

It is little solace for democracy's failure to live up to its promises that it appears to promise too little in the first place. The pluralist conception of democracy leaves no room for true community, social or personal transformation through politics, or even any sense of higher principle at stake. Even at its best, politics in this conception is simply the pursuit of private ends in the public sphere. There is no separate public interest, just the varying and temporary outcomes of the endless jockeying for advantage. Nor is there reason to suppose that any sort of community—as opposed to temporary alliances in pursuit of aims that happen to be shared at a given moment—underlies or emerges from politics.⁶⁶

The dissatisfaction with democracy takes on added meaning in

1981); Shenon, *Voter Turnout Still Poor, With 3 Exceptions*, N.Y. Times, Nov. 11, 1990, at A27, col. 1; Toner, *Turned Off by Campaigns, Or Just Too Busy to Vote*, N.Y. Times, Nov. 7, 1990, at B1, col. 4. See also B. GINSBERG & M. SHEFTER, *POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA* (1990).

64. See L. SABATO, *PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES* (1984); P. STERN, *THE BEST CONGRESS MONEY CAN BUY* (1988); Apple, *The Big Vote Is For 'No'*, N.Y. Times, Nov. 8, 1990, at A1, col. 4, B6, col. 1 (noting that 96% of House and most of Senate incumbents won reelection despite widespread voter dissatisfaction). But see A. MATASAR, *CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS: USE OR ABUSE OF POWER?* (1986) (doubting influence of corporate political action committees). See generally P. GREEN, *RETRIEVING DEMOCRACY: IN SEARCH OF CIVIC EQUALITY* 13-25 (1985).

65. E.g., J. ELY, *supra* note 32, at 4-5; see also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962); R. BORK, *THE TEMPTING OF AMERICA* 2-5 (1989); Bork, *supra* note 11, at 2-4; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 923-34 (1973).

66. See generally Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 64 (1987) (liberalism is associated "with a denial of a substantive conception of the public interest"); *id.* at 68-69 ("The republican tradition promotes the concept of an autonomous public interest, whereas the liberal ideal holds that the public interest is either simply procedural or the sum of private interests."); cf. Bork, *supra* note 11, at 9 ("Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure."). See also S. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 3-25 (1984); Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 289-91, 296-97 (1990); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542-47 (1988).

light of the growing recognition, alluded to earlier,⁶⁷ that personal life cannot be sharply separated from public life in some zone of privacy.⁶⁸ If power not only prohibits or commands, but also helps constitute us as individuals, there is all the more reason to be concerned about the state of democracy. To put it another way, if intervention into personal life is inevitable, the key issue is how democratically decisions about intervention will be made. At least in this respect, then, privacy and democracy are closely related.

One could respond to this connection in either of two ways. The first would be to seize on the fact that individuals are socially constituted, and look to a renewal of democracy as a way of ameliorating the totalitarian possibilities that raises. The second would be to redouble our efforts to shield individuals from at least the most overwhelming or insidious exercises of state power. The first neatly complements the republican revival that has marked recent constitutional theorizing; the second takes a far less optimistic stance towards the possibility of a democratic public life.

B. *Privacy and Republicanism*

Concerns over the state of democracy are, as just mentioned, reflected in large measure in the recent revival of civic republican theory in constitutional law. The revival has taken many variants,⁶⁹ but, at least as I plan to use the term, "republicanism" makes two basic assertions.⁷⁰ First, politics is not simply the pursuit of private ends by public

67. See *supra* Section I.

68. Indeed, there are striking similarities between the personhood conception of privacy and the pluralist conception of democracy. For one thing, both conceive the state and public life as entirely external to individuals. The state may facilitate or hinder an individual's own life plan, but in either case it does so as an outside force.

Moreover, both conceptions in effect treat individuals as black boxes; how individuals come to view one activity or another as central to their personal development is a matter for psychologists or anthropologists, not privacy theory. Tastes, whether pursued in public or private, are taken as given. Consequently, individual plans for self-realization are not necessarily tied up with any social self. To put it another way, there are no necessarily shared values. It may happen that a large number of people in a particular society share a particular value—e.g. sexuality as the key to self-realization—but there is no reason to think that that must be so for every individual.

69. See, e.g., Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) [hereinafter Ackerman, *Constitutional Politics*]; Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) [hereinafter Ackerman, *Storrs Lectures*]; Pope, *supra* note 66; Sunstein, *supra* note 66. But see, e.g., Fallon, *What is Republicanism, and Is it Worth Reviving?*, 102 HARV. L. REV. 1695 (1989).

70. In this essay I intend to concentrate on Michelman's understanding of republicanism. See Michelman, *supra* note 39; Michelman, *Possession vs. Distribution in the Constitutional Idea of*

means, but involves to some extent a collective determination or expression of ourselves as a society. Thus it involves more than an instrumental pursuit of privately formed ends; it also implies the formation and constant renewal of a community of interest. Second, individual political actors are (or should be) constituted in part through that very involvement in public life. One aim of politics is to instill or reinforce a civic virtue that is needed, in turn, for a flourishing public life. In this sense, privacy could be a concern of modern republicanism in roughly the same way that property was a concern of older versions.⁷¹ Indeed, in its most assertive (and potentially most disturbing) form, a republican theory might posit that politics requires the fashioning of a certain kind of citizen to sustain a flourishing public life.

1. Privacy and Republicanism: An Initial Critique

What might the republican revival portend for the right to privacy? By one reckoning, it would undermine it entirely. Jed Rubenfeld has set out one analysis of the dominant personhood conception of privacy from what he terms a republican point of view. He starts from the easily demonstrable proposition that there are no purely self-regarding

Property, 72 IOWA L. REV. 1319 (1987) [hereinafter Michelman, *Possession vs. Distribution*]; Michelman, *The Supreme Court, 1985 Term—Foward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Traces*]. See also Michelman, *Tutelary Jurisprudence and Constitutional Property*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 127-71 (E. Paul & H. Dickman eds. 1990). Although I believe that my analysis is relevant to any attempt to apply other understandings of republican theory to privacy, I make no attempt here to work through any of the multitude of historical works on republicanism. See, e.g., A. FRASER, *supra* note 57; I. KRAMNICK, REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH CENTURY ENGLAND AND AMERICA 163-295 (1990); T. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988); J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969). For a useful discussion of the different strands of late eighteenth century republican thought, see Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 43 WM. & MARY Q. 3 (1988). In addition, I do not intend to analyze Michelman's claim that his understanding of republicanism reflects the framers' own political conceptions. E.g., Michelman, *Possession vs. Distribution*, *supra*, at 1330-34.

71. See Michelman, *supra* note 39, at 1535 ("Just as property rights—rights of having and holding material resources—become, in a republican perspective, a matter of constitutive political concern as underpinning the independence and authenticity of the citizen's contribution to the collective determinations of public life, so is it with the privacies of personal refuge and intimacy.") (footnotes omitted); cf. A. FRASER, *supra* note 57, at 361-62 (arguing that, in a "modern republican polity," privacy can fulfill the function, which property can no longer serve, of security from "the conformist pressures emanating from everyday social life").

acts other than entirely uncontroversial ones.⁷² Just as a wedding ceremony is a public declaration of an intimate relationship, the very point of "coming out" is to make others aware of one's sexual preference. Some may find that revelation unpleasant or threatening; others might discover a new role model. Either way, the claim that the conduct affects no one but the actor is untenable.

From this premise, it follows that even when one is engaging in actions that are crucial to one's self-definition and development, *society's* definition is at stake as well. To countenance abortion or homosexuality, for example, might undermine the proper moral structure of the community as conceived by some religious fundamentalists. Similarly, interracial marriages might help break down the whole structure of segregation.⁷³ In short, iconoclastic practices could remake communities. Would one not then expect society's definition to prevail in the case of a conflict with an individual's? If it did not, in what sense would the approach be republican?⁷⁴

Such an approach would seem to render notions of privacy irrelevant. If *Griswold* is correct, a republican might argue, it is because it is important to our self-definition as a society that married couples be able to choose to engage in sexual activity that is not open to reproduction. If we thus recast *Griswold* as a republican decision, then *Bowers* could be taken to show how little *Griswold* has to do with privacy in the personhood sense. Could we not understand *Bowers* as a case in

72. Rubinfeld, *supra* note 4, at 758 ("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."); *see id.* at 756-61.

73. Rubinfeld, *supra* note 4, at 759-60. Cf. E. MORGAN, *THE PURITAN FAMILY: RELIGION & DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND* 10 (1966) (describing the Puritan view of sin) ("Since the whole group had promised obedience to God, the whole group would suffer for the sins of any delinquent member, unless that member were punished.").

74. There is an explicitly normative response to this dilemma. Perhaps the selves that are threatened by iconoclasm simply are not entitled to protection: they are intolerant. Or, in the abortion area, we could just say that abortion is (or is not) purely self-regarding because the fetus is not (or is) a person. But in openly favoring some values, personhood would ultimately risk sacrificing protection for those who need it the most. Someone must decide which kinds of self-definition reflect intolerance or prejudice, and in a democratic society individuals with untraditional or countermajoritarian values are likely to fare poorly in those decisions. Rubinfeld, *supra* note 4, at 768; Gerety, *supra* note 5, at 274 n.150.

A factual limitation would work as badly. As a society, personhood might argue, we have in fact adopted the value of tolerance. Given that value, certain intolerant selves—those who, for example, believe that gays should stay in the closet—are entitled to no protection. But having now effectively conceded that society's self-definition deserves priority, personhood skates on thin ice. Are not the laws passed by legislatures today far better indications of social values than inferences read into an eighteenth-century document? Rubinfeld, *supra* note 4, at 769-70.

which the Court (using common legislative enactments as signposts) concluded that we as a society do not wish to live in an atmosphere in which certain types of homosexual conduct are regarded as legitimate?⁷⁵ Sodomy, it might be argued, *must* be outlawed precisely because its acceptance would reflect a social self-definition that has been rejected. Similarly, the legitimacy of *Roe* would stand or fall, not on an evaluation of what is necessary to individual self-realization, but on the compatibility of access to abortion with our social self-conception. Read this way, the possibility that *Bowers* is *Griswold's* true heir rests on more than the simple speculation engaged in earlier.⁷⁶ Rather, *Bowers* may reflect the tendency of republicanism to seek community by exclusionary means, a tendency present from the beginning in the form of using a property qualification to vote as a way of guarding against the corrupting effect on politics that participation by the landless was feared to have.⁷⁷

To indict republicanism with the kind of intolerance the Court manifested in *Bowers*, however, would be too facile. If republicanism is about social self-definition, on what basis could the *Bowers* Court be thought to have articulated that self-definition as regards homosexuality? An appeal to state statutes could hardly suffice: so long as our politics remains imperfect, for the reasons laid out earlier,⁷⁸ there seems little ground for confident assertions that legislative enactments always represent the public interest or our society's deepest values. There is equally little reason to suppose that decisions rendered by an

75. Rubinfeld, *supra* note 4, at 762-63.

76. *See supra* Section I.

77. Michelman, *Possession vs. Distribution*, *supra* note 70, at 1329-30; Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 339-42 (1989). Another example was the eighteenth century Puritan practice of "warning out" dissenting individuals from the community. *See* M. ZUCKERMAN, PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY 112 (1970). And, although republican ideology may have indirectly fostered some improvements in women's property rights, *see* M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 190 (1986); *but see* Kerber, "I Have Don . . . Much to Carrey on the Warr": Women and the Shaping of the Republican Ideology after the American Revolution, in WOMEN AND POLITICS IN THE AGE OF THE DEMOCRATIC REVOLUTION 227, 232-34 (H. Applewhite & D. Levy eds. 1990), it did not go so far as to extend the vote to women.

Nor does the righting of those particular exclusions put to rest the fear of exclusion as a strategy for the present. Consider, for example, the tendency of small communities to assume what one commentator calls an "enclave consciousness," tending toward racial and economic exclusivity. Plotkin, *Enclave Consciousness and Neighborhood Activism*, in DILEMMAS OF ACTIVISM: CLASS, COMMUNITY AND THE POLITICS OF LOCAL MOBILIZATION 218 (J. Kling & P. Posner eds. 1990); *see also* R. SENNETT, *supra* note 5, at 294-312.

78. *See supra* Section II.A.

elite body of life-tenured individuals could plausibly be so characterized. The relationship between privacy and republicanism is evidently a complicated one, and there is more of a case for a republican version of privacy than would appear so far. That case is made by Michelman's avowedly republican critique of *Bowers*.

2. Privacy and the Rule of Law

Michelman situates his critique of *Bowers* in the context of an inquiry into a fundamental tension surrounding the courts and the rule of law in a democracy. Lurking in the pluralist conception of politics mentioned earlier⁷⁹ is a dilemma concerning the relation between democracy and the rule of law. How, Michelman asks, can we *both* be free as a people, yet also be subject to law?⁸⁰ There seems little reason to suppose that the two will necessarily coincide if one adopts what Michelman calls the "decisionist" premises of pluralism and rejects the existence of any "connection between moral choice and rational deliberation."⁸¹ In contrast, the ideal of the rule of law generally, and judicial activism in particular, reflect a commitment to just such a connection.⁸² Given the centrality of this dilemma to Michelman's approach, it may be worthwhile to dwell on it for a moment.

In the context of privacy, the most often-cited example of this dilemma is the countermajoritarian difficulty.⁸³ In the view of conserva-

79. See *id.*

80. See Michelman, *supra* note 39, at 1505 (stating that republicanism asks "how laws and rights can be both the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law").

81. Michelman, *Traces*, *supra* note 70, 25-26; see *id.* at 25 ("Decisionism is the conviction that moral choice proceeds not from publicly certifiable grounds or reasoning, but from the inexplicable private impulses of individuals, objectively unfounded and rationally unguided."). Cf. Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 300 (1985) (using the term to indicate a perspective by which "[e]valuative judgments are . . . nothing more than subjective preferences," and in which "reason cannot help the individual select specific values or goals; it can serve only as a means to their attainment").

82. See, e.g., Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3, 6 (S. Spitzer ed. 1980) (The significance of judicial activism is "that human reason is something more than an instrumental mechanism for the execution of collective or individual decisions reached through the clash of interests, passions, or appetites What is important is that [judges'] anomalous position has forced them, generation after generation, to justify their actions in terms that transcend the rhetoric of our political pluralism.").

83. A. BICKEL, *supra* note 65, at 16-17; *id.* at 20 ("Judicial review . . . is the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision."); see also *supra* note 65 and accompanying text.

tive critics, the entire line of privacy decisions is at best highly questionable on democratic grounds. In *Griswold* and other cases, these critics argue, an unelected Court struck down a statute in the name of the law—the Constitution—thereby overturning the work of a body elected by the people.⁸⁴ The absence of an express provision in the Constitution protecting reproductive or sexual freedom, or even privacy in general,⁸⁵ makes the dilemma more severe by implying all the more a commitment to a process of deliberation and reasoning at a high level of abstraction.

Although the countermajoritarian difficulty is the most cited, for my purposes the dilemma can be more fruitfully put in terms of a question concerning community that is raised by the pluralist model. If we adopt the premise of decisionism—that moral and political choices result from private nonrational impulses⁸⁶—there is little reason to suppose *a priori* that there is any connection between our commitments (or choices) today and those made by the framers: Yesterday's impulses may not be today's.⁸⁷ There is no justifiable basis for supposing that we are necessarily part of the same community as that of the framers. Indeed, it may well make no sense to speak of a community in either contemporary or historical terms. If politics is merely the instrumental pursuit of private, individual ends, then the Constitution—like any contemporary political enactment—would simply reflect the balance of power among those competing forces at the time of adoption.

This dilemma can be phrased in terms of the scope of the right of privacy. Whether they are thought to be set by the framers or by some current source, a right to privacy must have limits. Yet no matter how democratic our politics might be, what reason is there to suppose that the areas delineated as fundamental by the right of privacy, and so protected by the courts, will coincide with any given individual's sense

84. E.g., R. BORK, *supra* note 65, at 98-100, 110-14, 242-47, 257-59; Bork, *supra* note 11, at 10. Cf. M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 33-34, 40-50 (1987) (faulting the Court for taking the issue out of the hands of state legislatures, thereby precluding dialogue and compromise). For a critique of Bork's position on his own terms, see Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990).

85. Cf., e.g., FLA. CONST. art. I, § 23 (1980) (protecting "the right to be let alone and free from governmental intrusion into . . . private life"); ALASKA CONST. art. I, § 22 (1972) ("The right of the people to privacy is recognized and shall not be infringed.").

86. See *supra* note 81.

87. Cf. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 11 (1989) ("Consistency among values over time is not an obvious first principle of legitimate, democratic government.").

of what is fundamental to *her* self-realization? There is no particular reason to think that some individual would not, for example, work more important to self-realization than sex, and stake out a claim for judicial protection. Tailoring the scope of protected privacy to each individual would, however, be unworkable. Consequently, any attempt to protect personhood faces a dilemma like that set out more generally by Michelman: How can each of us both be free to pursue private life according to our own conception of the good life and at the same time partake, in our public as well as private capacity, of necessarily shared values concerning what is fundamental to self-realization? Once again, we see that *Griswold's* ambiguities are not merely matters of speculative interpretation, but reflect basic questions about the nature of our politics.⁸⁸

Michelman's answer to the general problem of reconciling democracy and the rule of law is to look to "jurisgenerative" politics, borrowing Robert Cover's term for the "creation of legal meaning."⁸⁹ Central to Michelman's conception of politics is dialogue broadly conceived. Dialogue in this sense does not mean simply the back-and-forth between the Court and Congress, or within the Court or Congress alone,⁹⁰ but includes as well any grassroots activity that bears on and helps shape our identity as a society in the course of dealing with social issues.⁹¹

88. See *supra*, Section I.

89. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983); *id.* at 11-19. See Michelman, *supra* note 39, at 1502.

90. Michelman, *Traces*, *supra* note 70 (Court); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48-85 (1985) (Congress). But cf. Kahn, *supra* note 87, at 28-42 (criticizing the elitism in Michelman's and Sunstein's focus on governmental bodies as the locus of republicanism); Pope, *supra* note 66, at 299-301 (similarly criticizing Michelman).

91. Michelman's description of political dialogue is worth quoting at length to show the breadth of his current conception:

The full lesson of the civil rights movement will escape whoever focuses too sharply on the country's most visible, formal legislative assemblies—Congress, state legislatures, the councils of major cities—as exclusive, or even primary, arenas of jurisgenerative politics and political freedom. I do not mean that those arenas are dispensable or unimportant. Rather I mean the obvious points that much of the country's normatively consequential dialogue occurs outside the major, formal channels of electoral and legislative politics, and that in modern society those formal channels cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement. Much, perhaps most, of that experience must occur in various arenas of what we know as public life in the broad sense, some nominally political and some not: in the encounters and conflicts, interactions and debates that arise in and around town meetings and local government agencies; civic and voluntary organizations; social and recreational clubs; schools public and private; managements, directorates and leadership groups of organizations of all kinds; workplaces and shop floors; public events and street life; and so on. Those are all arenas of potentially transformative dialogue.

Through dialogue we both draw on and create a fund of "narratives, analogies, and other professions of commitment"⁹² that give us an identity as a society and provide a common medium for further conversation and contest. Law that emerges from this process is in some sense ours as a society, and not merely an external constraint. A key aspect of jurisgenerative politics in Michelman's conception is that the activity by which we make ourselves into a free, law-giving community is not limited to a single founding constitutive moment, or to rare occasions thereafter.⁹³ Rather, he envisages "the *constant* redetermination by the people for themselves of the terms on which they live together."⁹⁴

The problem, to which Michelman is acutely sensitive, is that politics so conceived may fall prey to the kind of authoritarianism with which Rubinfeld indicts republicanism.⁹⁵ The dilemma can be stated as a question of who is entitled to participate in the dialogue. Only a commitment to the most rigorous kind of rationalism would allow us to believe that the shape and direction of the socially constitutive dialogue would be unaffected by who the participants are. Unless we accept such rationalism—and few would likely be prepared to do so—will there not always be a temptation to influence the dialogue by excluding certain citizens from participation?⁹⁶

The prospect is hardly hypothetical. The property qualification to vote can be read as one such example.⁹⁷ Moreover, one way to understand the debate over homosexuality is as an effort to deny *public* participation by certain citizens in the socially constitutive dialogue. The recent controversy over the Robert Mapplethorpe exhibit,⁹⁸ for exam-

Michelman, *supra* note 39, at 1531 (footnote omitted).

92. *Id.* at 1513.

93. See generally Ackerman, *Storrs Lectures*, *supra* note 69.

94. Michelman, *supra* note 39, at 1518 (emphasis added); see also *id.* at 1517 ("A constitution cannot retain its claim to republican validity without changing in response to historical change in the people's composition and values, its identity and 'fate as a People.'") (quoting Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1180 (1988)).

95. See Michelman, *supra* note 39, at 1495. Others, of course, have noted the same concern. E.g., Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 429-34 (1991); Horwitz, *supra* note 66, at 67 (noting concerns by some over whether "the republican vision does not lead inevitably to authoritarian conceptions of morality").

96. Or might there not be a tendency to accord presumptive legitimacy to moral claims that a community makes on its members, even when those claims are illegitimate? See Friedman, *Feminism and Modern Friendship: Dislocating the Community*, 99 ETHICS 275, 280-85 (1989).

97. See *supra* text accompanying note 78.

98. See Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. Times, Oct. 6, 1990, at A1, col. 1; Glueck, *Border Skirmish: Art and Politics*, N.Y. Times, Nov. 19, 1989, § 2, at 1, col. 2.

ple, likely had as much to do with discomfort over public presentation of erotic imagery of men as it did with philosophical disputes about the role of federal funding of the arts. Those who opposed public funding appeared to deem it particularly objectionable precisely because the exhibit publicly presented a matter not fit for conversation among decent people.⁹⁹ Forcing gays to maintain a discreet silence about an aspect of their identity is clearly an attempt to exclude their participation as gays in the myriad forms of dialogue. Moreover, exclusion can be achieved by stigma and belittling, as well as by the formal exercise of state power.¹⁰⁰

Michelman responds to this possibility by tempering his brand of republicanism and dialogue with a commitment to plurality (which he distinguishes from pluralism).¹⁰¹ Once one accepts plurality, the idea of limiting participation in the dialogue to conform to some ascertainable

99. See Dowd, *Unruffled Helms Basks in Eye of Arts Storm*, N.Y. Times, July 28, 1989, at A1, col. 3, B6, col. 1 (remark by Senator Jesse Helms that he was embarrassed to talk to his wife and the newspaper reporter about the images in the Mapplethorpe); Kastor, *Senate Defeats Helms Move to Revive Arts Amendment*, Washington Post, Sept. 29, 1989, at A1, A11 (suggestion by Helms that it might be better for "all the pages, all the ladies, and maybe all the staff [to] leave the chamber" while copies of the Mapplethorpe photographs were distributed to Senators). Indeed, artistic works that are supported by grants from the National Endowment for the Arts (NEA) and deal openly with gay and lesbian themes have been a favorite subject of fundamentalist attacks. See, e.g., Gamarekian, *Frohnmayr Defends Prize Film's Grant*, N.Y. Times, March 30, 1991, at 11, col. 1; Archibald, *NEA to Defend Male-Rape Film*, Washington Times, March 29, 1991, at A1; Parachini, *Conservative Group Renews Attack on NEA*, L.A. Times, March 27, 1991, at F1, col. 4. Moreover, when Congress enacted a limitation on the NEA's power to fund artistic works, it specifically listed depictions of "homoeroticism" (along with "sodomasochism" and the "sexual exploitation of children") as an example of obscene material. Department of Interior and Related Agencies Appropriation Act of 1990, Pub. L. No. 101-121, § 304, 103 Stat. 701, 741. See generally Note, *The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 EMORY L.J. 241 (1991) (arguing that the statute places an unconstitutional condition on exercise of protected first amendment rights). See also *Bella Lewitzky Dance Foundation v. Frohnmayr*, 754 F. Supp. 774 (C.D. Cal. 1991) (holding that NEA's requirement that recipients of federal funds certify in advance that they would not violate § 304 violates first amendment).

For another example that would be humorous if it were not pathetic, see Letter to the Editor, *NEWSWEEK*, Nov. 26, 1990, at 15 (efforts of elementary school teacher to extirpate "gay" from lyrics of songs sung by children).

100. How successful such exclusionary efforts will be is another matter. See *infra* Section III.A.

101. By plurality Michelman means to acknowledge that republican identity cannot be conceived in monolithic terms, ignoring a range of voices in the dialogue. Michelman, *supra* note 39, at 1513, 1526-28; see *id.* at 1528 n.144. At the same time, he rejects pluralism's "deep mistrust of people's capacities to communicate *persuasively* to one another their diverse normative experiences," *id.* at 1507, a mistrust that leads it to conceive of politics as nothing more than a "market-like medium through which variously interested and motivated individuals and groups seek to maximize their own particular preferences." *Id.* at 1508.

social *telos* must be abandoned in favor of openness to marginal and excluded voices.

Given plurality, a political process can validate a societal norm as self-given law only if (i) participation in the process results in some shift or adjustment in relevant understandings on the parts of some (or all) participants, and (ii) there exists a set of prescriptive social and procedural conditions such that one's undergoing, under those conditions, such a dialogic modulation of one's understandings is not considered or experienced as coercive or invasive, or otherwise a violation of one's identity or freedom, and (iii) those conditions actually prevailed in the process supposed to be jurisgenerative.¹⁰²

Thus reformulated, republicanism strengthens rather than weakens Hardwick's claim to constitutional protection. Homosexuality, Michelman asserts, is "an aspect of identity demanding respect" in contemporary society; a statute that declares such a basic aspect of identity illegal amounts to a denial of "admission to full and effective participation in the various arenas of public life."¹⁰³ Of course, Hardwick could participate while maintaining silence about his sexual preference, but, Michelman argues, that would render his participation inauthentic.¹⁰⁴ With authentic participation, however, the ideal of transformative revision would be possible. Michelman's approach thus captures an important aspect of demands for gay rights: they are in reality a demand that individuals and society generally abandon or at least temper their homophobia.

One could make a similar argument in defense of *Roe v. Wade*. In our society, control over the decision whether to become a mother, and the ability to engage in sexual relations without fear of unwanted pregnancy—something that is impossible without the availability of a backup to contraceptives—are aspects of identity demanding respect. Concededly, denial of abortion would not prevent a woman from participating in dialogue in some literal sense. But, one might argue, that participation—as a woman denied a basic aspect of her identity—would be inauthentic.

102. *Id.* at 1526-27.

103. *Id.* at 1533. For a somewhat similar approach and a discussion of sexual self-determination, see Note, *supra* note 58, at 474-76.

104. Michelman, *supra* note 39, at 1535.

3. Privacy and Republicanism: An Evaluation

Michelman's approach has much to recommend it, particularly in its concern to connect privacy with public values. Nevertheless, his attempt to "fortify constitutional adjudicators against a liberty-deferring, authoritarian stance towards constitutional law"¹⁰⁵ seems unsatisfactory for two reasons. First, he gives no real sense of the connection between privacy and participation in dialogue; indeed, there does not seem to be much actual self-revision in Michelman's critique of *Bowers*. Precisely for that reason, he comes perilously close to assuming implicitly something like an essence of gays (and one would suppose, women). Second, his three conditions for dialogic republicanism—of which the second stipulation is admittedly the most important¹⁰⁶—are so far from being realized that it seems misleading to invoke them.

One way to grasp the first criticism is to return to the problem of how an individual's sense of what is fundamental might coincide with society's. At its most optimistic, one might suppose the answer to be something like the following. One individual's sense of what is fundamental cannot simply be taken as given; each person, as well as society as a whole, is open to self-revision as part of the dialogic process.¹⁰⁷ In that way, both the individual and society are open to transformation, and what emerges from the process will be both law *and* our own vision, collectively and individually, of the scope of privacy. The dialogic process ought to be such that if an individual is told by a court that a particular activity, for which she had sought the protection of the right to privacy, will not in fact be deemed fundamental by the law, she would actually agree that the court's decision "warrant[s] being promulgated as law."¹⁰⁸ Note that in Michelman's conception, the shift might or might not be accompanied by a change in the individual's own conception of what is fundamental *to her personally*. What was transformed might be her views about what society should protect as fundamental. She might still regard an activity as fundamental to her own personal development, but conclude that society was correct in failing to protect it through a right of privacy.¹⁰⁹

105. *Id.* at 1524.

106. *Id.* at 1527-28.

107. *See id.* at 1526 (We no longer "suppose that all of the participants' pre-political self-understandings and social perspectives must axiomatically be regarded as completely impervious to the persuasion of the process itself.").

108. *Id.* at 1526.

109. A useful analogy might be the question of religious tolerance. In laying out his theory of

It is not clear, however, why Hardwick needs protection by the courts to be able to participate in dialogue. Certainly that assertion cannot be taken literally; otherwise, how else could he ever have brought his lawsuit in the first place? In any case, is it somehow part of the essence of being gay that, without full protection from state, he would not be able to participate in jurisgenerative dialogue? Any assumption of an essential gay identity is not only problematic, but also potentially oppressive.¹¹⁰ This is not the only respect, moreover, in which Michelman implicitly assumes something like an essence. Ironically, he simply takes it for granted that Hardwick would *not* be open to one particular self-revising discovery: a discovery that homosexuality is immoral and has no place in our society.¹¹¹

Might we expect that anyone in Hardwick's position would ever make such a discovery (assuming *no* violation of stipulation (ii))? Like Michelman, I would expect not, but I fail to see what would make it impossible *in principle*. One might imagine a conversion to Christian fundamentalism, for example. Indeed, history provides no shortage of religious figures who have taught that any sexual conduct is im-

an "overlapping consensus"—an idea that Michelman invokes in support of his own conception of republican dialogue—Rawls asks how a commitment to religious tolerance could come to represent something more than a mere recognition by various religious sects that they lacked the power to impose their views on everyone. See Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987). The shift from tolerance as a *modus vivendi* to tolerance as an example of overlapping consensus is grounded, according to Rawls, in three requirements: first, tolerance's practical success in lowering the stakes of political controversy; second, a commitment to a public reason that accords with common sense or uncontroversial scientific methods; and third, a product of the first two, a spirit of reasonableness and compromise. *Id.* at 18-22. "Political liberalism," writes Rawls, "tests principles and orders institutions with an eye to their influence on the moral quality of public life, on the civic virtues and habits of mind their public recognition tends to foster, and which are needed to sustain a stable constitutional regime." *Id.* at 21. In that spirit, one who believes that his own religion uniquely permits salvation might nevertheless accept that the law's respect for freedom of religion "express[es] political values that, under the reasonably favourable conditions that make a more or less just constitutional democracy possible, normally outweigh whatever other values may oppose them." *Id.* at 9. The approval of tolerance would not be merely a matter of convenience, but a genuine commitment—so genuine that, Rawls appears to suggest, one might revise one's religious beliefs in light of it. *Id.* at 19.

110. Rubinfeld's analysis is particularly good in this respect. See Rubinfeld, *supra* note 4, at 778-82. On the politics of identity, see, e.g., D. FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* 1-21, 97-112 (1989). Indeed, there is something insulting about the notion that "the behavior that *defines the class*" of gays is homosexual sodomy. *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (emphasis added).

111. There also seems to be very little actual self-revision by society in Michelman's description. It is not clear in his account whether, or exactly how, society would experience a transformative (if perhaps only partial) rejection of homophobia as a result of a Supreme Court declaration that sodomy statutes are unconstitutional.

moral.¹¹² Are we to believe that gays are by some peculiarity of nature precluded from embracing such a belief with regard to their own sexual desires?¹¹³

The question is important, for in dealing with it Michelman faces a choice of two options, either of which would undermine his theory. He could assume that a self-revising discovery of the immorality of homosexuality would be possible, in which case his factual assertion concerning requirements for authentic participation in dialogue is undermined: social acknowledgement of the legitimacy of homosexual sex is *not* necessarily crucial to authentic identity and participation. Alternatively, he could privilege identity from dialogic revision, in which case his seemingly factual assertion would be exposed as a deeply normative and highly contestable proposition. And having made that move, would he not face with renewed vigor the problem that Rubinfeld identifies with republican approaches—namely, the idea that at base, where society's identity is at stake, a republican approach suggests that society's identity should prevail? What else can a republican court say if most people feel that society's identity depends on keeping women in subordinate positions or on keeping gays in the closet? There seems little here to "fortify" the courts against such determinations.

A similar point could be made with regard to abortion. In what sense might women *require* access to abortion in order to be able to participate authentically in jurisgenerative dialogue? Clearly it could not be that the essential nature of women makes motherhood and reproduction so central to them that once they bear children they are unable to participate in politics. It would be equally untenable to assert that any such participation would necessarily be inauthentic. Indeed, having been confronted so starkly with the power of a male-dominated state over her body, might not a woman denied an abortion come to grasp more clearly the need for her own participation in feminist organizing? Her participation might thenceforth be *more* authentic. My aim is certainly not to justify putting women to the choice of forced

112. *E.g.*, E. PAGELS, *ADAM, EVE, AND THE SERPENT* 78-97 (1988); P. BROWN, *THE BODY AND SOCIETY: MEN, WOMEN AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY* (1988).

113. Note that, given Michelman's earlier description of the possibility of a "qualified" transformation, *see supra* notes 108-09 and accompanying text, we need not even assume that, for example, a lesbian seeking judicial protection would come to believe that her own sexual conduct is immoral. Michelman's theory would seem to encompass a more limited transformation: she might instead be persuaded that the law's decision not to give protection to homosexual conduct is part of a just constitutional democracy. Michelman, *supra* note 39, at 1527 n.139 (citing Rawls, *supra* note 110, at 9-15).

motherhood or illegal abortion, or to deny the terrible impact that being put to such a choice has had on women. Nevertheless, any notion that women *must* have the benefit of judicial intervention in order to be able to participate authentically in the dialogue is simply wrong.¹¹⁴ Indeed, it comes uncomfortably close to construing them entirely as powerless victims and nothing more.

The second flaw in Michelman's account is still more serious. The conditions under which laws are made seem to me to be so far from satisfying his "stipulation (ii)" that it seems premature to invoke it except as a reminder of how imperfect our democracy remains. "Stipulation (ii)," as I understand it, requires the elimination from republican dialogue of any coercion that might play a role in the individual's transformation.¹¹⁵ Yet dialogue, understood in Michelman's properly capacious use of the term, is in fact riven with violence and coercion. One need only think of "pro-lifers" screaming at women and trying to block them from entering abortion clinics, or punks bashing gays, egged on by a general atmosphere of loathing and discrimination, to get a sense of how pervasive—how *ordinary*—are violations of stipulation

114. Ultimately, as I argue in Section III below, there is little point in asking whether a woman's participation would be authentic in any given circumstance. Evaluations of authenticity can be made only if one assumes an essential personal identity, an assumption I reject. In the language of authenticity, it would be tempting, for example, to say that the woman who was denied an abortion and became a feminist had finally overcome her false consciousness and grasped her true interests. That is not my argument. Rather, my point here is simply that if one is going to argue about authenticity, it is far from clear that anti-abortion statutes would necessarily have the effect of rendering a woman's participation less authentic.

115. See Michelman, *supra* note 39, at 1526-27 (stipulation (ii) is that "there exists a set of prescriptive social and procedural conditions such that one's undergoing, under those conditions, such a dialogic modulation of one's understanding is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom").

Michelman's formulation is ambiguous in an interesting respect. His stipulation is not that the "social and procedural conditions" in fact be noncoercive and noninvasive, but that they be "considered or experienced" as such. The reference to how they are experienced, however, immediately raises a question of standpoint. We might well ask, "Not considered or experienced as coercive" by whom? If Michelman means "considered by society" rather than by the individual, the value of stipulation (ii) in connecting individual privacy to transformation through politics is severely diminished. If, on the other hand, he means "considered by the individual," does he mean the individual before "dialogic modulation" or after? Using the latter standpoint would raise an obvious problem: what if a coercive modulation resulted in an individual's subsequent endorsement of that coercion? Using the former standpoint would require the individual to assess the adequacy of the "social and procedural conditions" before undergoing them. But might the individual not simply make a mistake in some cases? In the end, as I will argue below, the only way to deal with such problems is to acknowledge the need for an openly normative critique of the factors that bear on individuals' moral decisions. See *infra* Section IV.

(ii).¹¹⁶ The same is true of dialogue conceived more narrowly as the judicial process: at the end of the case, the court issues a judgment that will, if necessary, be enforced by the coercive power of the state.¹¹⁷ Far from reminding us of this, however, Michelman's analysis reveals a certain impatience with those who dwell on the baser aspects of politics and law.¹¹⁸ Yet even in *Brown v. Board of Education*,¹¹⁹ the case that

116. On anti-abortion violence, see, e.g., N.Y. Times, Mar. 24, 1989, at A13, col. 6; N.Y. Times, Nov. 12, 1989, § 1, at 33, col. 1; *America's Abortion Dilemma*, NEWSWEEK, Jan. 14, 1985, at 20. See also C. CONNIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 151-63 (1990); B. HARRISON, *OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION* 1 (1984); H. MARIESKIND, *WOMEN IN THE HEALTH SYSTEM* 106-07 (1980); Apel, *Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction*, 48 WASH. & LEE L. REV. 41, 54-59 (1991). On violence against gays, see, e.g., G. COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* (1991); D. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 466-67 (1988). See also M. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1987).

"Violence" may be too narrow a term to encompass the countless ways in which sexist remarks, titillation over rape, workplace harassment, advertising, and pornography force every woman to "live[] with innumerable reminders of her perceived, and culturally-imposed, worthlessness every day." Apel, *supra*, at 74; Lawrence, *Public Spaces or Peep Shows?*, N.Y. Times, Jan. 8, 1991, at A13, col. 1. The same could be said of blacks. See, e.g., Williams, *When Blacks Shop, Bias Often Accompanies Sale*, N.Y. Times, April 30, 1991, at A1, col. 3. Interestingly, some medical researchers have developed evidence that the tendency of blacks to have high blood pressure is not genetic, but rather is the result of living with the racist insults our society daily inflicts on them. See Goleman, *Anger Over Racism Is Seen as a Cause of Blacks' High Blood Pressure*, N.Y. Times, April 24, 1990, at B8, col. 1.

117. See Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.").

118. One example is Michelman's rather begrudging acknowledgment that "interest" may have had something to do with the framers' intentions in drawing up the Constitution. Michelman, *supra* note 39, at 1508 & n.54.

The failure to give adequate recognition to conflict and the clash of interests is not unique to Michelman. Ackerman, for example, presents the Supreme Court's dramatic rejection of Lochnerian jurisprudence as an example of non-article V constitutional amendment. See Ackerman, *Storrs Lectures*, *supra* note 69, at 1052-57. See also Michelman, *supra* note 39, at 1520-21 (following Ackerman's account in that respect, though rejecting the idea that the Court's role is limited to giving retrospective legitimation to popular amendments). The amendment in the 1930s, in Ackerman's view, consisted of popular mobilization in support of the New Deal. Ackerman, *Storrs Lectures*, *supra* note 69, at 1055-57. For all the subtlety and perceptiveness of Ackerman's theoretical account, however, this is a remarkably monochromatic view of the New Deal and the rise of the welfare state. The New Deal was both a response to popular demands for a more just role by the government and an attempt to co-opt the populace and limit its ability to pose a basic threat to the system. See, e.g., I. KATZNELSON & M. KESSELMAN, *THE POLITICS OF POWER: A CRITICAL INTRODUCTION TO AMERICAN GOVERNMENT* 302-03 (3d ed. 1987) (The welfare state is both "a great popular victory" and "an important factor in ensuring the persistence of market capitalism and in controlling popular discontent."); S. BOWLES, D. GORDON & T. WEISSKOPF, *BEYOND THE WASTELAND: A DEMOCRATIC ALTERNATIVE TO ECONOMIC DECLINE* 249-52 (1984); F. PIVEN & R. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 45-180 (1971); C. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW AND THE ORGANIZED*

appears best to embody for Michelman the jurisgenerative possibilities of law,¹²⁰ considerations of Cold War politics played a role as well.¹²¹ There is, to say the least, an element of the sheer exercise of power in politics—perhaps irreducibly so—that Michelman's dialogic conception fails to adequately acknowledge.¹²²

LABOR MOVEMENT IN AMERICA, 1880-1960 (1985). Ackerman's account simply writes out the elements of dissent by the weak and co-optation by the powerful, that, together with popular endorsement, marked the New Deal. Only with such an elision does it become possible to present "the people" as having endorsed the creation of the welfare state without qualification.

An aversion to treating interest in a serious way may well hinder understanding of the limits of the republican tradition as a model for a revitalized contemporary democracy. Jennifer Nedelsky's recent account of the founders' republican vision subtly integrates both their interests and their general theoretical concerns about the nature of politics. The framers, she argues, did envisage a general conflict between majority rule and the protection of minorities through the rule of law, but they did not envisage the conflict exclusively in the abstract way that Michelman states it. For the framers, Nedelsky argues, the most important instance of the conflict concerned property rights. Acting on an assumption that a majority of people would always remain propertyless, the framers saw the need to protect property rights from popular sovereignty as a key issue. That, she argues, led them to devise a set of political institutions that, among other things, systematically discouraged widespread popular participation in politics, leaving us with a legacy of a severely limited conception of democracy. See J. NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990). The briefly fashionable neoconservative concerns about an excess of democracy perhaps represent one variation on that legacy. See P. STEINFELS, *THE NEOCONSERVATIVES: THE MEN WHO ARE CHANGING AMERICA'S POLITICS* 249 (1979). See also R. HANSON, *THE DEMOCRATIC IMAGINATION IN AMERICA: CONVERSATIONS WITH OUR PAST* 367-71 (1985).

119. 349 U.S. 294 (1955).

120. Michelman, *supra* note 39, at 1529-30.

121. One important political factor was the need in the Cold War to present the right image to the world. See Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62-63 (1988). Cf. G. GREEN, *THE ESTABLISHMENT IN TEXAS POLITICS: THE PRIMITIVE YEARS, 1938-1957*, at 79 (1979) (U.S. Attorney General expressed concern to Texas governor that "Axis propagandists were exploiting" a lynching incident in Texas). Indeed, given the antipathy, ranging from lethargy to open resistance, with which *Brown* and other civil rights decisions were greeted, see S. WASBY, A. D'AMATO, & R. METRAILER, *DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES* 162-222 (1977); Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 91, 98-102 (D. Bell ed. 1980); M. BELKNAP, *supra* note 116, at 27-52; Shepard & Grunes, "*A Tortuous Path*": *Shreveport Blacks and the Constitution*, in *GRASSROOTS CONSTITUTIONALISM: SHREVEPORT, THE SOUTH AND THE SUPREME LAW OF THE LAND* 135-51 (N. Provizer & W. Pederson eds. 1988), *Brown's* image of a social commitment to principle was more than a little hypocritical.

122. For a critique of Michelman's conception of dialogue, see Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1476-85 (1990). Cf. Kahn, *supra* note 87, at 85 ("Authority and discourse are both powerfully attractive ideas, but that does not make them reconcilable."). Indeed, it may be that violence and coercion are intrinsically a part of individual and collective self-definition. What could be more coercive and invasive than death? Yet few if any other things are as central to individuals' attempts to come to grips with themselves. To make this observation is not, of course, to sanction violence indiscriminately, but

This second critique is the more significant because its implications are more far-reaching. To the extent that dialogue does result in self-revision, there is ample reason to be worried. Perhaps we should grant the force of Michelman's point about politics and work to make it jurisgenerative by bringing about a society in which stipulation (ii) seems more a matter of hope than of reality. But perhaps also it is very wrongheaded to think that *that* task forms the foundation for privacy. Instead, pending the achievement of a far more democratic public life than we now have, we might seek to place a basic limit on the revision of self through politics. That is Rubenfeld's approach, to which I now turn.

C. *Privacy as an Effort to Preclude an Infinite Loop*

Rubenfeld recoils from the very prospect to which Michelman gives his blessing: personal self-transformation as a result of politics.¹²³ The fear perhaps arises from an implicit assertion that we cannot, in practice, rely upon satisfaction of the conditions laid down in stipulation (ii). Power, as Rubenfeld conceives it, is pervasive, overwhelming, and unchecked. The result is an effort to cordon individuals off from total determination by state power. Ironically, in focusing so heavily on

only to wonder whether stipulation (ii) is possible even in principle. Indeed, the "virtues of tolerance and being ready to meet others halfway, and the virtue of reasonableness and the sense of fairness," Rawls, *supra* note 109, at 17, are not unambiguously desirable without regard to context. Imagine a husband telling his wife to be reasonable when she insists that he take on a greater share of the housework, or conservative politicians insisting that feminists be reasonable in their demands. Or, as Cindy Patton notes:

AIDS activists know that silence equals death, but we also know that this cannot be *said*, it must be *performed* in an anarchistic politics Not candlelight marches of commemoration and pathos—though we attended these, too—but throwing our blood at insurance companies, setting up illegal AIDS drug counters in front of the [Food and] Drug Administration, holding die-ins at hospitals and drug companies. There is no logical relationship between these events and the actions of the FDA, hospitals, and drug companies in changing some of their policies. But they do change their policies, and not only to shut up the militants and suppress their messy performances. Somewhere in the fissures of scientific discourse are lodged the elided meanings of, can we say it? justice? humanity? Somewhere in their practices the administrators see that silence equals death, and that they are the cool, if uneasy executors of the discursive death squad.

C. PATTON, *INVENTING AIDS* 131-32 (1990).

In some cases, then, impatience, disruption, boycotts, and other forms of conflict are the only way to challenge injustices, and in those cases, reasonableness and a ready willingness to compromise are certainly *not* civic virtues. In the end, therefore, there is little point in attempting to define those virtues so abstractly.

123. A qualification is in order. Rubenfeld, as will be shown below, does not reject the prospect of some self-revision through politics; his focus is on what he sees as more limited cases of utter transformation or determination by the state. See *infra* Section II.C.1.

state power while simultaneously asserting the irresistibility of power generally, Rubenfeld leaves us wondering whether the effort is worth it.

1. Personhood and Power

Personhood's reliance on the notion that one's sexual life is central to one's identity forms the basis for the repressive hypothesis.¹²⁴ That hypothesis is that in outlawing various forms of sexual conduct, the state has heretofore disrespected individuality by repressing so basic an aspect of our private selves. It is just that reliance that renders this hypothesis vulnerable to a Foucauldian critique. In an incisive application of Foucault's work, Rubenfeld writes that, far from being long repressed and recently (if imperfectly) liberated, sexuality has become the subject of a discourse that affirmatively constitutes individuals. Instead of repressing us, "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 consciousness its particular designs."¹²⁵

Rubenfeld's rejection of the repressive hypothesis epitomizes his general account of Foucault's work. Power, Rubenfeld tells us, emanates from a whole set of "political technologies . . . [and] invest[s] the body, health, modes of subsistence and habitation, living conditions, the whole of existence."¹²⁶ In this sense the term "power" clearly goes far beyond broad legal prohibitions and regulations: it is productive and detailed, encompassing a whole range of medical and social disciplines in which people become enmeshed through their everyday lives and practices.¹²⁷ Indeed, as Foucault himself observes, state power in the sense of legal rules is merely a small and diminishing aspect of power relations more broadly conceived.¹²⁸ The regimens and disciplines that Rubenfeld describes in the case of pregnancy and child raising, for example, obviously are not imposed by governmental coercion; they are

124. See *supra* Section II.A.

125. Rubenfeld, *supra* note 4, at 775. See generally *id.* at 770-82.

126. *Id.* at 776 (quoting M. Foucault, *THE HISTORY OF SEXUALITY*, *supra* note 53, at 143-44).

127. See *supra* note 56.

128. See M. Foucault, *THE HISTORY OF SEXUALITY*, *supra* note 53, at 144:

The law always refers to the sword. But a power whose task is to take charge of life needs continuous regulatory and corrective mechanisms. . . . I do not mean to say that law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated in a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.

For a critique, see C. SMART, *FEMINISM AND THE POWER OF LAW* 4-25 (1989).

embedded in a set of material practices concerning reproduction.

In keeping with this description of power, Rubenfeld rejects personhood's claim that individuals can, if freed from governmental intrusion, shape their own personal identities in some sphere of relatively free choice. In fact, he rejects the claim that they have any personal identity at all. "We are all so powerfully influenced by the institutions within which we are raised," he writes, "that it is probably impossible, both psychologically and epistemologically, to speak of defining one's own identity."¹²⁹ Although Rubenfeld suggests that the concept of identity may be analytically insupportable,¹³⁰ the main thrust of his argument is that the idea of having a personal identity is empirically groundless in the face of the regimens and disciplines that characterize power today.¹³¹

This Foucauldian understanding of power leads Rubenfeld to offer what he calls an "anti-totalitarian" right of privacy. The function of a right of privacy is not to identify and protect certain areas of activity or decisionmaking that are fundamental to personhood. Rather, it is to keep the government from taking over one's entire life and channeling it along standardized lines. To be sure, virtually any law can be said to standardize people by prohibiting certain practices. But there are instances where even a single prohibition, by excluding a broad range of lifestyles, in fact would take over an individual's life.

Consider a woman who is precluded from obtaining an abortion. She will, Rubenfeld argues, find that motherhood has a profound impact on the course of her life, down to the smallest details.¹³² If the Court's ruling in *Webster* turns out to signal the demise of *Roe v. Wade*,¹³³ the government will be able to prevent the woman from obtaining an abortion and force her to have the baby.¹³⁴ During preg-

129. Rubenfeld, *supra* note 4, at 794. Cf. S. BUTLER, *THE WAY OF ALL FLESH* 288 (1975) (London 1903) ("Our most assured likings have for the most part been arrived at neither by introspection nor by any process of conscious reasoning, but by the bounding forth of the heart to welcome the gospel proclaimed to it by another.").

130. Rubenfeld, *supra* note 4, at 797-98.

131. *Id.* at 775-97, 794. For an analysis of the relationship of Foucault's thought to personal identity, see Nikolinakos, *Foucault's Ethical Quandary*, *TELOS* No. 83, at 123, 136-388 (Spring 1990).

132. Rubenfeld, *supra* note 4, at 789-91. See also *id.* at 799-801 (making a similar point regarding laws prohibiting homosexual sex).

133. 410 U.S. 113 (1973).

134. Indeed, by upholding cutoffs of abortion funding, see *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977), the Court has already left women who cannot afford abortion in precisely that position.

nancy, "[t]he 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."¹³⁵ Nor will the effects cease when she gives birth. Having a baby and raising children "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 . . . [the woman's] daily life and consciousness."¹³⁶ Prohibiting abortion will do far more than merely foreclose a particular option; the state will, in effect, transform her into a different person.

Similarly, Rubenfeld asserts, prohibitions of all homosexual conduct have an all-determining effect on individuals. The point is not so much that gays and lesbians will either be forced to remain celibate or will be unable to conduct their sexual lives with the freedom they wish. Rather, it is that laws banning homosexual conduct are an integral part of a social effort to channel all sexual expression into one of two distinct outlets: (permitted) heterosexual conduct and (prohibited) homosexual conduct. In that sense, no one is untouched by the constitutive effects of such laws, though of course those effects are experienced in different ways.¹³⁷

This conception of power leads Rubenfeld to reject the personhood conception as not only inadequate but positively misleading and harmful. It is not just that it is analytically insupportable to say that abortion rights must be protected because they are central to women's identity or personhood. To say that decisions about whether to bear children are central to every woman's identity is implicitly to assert that motherhood is a "fundamental, inescapable, natural backdrop of womanhood against which every woman is defined."¹³⁸ The ironic effect of recognizing a right to define oneself in those terms is to contribute to the very process of molding and standardization against which personhood is offered as a protection.

Rubenfeld makes a similar criticism regarding legal recognition of gay rights on the basis of protecting personhood.¹³⁹ It is wrong to envision, as the Supreme Court did in *Bowers*, an invariant homosexuality

135. Rubenfeld, *supra* note 4, at 790.

136. *Id.* at 801-02.

137. *Id.* at 799-802.

138. *Id.* at 782.

139. *Id.* at 779-80.

that has been condemned and repressed throughout the ages.¹⁴⁰ Indeed, to protect sexual relations between two persons of the same sex on the ground that such practices are essential to their personhood is not to offer them protection. Rather, it enmeshes them further in a discourse that makes their entire identities dependent on their sexuality—a sexuality not of their own creation. “Homosexuality” as we think of it today—as an orientation that virtually defines certain individuals as separate and distinct from heterosexuals—is a relatively modern phenomenon.¹⁴¹

Having thus set out an alternative understanding of the right of privacy, Rubinfeld grounds it in a theory of democracy. Whatever the framers might have had in mind, the fact is that today government potentially exercises “total control over the shape and purposes of citizens’ lives.”¹⁴² It therefore has the power to produce standardized citizens in its own preferred image. If democracy means anything, it surely includes a notion of the accountability of government to the people. And “[t]he 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.”¹⁴³

140. See Goldstein, *supra* note 34, at 1086-91.

141. See generally M. Foucault, *THE HISTORY OF SEXUALITY*, *supra* note 53, at 43, 103-14; M. Foucault, *THE USE OF PLEASURE*, *supra* note 53, at 187-225; D. Greenberg, *supra* note 116; J. Weeks, *SEX, POLITICS AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800*, at 96-121 (1981); Chauncey, *From Sexual Inversion to Homosexuality: The Changing Medical Conceptualization of Female “Deviance,”* in *PASSION AND POWER: SEXUALITY IN HISTORY* 87-117 (K. Peiss & C. Simmons eds. 1989) [hereinafter *PASSION AND POWER*]; Law, *supra* note 29, at 200-02. Cf. Goldstein, *supra* note 34, at 1086-89 (1988) (arguing that legal proscriptions against oral sex are not of ancient origin); Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181, 1183-84 (1988) (making same argument). Indeed, even the apparent similarity of some older proscriptions of homosexual acts to current ones may be misleading. See M. Foucault, *THE USE OF PLEASURE*, *supra* note 53, at 250, where Foucault notes that even though rules regulating sexual conduct at different points in history may be “formally alike, . . . this actually shows only the poverty and monotony of interdictions. The way in which sexual activity was constituted, recognized, and organized as a moral issue is not identical from the mere fact that what was allowed or prohibited, recommended or discouraged is identical.”

On the social construction of sexuality generally, see Padgug, *Sexual Matters: On Conceptualizing Sexuality in History*, in *PASSION AND POWER*, *supra*, at 14-31. But see Boswell, *Revolutions, Universals, and Sexual Categories*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 17-36 (M. Duberman, M. Vicinus, & G. Chauncey eds. 1989) (arguing against an exclusively constructivist view of homosexuality); Hussen, *Sodomy in the Dutch Republic During the Eighteenth Century*, in *id.* at 141-49. For a good overview of the debates over the extent to which homosexuality should be viewed as a largely modern, socially constructed phenomenon, see Halley, *supra* note 29, at 932-46.

142. Rubinfeld, *supra* note 4, at 807.

143. *Id.* at 805.

For this reason, Rubenfeld concludes, the right of privacy, conceived as a limit on the government's power to shape its citizens, is an essential part of a democratic constitution.¹⁴⁴

2. A Critique of the Anti-totalitarian Right of Privacy

Rubenfeld's account does capture an important insight about the nature of modern power relations: they are productive and pervasive, embodied in detailed regimens in which people actively implicate themselves. He carries this observation to the point, however, of treating the possibility of struggle and resistance to power as irrelevant.¹⁴⁵ No theory can account for everything, but this particular omission exacts too high a price, pushing his alternative right of privacy dangerously close to irrelevance.

Why, one might ask, should it particularly matter whether the *government* attempts to mold one's life? It is clear, for example, that a woman who *chooses* to continue with a pregnancy will be subject to precisely the same "regimen of diet, exercise, medical examination, and possibly surgical procedures" that Rubenfeld mentions in describing the effects of being *forced* by the state to give birth. Similarly, having a baby and raising children would seem to confine the woman to a standardized norm whether or not motherhood was her choice. A right of privacy, it would appear, simply leaves individuals free to enmesh themselves in discourses and disciplines without governmental interference.

One might reply that a woman who chooses motherhood has not been molded and shaped because she herself has chosen the regimen to which she is subject. But that argument would presuppose precisely what Rubenfeld rejects—that we can speak of an individual self that persists through change over time, or of a domain of individual choice insulated to some meaningful degree from outside forces.¹⁴⁶ Indeed, one

144. *Id.* at 802-07.

145. In fact, the one time he discusses the question of disobedience to a law, he rejects it as irrelevant. *Id.* at 800 n.221 (arguing that because "[a]ll laws . . . are disobeyed," decisions as to when to apply the anti-totalitarian right must be premised on the assumption of obedience). Rubenfeld is correct to assert that the fact of disobedience is, in itself, no argument for striking down a law. *Id.* That observation, however, in no way justifies assuming for purposes of a theory of privacy that any given law will in fact have the kind of totalitarian consequences he ascribes to certain laws.

146. *See id.* at 798-99 (rejecting notion of "a self, or at least a 'moment' of selfhood, that remains in its active essence disunified, undefined and ungoverned—and hence free to define or govern itself").

need not resort to specifically Foucauldian ideas about power to question the meaningfulness of such a reply. Feminist analyses of the inadequacy of the liberal notion of individual choice, stripped of its social context, make the same point.¹⁴⁷ That is, given extensive sex discrimination in wages and career opportunities, as well as the socially determined fact that the burdens of raising a child in our society fall primarily on the woman, there may be many circumstances where women feel they have no choice but to obtain an abortion. Conditioning welfare benefits or food stamps on obtaining an abortion would be a more blatant version of the same absence of effective choice, but not fundamentally different.¹⁴⁸ The word "choice" seems as drained of its meaning when a woman chooses abortion because discrimination in wages or job opportunities deprives her of the means to raise a child as it is when a woman who lacks funds or access to abortion chooses motherhood.¹⁴⁹

One could make a similar point concerning Rubinfeld's account of *Bowers*. Why should it matter so much that the government attempts to mold everyone's sexuality into a sharply bipolar model of heterosexuality and homosexuality? Rubinfeld's depiction of the effects of power on sexual expression is not quite as graphic as his description of the effects of motherhood, but it is not difficult to imagine them. The entire thrust of his Foucauldian argument is that all sexual expression is af-

147. See, e.g., K. McDONNELL, NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION 68-80 (1984); Davis, *Racism, Birth Control, and Reproductive Rights*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 15-26 (M. Fried ed. 1990) [hereinafter FROM ABORTION TO REPRODUCTIVE FREEDOM]; Riley, *Feminist Thought and Reproductive Control: The State and the "Right to Choose,"* in WOMEN IN SOCIETY 185-99 (Cambridge Women's Studies Group 1981); Rose & Hanmer, *Women's Liberation, Reproduction, and the Technological Fix*, in SEXUAL DIVISIONS AND SOCIETY: PROCESS AND CHANGE 199-223 (D. Barker & S. Allen eds. 1979); Petchesky, *Reproductive Freedom: Beyond "A Woman's Right to Choose,"* 5 SIGNS 661 (1980).

148. See K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 72-74 (1984). Cf. *Wyman v. James*, 400 U.S. 309 (1971) (woman receiving Aid for Families with Dependent Children has no fourth amendment right to warrant for "home visit" by social worker). Another example would be conditioning probation on agreement to a contraceptive implant. See *Lev, Judge Is Firm on Forced Contraception, But Welcomes Appeal*, N.Y. Times, Jan. 11, 1991, at A7, col. 1; *Lewin, Implanted Birth Control Device Renews Debate Over Forced Contraception*, N.Y. Times, Jan. 10, 1991, at A20, col. 1.

149. In fact, one could also argue that if the government does fund abortion along with childbirth, while doing nothing more generally about women's equality, it merely removes a cash-flow barrier to obtaining abortion, and thereby permits the factors that contribute to women's inequality to influence her decision more directly. Cf. Petchesky, *supra* note 147, at 679-80 (greater access to abortion, in the absence of "adequate material support" for raising children, can leave women "more vulnerable than before"); MacKinnon, *supra* note 61, at 1312-13 (noting women's general lack of control over circumstances of reproduction).

firmatively molded and shaped by discourses in which people—gay or straight—enmesh themselves, thinking that in so doing they are escaping to a private world in which they learn about their true essences, stripped of the masks they must wear to play their prescribed social roles. That belief, Rubenfeld argues, is illusory. If the state is disabled from playing the increasingly smaller supporting role that it otherwise would play, will not the result be simply to let that function be taken over entirely by other forms of power? That answer seems all the more plausible when one recalls Rubenfeld's rejection of the idea of personal identity. And in any case, as Foucault makes clear, state power is only one, diminishing aspect of power so conceived.

Thus we are left with a troubling question about the worth of the anti-totalitarian right of privacy. If preserving a sphere of personal choice is out of the question, why should one care about state interference in particular? In the end, Rubenfeld's argument appears to rest on a fear of the political equivalent of an infinite loop. That is, he seeks to avoid the prospect of the state molding standardized citizens who, in turn, ratify the authority of the state.¹⁵⁰ Rubenfeld is right to call that prospect undemocratic, but he settles for an alternative that seems little better: the citizens who ratify the government's authority will still be molded and shaped through and through, but by disciplinary regimes other than legal prohibitions or state commands in the narrow, traditional sense. To accept this limitation as sufficient—to be content simply that "the course of one's life [will not be] dictated by the state"¹⁵¹—is, in my view, to acquiesce in a sterile and impoverished concept of democracy, one that eschews any thought of a vigorous, independent citizenry. The anti-totalitarian right of privacy turns out to be rather like theories of democracy that focus entirely on formal aspects like voting, without considering whether unequal power relationships in the market¹⁵² and in personal life (indeed, anywhere outside of electoral politics) are democratic themselves.¹⁵³ The citizens in

150. See *supra* note 143 and accompanying text.

151. Rubenfeld, *supra* note 4, at 807 (emphasis added). See also *id.* at 797 (aim of anti-totalitarian right is to resist "state-imposed identities").

152. See generally A. WINNICK, *THE CHANGING DISTRIBUTIONS OF INCOME AND WEALTH IN THE U.S. SINCE 1960* (1989) (documenting increasing inequalities in distribution of wealth and income).

153. For critiques, see, e.g., C. GOULD, *RETHINKING DEMOCRACY: FREEDOM AND SOCIAL CO-OPERATION IN POLITICS, ECONOMY, AND SOCIETY* 25 (1988); P. HIRST, *LAW, SOCIALISM AND DEMOCRACY* 108-23 (1986); M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 192-99 (1987); C. MILLS, *THE POWER ELITE* (1956); J. NEDELSKY, *supra* note 118, at 216-22; Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 235-59 (1981).

Rubinfeld's republic have their privacy, but not much else.

Rubinfeld's anti-totalitarian right of privacy arrives at this unattractive impasse because, as noted, he presents power as so all-encompassing and pervasive that it virtually rules out any possibility of individual choice or control.¹⁵⁴ Besides undermining much of the point of a right of privacy, the omission of struggle and resistance to power contradicts Rubinfeld's Foucauldian premises and fails as an account of the abortion and gay rights issues, as we shall see in the following section. The best way to deal with the apparent tendency of a Foucauldian account of power to undermine the very point of a privacy theory is to give a more accurate account of the conflict and struggle that marks our politics.

III. POWER AND RESISTANCE

Different as their accounts are, Michelman and Rubinfeld share a common aim to ground the right of privacy in a theory of democracy. The commonality is not surprising, given that both republican theorizing and Foucauldian analysis are concerned with the ways in which individuals are shaped through politics. The two accounts of privacy are remarkable, however, for their studied indifference to the actual conflict and resistance to power that have marked struggles over reproductive and sexual freedoms. Indeed, there is something distinctly unattractive about the passivity that undergirds both Michelman's and Rubinfeld's conception of politics. In their world, people will be permitted to enter the dialogue—or be protected from utter determination by the state—not because they struggle to assert themselves on matters about which they care deeply and for which they are willing to take enormous risks and demonstrate great courage. Rather the courts, an agency of the state, will decide for them that the state should refrain from directing their lives or should not exclude them from republican conversation.

The failure to focus on conflict and struggle reflects an overemphasis on the judicial role in giving meaning to constitutional protections. Like many theorists, Michelman and Rubinfeld adopt an immediate approach to judicial persuasion. By "immediate" I mean simply that, in theory, a judge could read a brief or article and, convinced by it, rule as the theory suggests. When a privacy theory is aimed in such a direct

154. In addition, notwithstanding his concern for democracy, Rubinfeld gives no hint that we might respond to concerns about the exercise of state power over private life in part by trying to democratize the state.

and immediate fashion at the courts there appears to be an almost irresistible temptation, in thinking about the meaning of privacy, to focus on long-standing tradition and social consensus rather than conflict, disruption, and deep normative disagreement.

The link between an emphasis on immediate persuasion and a tendency to look to consensus most likely stems from the felt imperative to present the courts with a theory that is "legal" rather than "political." In practice, that means maintaining a posture of some neutrality with respect to the moral and political controversies that give rise to the legal dispute in the first place. To be sure, no one expects any theory of the constitutional right to privacy to be neutral in all possible respects. No court will likely be embarrassed, for example, to admit that the Constitution itself embodies substantive choices, or even that the court's own stance regarding the proper judicial role is a normative one. But for those seeking to formulate a distinctively legal approach, the theory must be neutral at least to the extent that it permits the court to decide whether to protect privacy without making a normative evaluation of the particular conduct sought to be protected.

One way to do that is to combine an appeal to an ideal that we are all said to share (at some high level of generality) with a test that purports to identify in a relatively factual or observational manner the circumstances in which the ideal is implicated. Rubenfeld, for example, attempts to show that protecting democracy—certainly an uncontroversial goal—just *means* protecting individuals who are threatened with utter determination by the state;¹⁵⁵ and the circumstances in which that threat is posed, he assumes, can be identified by observing, in a fairly straightforward way, the effect on individuals of any particular prohibition. If in fact the effect would be totalitarian, then, Rubenfeld tells the courts, protect the conduct. Similarly, Michelman's theory turns, at a key point, on what he proffers as the observation that homosexuality is in fact an important aspect of personal identity for some people.¹⁵⁶ In this way, then, tradition and neutrality are linked. We begin with some value that we all share—and what could seem more appropriate in finding such values than to look to tradition and consensus?—and then determine the implications of that value for a particular case by means of relatively uncontroversial factual observations.

As I will argue in this Section, that approach certainly does not

155. See Rubenfeld, *supra* note 4, at 802-07.

156. See Michelman, *supra* note 39, at 1533.

succeed in Rubenfeld's and Michelman's theories. I doubt that it would ever succeed in any other context, either. My aim, however, is not simply negative; nor do I wish to speculate at any length about the source of the tendency to play down conflict and disagreement in privacy theorizing. Rather, I wish to show what a theory of the constitutional right to privacy would look like if it brought the deepest moral and political disputes to the surface.

A theory of that sort, as one might expect, might seem less likely to persuade a court in any immediate sense, precisely because it would be so openly political. To reject it on that ground, however, is to misunderstand the nature of the issues at stake. The political fights over abortion and gay rights are in large part efforts to constitute women and men in a particular way; or to put the matter differently, they are efforts to shape the institutional contexts of personal and social life as they relate to gender roles. Once one acknowledges the constitutive nature of the struggle, the effort to find some seemingly uncontroversial theory to present to the courts is revealed as unsuccessful at best, and obscurantist, at worst. Moreover, rejecting the emphasis on immediate persuasion entails less of a loss than one might think initially. The more important form of persuasion, I will argue in Section IV, is a mediated one. By that, I simply mean the process by which movements for progressive social change meet with enough success outside the courtroom to give their legal arguments a plausibility they would otherwise lack.

A. *The Centrality of Struggle and Resistance*

The indifference to struggle and conflict is equally problematic in both cases, but it is particularly surprising in Rubenfeld's account, for Foucault himself calls attention to the possibility of resistance to power. As Foucault observes in his *History of Sexuality*, power "is everywhere; *not* because it embraces everything, but because it comes from everywhere."¹⁵⁷ He continues:

Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power. Should it be said that one is always "inside" power, there is no "escaping" it, there is no absolute outside where it is concerned, because one is subject to the law in any case? . . . This would be to misunderstand the strictly

157. M. Foucault, *THE HISTORY OF SEXUALITY*, *supra* note 53, at 93 (emphasis added).

relational character of power relationships. Their existence depends on a multiplicity of points of resistance: these play the role of adversary, target, support, or handle in power relations. These points of resistance are present everywhere in the power network. Hence there is no single locus of great Refusal Instead there is a plurality of resistances, each of them a special case.¹⁵⁸

To be sure, Foucault does argue that the perception of sexuality as some purely natural or biological drive that society has long repressed is itself part of a socially constituted discourse of sexuality.¹⁵⁹ By the same token, neither women's need to control their reproductive capacities nor the need of gays to express their identity as such reflects some timeless natural or biological imperative.¹⁶⁰ It does not necessarily follow, however, that one can dismiss as a chimera the impulse that gives rise to people's attempts to define themselves through their choices regarding sexuality and procreation.

In Foucault's conception, although one can never be exterior to power, struggles can take place within the context of power relations. Indeed, that is the *only* context in which resistance is possible.¹⁶¹ My purpose here, however, is not to argue over the best interpretation of Foucault's notion of power, which can be elusive to say the least.¹⁶²

158. *Id.* at 95-96.

159. *Id.* at 105. Indeed, he goes so far at one point as to call sexuality itself a "centuries-long apparatus of subjection." Foucault, *Interview—The Confession of the Flesh*, in *POWER/KNOWLEDGE*, *supra* note 56, at 194, 219.

160. *See infra* Section III.B.3.

161. *See, e.g.*, Foucault, *Is It Useless to Revolt?*, 8 *PHIL. & SOC. CRIT.* 1, 9 (Spring 1981): [T]he power that one man exercises over another is always perilous. . . . [O]wing to its mechanisms, power is infinite (which does not mean to say that it is all powerful; quite to the contrary). In order to limit power, the rules are never sufficiently rigorous. In order to displace it from all the opportunities which it falls upon, universal principles are never strict enough. Against power it is always necessary to oppose unbreakable law and unbridgeable rights.

See generally M. FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 53, at 92-102.

162. Foucault has been particularly criticized for the obscurity of his argument that resistance is possible in the face of the kinds of all-encompassing power relationships he describes. *See, e.g.*, N. POULANTZAS, *STATE, POWER, SOCIALISM* 77-80 (1978); Wolin, *Foucault's Aesthetic Decisionism*, *TELOS* No. 67, at 71, 86 (Spring 1986). Foucault himself has spoken of the Iranian revolution, for example, as almost a *deus ex machina*, presumably beyond analysis. Foucault, *Is It Useless to Revolt?*, *supra* note 161, at 18 ("Is there or is there not a reason to revolt? Let's leave the question open. There are revolts and that is a fact."). Even here, though, Foucault hedges his argument. *See id.* at 6 ("the man who revolts is . . . 'outside of history' as well as in it").

In the end, the most important task is not to determine what Foucault meant but to try to understand the phenomena addressed by his conception of power. In my view, such an understand-

More to the point, any understanding of the abortion issue or struggles for an end to discrimination against gays that discounts the possibility of resistance is notably inadequate.

During the century or so when abortion was illegal, women could not be characterized as passive and unresisting objects of power: women have always sought abortions, whether legal or not.¹⁶³ Resistance took a more openly political form in the women's movement in the 1960s and early 1970s. Although supported by elements of the medical establishment, the liberalization of state abortion laws during that period depended heavily on feminist support.¹⁶⁴ Without the change in perception of women's rights brought about by those legislative efforts, it is difficult to imagine that the Supreme Court could have decided in *Roe v. Wade* that the Constitution protects the right to abortion.

Of course, even when resisted, anti-abortion laws had a profound and oppressive impact on many women. Laws forbidding abortion

ing has two key aspects. First, the sense that many people have that their sexual relationships are *naturally* the prime arena for personal fulfillment is wrong. Sexual urges are natural, but "sexuality" as the primary site of personal self-discovery and development is a historical construct. Second, enmeshing oneself in sexuality has all the appearances of resistance to power with none of the effects. The illusion that it does have such effects is merely testimony to the hold that the repressive hypothesis has on our views of sexuality. It is, moreover, the potency of that illusion which justifies referring to the sexual discourses in power terms: obsessed by the pursuit of private, we debase our own collective power to transform the conditions of society. A useful analogue can be found in consumer culture. Advertising and other aspects of the rise of consumer culture (like the systematic weakening of unions) encourage us to focus on the pursuit of private oases of control and fulfillment to the exclusion of collective action. The illusory freedom provided by owning a car, for example, acts as a palliative for the lack of control over the conditions of work, community, and environment that many people experience. See generally S. EWEN, *supra* note 54, at 103-04.

163. See, e.g., Paltrow, *Women, Abortion and Civil Disobedience*, 13 NOVA L.J. 471 (1989). For an account of abortion in the nineteenth-century United States, see J. MOHR, *supra* note 25. Indeed, to speak of resistance may be inadequate, as if women have always simply reacted to impositions on them. On the contrary, the enactment of anti-abortion laws at the end of the nineteenth century was a response to an upsurge in the number of women, particularly middle- and upper-class married women, seeking abortions between 1840 and 1880. J. MOHR, *supra* note 25, at 86-102. When the new laws failed to stop all abortions, the state responded with additional strategies. See Reagan, "About to Meet Her Maker: Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940," 77 J. AMER. HIST. 1240 (1991) (practice of obtaining dying declarations to use as evidence against person who performed the abortion). It could as easily be said that the law has reacted to women's efforts to control their own reproductive decisions.

164. See generally F. GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* 23-42 (1989); K. LUKER, *supra* note 148, at 66-125. For a perspective that emphasizes the incompleteness of those victories, see N. BAEHR, *ABORTION WITHOUT APOLOGY: A RADICAL HISTORY FOR THE 1990s* 31-50 (1990).

caused women to risk their lives in what should be a simple and safe procedure, and forced others to become mothers against their choice. Nevertheless, in some cases the transformative effect of being denied an abortion might be more liberating or empowering than Rubenfeld allows. At the very least, a woman who unsuccessfully sought an abortion or obtained an illegal one might come to terms with the societal devaluation of women implied by statutes that criminalize abortion.¹⁶⁵ Or she might be moved to dedicate herself to seeking abortion rights and women's equality. Collectively, women who set up illegal feminist clinics or underground networks for helping other women to obtain abortions in the late sixties and early seventies freed themselves to some extent from domination by the medical establishment and the state.¹⁶⁶ Yet the very notion that an encounter with state power might have the potential to radicalize some women rather than press them into a rigid, standardized mold seems entirely inconsistent with Rubenfeld's description of power as pervasive and all-encompassing, with little or no scope for resistance.¹⁶⁷

A similar point can be made about gay rights. To be sure, conceiving the issue as one of private sexuality alone risks enmeshing individuals in a discourse on sex that has little to do with personal freedom and even less to do with a democratic dialogue.¹⁶⁸ But as Foucault observes, the creation of homosexuality as a category made possible both control *and* resistance.¹⁶⁹ There is a long history of resistance to discrimination

165. E.g., Cerullo, *Hidden History: An Illegal Abortion in 1968*, in FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 147, at 87, 89.

166. See generally N. BAEHR, *supra* note 164, at 7-30; R. PETCHESKY, ABORTION AND WOMAN'S CHOICE 127-29 (rev. ed. 1990); Bart, *Seizing the Means of Reproduction: An Illegal Feminist Abortion Collective—How It Worked*, in WOMEN, HEALTH AND REPRODUCTION 109-28 (1981); "Jane," *Just Call "Jane,"* in FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 147, at 93-100. See also Aries, *Abortion Clinics and the Organization of Work: A Case Study of Charles Circle*, 12 REV. RADICAL POL. ECON. 53 (Summer 1980).

167. Note that my argument is not that women who were radicalized by being denied abortions would thenceforth be more authentically true to their essential identity. My focus here is purely on the counterhegemonic aspect of power, not its relation to some ideal of authenticity. In emphasizing the element of struggle and resistance, moreover, I do not mean to downplay the harsh effects of anti-abortion laws. For one thing, many women reacted with intense humiliation and pain without, however, questioning the law that required them to undergo such suffering. See K. LUKER, *supra* note 148, at 105-06. And to say that a woman might be radicalized by the experience of obtaining a back-alley abortion is no justification for putting anyone through such a demeaning and dangerous experience. I simply wish to point out that women have not reacted with complete passivity to anti-abortion laws, or to put it another way, that women have not been victims and nothing more.

168. See Rubenfeld, *supra* note 4, at 799-82; Michelman, *supra* note 39, at 1534.

169. See M. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 53, at 101:

against gays and lesbians, ranging from actions like the Stonewall riot in 1969¹⁷⁰ to more conventional activities like organizing and lobbying.¹⁷¹ No modality of all-embracing power created such tolerance and rights as exist today for gays and lesbians.¹⁷² Nor should we deceive ourselves that the courts, munificently bestowing an admission ticket to dialogue, can claim principal credit for the ability of gays, however still limited, to participate as such in public life. Rather, that ability exists today because gays and lesbians pushed their way, unwelcome, into the public forum.¹⁷³ Once again, my aim is not to minimize the harms that oppression of gays causes; one need not defend an oppressive law to grasp the point that an encounter with it might radicalize and even liberate someone. Both the exercise of power and resistance to it are intrinsically complex.¹⁷⁴

There is no question that the appearance in nineteenth century psychiatry, jurisprudence, and literature of a whole series of discourses on the species and subspecies of homosexuality . . . made possible a strong advance of social controls into this area of "perversity"; but it also made possible the formation of a "reverse" discourse: homosexuality began to speak in its own behalf, to demand that its legitimacy or 'naturalness' be acknowledged . . . using the same categories by which it was medically disqualified.

170. See B. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* 75-76 (1987); D. ALTMAN, *HOMOSEXUAL: OPPRESSION AND LIBERATION* 105-06 (1971); J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 231-33 (1983).

171. See, e.g., B. ADAM, *supra* note 170, at 121-60; Barron, *Homosexuals See Two Decades of Gains, But Fear Setbacks*, N.Y. Times, June 25, 1989, § 1, at 1, col. 5.

172. See B. ADAM, *supra* note 170; D. ALTMAN, *supra* note 170, at 30-57; D. GREENBERG, *supra* note 116.

173. Indeed, although it may have earlier antecedents, the very use of the term "gay" today is itself a form of resistance to the imposition upon individual experience of a medically created category called homosexuality.

174. See Cone, *Landmark by Design*, Miami Herald, Dec. 17, 1990, at 1C (concerning effect of *Bowers* case on Michael Hardwick); D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in *PASSION AND POWER*, *supra* note 141, at 226, 237 ("[O]ne should note the unintended consequence of the McCarthy era campaigns [to root gays out of government]. In marshaling the resources of the state and the media against the more extensive gay subcultures of midcentury, political and moral conservatives unwittingly helped weld that subculture together."); *id.* at 234; Leavitt, *The Way I Live Now*, N.Y. Times, July 9, 1989, § 6, at 28, col. 1 (arguing that militant AIDS group ACT UP "presented an image of a community powered by anger and willing to go to almost any length in order to defend itself"); Escoffier, *Sexual Revolution and the Politics of Gay Identity*, *SOCIALIST REV.* No. 82/83, at 119, 141 (1985).

Of course, just as oppression does not inevitably result in complete victimization, efforts to build community can have paradoxical consequences. See C. PATTON, *SEX AND GERMS: THE POLITICS OF AIDS* 119-20 (1985):

Greater openness and tolerance, and a stronger emphasis on sexuality as part of the integrated identity, cost the camouflage early homosexuals often had—despite greater individual struggles—and created a *community* which could become the target of erotophobic and homophobic strategies. . . . The formation of identity as a central principle

In sum, any account of the issues underlying *Roe* and *Bowers* that fails to incorporate the sacrifices and courage that people have shown in resisting anti-abortion statutes and homophobia is incomplete in a key respect: the rights were won by defiance, demonstrations, and myriad other forms of resistance, both collective and personal.¹⁷⁶ In leaving struggle and resistance out, both Rubinfeld and Michelman implicitly assume a passive citizenry. That assumption is particularly ironic in light of their concern to meld a theory of privacy with a conception of democracy.

B. *The Constitutive Nature of Struggle and Resistance*

Political conflicts over abortion rights are often posed in terms of women's access to abortion. Like most commentators, for example, Rubinfeld takes for granted what "abortion" is and, in determining whether the anti-totalitarian right of privacy he espouses should apply, simply asks what will happen if women are denied access to it.¹⁷⁶ Similarly, the struggles over gay rights are often posed in terms of people's ability to express themselves authentically, in public as well as private, without any questioning of what "gays" are. Thus Michelman takes gay identity for granted, simply asking whether gays will be able to express themselves in a fashion that is true to that identity.¹⁷⁷

Yet, while questions of access and expression are central, they are far from the only issues. Since *Roe v. Wade* was decided in 1973, abortion opponents have successfully sought a variety of measures short of outright criminalization that do not merely limit access to abortion or change attitudes about it, but also help to constitute it in a particular way. The struggle over abortion is thus a constitutive one: an effort to embed in a set of social practices an "abortion" that produces women and men in accordance with a vision of their proper roles. This constitutive struggle, moreover, is part of a larger contest over gender roles

of the emerging lesbian and gay community made it possible to deploy erotophobia in a genocidal form: rather than attacking or terrorizing a loose collection of individuals with a perverted component which they might hide or forfeit, a whole culture of homosexuality could now be destroyed.

175. See generally Taylor, *Foucault on Freedom and Truth*, in *FOUCAULT: A CRITICAL READER* 69, 81-83 (D. Hoy ed. 1986). Cf. Marshall, *supra* note 32, at 5 ("'We the People' no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them.").

176. Rubinfeld, *supra* note 4, at 788-91.

177. Michelman, *supra* note 39, at 1533-35.

that also encompasses struggles relating to rights of gays and lesbians. In a sense, they are struggles to determine what women and men *are*.

1. The Struggle to Constitute Abortion

Abortion is a socially determined experience.¹⁷⁸ "Determined," however, may be a misleading word, because experience is always a contested terrain. It would therefore be more accurate to say that abortion is the subject of a constitutive struggle in which advocates on both sides of the dispute have sought to embed their conflicting visions of abortion in a set of material practices. Briefly put, in the eighteen years since *Roe v. Wade* was decided, anti-abortion advocates have attempted to constitute the abortion experience as a necessarily damaging and degrading one, an experience that by its nature traumatizes a woman for years to come.¹⁷⁹ That aim, as much as the aim of restricting or eliminating abortion, lies behind efforts to outlaw abortion as well as statutes like the one the Supreme Court upheld in *Webster*.¹⁸⁰

Take the extreme: a statute outlawing abortion. Access to abortion would, of course, be sharply cut back. The denial of access is assuredly important, but it would not be the only impact. Even for women who managed to obtain illegal abortions, the effect would be dramatic. For many women, abortion would again become a major act of social devi-

178. In fact, even at the most elemental level, abortion cannot be understood in a neutral, technical sense apart from social and political factors. For example, whether the IUD, which may prevent implantation of a fertilized egg in the uterus, is "abortion" or "contraception" obviously depends on whether one accepts the right-to-life view that a distinct new human life begins when sperm and ovum meet. See Kolata, *Abortion Law Foes Say It Limits Contraceptives*, N.Y. Times, June 21, 1991, at A7, col. 5. The same observation can be made of the new drug RU-486, which prevents a fertilized ovum from implanting properly in the uterus. Right-to-life advocates call it abortion (and so murder); pro-choice advocates call it birth control. See Kaye, *Are You for RU-486?*, THE NEW REPUBLIC, Jan. 27, 1986, at 13; Washington Post, Dec. 25, 1989, at A11, col. 1.

A seemingly natural phenomenon like spontaneous abortion is likewise infused with social and political factors. Suppose one woman with limited economic means decides to have an abortion because she feels she cannot support a child, while another woman suffers a miscarriage because her inability to afford adequate prenatal care put her pregnancy at risk. To call the latter "spontaneous," as it if were naturally the opposite of "intentional" or "induced" abortion, would be to obscure the political, racial, and economic factors that account for the failure of our health care system to deliver needed medical services to lower-income women. See, e.g., Haas & Schottenfeld, *Risks to the Offspring from Parental Occupational Exposures*, 21 J. OCCUPATIONAL MED. 607, 610 (1979) (noting the "profound and subtle effects" of "variables such as race, socioeconomic status, maternal age, birth order, parity, smoking and alcohol exposure during pregnancy, maternal infections, and previous pregnancy outcomes").

179. For a trenchant illustration, see N. BAEHR, *supra* note 164, at 3 (reproducing cartoon by Patricia Maginnis).

180. MO. REV. STAT. §§ 188.205, 188.210, 188.215 (1986).

ance, a terrifying search for an illegal abortionist who, for all the woman knows, might well kill or maim her.¹⁸¹ It is no wonder that some psychiatric studies undertaken when abortion was illegal found that it was an experience of great shame and emotional trauma for women.¹⁸² It is equally clear that a legal abortion performed in a clinic in which abortion was treated as a simple procedure and women were given information about their own health care and reproductive choices¹⁸³ would generally be experienced very differently.

When the law restricts rather than prohibits abortion, its constitutive nature becomes even more evident. Of course, statutes that require abortions to be performed in a hospital, or to be performed only after a waiting period, limit access to abortion by making it more costly and difficult to obtain.¹⁸⁴ The same is true of the statutes, enacted soon after *Roe* but struck down by the Supreme Court, that prohibited safer and less intrusive methods of abortion in favor of more intrusive means,¹⁸⁵ or of the current effort to bar the sale of the drug RU-486 in the United States.¹⁸⁶ But there is more to these requirements than limitations on access. At the very least, such restrictions tend to preclude a woman from fully experiencing abortion as an instance of control over her own reproductive destiny. The very fact the abortion would have to

181. For descriptions of women's experiences of abortion before legalization, see N. DAVIS, *FROM CRIME TO CHOICE: THE TRANSFORMATION OF ABORTION IN AMERICA* 65-107 (1985); N. LEE, *THE SEARCH FOR AN ABORTIONIST* 78-102 (1969); E. MESSER & K. MAY, *supra* note 26; *THE CHOICES WE MADE: 25 WOMEN AND MEN SPEAK OUT ABOUT ABORTION* (A. Bonavoglia ed. 1991); Fichtner, *Abortion Before Choice*, *Miami Herald*, Sept. 10, 1989, at G1, col. 2; Brief for the *Amici Curiae* Women Who Have Had Abortions and Friends of *Amici Curiae* In Support of Appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), *reprinted in* 8 DOCUMENTARY HISTORY OF ABORTION, *supra* note 12, at 171-412.

182. See M. ZIMMERMAN, *PASSAGE THROUGH ABORTION: THE PERSONAL AND SOCIAL REALITY OF WOMEN'S EXPERIENCES* 19-31 (1977); Shusterman, *The Psychosocial Factors of the Abortion Experience: A Critical Review*, 1 *PSYCHOLOGY OF WOMEN Q.* 79 (1976). For a graphic description of the humiliation and pain to which women suffering from botched abortions were subjected in the course of the state's effort to gather evidence against those who performed illegal abortions, see Reagan, *supra* note 163.

183. See S. RUZEK, *THE WOMEN'S HEALTH MOVEMENT: FEMINIST ALTERNATIVES TO MEDICAL CONTROL* 103-42 (1978).

184. See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75-79 (1976).

185. See *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 434-39 (1983) (striking an ordinance that required second- and third-trimester abortions to be performed in a hospital). See also N. DAVIS, *supra* note 181, at 203-05 (describing saline abortions as "degradation ceremony").

186. See L. LADER, *RU 486: THE PILL THAT COULD END THE ABORTION WARS AND WHY AMERICAN WOMEN DON'T HAVE IT* 103-21 (1991); *About-Face over an Abortion Pill*, *supra* note 11; MacFarquhar, *supra* note 11.

be performed in a hospital or hospital-like setting,¹⁸⁷ for example, would help transform it into a major medical intervention at least partly under the control of professionals.¹⁸⁸

Other kinds of anti-abortion regulations have a similarly transformative effect.¹⁸⁹ A requirement that a doctor secure what is misleadingly called a woman's "informed consent"—a requirement that in practice tends to mean that she must listen to statements espousing the right-to-life view that life begins at conception¹⁹⁰—helps turn abortion into a necessarily tragic event in which a woman agonizes about ending a human life.¹⁹¹ Statutes and regulations designed to prohibit public employees or federally funded clinics from even mentioning abortion,¹⁹²

187. The restrictions imposed by the Illinois statute at issue in *Ragsdale v. Turnock* would have required abortion clinics to meet hospital standards in many respects (e.g., ventilation and room size requirements), even where there was not "any evidence at all of a medical justification" for them. *Ragsdale v. Turnock*, 841 F.2d 1358, 1374 (7th Cir. 1988), *joint motion to defer further proceedings granted*, 110 S. Ct. 532 (1989).

188. Cf. Charles, *Abortion and Family Planning*, in *LEGAL ASPECTS OF HEALTH POLICY* 331, 337 (R. Roemer & G. McKray, eds. 1980) (effect of such requirements is to turn abortion into "a carefully considered decision supported by something like a consensus of impeccable medical opinion in the confines of a distinguished hospital"). Similarly, right-to-life advocates are disturbed at the prospect of the introduction of RU-486 into this country precisely because they fear that abortion would be viewed as more acceptable if performed at an early stage by such a relatively unintrusive method. See Kaye, *supra* note 178. See also Ricks, *The New French Abortion Pill: The Moral Property of Women*, 1 *YALE J.L. & FEMINISM* 75, 92-93 (1989) (footnotes omitted):

In the minds of anti-abortionists, if abortion can be had in a pill, a woman would no longer need to travel to a clinic for surgery, to wait surrounded by other anxious women, some crying, some changing their minds. The anti-abortionists fear that the act in the home could follow the formation of intent too quickly to give the act its moral significance. They fear that women would no longer risk traversing the moral barriers of their picket lines, with their graphic literature and photographs, to get an abortion.

189. See generally Brief of Seventy-seven Organizations Committed to Women's Equality as *Amici Curiae* in Support of Appellees, *Webster v. Reproductive Health Services* at 24-29, 492 U.S. 490 (1989), reprinted in 7 *DOCUMENTARY HISTORY OF ABORTION*, *supra* note 12, at 497, 532-37.

190. See *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 423 n.5 (1983) (striking down statute requiring physician to tell woman that "the unborn child is a human life from the moment of conception").

191. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 762 (1986) (noting that statements required by Pennsylvania's so-called informed consent statute would "serve only to confuse and punish [the woman] . . . and to heighten her anxiety").

192. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (plurality opinion) (upholding constitutionality of Mo. REV. STAT. §§ 188.205, 188.210, 188.215 (1986)); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding 42 C.F.R. §§ 59.1-59.17 (1990) against statutory and constitutional challenges). See also HOUSE COMM. ON GOV'T. OPERATIONS, *THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTION ON WOMEN*, H.R. REP. No. 392, 101st Cong., 1st Sess. 18 (1989) (recounting testimony of medical researcher at federal Centers for Disease Control that Reagan administration prohibited mention of abortion in various CDC reports). The silence can extend even to organizations that criticize federal re-

not only reduce access to abortion by depriving women of needed information, but also help transform abortion into something so debased that it cannot even be discussed.¹⁹³ Even more dramatic are direct techniques like bombing clinics, blocking their entrances, or screaming at women who seek to enter them.¹⁹⁴ Obviously, such tactics limit access to abortion, but they do more than that: they add an element of degradation and terror to the experience of going to a clinic for an abortion. Cutoffs of funding are also constitutive. By prohibiting abortion in any "public facility" broadly defined, for example, the Missouri legislature in effect declared that abortion was such a shameful matter that the state could not defile itself by being associated with it in any way.¹⁹⁵

To be sure, it would be wrong to assume that the passage of anti-abortion measures has completely transformed abortion into the kind of dangerous and degrading experience that abortion opponents seek to make it. For one thing, even if abortion were illegal, it would not necessarily become, for all women, a shameful act of deviancy and nothing more. As mentioned earlier, an illegal abortion obtained from a feminist underground clinic, for example, could spur some women to work for repeal of anti-abortion laws. Once again, that possibility does not justify anti-abortion laws, but simply reminds us that women always have the potential to respond in an empowering way to efforts to transform abortion into something shameful and degrading. More importantly, pro-choice groups have also sought to embody their own vision of abortion in a set of practices. Because pro-life advocates have held

strictions on abortion funding. See *A.M.A. Condemns Federal Curbs to Providing Abortion Counseling*, N.Y. Times, June 26, 1991, at A9, col. 1 (noting that A.M.A. resolution criticizing regulations upheld in *Rust* deliberately "does not mention the word 'abortion'").

193. Alternatively, government-scripted speeches at federally funded clinics that abortion is not "an appropriate method of family planning," 42 C.F.R. § 59.8(b)(5) (1990), will help constitute abortion as something that "nearly always is an improper medical option." *Rust v. Sullivan*, 111 S. Ct. 1759, 1785 (1991) (Blackmun, J., dissenting).

194. See *supra*, note 116.

195. MO. REV. STAT. § 188.200 (1986). See *Webster v. Reproductive Health Services*, 492 U.S. 490, 502-12 (1989) (plurality opinion).

The combined effect of this and other restrictions on abortion that right-to-life advocates have supported would be to leave large areas without any legal abortion services. The search for an abortion, technically legal, may come to echo the demeaning pre-1973 search for an illegal abortion as women are compelled to travel for hundreds of miles to secure an abortion at great cost. Indeed, physicians who perform abortions are increasingly stigmatized. In turn, the very fact that relatively few doctors perform abortions leaves "the impression that abortion is a dirty business and that it is somehow not an appropriate or legitimate medical procedure." Kolata, *supra* note 26, at 1, col. 1 (quoting medical director of Planned Parenthood in San Francisco). See also Wilkerson, *North Dakota a Hostile Landscape for Abortion*, N.Y. Times, May 6, 1990, at 30, col. 1.

the offensive until recently, much of the pro-choice effort since *Roe* has consisted of little more than opposition to restrictive abortion legislation. Even today, the main focus of abortion rights advocates has been on opposing attempts to take advantage of the greater leeway that *Webster* appeared to give the states in restricting access to abortion.¹⁹⁶ Nevertheless, even such a largely defensive program is constitutive. The more abortion is widely and routinely available, publicly funded, and free from legal restrictions and direct obstruction, the more likely women will come to see abortion as an instance of personal control over decisions on childbearing and as an instance of partial escape from men's power over their bodies.

2. The Struggle over Gay Rights and Gender Roles

Struggles over laws discriminating on the basis of sexual preference have not been as prominent a part of the politics of personal life as have the conflicts over abortion rights, but the nature of the struggles is the same. Although the *Bowers* Court in effect assumed the existence of an invariant homosexual identity (and, by contrast, a heterosexual identity) throughout the ages, that identity, like abortion and gender roles, has been socially constructed.¹⁹⁷

Statutes that outlaw same-sex relations could be understood as attempts to prohibit such activity, but, particularly given the relative infrequency with which they are brought to bear on private conduct,¹⁹⁸ this interpretation misses their main significance. The primary importance of such statutes is their effect in helping to constitute homosexu-

196. These efforts have met with varying success. See generally Lewin, *Strict Anti-Abortion Law Signed in Utah*, N.Y. Times, Jan. 26, 1991, at A10, col. 4 (noting proposals or statutes in a number of states to restrict abortion); *Utah Abortion Law Is Suspended*, N.Y. Times, April 10, 1991, at A18, col. 5 (noting suspension of Utah abortion statute pending challenge of its constitutionality). Louisiana enacted a law imposing up to 10 years imprisonment for performing an abortion. 1991 La. Acts 26 § 2 (Reg. Sess.) (codified as LA. REV. STAT. ANN. § 87.E(1) (1991)). On the other hand, in a special session called by the governor shortly after the *Webster* decision was handed down, the Florida legislature rejected all efforts to tighten restrictions on abortion. See Schmalz, *Abortion Access Stands in Florida*, N.Y. Times, Oct. 12, 1989, at A23, col. 1. See also *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (holding that state constitution protects right to abortion). Both Connecticut and Maryland enacted statutes after *Webster* generally recognizing a right to abortion along the lines of *Roe v. Wade*. See 1990 Conn. Acts 113, § 3 (Reg. Sess.) (codified as CONN. GEN. STAT. § 19a-602 (1991)); 1991 Md. Laws ch. 1, § 1 (codified as MD. HEALTH-GEN. CODE ANN. § 20-209 (1991)).

197. See *supra* Section II.C.1.

198. See *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring) ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.").

ality as a source of shame. Similarly, efforts to deny public funding of artistic expression that deals with homosexual imagery¹⁹⁹ are more than attempts to cut off public expression. Like statutes that prohibit providers of medical care from discussing abortion,²⁰⁰ they are efforts to constitute homosexuality as something so depraved that it cannot be allowed to sully the public fisc.

Efforts to deny gays and lesbians the right to adopt children, or to obtain custody of their children in divorce, are another arena of struggle over gay rights.²⁰¹ Of course, such efforts are important in a direct sense, denying parenthood based solely on sexual preference. They are also an effort, however, to stigmatize all gays as so immoral that they are automatically disqualified from being parents.

Further, the struggles over various issues related to AIDS—ranging from proposals for state or federally mandated HIV testing to attempts to exclude HIV-positive children from schools to proposals to quarantine all AIDS patients²⁰²—have a constitutive significance beyond the immediate issues they raise. They are aspects of an overall effort to constitute homosexual relations as immoral, the natural or divinely mandated consequence of which is suffering and death.²⁰³ Of course, as is the case with attempts to cut back women's

199. See *supra* notes 98-99 and accompanying text.

200. See *supra* notes 192-93 and accompanying text.

201. See, e.g., Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 883-904 (1979); Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); Note, *supra* note 47, at 1119-34.

202. See R. BAYER, *PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH* (1989); *THE AIDS EPIDEMIC: PRIVATE RIGHTS AND THE PUBLIC INTEREST* (P. O'Malley ed. 1989). See also B. ADAM, *supra* note 170, at 156-60; D. GREENBERG, *supra* note 116, at 479; R. SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 585-601 (1987); Senak, *The Lesbian and Gay Community*, in *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* 290-300 (H. Dalton, S. Burris, & Yale AIDS Law Project eds. 1987); Dunne, *New York City: Gay Men's Health Crisis*, in *AIDS: PUBLIC POLICY DIMENSIONS* 155, 159 (J. Griggs ed. 1987); Altman, *The Politics of AIDS*, in *id.* at 23; Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986); D. KIRP, *LEARNING BY HEART: AIDS AND SCHOOLCHILDREN IN AMERICA'S COMMUNITIES* (1989) (describing hysteria over placement of HIV-positive children in schools); Sullivan, *District 27 v. Board of Education*, in *AIDS: PUBLIC POLICY DIMENSIONS*, *supra*, at 69 (same).

The early efforts, before the isolation of the HIV, to portray AIDS as the inevitable outcome of a gay lifestyle are particularly revealing in this respect. C. PATTON, *supra* note 174, at 6-7; R. BAYER, *supra*, at 24-25; D. ALTMAN, *AIDS IN THE MIND OF AMERICA* 30-36 (1986). See also *id.* at 58-70 (on discrimination against AIDS patients).

203. For useful descriptions of the relationship, see C. PATTON, *supra* note 174, at 83-100; Epstein, *Moral Contagion and the Medicalizing of Gay Identity: Aids in Historical Perspective*, in 9 RESEARCH IN LAW, DEVIANCE AND SOCIAL CONTROL 3-36 (S. Spitzer & A. Scull eds. 1988).

reproductive freedoms, these efforts have not gone unresisted. To some extent, the self-help measures of various gay communities in dealing with AIDS have provided the occasion for a renewed activism.²⁰⁴

Finally, the entire system of formal and informal discrimination against gays and lesbians—ranging from state sanctioned intolerance in the form of anti-sodomy laws or the ban on military service by gay men and women, to gay-bashing and other forms of harassment—has significance for *all* women and men. Constraints on homosexual conduct are an important source of social support for traditionally prescribed gender role norms of appropriate masculine and feminine behavior. For example, men who openly carry on intimate relationships with other men, or who display character traits traditionally associated with women, threaten the sense of naturalness typically attributed to traditional gender role norms. Moreover, to the extent that women who take on traditionally masculine roles are immediately labeled and stigmatized as lesbian, traditional constraints on what is viewed as appropriate roles for women are reinforced.²⁰⁵

3. The Struggle over the Institutional Contexts of Personal Life

We have seen that the two sides in the abortion controversy have sought to constitute abortion alternatively as a dangerous and shameful act, or as the assertion of a woman's control over her body and reproductive life. Similarly, the controversy over gay rights is in part an effort to constitute a homosexual identity in a shameful and degraded way, an effort that has met with significant resistance. What we have

204. See D. ALTMAN, *supra* note 170, at 82-109; Dunne, *supra* note 202; Silverman, *San Francisco: Coordinated Community Response*, in AIDS: PUBLIC POLICY DIMENSIONS, *supra* note 202, at 170; Padgug, *Gay Villain, Gay Hero: Homosexuality and the Social Construction of AIDS*, in PASSION AND POWER, *supra* note 141, at 293, 294-99. On resistance to the efforts to constitute homosexual relations as immoral, see *id.* at 299:

Refusing to see themselves as victims or to be expelled from society again, . . . gay men are building on many decades of political and social organizing and using that experience to create new forms of resistance. The speed with which gay self-help and political organizations sprang up to meet the AIDS crisis, and the efficiency with which they achieved their aims, was a measure of the community's organizational and institutional sophistication.

205. For insightful discussions, see Fajer, *Can Two Real Men Eat Quiche Together? Story-Telling, Gender Role Stereotypes, and Constitutional Protection for Gay Relationships*, 46 U. MIAMI L. REV. — (1991) (forthcoming); Copelon, *From Privacy to Autonomy: The Conditions for Sexual and Reproductive Freedom*, in FROM ABORTION TO REPRODUCTIVE FREEDOM, *supra* note 147, at 27, 37; Law, *supra* note 29. But see C. MACKINNON, *supra* note 28, at 141-42 (arguing that gay and lesbian modes of sexuality do not necessarily undermine relations of dominance and submission that mark predominant sexuality).

not seen so far is why each side finds the fights over abortion and gay rights to carry ramifications far beyond their particular context. The answer lies in the way that abortion, and to a lesser extent gay rights, has come to embody a whole range of issues relating to gender roles.²⁰⁶ Abortion produces people; the question up for grabs is what kind of women and men the abortion experience will produce. The same is true of the disputes over sexual identity.

Prominent in the conservative reaction to changing gender roles over the past decade has been the reassertion of seemingly traditional understandings of the family and of women's and men's roles. For our purposes here, only a brief summary of some of the main characteristics of this conservative reaction is necessary. An important aspect is the reassertion of the view that women are naturally suited to child raising in a way that men are not. Children need the special attention of their mother; working women—not male breadwinners—are to blame for the ills of the family. In the ideal family, men and women naturally play distinct roles, with the wife respecting the husband's dominance and leadership. Sex in this view is necessarily tied, if not strictly to reproduction, then to marriage and family.²⁰⁷ Finally, sexual relations between men or between women are viewed not only as wrong but also as corroding society's moral fiber.²⁰⁸ It is no coincidence that fundamentalist opponents of abortion like to draw connections between lesbianism and women's support for abortion.²⁰⁹

206. I say gay rights "to a lesser extent," not because recognition of gays and lesbians would be less threatening to established gender roles than would recognition of abortion rights, but simply because the abortion dispute has in fact occupied a more commanding place in our politics over the last two decades.

207. See generally, e.g., K. LUKER, *supra* note 148, at 159-75. See also P. STEINHOFF & M. DIAMOND, *ABORTION POLITICS: THE HAWAII EXPERIENCE* 106-13 (1977). For a more extended account, see Schnably, *Normative Judgment, Social Change, and Legal Reasoning in the Context of Abortion and Privacy*, 13 N.Y.U. REV. L. & SOC. CHANGE 715, 764-82 (1984-85).

208. See B. ADAM, *supra* note 170, at 102-17; D. GREENBERG, *supra* note 116, at 467-75; Escoffier, *supra* note 174, at 119. The idea that same-sex relations are tied up with a breakdown in society's moral fiber is certainly not unique to today's politics. The Cold War crackdown on gay subcultures, see B. ADAM, *supra* note 170, at 56-60; see also Note, *Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays Based on Current Government Security Clearance Procedures*, 7 J.L. & POL. 133, 138-39 (1990), was part of a reaction to a larger breakdown in gender roles that accompanied the upheavals of the Depression and World War II. See D'Emilio, *supra* note 174, at 226, 233-35.

209. See, e.g., Faludi, *The Antiabortion Crusade of Randy Terry*, Washington Post, Dec. 23, 1989, at C1, col. 2, C2, col. 2 (comment by "Operation Rescue" leader Randall Terry) ("Radical feminism gave birth to child killing. . . . Radical feminism, of course, has vowed to destroy the traditional family unit, hates motherhood, hates children for the most part, [and] promotes lesbian activity."); Apel, *supra* note 116, at 56 (noting use of anti-lesbian epithet against women escorting

Notwithstanding the strength of the conservative reaction, serious obstacles face any effort to roll back feminist gains achieved in the past two decades. What we might call the "traditionalist" view of the family, sexuality, and gender roles has been seriously undermined by a number of structural factors, including the long-term entry of women into the labor force and by the changes in women's consciousness wrought by the feminist movement, particularly in the post-War era.²¹⁰ The fierce political reaction that *Webster* produced when the Court signaled its impending retreat from *Roe v. Wade*, and the continued vitality of the gay rights movement after *Bowers*, both show that political struggles over sexuality and gender roles continue unabated.²¹¹

These struggles are not simply attempts to put forth ideas and persuade others of their correctness; they are also efforts to embody conceptions of women's and men's identities in sets of material practices. Abortion, I would argue, is one arena in which those struggles are played out. The connection between abortion and gender roles is most apparent if we look at traditionalist views. The most fervent advocates of the right-to-life position tend also to support more traditional roles for women. To be sure, there is no strictly logical explanation for this relationship; nor can it be denied that some individuals may support the right-to-life position without perceiving themselves as supporters of a traditionalist view when it comes to women's roles. What matters for our purposes, however, is that the relationship undeniably exists to a substantial degree.²¹²

patients into abortion clinics).

210. See generally W. CHAFE, *THE AMERICAN WOMAN, 1920-1970* (1972); J. MATTHAEI, *AN ECONOMIC HISTORY OF WOMEN IN AMERICA: WOMEN'S WORK, THE SEXUAL DIVISION OF LABOR, AND THE DEVELOPMENT OF CAPITALISM* (1982); G. RILEY, *INVENTING THE AMERICAN WOMAN: A PERSPECTIVE ON WOMEN'S HISTORY* 121-46 (1986).

211. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 520-21 (1989) (plurality opinion); 492 U.S. at 525-26 (O'Connor, J., concurring in part and concurring in the judgment); 492 U.S. at 532-37 (Scalia, J., concurring in part and concurring in the judgment). On the political reaction to *Webster*, see, e.g., Feldman, *States Sticking Patchwork Quilt of Abortion Law*, *Christian Science Monitor*, Nov. 7, 1990, at 8.

212. For more detailed analyses of the way that the abortion dispute embodies a conflict over notions of femininity and masculinity, see F. GINSBURG, *supra* note 164, at 212-21; K. LUKER, *supra* note 148, at 159-75; Eisenstein, *The Sexual Politics of the New Right*, 7 *SIGNS* 567 (1982); Gordon & Hunter, *Sex, Family and the New Right: Anti-Feminism as a Political Force*, 11-12 *RADICAL AM.* 9 (Winter 1977-78).

Of course, the symbolic meaning of abortion extends beyond strictly feminist issues to other concerns that are not exclusive to pro-life advocates. See F. GINSBURG, *supra* note 164, at 104-10; *id.* at 128 (arguing that both pro-choice and right-to-life advocates share similar concerns about "cultural currents that promote, in their view, narcissistic attitudes in which the individual denies any responsibility to kin, community, and the larger social order" but that the two respond to

Clearly, if abortion were illegal women would have much less control over their fertility. That lack of control, in turn, would tend to reinforce the notion that women are by nature primarily concerned with childbearing. Similar reinforcement of that notion would be gained by denying women the option of sexual intimacy with other women. Moreover, as the primacy of women's roles as wives and mothers was strengthened, so would the primacy of men's roles as husband and breadwinners—a change that would complement continued stigmatization of gays.

Of course, power is not irresistible. As I have argued, a woman denied an abortion and forced to bear a child might react instead with rage at the imposition of a role on her. In the same way, a woman barred from visiting her female partner in the hospital might refuse to accept society's stigmatization of lesbian relationships.²¹³ But the more successful traditionalists are in imposing their conception of appropriate gender roles, the less social support any woman will find for reacting with rage rather than acceptance of her place.²¹⁴

Suppose right-to-life forces were successful in imposing every restriction on abortion (in law and in practice) that they have sought, short of outright criminalization. As mentioned earlier,²¹⁵ abortion

them differently). For a useful analysis of the ways in which the abortion controversy ties in with a whole range of issues, see M. FALIK, *IDEOLOGY AND ABORTION POLICY POLITICS* (1983).

I do not mean to suggest here that opponents of abortion are simply using asserted beliefs about its wrongfulness as a cover for an antifeminist agenda. That might, of course, be true in some cases, but I accept for the most part the sincerity of right-to-life advocates' assertions that the fetus is a person and that abortion is murder. As for how that issue ties in with the analysis here, see *infra* note 221.

213. See *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. App. 1986). For a good discussion of the *Kowalski* case, see Note, *supra* note 47, at 1134-39.

214. Cf. Held, *Birth and Death*, 99 ETHICS 362, 364 (1989):

That women give birth is said to make them "essentially" close to nature. . . . Human mothering is seen as a kind of extension of the "natural," biological event of childbirth. It is thought that women engage in the activity of mothering because they have given birth and that mothering should be incorporated in the framework of the "natural."

. . . .

For most women most of the time, then, giving birth has represented most starkly . . . their vulnerability to the forces of nature and male domination. With little chance to avoid pregnancy and few chances for abortion, women have experienced childbirth as something almost entirely outside their control.

See also *id.* at 373. A similar point can be made about domestic violence. The more social institutions and attitudes regard domestic violence against women as natural (or at least purely private) and provide no support for women who seek to defend themselves and their children, the more it tends to give support to a reaction of helplessness on the part of women. See D. RHODE, *supra* note 62, at 237-44.

215. See *supra* notes 179-195 and accompanying text.

would tend to be experienced as a tragic option which could barely be mentioned in public and which could be chosen only at great financial cost and with the permission of the woman's husband. Obtaining an abortion would require the woman to cross picket lines and listen to people brand her a baby-killer, after which she would become a patient in a private hospital or hospital-like setting. Committees would supervise her decisions, and for later abortions a state-mandated physician for the fetus would accompany the woman's own doctor. The experience of abortion so constituted would bolster the sense that any deviation from motherhood was an unnatural rejection of the women's most appropriate role.

Suppose, on the other hand, that abortion were widely available, with public funds if necessary, as a relatively minor procedure chosen by the woman without interference from the state, her husband, or any other man. In at least that respect many women would come to experience abortion as an aspect of greater control over their reproductive lives and (given the unequal burdens in child raising) their careers. Men's power over women would thus be undercut. Moreover, the idea of parenthood as one of a number of roles that men and women might choose or reject (or, equally important, refashion in their own way) would be enhanced. Equally significant, the notion that sexuality is intrinsically tied in with marriage and the family would tend to be weakened.

Finally, one can easily imagine the ways in which different outcomes of political struggles would bolster one sort of sexual identity or another. Suppose that fundamentalists were successful not only in reinforcing traditional gender roles in general, but also in maintaining anti-sodomy statutes, requiring widespread, medically unnecessary HIV testing, and barring gays and lesbians from adopting children. So constituted, sexual attraction to someone of one's own gender would tend to be experienced as shameful and unnatural. Undoubtedly, outrage and resolve to resist might be the reaction to any particular instance of stigmatization or discrimination. But that reaction would be all the less likely the more strongly the traditionalist condemnation of all homosexual desire became embedded in society's material practices concerning gays. In this context, the sense that being gay is an essential part of one's identity would tend to be undermined or would be experienced as a weakness or deviation that needed to be corrected in order to be authentic. In turn, stigmatization of gay and lesbian relationships would tend to reinforce traditional gender roles.

C. *The Significance of Struggle and Resistance*

The recognition that there is a struggle to constitute what men and women are does more than add a new descriptive element to the theories presented by Michelman and Rubenfeld. It entirely undermines their efforts to provide a neutral criterion by which the courts could determine whether or not to apply the right to privacy. Those efforts depend crucially on a factual assessment either of impact (in Rubenfeld's case) or of requirements for authentic participation (in Michelman's case). Because Rubenfeld's effort to delineate the scope of privacy is the more systematic and encompassing, I will address it first.

1. Assessments of Impact

Once one recognizes that there is a struggle to constitute what abortion and women are, the apparently neutral, observational character of Rubenfeld's limiting technique as a factual assessment of the effect of denying abortion on a woman's life unravels. The problem, it should be emphasized, is not that Rubenfeld's approach requires one to draw lines in determining how severe the impact is. Any privacy theory requires line-drawing. Taking the present contexts of personal and social life as a given, Rubenfeld draws his lines with great skill. The problem, rather, lies in his very assumption of those contexts.

Consider his assertion that statutes prohibiting abortion must give way to the anti-totalitarian right of privacy because they take over and occupy a woman's life, imposing an entire direction and content on her existence. The seemingly neutral observation that anti-abortion laws "substantially shape the totality" of a woman's life²¹⁶ implicitly assumes a whole set of social arrangements concerning abortion, the family, the workplace, and gender stereotypes. Yet these institutional contexts are themselves the object of dispute, the course of which will inevitably be affected by fights over abortion statutes themselves.²¹⁷

In our society the burdens of child raising still tend to fall disproportionately on women (even as that allocation has increasingly lost its sense of naturalness). Women have entered the labor force in large

216. Rubenfeld, *supra* note 4, at 801.

217. Rubenfeld is not entirely unaware of the dependence of his assessments on the institutional contexts of social and personal life. Interestingly, he argues at one point that prohibiting incest does not take over and occupy one's life because there are no "well-defined institutional parameters" for the category of "non-incestuous person." *Id.* at 801 n.223. In other words, the extent to which a law has a totalitarian effect depends on the institutional parameters of people's relations with one another. Rubenfeld, however, does not generalize this observation.

numbers on a long-term basis and adequate day care and flexible leave policies remain a dream for most. Denying abortion in this context will certainly tend to have the pervasive impact on women that Rubenfeld attributes to anti-abortion laws.²¹⁸ Indeed, in a society that gave little support to child raising but in which people are not differentiated by gender in terms of responsibility for child raising and commitment to careers, forced parenthood might well take over the lives of *both* women and men in a way that Rubenfeld finds objectionable.

These contexts, however, are not the only ones that are possible. Other social arrangements of a very different sort might make access to abortion much less important. Imagine, for example, the kind of society a traditionalist might envision. In that society, women would be thought best suited by nature to being wives and mothers. Jobs would be viewed as playing a peripheral role in women's lives, and women would be employed only out of economic necessity. Effective protection against sexual harassment, wage inequities, and other forms of gender-based discrimination would be limited at best. The core of a woman's life would typically be the care of her family. Abortion—and perhaps even contraception—would be prohibited, and children would tend to be viewed as the natural accompaniment to any marriage. To the extent that abortions could be obtained illegally, they would be experienced as acts of shame and deviancy taken out of desperation.

Of course, that is not the society we have now. But on what basis could one expect a right-to-life advocate to accept the argument that restricting or outlawing abortion is wrong because forcing motherhood on a woman determines the course of her life? If one pointed to the institutional contexts of women's roles that inform Rubenfeld's view about the impact of outlawing abortion, many right-to-life advocates might well respond, "But I'm working to change that, and outlawing abortion is one aspect of my program to accomplish the change." That is, right-to-life advocates could always defend their position by arguing that the restriction would help to create a more traditionalist society—a set of institutional contexts in which Rubenfeld's assessment that anti-abortion laws take over and determine women's lives would *not* be true. The more success right-to-life proponents might meet in their efforts to constitute abortion as a guilt-ridden trauma, and the more success traditionalists might enjoy in giving renewed strength to the idea

218. Of course, it remains true that many women would work to oppose restrictive abortion laws. The possibility of opposition does not, however, undermine Rubenfeld's basic point about the general impact antiabortion laws would have on most women today.

of women as naturally best suited to being wives and mothers (or at least better suited to parenthood than men), the harder it would become to sustain Rubenfeld's appraisal of the totalitarian impact of anti-abortion laws. For one thing, in prohibiting abortion, the state would seem to be preventing women from undergoing a harmful experience that "informs, shapes, directs, and occupies the actual day-to-day activities of the persons concerned" by traumatizing them for years to come.²¹⁹ And while motherhood would be the central, perhaps determining, occupation for women in the traditionalist society toward which many right-to-life advocates aspire, one could not attribute that centrality to the denial of abortion. On the contrary, an inability to obtain an abortion would at most affect the timing of a woman's assumption of a natural role as mother that she was bound to undertake anyway.²²⁰

219. Rubenfeld, *supra* note 4, at 794. Rubenfeld speaks of the impact of forced motherhood on women; my point is that in a different society that appraisal could be made of permitting abortion.

220. Of course, even a matter of timing could be of major significance for any particular woman. Such individual differences, however, play no role in Rubenfeld's anti-totalitarian right of privacy, and it is hard to see how they could. For example, one could not plausibly tell a particular brother and sister whose life plans centered on marrying each other that the prohibition of incest did not have any broad effect on them. *Cf. id.* at 801 n.223. What one could say is that the law generally does not have that effect on people and that the assessments of impact cannot be tailored to each particular case.

Another example of the way that seemingly factual issues actually implicate deeply contested moral and political questions is the question of the impact of abortion on women. The issue flared up at one point when the Reagan administration was accused of deliberately playing down data developed by the federal Centers for Disease Control that, according to administration critics, showed that abortion has no significant harmful effects on women. *See generally* HOUSE COMM. ON GOV'T. OPERATIONS, THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTION ON WOMEN, H.R. REP. NO. 392, 101st Cong., 1st Sess. (1989). There are indeed some aspects of abortion that, at any given time, can be the subject of factual observations—e.g., rates of spontaneous abortion. (Of course, as pointed out earlier, *see supra* note 178, even such figures are heavily influenced by social and political factors.) But in the final analysis, the question of impact—particularly emotional impact—cannot be determined on a neutral basis. The more that right-to-life and traditionalist views about the status of the fetus and women's proper role became accepted, the more devastating would be the impact on the woman. Conversely, the more that feminist views came to be generally accepted, the less one could make sweeping judgments about abortion's effect on women.

Even apart from disputes over whether the fetus is a person, it is therefore somewhat disingenuous to expect right-to-life proponents to temper their opposition to abortion in the face of data showing that it is less traumatic than unwanted pregnancy. There is, to be sure, no justification for tampering with statistics, but neither does it make sense to ignore the fact that right-to-life advocates are working toward a society in which abortion would be highly traumatic, for—from their point of view—very good reasons. The real issue is not what abortion is intrinsically, but what kind of experience we want it to be.

The fact that the institutional contexts of personhood are themselves the object of struggle has both epistemological and political consequences. Assessments of impact are necessarily choices of vision—choices that Rubenfeld's theory seeks to transcend. Precisely because he seeks to transcend these value judgments, however, Rubenfeld's theory has nothing to say about a matter that is indispensable to the assessment of impact. The political consequences should be equally obvious. There simply is no way that the state—or, more accurately, political struggles aimed at deploying the power of the state—can be prevented from having a pervasive impact on the most personal aspects of the way people structure their lives.²²¹

221. Rubenfeld's failure to understand that the institutional contexts of personhood are themselves up for grabs also undermines his argument that a state legislature cannot constitutionally declare, as Missouri did, that life begins at conception. MO. REV. STAT. §§ 1.205-1(1), (2) (1986); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 500 (1989). See Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599 (1991).

For our purposes here, Rubenfeld makes three key assertions. First, the personhood of the fetus is not a matter of fact or observation, but a label we decide whether to attach to the fetus after concluding that it is (or is not) a person. "Personhood" is a normative conclusion, not a factual premise. Among other things, that means that we have to consider the consequences of concluding that the fetus is (or is not) a person at any given point. See *id.* at 617-20. Second, viability is the earliest possible point at which a state could plausibly conclude that the fetus should be treated as a person in the context of abortion. (Rubenfeld recasts viability to refer not to the point when the fetus can survive outside the womb, but rather to the time "when the fetus's brain develops important attributes of the capacity for distinctly human mentality." *Id.* at 624. See *id.* at 620-27.) Third, to the extent that any doubt might remain about the second proposition, that doubt should be resolved against those who assert that personhood begins earlier, before viability. We must, as noted above, consider the consequences of a determination of fetal personhood. One very obvious consequence of deeming the fetus or embryo a person from the moment of conception is to deprive women of their freedom to decide whether to bear children. Rubenfeld therefore concludes that a legislature should not be permitted to resolve doubts about fetal personhood in such a way as to deprive women of a constitutional right. *Id.* at 627-34.

Rubenfeld's analysis is more subtle than this brief summary can convey, and is generally convincing as to the first two points. As for the third, Rubenfeld is right to see that there is a close relationship between society's determination of fetal personhood and the interests that women have at stake in the abortion controversy. But his account of the relationship founders precisely because it fails to recognize that the institutional contexts of personal life *are* up for grabs in the debate over abortion rights.

One way to see the flaw in Rubenfeld's analysis is to ask why the state could not decide to resolve doubts about fetal personhood in favor of conception, on the ground that, by virtually eviscerating women's right to an abortion, women's traditional roles as wife and mother would be bolstered. Rubenfeld's response is to rule that possibility out as an instance of the state illegitimately taking over and determining women's lives. *Id.* at 611. If one accepts his general approach, then this response makes perfect sense. If, on the other hand, one accepts my argument that there is no way that the state can avoid involvement in the constitutive struggles over personal life, then how could we rule out the possibility of the state's resolving doubts about fetal personhood in a way that aims to support traditional gender roles?

The short answer is that we cannot. Indeed, that is what makes the debate about the status of

One might respond that these observations merely show the limits to Rubenfeld's theory without dethroning it in its own proper domain. Rubenfeld, after all, aims not to give an account of some broader political struggle over the way our personal lives are structured, but to elaborate a theory to guide *the courts*. Perhaps the courts should try to stay above the disputes over what abortion is or what women and men are. Judges are not elected; they should take society as it is at any given moment, gauging the effect of prohibiting abortion against that background.

This fallback might seem disarmingly reasonable, but any such judicial neutrality would be illusory. If the courts strike down various abortion restrictions, the likely effect—whether they intend it or not—is to help constitute abortion, and indirectly gender roles, along the lines envisaged by pro-choice activists. The more readily the courts strike down abortion restrictions, for example, the more routinely abortion will be available. And the more routinely available it is, the greater the possibility that the experience of abortion will tend to be constituted as a woman's exercise of control of her reproductive life, helping to undermine the idea and practice of abortion as a guilt-ridden tragedy in which a woman departs from her natural role. Conversely, if the courts uphold the restrictions (or even statutes outlawing abortion), the effect will be to help constitute abortion and gender differences along the lines envisaged by pro-life activists. In these circumstances, for a court to make a decision based on an "observation" it makes about the impact of a statute outlawing or restricting abortion is to take a side in that dispute. The courts are inevitably a participant—though by no means the only one—in the struggle to constitute abortion.²²²

the fetus so difficult. Though he is right to emphasize that the consequences of determining fetal personhood are important, Rubenfeld misses the most important conclusion that one could draw from that fact: the issue of *how* to resolve doubts about fetal personhood—in favor of a resolution that supports traditional conceptions of women's roles or in favor of one that works to some extent to free women from those conceptions—is itself contested. The contest simply cannot be resolved by pronouncing the matter settled, as Rubenfeld does. For a more extended analysis, see Schnably, *supra* note 207, at 775-82 (arguing that different social visions about women, the family, and sex attenuate in differential ways skepticism about the status of the fetus and the scope of privacy).

222. It should be added that it would be just as erroneous to ascribe to the judiciary alone the kind of irresistible transformative power that Rubenfeld attributes to power generally. *Roe v. Wade* did not end all opposition to abortion; indeed, it gave the right-to-life movement the same kind of rallying point that *Webster* has become more recently for pro-choice advocates. Nevertheless, it cannot be denied that the courts can have a significant impact on the contexts of personal

2. Requirements for Authentic Participation

Like Rubinfeld, Michelman wants to show how even a conservative Supreme Court could have decided *Bowers* differently. The key point of his argument in this respect, though more briefly stated, is remarkably similar to Rubinfeld's. It also suffers from the same defect.

The linchpin of Michelman's argument against *Bowers* is, as mentioned earlier, his claim that Hardwick cannot participate authentically in jurisgenerative dialogue so long as state anti-sodomy statutes remain on the books.²²³ How, one might ask, is the Court to grasp that need? Michelman's response rests on a factual assessment put forth with an elegance that draws our attention away from its qualified nature. It is a fact in our society, Michelman tells us, that homosexuality "has come to be experienced, claimed, socially reflected and—if ambiguously—*confirmed* as an aspect of identity demanding respect."²²⁴ The significance of this confirmation is, in his view, quite straightforward. The Georgia statute attacks "the independence and authenticity of the [gay] citizen's contribution to the collective determinations of public life . . . by exposing to the hazards of criminal prosecution the intimate associations through which personal moral understandings and identities are formed and sustained."²²⁵

I have already remarked on the way that this assertion seems to suppose some essence of an authentic gay identity immune from self-revision in at least this respect.²²⁶ What I wish to focus on here is the confirmation to which Michelman alludes. Michelman is too perceptive not to qualify his use of that term with the caution that this identity has been "ambiguously" confirmed. The ambiguity has far greater significance than he realizes, however, for the question whether homosexuality is to be confirmed goes to the heart of the disputes over gay rights.

Consider a more traditionalist society in which anti-sodomy statutes were vigorously enforced and in which mention of homosexuality

life. The experience of abortion that *Roe* made possible—as a matter to be decided by the woman alone—has had a profound effect on the lives and consciousness of many women, an impact that surely explains much about the fierceness of the reaction to *Webster*. In short, although Rubinfeld overestimates the law's transformative impact in one regard by discounting the possibility of resistance, he *underestimates* it in another respect: in striking down anti-abortion laws, *Roe v. Wade* transformed individuals as profoundly (but partially) as statutes outlawing abortion might ever mold and shape them.

223. See *supra* text accompanying notes 103-05.

224. Michelman, *supra* note 39, at 1533 (emphasis added).

225. *Id.* at 1535-36.

226. See *supra* text accompanying notes 107-114.

in public and private, while not outlawed, was invariably met with contempt and derision. In that context, homosexual desires might well still exist—there is little basis for supposing they could be stamped out—but their meaning might well be radically different. We all have our flaws, whether minor and tragic; such desires would be one of them. There is no reason to believe, however, that individuals experiencing such desires—of which they would likely be ashamed, or perhaps even barely aware—would think their identity so impaired that they would be barred from authentic participation in civic life. Alternatively, take a very different kind of society, in which sexuality was experienced as encompassing a range of desires, from exclusive orientation to one's own or the opposite gender, to attraction to both genders whether throughout one's life or transiently. In that society, too, the relationship between sexual identity and public citizenship would be greatly attenuated.

The possibility of such radically different contexts undermines the apparently observational character of Michelman's assertion about the connection between gay identity and participation in dialogue. In what way could one expect a traditionalist to accept that connection as the basis for judicial intervention? Of course, one could point to the institutional contexts of personal life that have undoubtedly led many gays to believe that their identity as such is a key aspect of their selves, public and private. But suppose the traditionalist replied that this context is the very thing he was working to change. To uphold the statute would likely be to move our society, in some small part, toward one in which there would be no sense of a gay or lesbian identity because sexual attraction outside the heterosexual model would be nothing more than a troubling personal deviation.²²⁷ To strike down Georgia's statute, on the other hand, might well give support not simply to individual men and women whose basic identity is avowedly gay or lesbian, but also to the very kind of social context in which that identity is thought to be central to one's self. The centrality of that identity would not, of course, be immutable; in the long run, protecting homosexual expression might contribute to a more androgynous—and less politically charged—experience of sexuality. In any event, a court faced with a

227. The experience of identity that individuals would have in a different social context is impossible to predict with certainty. But that fact would provide no argument against the traditionalist (or anyone else) who made suppositions in working toward some new context. Precisely because identity is always contested and in flux rather than fixed and timeless, *any* assertion about identity and its relationship to the institutional contexts of personal life will involve speculation.

challenge to an anti-sodomy statute cannot escape making a deeply substantive and thoroughly controversial choice of precisely the sort that Michelman needs to avoid in order to be able to claim that his approach "fortifies" conservative courts to rule in *Hardwick's* favor.

Of course, it would be possible to resort to the same kind of fallback that Rubinfeld might use: Michelman, after all, is attempting to delineate a legal theory that could guide the courts. Thus, one might argue that the Constitution in some sense has already made that choice for us, and the courts need only follow that command. Such an argument, however, would require more than a demonstration of a commitment to plurality or tolerance at some abstract level. More fundamentally, the notion that the choice had already been made, once and for all, would contradict the idea of a society constantly in the process of self-revision.²²⁸ It would also represent just the sort of authoritarian approach to constitutional adjudication that Michelman and others properly reject.²²⁹

In the same vein, one might claim that, inevitably, the courts must deal with our society as it exists, and one might attempt to defend Michelman's assertion that anti-sodomy statutes hinder participation in dialogue as appropriate to our society. But even if it were correct on its own terms, such a reply would miss the point entirely. Like assessments of impact in Rubinfeld's scheme, assessments of requirements for participation are inevitably choices of vision. The more traditionalists succeeded in restructuring society to reinforce traditional gender role norms and block recognition of gay rights, the less central any gay identity would be to participation in republican dialogue. Consequently, there is simply no way that the courts can discern and then apply the implications of some identity; though obviously not determinative, their rulings inevitably help constitute identity and its relation to participation in one way or another.²³⁰

228. Michelman, *supra* note 39, at 1515 ("Once . . . is hardly enough."). To put it another way, it would require Michelman to reject his commitment to a doctrinal practice that embraces rather than withdraws from "controversy over the basic terms of social life." *Id.* at 1494 n.2.

229. *Id.* at 1496; West, *supra* note 35.

230. Yet another response is possible. One might recognize that the choice cannot be taken as settled for all time at some point in the past, grant that the courts cannot *merely* reflect current social choices, and argue that judicial determination of that choice is preferable to the open clash of interests that characterizes the political process. To do that, however, would require an extremely narrow conception of jurisgenerative dialogue as briefing, oral argument, and opinion writing. The jurisgenerative flame would be virtually extinguished, with only a spark remaining in court. Such a conception Michelman properly rejects. Michelman, *supra* note 39, at 1531. *See also infra* Section IV.B.

In short, there is no reason to doubt that many people experience precisely the relationship between personal identity and authentic participation that Michelman asserts. But that relationship cannot be privileged by being placed beyond the reach of constitutive struggle, as Michelman effectively proposes. Whatever the possible benefits of that approach may be, the cost—the assumption of an invariant identity, politically powerless but for the intervention of the state—is too great. If republicanism is to have any meaning for us today, it cannot rest on claims that the civic virtue to be instilled and cultivated is not itself open to political struggle.

IV. PRIVACY, POLITICS, AND THE COURTS

It may help to return to the dual sources of the power of Justice Douglas's image. The first, it will be recalled, was personhood, with its exaltation of private life and its conception of power as something that individuals can be subjected to or shielded from. It should be clear now that it is unrealistic and harmful to exalt private life as a zone of personal development cut off from public life and protected from power. The same can be said of any conception that assumes it is ever possible for individuals to be utterly colonized by power, or absolutely excluded from authentic participation in politics.

Both Foucauldian and republican analyses, for all their differences, make clear that individuals are socially constituted. The central concern of a privacy theory must therefore be to democratize that constitution. A privacy theory has nothing useful to say about reproductive or sexual freedoms if it asks merely how individuals may be shielded from the power of the state or how they may be given a ticket to the dialogue.²³¹ It must instead ask how the power of the state *should* be

231. Indeed, it may well prove positively harmful. As Samuel Barber argues in his critique of liberal democracy's potential for authoritarianism:

Historical irony has left its mark here: the defense of the individual against the old tyrannies of hierarchy, tradition, status, superstition, and absolute political power has been sustained by a theory of the radically isolated individual defined by abstract rights and liberties. Yet this theory, as put into practice in the world of actual social relationships, has eroded the nourishing as well as the tyrannical connections and has left individuals cut off not only from the abuses of power but from one another. And without one another, individuals have become easy targets for authoritarian collectivism. The theory that was supposed to defend men and women from power has thus in fact stripped them of the social armor by which they could most effectively defend themselves.

S. BARBER, *supra* note 66, at 101 (footnote omitted). Catherine MacKinnon makes a similar point in feminist terms. C. MACKINNON, *supra* note 28, at 193 ("When the law of privacy restricts intrusions into intimacy, it bars changes in control over that intimacy through law," and therefore

deployed—because, inevitably, it *will* be deployed—in the constitutive struggles over the institutional contexts of personal life. Like the chains that bind Rousseau's free men,²³² the link between privacy and politics cannot be broken but only made legitimate.

The second source of the power of Justice Douglas's image was the affirmation of the possibility of reasoned—even creative and empathetic—elaboration of defining social values. The republican vision presents a conception of a society in which such an elaboration is more than a possibility. As Michelman properly notes, however, a republican approach poses a real danger of authoritarianism—a danger to which Foucault's conception of power further sensitizes us. Yet, the counter to this danger is not simply to recognize diversity or plurality in a general way, but to place the strongest conflicts and the deepest disagreements over the terms of social and personal life at the center of the politics to which privacy theory will be linked.

The concomitant to privacy thus revised is a more modest role for the courts, in which the most important "arguments" are made in the political movements to transform aspects of social and personal life. In part, this modesty stems from the need for a more sober appreciation of what should be obvious in any event. The Supreme Court is an agency of the state, dominated by elites. It is as politically unaccountable in theory as Congress is in practice. Fundamental social changes do not occur primarily because of decisions by the Court.²³³ To give the courts anything other than a relatively peripheral role in the collective articulation of our deepest values is to debase the politics with which our personal as well as our public selves are inevitably bound up.

A. *Privacy and Unequal Power*

1. Enriching Personal Life

One way to think about what the notion of privacy has to contribute to debates about abortion and gender roles is to ask why we need it at all. Why not simply discard privacy arguments entirely in favor of equal protection arguments? In the abortion context, for example, we could focus exclusively on gender equality. It is not hard to formulate a

supports men's power over women.).

232. J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 3-4 (G. Cole trans. 1950) (1762).

233. Or, one might add, Congress. Cf. Sunstein, *supra* note 66 (locating republican dialogue in Congress); West, *supra* note 35 (arguing that Congress should be prime focus of constitutional argument).

straightforward argument.²³⁴ Men's power over reproductive decisions and over women's bodies, exercised both directly and through the state, has historically been an important underpinning of the structures of sexual inequality. Putting the abortion decision in women's hands helps undermine those structures, thereby moving us closer to a society in which women—and men—can enjoy real freedom from the arbitrary constraints of rigid gender roles.

In the context of sexual freedoms, too, we might jettison privacy arguments. State sodomy statutes, as noted earlier, are rarely enforced, and then only in unusual circumstances.²³⁵ To be sure, the harm they do is more than symbolic, for they help stigmatize those whose sexual orientation fails to conform to a rigid heterosexual model. But as we have seen, to argue that they interfere with a fundamental, identity-defining activity is to risk endorsing a definition of gays and lesbians as principally concerned with—or obsessed by—sex. Why not, one might ask, leave privacy aside (particularly after *Bowers*),²³⁶ and argue that gays and lesbians are a traditionally disadvantaged class entitled to the benefits of heightened scrutiny?²³⁷

Equality plainly has its attractions, but it should complement privacy, not displace it entirely. What is missing from these equality arguments is any sustained examination of the process of moral decision-making.²³⁸ Republican theorizing, with its focus on deliberation and

234. Of course, the idea of equality is itself contested. See, e.g., Jaggar, *Sexual Difference and Sexual Equality*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 239-54 (D. Rhode ed. 1990); Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990); MacKinnon, *supra* note 61.

235. See *supra* note 198 and accompanying text.

236. Of course, it remains possible to bring privacy challenges (or, for that matter, equal protection challenges) to sodomy statutes under state law. See Morris, *Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy*, 66 IND. L.J. 609 (1991). See, e.g., Seebol v. Farie, No. 90-923-CA-18 (Cir. Ct., Monroe Co., Fla. March 15, 1991) (statute barring gays from adopting children violates Florida constitutional right to privacy); Commonwealth v. Wasson, No. 86-X-48 (Cir. Ct., Fayette, Ky. June 8, 1990) (statute that outlaws homosexual but not heterosexual sodomy violates both privacy and equal protection protections of Kentucky constitution), *appeal docketed*, No. 90 SC-558-TG (Ky. Sup. Ct. July 18, 1990); Michigan Organization for Human Rights v. Kelley, No. 88-815820 (CZ) slip op. at 5-12 (Cir. Ct., Wayne Co., Mich. July 9, 1990), (holding that consensual sodomy in the home is protected by state constitutional right to privacy).

237. See Halley, *supra* note 29 (urging focus on equal protection); Sunstein, *supra* note 21, at 1174-76. A number of courts have already rejected equal protection claims, citing *Bowers*. See Morris, *supra* note 236, at 610 n.8 (collecting cases). But it seems plausible to suppose that, for the reasons that Halley and Sunstein lay out, at least some courts will hold that *Bowers* does not foreclose an equal protection claim.

238. Cf. Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L.

dialogue, might seem an ideal vehicle for remedying that lack. However, a republican theory such as Michelman's is problematic because it lacks any concrete focus on the conditions of moral deliberation and their relationship to state power. Foucauldian theories, if framed to reject notions of utterly totalizing power, help explicate that relationship. I would suggest, then, that the focus of privacy theory be the effort to delineate the ways that state power can be deployed to improve the institutional contexts of moral deliberation about abortion and sexuality.

Thus, at a deeper level, the equality argument is closely tied up with the privacy argument. Properly understood, the right of privacy addresses the problem of unequal power and the way it distorts individuals' attempts to come to grips with moral issues.²³⁹ Using the power of

& FEMINISM 7, 33-36 (1989) (arguing that democracy as an ideal should not entirely supplant the value of autonomy).

239. For an insightful discussion of the notion of "distortions," see Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (drawing on J. ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983)). Sunstein's approach is, I believe, consistent with Foucault's analysis of power, which has been characterized as asserting that power, being everywhere, must be opposed everywhere. This is a thesis that is particularly relevant to the formulation of a feminist politics. The discourses that constitute women as subordinate are not localized in a single institution, but permeate every aspect of society; they are an element of every institution. The subordination of women thus cannot be eradicated by reforming the political and/or economic structures alone because elements of that subordination are constituted by the plurality of discursive regimes that structure all aspects of society, not just these two structures. Thus female subordination will not be eliminated by giving women the vote or equal pay. A Foucaultian politics speaks to this peculiarity of the subordination of women. It suggests that we must oppose those knowledge/power discourses that subordinate women everywhere throughout society.

S. HEKMAN, *GENDER AND KNOWLEDGE: ELEMENTS OF A POSTMODERN FEMINISM* 186 (1990); see generally *id.* at 175-88. But see S. LEONARD, *CRITICAL THEORY IN POLITICAL PRACTICE* 244-48 (1990) (arguing that Foucault's stance evinces a complete rejection of subjectivity that is incompatible with feminist theories).

The concept of "distortions" that I use here should be distinguished from two other notions. First, I am not aiming to delineate women's true interests any more than I have attempted to present a theory of women's authentic identity. The notion of distortions as I have used it here is a negative one, pointing out the specific and concrete ways that people's decisionmaking contexts are hampered by distorting elements. It does not rest on a positive assertion of what women's true interests are, or assert that the failure to recognize those interests must stem from a false or distorted consciousness. Indeed, any attempt to delineate a theory of women's true interests apart from their own consciousness of them would be dubious at best and patronizing at worst. The aim should be, as Kathryn Abrams has put it in a related context, to develop "forms of discourse that acknowledge the possibility that women may be influenced by the internalization of the very ideology that has subordinated them, yet avoid the claims of determination that alienate women, facilitate the misrepresentation of their decisionmaking capacities and impede the inquiry into contributing causal factors which may be more readily subject to remediation." Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 795 (1990).

the state to eliminate inequalities in the private sphere can help cultivate individual responsibility in moral decisionmaking.²⁴⁰ In the context of abortion and gay rights, this general aim takes on a very specific cast: to constitute abortion and sexuality in such a way that the institutional contexts of people's personal moral decisionmaking are less marked by sexism and homophobia.²⁴¹

Second, any appeal to the notion of distortions may suggest Habermas's theory of universal pragmatics. See generally J. HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 43-115 (1990); J. HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 1-68 (1979); J. HABERMAS, *LEGITIMATION CRISIS* 111 (1975) (asserting that "justifiable norms"—i.e., those upon which people could reach agreement through undistorted communication—"can be distinguished from norms that merely stabilize relations of force"); Habermas, *Toward a Theory of Communicative Competence*, in 2 *RECENT SOCIOLOGY* 114-48 (H. Dreitzel ed. 1970) (concerning distorted communication). For a useful overview, see S. BENHABIB, *CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY* 282-97 (1986). At its most ambitious, Habermas's work can be viewed as an affirmative effort to construct a reference point—the ideal speech situation—for a comprehensive critical evaluation of the extent to which supposedly consensual social norms reflect domination and unequal power rather than true agreement. In a less ambitious reading, Habermas's theory could be seen as an effort to determine how to identify particular distorting elements in communication, without necessarily appealing to some general Archimedean point. See *id.* at 311-13 (noting Habermas's ambiguity in this respect). The latter aim obviously has potential points that complement my approach, especially in its concern to identify the way that unequal power may affect dialogue. I am not certain, however, that I would accept the apparent dismissal of context and particularity that seems to characterize Habermas's approach. See S. BENHABIB, *supra*, at 340-42; S. LEONARD, *supra*, at 241-45.

Michael Sandel has made a similar criticism of Rawls's appeal to an original position in which a veil of ignorance denies participants knowledge of any particularizing characteristics, an approach to which Habermas's theory of universal pragmatics has been compared. See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179-83 (1982) (criticizing Rawls for positing, in the original position, subjects wholly free of constitutive particularities); S. BENHABIB, *supra*, at 288 (Habermas, like Rawls, presents a "procedural Kantian theory"); Lukes, *Of Gods and Demons: Habermas and Practical Reason*, in HABERMAS: *CRITICAL DEBATES* 134, 300 n.29 (J. Thompson & D. Held eds. 1982) (noting "many interesting points of convergence with Rawls"). On the original position, see J. RAWLS, *A THEORY OF JUSTICE* 17-22 (1971).

240. In this sense, my analysis has an affinity with the "jurisprudence of responsibility" that Robin West has recently proposed. See West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 *HARV. L. REV.* 43 (1990). See also Apel, *supra* note 116, at 70 (same).

241. To be sure, there is no way to prove beyond doubt that individuals engage in significant moral deliberation at all. If one believes, as Rubenfeld appears to assume, that individuals are so determined by power that the notion of personal identity is meaningless, then the very idea of attempting to improve the contexts of their moral deliberations would seem to be misguided.

Ultimately, the proper response to an objection like this is skepticism. A helpful analogy can be drawn to the question whether differences between women and men in social roles, behavior, intellectual aptitudes, and the like are biologically determined. There is no way that one can prove definitively that no such biologically determined differences exist. What we can do, however, is carefully examine each particular claim that any given characteristic is biologically determined, and take note that on close scrutiny such claims either fail to hold up or, at best, remain unresolved. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96

a. *Abortion rights*

Consider the debates over the legality of abortion. The arguments for abortion rights have tended to be framed largely in terms of respecting individual choice, treating any consideration of its morality as a separate matter. What that dichotomy overlooks, however, is the state's inevitable impact on the conditions of personal choice. At the most general level, when the state attempts to stop abortion entirely by criminalizing it, people's consideration of the moral issues is distorted. As one commentator has noted, "When the authority to make fundamental moral choices over one's own life is denied and placed at someone else's discretion, procrastination in confronting one's own reality, particularly if it means confronting another's power over you, is bound to ensue."²⁴² In short, constituting abortion as an illicit, degrading, and dangerous experience interferes with women's (and, in a different way, men's) consideration of the moral issues regarding abortion.

It should be equally clear that simply making abortion freely available without hindrance by the state's criminal law is not enough by itself. To be sure, this claim could be put forth in terms of a fairly standard equality argument. Abortion rights do not guarantee true equality of women and men; adequate day care, comparable worth

HARV. L. REV. 1497, 1571 (1983). That is, of course, very different from showing once and for all that differences in gender roles have no biological basis; but our inability to support a definitive statement does not logically compel us to accept any biological determinism. Indeed, more than logic is at stake here, for biological determinism has deeply conservative implications. See Lewontin, *Biological Determinism*, in 4 THE TANNER LECTURES ON HUMAN VALUES 149, 174 (S. McMurrin ed. 1983) (import of biological determinism is that "no serious reconstruction of society is possible because our genes make us what we are"); Hubbard, *The Political Nature of "Human Nature,"* in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 234, at 63-73.

A similar approach seems appropriate to privacy theory. To protect privacy, I will argue, is to examine critically the factors that influence the context in which individuals experience themselves as making their own decisions, with the aim of removing as much as possible factors like sexual inequality that we believe should have no part in people's decisionmaking. Not only is that a deeply subjective and controversial endeavor, but we also have no guarantee that people's sense that they do participate meaningfully in their own self-creation is ultimately anything more than an illusion. Having stripped away the layers of unjustifiable influences on the contexts of people's moral deliberations, perhaps we will find nothing at the core. But until we reach that point, any assumption that the notion of individual autonomy in matters of morals is meaningless seems premature.

242. B. HARRISON, *supra* note 116, at 228. Cf. M. DENES, IN NECESSITY AND SORROW: LIFE AND DEATH IN AN ABORTION HOSPITAL xv-xvi (1976) (arguing that "if we remove abortions from the realm of defiance to authority, . . . if we permit them to be acts of freedom as they should be, their meaning, private and collective, will inescapably emerge in the consciousness of every person").

standards of pay, and many other reforms are needed as well. That argument, however, is not my main concern here. What *is* important here is the way that sexual, racial, and economic inequalities continue to distort the context in which women and men grapple with the moral issues surrounding abortion even when it is not criminalized. So long as our society values men more highly than women, for example, women as well as men will feel the pressure to favor boys over girls as their first child.²⁴³ Any steps taken to recognize women's equality—one of which is the full assurance of reproductive freedom—would help undermine the distorting effects of sexism on personal moral decisionmaking. If women were fully empowered, current social pressures to prefer males would lack the institutional support they now have. A law forbidding abortion based on gender preference, in contrast, would help sustain the very practice it purported to condemn.

Given the republican concern with dialogue—a concern that Michelman properly extends beyond the courts and legislatures—it might be useful to go beyond these general assertions about people's moral reasoning to examine in detail the kinds of dialogue about abortion that might take place under different regimes of rights. Consider, for example, a discussion about abortion between a pregnant woman and her husband. What exactly is objectionable about a statute that permits the woman to have an abortion only if she obtains her husband's consent? The Supreme Court was right to strike this kind of statute down,²⁴⁴ but not because abortion is inherently a decision that should be considered and decided by the woman alone. Many women, given the option, include their husband or significant other in the process of deciding what to do; in fact, if a woman's partner refrains from participating in the decision on the ground that it is her choice alone, she may feel profoundly isolated.²⁴⁵ What is objectionable about stat-

243. See generally Hanmer, *Sex Predetermination, Artificial Insemination and the Maintenance of Male-Dominated Culture*, in *WOMEN, HEALTH AND REPRODUCTION* 163, 185 (H. Roberts ed. 1981). Similarly, until women generally have the same earning power as men, the choices of many women in favor of abortion will be as distorted as are the choices of others in favor of motherhood when public funding of abortion is cut off. We should be as concerned about abortions that result from economic pressures as we are about births that result from denying women the option of abortion.

244. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67-72 (1976).

245. See K. McDONNELL, *supra* note 147, at 65-66 ("Men sometimes, with the best of intentions, keep silent about their preference and withdraw from the abortion decision in the belief that it is 'all up to her.' This is true in a sense, but . . . such a withdrawal can also be interpreted by the woman as . . . a disavowal of responsibility and an abandonment of her to the lonely process of soul-searching.").

utes that require a husband's consent to abortion is that they constitute abortion in such a way as to infect every attempt to consider the moral issues surrounding it with the distorting effects of gender inequality. It would be difficult, to say the least, for any woman to think freely about her own evaluation of the moral issues if she knew that in the end her husband could veto a choice to have an abortion. Even if a particular husband told his wife that he would respect her choice, their discussion of the moral issues could not help but be affected by awareness of the fact that the husband could veto an abortion.²⁴⁶ Indeed, even if the two of them agreed that abortion was the best option, the woman would still have to take a note from her husband to the doctor allowing her to have the abortion. It is not simply that such an act would be demeaning; it would also represent an instantiation of men's power over women. Abortion, in other words, would be constituted in such a way as to reinforce that power. Precisely for that reason, placing the decision in the woman's hands undercuts men's power and thereby removes a distorting element from the context of people's consideration of the moral issues surrounding abortion.

It is fair to ask at this point why one could not object on similar grounds to leaving the decision in the hands of the woman. Does that not give her power over the man (who after all is potentially a father)? There is no question that some men will find such vulnerability painful. The apparent symmetry, however, rests on an utterly unrealistic approach to the issue, ignoring the fact that historically it has been men who have controlled women's bodies and reproductive lives, not the other way around. To be sure, the partner who lacks the final say may be hurt; there will always be situations where the two cannot agree. *Against the background of men's power over women*, however, there is a crucial difference between placing the decision in the man's hands and leaving it up to the woman. Only the latter allocation helps undermine structures of gender inequality and thereby helps undercut the distorting element of men's power over women from the decisionmaking process.²⁴⁷

246. See 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, 39-41 (1973).

247. My analysis is thus somewhat similar to Ruth Colker's argument that although both partners to heterosexual sex must bear responsibility for contraception, "in a society where women are more readily subject to social and sexual coercion and simultaneously are forced to bear virtually all the costs of an unwanted pregnancy, the male partner must accept substantial responsibility." Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CALIF. L. REV. 1011, 1048 (1989). Cf. Roberts, *Punishing Drug Addicts Who Have Babies*:

It should be emphasized that the key notion here is the distortion of individual decisionmaking—not its preclusion. To see the existence of inequalities as making it impossible for women and men to consider the moral issues surrounding abortion would be to repeat the error of understanding power as overwhelming. My purpose is not to argue that, in the presence of a spousal consent statute, it would be useless for a husband and wife to try to reach, in their personal lives, an accommodation that each could accept as representing true equality. Nothing dictates, for example, that the husband would have to exercise (or threaten to exercise) his veto simply because the state gave him one. What I would like to emphasize, however, is that no matter how much the couple believed that they could fashion their own particular relationship in their private lives, all the while leaving politics aside, that belief would be profoundly misguided. Inevitably, their relationship would be affected in a real though not all-determining way by allocating final decisionmaking power to the man—as it would be affected, in a different way, by allocating power to the woman.

It is *not*, then, the efforts of individuals to fashion their own personal relationships that are mistaken; it is *not* the value people place on their own personal lives that I would call into question. Rather, my objection goes to the inadequacy of a conception of dialogue and deliberation that focuses too heavily on the image of people talking to each other, without considering the inevitable impact of power on their interaction. Even though the *words* in a discussion between husband and wife might be the same, their meaning in a situation in which the husband held a veto would be profoundly different from their meaning in a situation in which the wife held the final say. A dialogue is constituted not merely by the words that pass between its participants, but also by

Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419, 1480 (1991) ("the reason that legislatures should reject laws that punish Black women's reproductive choices is not an absolute and isolated notion of individual autonomy. Rather, legislatures should reject these laws as a critical step towards eradicating a racial hierarchy that has historically demeaned Black motherhood.") Such an analysis inevitably raises the question whether a right to abortion would survive the achievement of a complete end to gender discrimination. Precisely because gender discrimination is so pervasive and deeply embedded in our society, the question is not likely to have any practical relevance in the foreseeable future. Moreover, if we ever achieved a complete elimination of all forms of gender discrimination, "the politics of abortion would be so dramatically reframed, and the numbers so drastically reduced, as to make the problem virtually unrecognizable." MacKinnon, *supra* note 61, at 1327. A reevaluation of the interests at stake would be in order; what that reevaluation would produce is speculative. (For the reasons already discussed, however, I disagree with MacKinnon's assertion, *id.*, that a privacy approach would become relevant only in such a society.)

the power they bring with them to the discussion.²⁴⁸ Thus, it would be mistaken for a woman and a man to believe that they could ever construct even their most intimate personal relationship in a fully self-determined way without also becoming politically involved in the abortion controversy.²⁴⁹ For them to try to retreat entirely to their own personal world would be to leave the determination of a very real part of their most intimate relationship to others acting in the name of the state.²⁵⁰ It is not the valorization of the private to which I object, but rather the devaluation it suffers when we imagine that it could ever be apolitical.

Another example of dialogue about abortion would be abortion counseling. Consider the statute at issue in *City of Akron v. Akron Center for Reproductive Health*,²⁵¹ which, in effect, required the physician to read a right-to-life tract to women seeking abortions.²⁵² To object to that requirement on the ground that the state was intruding into the woman's personal decisionmaking process would be to invoke the sterile notion of isolating that process from the effects of power. Rather, any argument against one of these so-called informed consent requirements must rest on a substantive judgment about how abortion should be constituted: a judgment about how the power of the state *should* be deployed to improve the context and process of decisionmak-

248. See S. PHARR, *supra* note 58, at 53-54:

I often hear people say that they know people of color in this country who are racist. This is confusing racism with bigotry or prejudice or hatred. People of color simply do not have institutional power to back up their hatred or bigotry or prejudice and therefore cannot be deemed racist. In the same way, women do not have the power to institutionalize their prejudices against men, so there is no such thing as "reverse sexism."

A similar criticism can be made of any talk about dialogue in the broader sense that ignores the realities of power. Mary Ann Glendon, for example, argues that abortion laws should be decided by a model of "social conversation" or "social dialogue," M. GLENDON, *supra* note 84, at 140, in which the law functions as a set of "stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where are going." *Id.* at 8. What Glendon's account of conversation overlooks, however, are the realities of "disparate access to power; the limitations of representative systems; and the constraints which operate when members of a community experience great gaps between their own experience and the translated version of that experience that takes shape in the dominant discourse." Ashe, *Conversation and Abortion*, 82 Nw. U.L. REV. 387, 393 (1988).

249. The form of involvement could, of course, vary widely. I use the term politics here in the broad sense that Michelman uses "dialogue." See Michelman, *supra* note 39, at 1531.

250. The same argument would apply to a couple who thought abortion wrong because it involved the selfish killing of innocent children. Any retreat to the sphere of the private would be illusory. For them merely to refrain from abortion, while doing nothing about its acceptance by society generally, would inevitably affect their own lives and relationship.

251. 462 U.S. 416, 444 (1983).

252. See *id.* at 423-24 n.5.

ing about abortion. As I argued earlier,²⁵³ these "informed consent" requirements are efforts to constitute abortion as an inherently agonizing and degrading decision. How, then, might the power of the state be deployed to constitute abortion in a way that undercuts rather than embodies gender role norms that disempower women?

Ruth Colker suggests one possible answer to that question in her comments on the *Akron* decision. She argues:

Rather than rule out any regulation of the abortion decision-making process, the Court should encourage states to develop programs that could improve a woman's deliberative process about abortion. As an example, the Court might suggest that states require that all health care providers offer counseling sessions to pregnant women and their partners (irrespective of whether they are considering an abortion) to discuss the quality of their own lives, the implications of raising a child or having an abortion, and the meaning or value of the fetus' life.²⁵⁴

Colker's focus on the deliberative process as the central concern is well placed. I would have doubts, however, about the particular proposal she makes. To my mind, the most effective, concrete way to improve women's (and men's) deliberative processes about abortion would be to provide abortion funding and adequate day care. The indirect effects of those actions would likely be far more important to the quality of personal deliberations about abortion than any counseling program or personal discussion under state sponsorship. A state-mandated program of voluntary counseling could be helpful only if the counseling directly addressed the effects of gender discrimination on women's lives and their reproductive decisions.²⁵⁵ Any attempt to impose notification or

253. See *supra* text accompanying notes 190-91.

254. Colker, *supra* note 247, at 1067; see *id.* at 1061-67. See also *id.* at 1068 (proposing that married women be required to notify their husbands of their abortion decisions, though with "broad exceptions for the woman whose life situation would be endangered or worsened by compliance"). To be sure, it is not clear that *Akron* would prohibit a state from requiring that counselling be made *available* by health care providers. Cf., e.g., *Akron*, 462 U.S. at 448 ("[W]e do not suggest that the State is powerless to vindicate its interest in making certain the 'important' and 'stressful' decision to abort is 'made with full knowledge of its nature and consequences.'") (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 (1976)).

255. For a discussion of abortion counselling along feminist lines, see Bутtenweiser & Levine, *Breaking Silences: A Post-Abortion Support Model*, in *FROM ABORTION TO REPRODUCTIVE FREEDOM*, *supra* note 147, at 121-28.

consultation, directly or indirectly, would undercut its utility.²⁵⁶ In any event, though, Colker is right to make the focus of her analysis the process by which women (and men) deliberate about abortion, and the role of the state in affecting that process. It is over these questions that debates about abortion and privacy should be conducted—not over whether to exclude the state from personal decisionmaking but over how its power is best deployed with respect to it.

In sum, the right to abortion is not a gender neutral right, part of some larger “right to control one’s body” or “right to control decisions about reproduction” that just happens, by virtue of biology, to apply to women. It is, on the contrary, grounded in women’s (and men’s) constitution in our society—a constitution that is always contested politically and experienced personally. To delineate the scope of the right to abortion is to ask how the power of the state can be used to reduce the impact of sexism and other distorting factors on the institutional contexts of personal moral decisionmaking.

b. *Gay and lesbian rights*

The corresponding argument concerning rights of sexual expression is similar and can be briefly presented. There is a valid role for equal protection arguments to protect from discrimination those whom society categorizes as gay. But, once again, equality is not enough. At the most general level, individual experience of sexuality is distorted by society’s rigid emphasis on sharply distinct gender roles. In this sense, it plainly is not only gays and lesbians who would benefit from protection of homosexual conduct. Individual consideration of a myriad of other issues would be improved by removing the distorting effect of society’s stigmatization of homosexuality—precisely because any sexual conduct raises moral issues.

Just as abortion is not a gender-neutral right, though, privacy protection for gays and lesbians cannot rest on recognizing some general right, indifferent to sexual preference, to engage in whatever sexual activity one desires. Just as abortion can be understood only against the

256. Requiring a woman to notify her husband, *see supra* note 254, would be unwise. Unless one distrusts the decisions that most women tend to reach on the question of consultation with their husbands, it seems unlikely that any discussion between husband and wife that would not have taken place but for a state statute would produce any worthwhile results. Indeed, the state’s constitution of her as unworthy of making her own decision whether to consult her husband would, in the historical context of men’s power over women, tend to diminish the power she brought with her to the discussion.

particular historical fact of men's (and the state's) power over women's bodies, so too can the case for gay rights be understood only in the context of the historical construction of gay and lesbian identities, a constitution intimately bound up with society's stigmatization of anything but heterosexual activity.²⁵⁷

For many gay men, for example, AIDS has provided the occasion for debates over notions of commitment and responsibility to others in sexual conduct.²⁵⁸ The debate over the closing of gay bathhouses, in which the very act of defying conventional morality could be put forth as a value in itself, is perhaps the most telling example of the distortions that society's stigmatization of homosexuality has caused.²⁵⁹ To be sure, patterns of multiple anonymous and risky sexual activities are tied to acknowledgment of gay identity in conflicting ways. For some men such activities may represent an open affirmation of a gay identity and an utter rejection of society's efforts to stigmatize them for their sexual orientation. For others such conduct may represent an inability to acknowledge their sexual orientation in the light of social stigmatization.²⁶⁰ For the former, acting in a context in which the law stigmatizes all homosexual conduct, it is likely to be difficult not to experience the very debate over bathhouses as an attempt to enforce abandonment of a hard-won gay identity in favor of the monogamy that officially (if unrealistically) characterizes legally sanctioned heterosexual relationships; an effort, in other words, to shunt those newly escaped from the

257. In fact, the very notion of gay or lesbian identities may itself be a distorting factor. Lesbians in particular face discrimination on account of both their gender and their sexual orientation; the divide between heterosexual and homosexual identities, consequently, is perhaps less rigidly marked than it is for men. The entry of women into the labor force, for example, has given all women, regardless of their sexual orientation, greater freedom from direct and personal dependence on men. See J. D'EMILIO, *supra* note 170, at 93. A sense of a sharp separation between lesbians and other women may obscure the commonality of interest. See B. ADAM, *supra* note 170, at 91-97 (discussing the relationship between lesbian rights and feminism). Conversely, notions of identity can blind us to significant differences. Gays and lesbians of color, for example, face discrimination on account of their race as well as their sexual orientation. Cf. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (arguing that feminist claims about women's essential identity tend in fact to look principally to white women's experience and orientation). It would be mistaken, therefore, to attribute all problems in moral judgment that gays and lesbians face to their stigmatization as such; my claim is simply that that stigmatization is one distorting factor.

258. See *supra* notes 202-04 and accompanying text; C. PATTON, *supra* note 174, at 134-43.

259. See R. BAYER, *supra* note 202, at 20-71; R. SHILTS, *supra* note 202, at 429-56, 481-82, 489-92, 498-99.

260. See Eckholm, *Cut Down as They Grow Up: AIDS Stalks Gay Teen-Agers*, N.Y. Times, Dec. 13, 1990, at A1, col. 3 (noting difficulties of gay teenagers, in conflict over their sexuality, in avoiding high-risk sexual conduct).

closet directly into the marital bedroom. For others, less able to consider issues of sexual orientation, the law's stigmatization contributes to a context in which it is difficult even to acknowledge the existence of moral issues in the first place; denial takes the place of moral deliberation.

If homosexual conduct were less stigmatized to begin with—an outcome to which recognition of a right to privacy would contribute (though of course not ensure)—refraining from unsafe sex might seem less like a surrender of a chosen identity or a surrender to an imposed identity. Indeed, sexual conduct eventually might well become less entangled with questions of identity in the first place. The more that issues of sexual conduct were disengaged from society's attempt to stigmatize all sexual conduct between men, in other words, the more possible it would be for individuals to consider the moral issues surrounding their sexuality.

The AIDS crisis has not had the same significance for lesbians as for gay men, but the social stigmatization of lesbians has its own distorting effects. The phenomenon of lesbian-battering, for example, poses issues of responsibility towards others, issues that the stigmatization makes more difficult to confront. Against the background of efforts to forge a lesbian community, even acknowledging the problem—let alone calling upon the law to deal with batterers—becomes difficult.²⁶¹ The result may be a turning away from or even blaming of the victim.²⁶²

Once again, it should be emphasized that the focus here is on the existence of distortions in individual moral decisionmaking, not on its supposed impossibility. The widespread adoption of safe sex by many gays²⁶³ proves that the stereotypes about gays and sex have as little

261. See Benowitz, *How Homophobia Affects Lesbians' Response to Violence in Lesbian Relationships*, in *NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING* 198-201 (K. Lobel ed. 1986) (efforts to develop sense of pride in reaction to homophobia make it difficult to acknowledge possibility of violence and control in lesbian relationships) [hereinafter *NAMING THE VIOLENCE*]; Cormier, *Coming Full Circle*, in *id.* at 123, 125 (noting how the absence of "social structures and approval available to heterosexual couples" tends to cut off each partner from others, facilitating the batterer's attempts to control); Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 *GOLDEN GATE U.L. REV.* 567 (1990). The debate among feminists and lesbians over the morality of sadomasochistic sexual practices raises similar issues of responsibility toward others. For a useful overview, see Robson, *Lifting Belly: Privacy, Sexuality & Lesbianism*, 12 *WOMAN'S RIGHTS L. REP.* 177, 197-200 (1990).

262. See Dietrich, *Nothing Is the Same Anymore*, in *NAMING THE VIOLENCE*, *supra* note 261, at 155-62.

263. See Becker & Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 *AM.*

validity as do stereotypes of selfish women seeking abortions for trivial reasons. At the same time, the continued presence of a variety of modes of intimate relationships demonstrates that a simple mimicry of marriage is not the only alternative.²⁶⁴ Similarly, the stigmatization of lesbian relationships has not constituted an absolute barrier to the lesbian community's acknowledgment of the problem of lesbian battering.²⁶⁵

There is, then, a role for privacy theory in the issues of abortion and gay rights if we view privacy as posing the question of how state power should be deployed in light of its constitutive effect on the institutional contexts of personal decisionmaking. So conceived, a privacy argument for abortion and gay rights is deeply substantive.²⁶⁶ At the same time, it makes room for differing opinions on the morality of various aspects of abortion and gay life without necessitating resort to spurious claims about pristine spheres of individual autonomy.

2. Enriching Public Life

A reformulated privacy theory can also provide a basis for giving concrete meaning in the public sphere to the aspirations of transformation and self-revision that Michelman's republican theory raises rather abstractly. To begin with, it is wrong to think of abortion as an essentially private matter. On the contrary, abortion *should* be a public matter, to some extent. A truly private abortion decision may not be desirable if it deprives women of the opportunity to consider it in a supportive environment of the sort that feminist clinics attempt to pro-

J. PUB. HEALTH 394 (1988).

264. See D. ALTMAN, *supra* note 202, at 156-61 (1986); Altman, *AIDS: The Politicization of an Epidemic*, SOCIALIST REV. No. 78, at 93, 105-06 (Nov.-Dec. 1984); Padgug, *supra* note 204, at 293, 303-05.

265. See generally NAMING THE VIOLENCE, *supra* note 261. See also Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 53 (1990):

[S]tereotypes [about lesbian battering] have indeed existed among lesbians. Yet when these attitudes emerged within activist, feminist communities, they were promptly confronted. They do not define the literature, and therefore do not create more ongoing stereotyping of battered lesbians. Traditional stereotypes are largely absent: the voice of the conservative social scientist, the Freudian analyst, and the professional who blames the battered woman for failing to control her batterer, have been left behind. The analysis generated by a grassroots, feminist, activist community presents a more nuanced, less stereotyping, and less victim-blaming view than any other literature in the field.

266. Cf. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 521 (1989) (advocating a "naive" perspective in which "[t]he justice (or injustice) of laws against abortion and homosexual sodomy depends, at least in part, on the morality (or immorality) of those practices").

vide.²⁶⁷ *Roe's* characterization of the decision as one to be made between a woman and her doctor²⁶⁸ thus is not necessarily entirely undesirable. To be sure, if our image is that of a white male doctor condescendingly prescribing a course of action to a woman for whose experiences he has no deep appreciation, the doctor's involvement is unwelcome and intrusive. But a health care system infused with feminist principles of empathy and understanding would provide a far better ideal of the abortion decision than would taking a pill in the isolation of the home.²⁶⁹ In that respect, public life would be enriched. More generally, women's struggles for equality—including the fight for abortion rights—are, in the end, about more than simple equality with men. They are also about the loosening of rigid gender stereotypes and, potentially, the introduction of a different voice in our politics.²⁷⁰

A similar point holds true for gay rights. One of the most favored images invoked by proponents of homophobia is that of the gay school teacher "recruiting" impressionable children by seducing them.²⁷¹ The

267. See Ricks, *supra* note 188, at 95-96 (concerning impact of "home abortions" by taking RU-486) (footnotes omitted):

While some feminists believe the increased privacy of chemical abortion is 'wonderful,' others are concerned that the long feminist struggle to identify private lives as political may be undermined by the decentralization of abortion services. A corollary of privacy may be inducement or exacerbation of feelings of guilt or shame. A woman who aborted at home would not benefit from the supportive counseling offered at some clinics, counseling which can lead to the politically significant realization that she is not alone in needing an abortion.

268. *Roe v. Wade*, 410 U.S. 113, 164 (1973) (in first trimester, Constitution requires that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician").

269. Equally important, a supportive environment might help women address in a productive way the question of why they became pregnant and why they wish to terminate the pregnancy. Viewing abortion as a purely private and individual matter can all too easily divert attention from the issues pertaining to the male partner's responsibility for contraception. Similarly, a single woman who has an abortion because she decides she cannot afford to raise a child is less likely to view her predicament in the context of systematic wage discrimination against women if her abortion is a purely personal experience.

270. See generally, e.g., MacKinnon, *supra* note 61, at 1327-28; Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); For a more skeptical view, see Henderson, *supra* note 95, at 431, 441-43.

271. See B. ADAM, *supra* note 170, at 151; D. GREENBERG, *supra* note 116, at 471-72; Rivera, *supra* note 201, at 860 n.367. That specter appears to lie beneath statutes that forbid teachers to advocate or encourage homosexual conduct. E.g., *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984) (finding the statute unconstitutional), *aff'd mem. by an equally divided court*, 470 U.S. 903 (1985). See also, e.g., *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

It shows up in other forms as well. It is surely no accident, for example, that the Helms

prevalent response is to dismiss the argument as factually ungrounded (which it surely is) and normatively misguided, given the irrelevance of what someone does in bed to his or her ability to be a good teacher.²⁷²

The argument that gay school teachers' personal lives are irrelevant to their role as teachers is profoundly misguided. At base, the appeal for protection of a purely private sphere amounts, as I have noted,²⁷³ to the confinement of anything other than heterosexual identity to a judicious silence. But the inadequacy of that appeal does not lie solely in its consequent distortion of personal identity. Any effort to construct a personal identity necessarily entails social and political acts at the same time.²⁷⁴ Failure to recognize the connection can only stunt efforts to create the new forms of public communities and institutions that are the foundation of any challenges to our society's tendency to impose a heterosexual identity.²⁷⁵

amendment lumps "homoeroticism" together with (among other things) "the sexual exploitation of children." See Dept. of Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304, 103 Stat. 701, 741.

272. *E.g.*, *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (en banc) (Norris, J., concurring in the judgment) ("Sexual orientation plainly has no relevance to a person's 'ability to perform or contribute to society.'") (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)), *cert. denied*, 111 S. Ct. 384 (1990). *Cf.* *Bowers v. Hardwick*, 478 U.S. 186, 217-18 (Stevens, J., dissenting) ("[W]hen individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the State—to decide.") (footnote omitted).

273. See *supra* text accompanying note 57.

274. For an excellent account of this relationship, see Halley, *supra* note 29, at 963-76. See also S. PHARR, *supra* note 58, at 85 ("Every act of lesbian visibility is an act of resistance. Its defiance says no to the oppression of homophobia. There are lesbians throughout the world who bravely perform these acts of resistance every day, and even the smallest act has an impact upon our individual lives and upon society.").

275. See Escoffier, *supra* note 174, at 119, 144-45:

Coming out achieved two important effects. First was the creation of a network of formal institutions serving a range of previously unsatisfied needs—religious, educational, political, recreational, professional; the publication of newspapers and periodicals, social service institutions (e.g., counseling services) and mutual-aid societies. Second, the mobilization of those who came out and the availability of community institutions helped to create a well-defined public identity for homosexuals.

Visibility was the precondition for the establishment of lesbian and gay communities that resembled the urban neighborhoods of the immigrant groups in the late nineteenth and early twentieth centuries. Visible homosexuals created gay residential neighborhoods, political groups that influenced elections, and gay-owned or -serving businesses that thrived. Many homosexuals left their communities, their families, and jobs and careers that conflicted with their being openly gay, and migrated to those cities with visible lesbian and gay communities.

The same point can be made with regard to contraception. The right of married couples—or anyone else—to have nonprocreational sex plainly depends on the public availability of contraceptives. Indeed, availability is not enough: without visible institutions like birth control clinics, the

Thus a better privacy-based argument for protecting the gay school teacher would begin with the fact that anti-sodomy statutes bolster the stigma that our society attaches to homosexuality, thereby confining many gays to the closet.²⁷⁶ Striking those statutes down would help remove that stigma and permit a more open acknowledgement of sexual preference. Moreover, by emphasizing the aspect of public identity, it would be possible to escape some of the problems of defining gays by particular sexual acts. Of course doing so would, in turn, enrich the school environment by exposing children to the existence of a variety of forms of sexual identity—a variety that would, in addition, help undermine harmful stereotypes.²⁷⁷ In that sense, the homophobic image of recruitment, like many fantasies, contains a grain of truth that privacy theory need not hide in embarrassment: to protect the gay school teacher from firing is, in part, to shape the schoolchildren's un-

right will effectively be foreclosed to many individuals. Connecticut implicitly recognized this when its anti-contraceptive statute was on the books. During that time, prosecutors apparently never brought charges against individual users of contraceptives or even against stores that sold them. Rather, the two cases litigated under the statute were test cases, brought when someone tried to make a public point. *See State v. Nelson*, 126 Conn. 412, 419, 11 A.2d 856, 859 (1940); *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). *See also Poe v. Ullman*, 367 U.S. 497, 501-02 (1961) (plurality opinion). At least one of them—*Griswold*—involved a birth control clinic. And, as noted earlier, *see supra* note 8, the primary effect of the Connecticut statute was to preclude the availability of birth control at clinics.

Even the most seemingly personal and private decision a man and a woman might make together depends effectively on the existence of public institutions to support that choice. More generally, the conception of privacy as a zone of autonomy is hardly a neutral concept applicable to a wide range of conduct, but rather reflects the assumption of a strictly heterosexual point of view. Like the mythical fish that knows nothing of water, only one thoroughly immersed in the "heterosexual assumption," Escoffier, *supra* note 174, at 137, could fail to detect the pervasive social support that informs heterosexual private life in its most intimate details.

276. There is, to be sure, an empirical question as to how much those statutes contribute to the stigma. It may well be that the simple absence of an anti-sodomy statute on a state's books for historical reasons makes very little difference one way or the other. It might be the case that striking down such statutes would have more effect in undermining the stigma than the mere continued validity of such statutes has in bolstering it. In any event, the question is simply one of strategy. If anti-sodomy statutes have little relationship to social stigma, then there is little if any point in worrying about them.

277. The argument, of course, need not be confined to schoolteachers. Karl Klare argues that the law should not only create zones of privacy . . . but it should also recognize a public right of employees to work in a sexually pluralistic environment. In this view, the workplace is one of people's most important learning environments. This approach would therefore require employers to undertake a public responsibility 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. Employers would be required not only to take affirmative action to hire gay men and women, but to provide a work setting conducive to gay pride.

Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1387 (1982).

derstanding and experience of sexual identity in a particular way.²⁷⁸

B. Courts and Dialogue

The analysis set out above obviously implicates deeply controversial positions regarding personal and social life; my argument about *Roe*, for example, plainly comes out in favor of a feminist perspective. That it requires a substantive commitment of some sort cannot, however, count as a serious objection. If the analysis up to now is correct, the theorist of privacy simply cannot avoid making *some* moral judg-

278. In one case upholding the removal of a public school teacher from the classroom, an expert witness testified that it would be impossible for the students to separate the teacher's homosexual identity from his identity as an earth science teacher. *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 847 (D.C. Md. 1973) (upholding the transfer of a school teacher for appearing in the news media to attack discrimination against gays), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974). *Cf. McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971) (objecting that applicant for position with a university library, who had earlier applied for a marriage license with his male partner, was attempting "to foist tacit approval of this socially repugnant concept upon his employer"), *cert. denied*, 405 U.S. 1046 (1972). That is precisely the point, and it undermines in practice any attempt to limit protection to gay or lesbian teachers who do not "overtly advocate" their lifestyle. V. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* 147 (1991).

To be sure, one might argue that the school teacher should be protected on a content-neutral basis: It was wrong to transfer the plaintiff in *Acanfora* because he had exercised his first amendment rights in a way that displeased the board of education. But that defense would be illusory. Teaching inevitably involves a substantive choice as to the message to be sent to the children.

Because the question is one of which message to send, there is no avoiding the fact that my approach requires a substantive judgment about forms of sexuality. Diversity in this context does not mean taking the attitude that all forms of sexual conduct are equally desirable or valid. Protecting the gay school teacher in no way implies protecting someone who sexually abuses children. (Indeed, the sense that protecting gays' privacy rights somehow raises the question of incest or child abuse with special urgency is simply a reflection of society's stigmatization of gays.) Similarly, the supervisor who claims that harassment of female subordinates represents his way of expressing his sexuality must be distinguished from the employee who is fired because she talked as openly about her lesbian partner as other employees talk about their spouses. *See supra* note 277. There is no doubt that such judgments may be difficult, and that they have real effects. In the latter example, we might fire the supervisor and reinstate the lesbian employee. If my argument is correct, however, there simply is no way to avoid the necessity of making such judgments.

Thus, the sense in which I speak of recognizing more diverse forms of sexuality has little to do with more well-known ideas about tolerance, like Dean Bollinger's perceptive argument about extremist speech. *See* L. BOLLINGER, *supra* note 5. Bollinger argues that the benefits from permitting American Nazi party members to march through Skokie (and generally permitting extremist speech) lie not in the value of the speech itself, but rather in the way that refraining from giving vent to our impulse to silence hate speech cultivates an awareness of our biases. That cultivation of a tolerant mind, in turn, fortifies our general respect for freedom of speech. *See, e.g., id.* at 243 (summarizing argument). There is much to be said for Bollinger's theory as it applies to the first amendment; but in the area of sexual conduct, it seems hard to imagine how we could avoid making and acting upon the kinds of moral judgments in precisely the way that Bollinger counsels against in relation to speech.

ment about the structures of personal life. The question remains, however, what role the courts might play in such an approach.

In my view, the question is best put in practical rather than theoretical terms: What strategy will most likely result in a favorable ruling by the courts? That question, in turn, requires us to decide what we mean by dialogue in the context of judicial decisionmaking. One conception, the more common, identifies it with the presentation of briefs and oral argument, with the aim of immediate persuasion through argument. Another, which I would call "mediated persuasion," looks to the persuasive force of movements for social change outside the courtroom.

If one takes immediate persuasion as the aim, the attempt to place privacy in its political context might well seem misguided. The more open the theory is about the deep moral and political disagreements that lie at the heart of contests over privacy, the more likely, one might fear, are the courts either to recoil from giving any protection to privacy, or to make substantive judgments that are very different from those made by the parties seeking relief. Should feminists, for example, ask the courts to make decisions about how abortion and women should be constituted? However great their commitment to dialogue may be, it remains the case that judges' viewpoints and experiences will have a profound effect on their receptiveness to particular arguments. Because the courts are highly unrepresentative, they might be thought unlikely to be sympathetic to the perspectives of oppressed or marginalized groups.²⁷⁹

The extent to which frankness about the underlying moral and political controversies undermines the possibilities of immediate persuasion can, however, be overstated. Although judges may constitute an unrepresentative group, it is not clear that they can never be "educated." Briefs can sometimes persuade courts or expose them to unfamiliar perspectives, particularly if efforts are made to tie arguments into some perspective with which judges are more likely to be familiar. For example, in a challenge to some statute or policy that discriminates against gays it might be useful to choose plaintiffs who could portray their sexual relationship as part of a long-term commitment, not because marital monogamy must be accepted as a definitive model of morality in sexual relations, but because doing so would make it easier for

279. Henderson, *supra* note 95, at 441 ("Racism, nationalism and indifference to oppression characterize" the Supreme Court's recent constitutional opinions.).

judges to empathize with them.²⁸⁰ Finally, the costs of winning a victory on grounds that obscure the deep political conflicts at stake are by no means insignificant. The obfuscatory notion upon which *Roe* was based—that abortion is a matter for the isolated woman alone, or, to state the holding more accurately, for the woman and her doctor—helped lay the groundwork for cutting off abortion funding.²⁸¹

In the end, though, the best response to questions about the appropriate degree of political frankness to adopt in presenting arguments to the courts is a certain agnosticism. This agnosticism reflects the fact that the second form of argument—mediated persuasion—is far more important. Any resort to the courts must be an integral part of a political strategy to effect particular changes that will help reshape society in a way that, in turn, can lend credence to claims for recognition of new rights. Transformative social change is one kind of argument, and it seems to me to eclipse the effect of any more immediate kinds of persuasion.²⁸² After all, though the courts do participate in the struggle to shape the institutional contexts of personal life, they also reflect the contemporary balance of power in those struggles. Indeed, it is likely that they reflect as much as, if not more than, they shape. The *Gris-*

280. There are, of course, different ways to appeal to empathy. The circumstances of Hardwick's case—intrusion by a state official into his bedroom while he was having sex—might appeal to some judges' sense of empathy if they imagined a similar intrusion into their own bedrooms. But an appeal to the notion of a private sphere safe from state intrusion is itself problematic, given my analysis. Similarly, one would suspect that the model of individual choice seemed appropriate to the Court in *Roe v. Wade* in no small part because it comported with a perspective with which judges are likely to be familiar: that of professionals with the sense of options and so control over one's life that our society bestows on those who have money. In and of itself empathy will never tell us what sorts of values and experiences to present.

281. See, e.g., *Maier v. Roe*, 432 U.S. 464, 481 (1977) (Burger, C.J., concurring) ("The Court's holdings in *Roe v. Wade* . . . and *Doe v. Bolton* . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion. These precedents do not suggest that the State is constitutionally required to assist her in procuring it."). At the same time, one cannot simply assume that the Supreme Court's decision to frame the issue in privacy terms has had a great impact. On the one hand, it is possible that "privacy" and "choice" would have dominated discussions about abortion rights even without *Roe v. Wade*. Privacy arguments will always have a certain attractiveness in a society that systematically devalues the public sphere. On the other hand, it would also be wrong to assume that the mere fact that the Supreme Court analyzed abortion rights in terms of privacy precluded people from developing an understanding of abortion rights in terms of gender equality. For an insightful discussion of the effect of *Roe v. Wade* on the terms of the abortion debate, see Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 634-42 (1986).

282. See Winter, *supra* note 122, at 1534-38. Cf. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Laws*, 137 U. PA. L. REV. 1105, 1234-34 (1989) (concerning the grounding of rights in the lived experience of beneficiaries). On the limits to persuasion of the sort I am describing, see Cover, *supra* note 117, at 160.

would Court was, I suspect, most powerfully persuaded by changes wrought in our social and personal lives by the long history of agitation by feminists and others for accessible birth control. Similarly, what made it even plausible to the Court in 1973 that the right to abortion is protected by the Constitution was not simply the persuasiveness of any particular privacy theory or the implications of *Griswold*. Rather, it was the effect of a decade of feminist agitation and of an even longer period of significant changes in the role of women that gave the thesis its plausibility, by making women's right to control their own reproductive processes appear to be a serious concern.²⁸³ In contrast, the Court's closely divided response to Hardwick's claim most likely had very little to do with the precise arguments presented in the briefs, but rather reflects the smaller gains that gays and lesbians had achieved at the time the case was decided.

Express recognition of the importance of mediated persuasion is itself empowering. Consider, for example, two different possible attitudes toward the experience of legalized abortion since 1973. One is thankfulness toward the Court for having ensured that women could obtain abortions, settling the issue by placing it on a constitutional plane and so outside ordinary politics. The other is thankfulness toward the women's movement for having secured a victory for women in 1973, a victory that, however, was neither complete nor immune to reaction. The former attitude, in my view, simply misconceives the nature of the Court's action in 1973, in terms both of what led to its decision and of what *Roe v. Wade* meant. It also necessarily, if implicitly, denigrates the sacrifices and courage of those who made *Roe v. Wade* possible.²⁸⁴

Recognizing this mediated form of dialogue, then, more accurately describes the relationship between the courts and social change, and that greater accuracy is itself potentially empowering. Two qualifica-

283. Conversely, the success of conservative forces in greatly limiting progress towards gender equality over the last decade, and in revitalizing a more traditional conception of the role of women, has surely played a role in the Court's new-found skepticism about the constitutional basis of a right to abortion.

284. The same point can be made about *Brown v. Board of Education*, 347 U.S. 483 (1954). To write, for example, that but for Chief Justice Earl Warren we might still have had segregation today, see Lewis, *The Possible Dream*, N.Y. Times, Apr. 12, 1991, at A29, col. 5; cf. A. BRILL, *NOBODY'S BUSINESS: THE PARADOXES OF PRIVACY* 17 (1990) (calling Justice Blackmun "the father of pro-choice"), is to overlook the enormous sacrifices and collective self-empowerment that the civil rights movement represented, however partial and embattled its legacy remains today. The better counterfactual to pose would be the United States of today had there been no such movement; there is every reason to believe that *Brown* would be a dead letter.

tions, however, are in order. One is that the business of persuasion through social change is never fully in the control of the actors who engage in it. *Brown v. Board of Education*, for example, reflected to a very real extent the aspirations of blacks to equality and the conscious strategy of the NAACP.²⁸⁵ But as noted earlier, it seems likely that it also reflected in part factors beyond their control, such as elite perceptions of Cold War imperatives.²⁸⁶ Similarly, it seems unlikely that the women's movement was the sole argument for legalizing contraceptives. The rise of the welfare state, with both the development of a state interest in controlling reproduction and the growth of a class of health-care professionals, surely contributed in part to Justice Stewart's view in *Griswold* that Connecticut's statute was "uncommonly silly."²⁸⁷ And it was not only the women's movement, but also the American Medical Association, that pushed for liberalization of abortion laws.²⁸⁸ At the time *Roe v. Wade* was decided, population control was as much in the air as was women's equality.²⁸⁹ And that strand of the argument leads all too easily to coerced sterilization.²⁹⁰

Michelman is correct, then, to say that the voices of the excluded and oppressed deserve special hearing in the courts.²⁹¹ But the fact remains that those voices can never be heard in the most important—that is, mediated—way entirely on their own terms. It also remains true that the courts' own part in this mediated dialogue is likely to bear the

285. See generally R. KLUGER, *supra* note 32; M. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

286. See *supra* note 121.

287. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). See generally L. GORDON, *WOMEN'S BODY, WOMEN'S RIGHT: BIRTH CONTROL IN AMERICA* 249-418 (1976).

288. See, e.g., K. LUKER, *supra* note 148, at 88, 142.

289. See, e.g., J. REED, *FROM PRIVATE VICE TO PUBLIC VIRTUE: THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY SINCE 1830*, at 369-81 (1978) (noting development of concern in 1960s and 1970s over population explosion and consequent easing of restrictions on contraceptives).

290. On the relationship between "population control" and coercion, see L. GORDON, *supra* note 287 at 395-402; Davis, *supra* note 147. See also P. REILLY, *THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES* (1991); S. TROMBLEY, *THE RIGHT TO REPRODUCE: A HISTORY OF COERCIVE STERILIZATION* (1988). The recent controversy over Norplant, a birth control device that can be implanted in a woman's arm to release hormones over a long term, provides a good example. Introduced as a new form of birth control that women could choose, some local authorities immediately began considering programs to distribute it to the poor, and at least one judge ordered a woman to have the device implanted. See Lewin, *supra* note 148; Lev, *supra* note 148; Petchel, *Jackson Mulls Birth Control Implant for Poor*, Miami Herald, Jan. 25, 1991, at 1B, col. 1.

291. Michelman, *supra* note 39, at 1528-32.

marks, not only of the struggles for recognition, but also of the limitations that existing power relationships impose on social change. The political fights over abortion, and to a large extent the women's movement itself, reflect to a very real extent the concerns of white, professional women. Those concerns, not surprisingly, are best met by the *Roe* Court's emphasis on individual choice.²⁹²

The second qualification concerns the courts' impact on movements for social change. Though it is primarily such movements that persuade the courts, the relationship is symbiotic to some degree. In rare moments like *Brown*, the Court may help articulate a new form of life and lend inspiration to movements for social change. Similarly, the *Roe* Court's legalization of abortion has had a profound impact on the lives of countless women (and men). It is that impact—rather than the precise rationale of the opinion—which accounts for the Court's greatest contribution to the debate over abortion. By far the most important part of the Court's contribution to dialogue, in other words, was not the reported opinion, but the real (if partial) freedom from the violence, shame, and sense of powerlessness that anti-abortion statutes had long imposed on many women. Exactly *how* we understand that freedom—or what we make of it—remains to be determined. Only sustained political battles to win equality for women will give life back to *Roe*. Only further struggles to increase our society's respect for the diversity of relationships in which human love and respect may be embodied will undercut the intolerance and coldheartedness that *Bowers* represents.

Ultimately, then, the judicial process itself is a poor model for republican dialogue. Why settle for a trace of jurisgenerative politics when its actuality is played out in the constant political struggles to transform the institutional contexts of personal and social life? Dialogue is not the back and forth of oral argument, or even the interplay between the Court and Congress, but the exercise of a kind of practical

292. See C. CONDIT, *supra* note 116, at 194-95:

What had been a classless *women's* private discourse was publicly articulated by middle- and professional-class American women (because they had the discursive skills and were economically privileged enough to have access to the communicative channels). These women did not share the economic problems and cultural barriers faced by women in poverty or minority groups. The childbearing choices they were likely to emphasize were choices to limit or repudiate child-bearing. In addition, these spokeswomen advocated the women's discourse within an American public vocabulary that featured an historically developed commitment to laissez-faire economic liberalism. . . . As a consequence of all these limitations, the American *public* version of the vocabulary of Choice evolved in a way that made it fit most closely the demands of middle- and professional-class women.

reason in which, through struggle and conflict, new and more liberating forms of personal and social life may emerge. At the same time, the ineluctable presence of violence and inequality in that dialogue reminds us of the need for a constant degree of skepticism about what emerges from jurisgenerative politics.

From this perspective, the contribution of the courts is real but relatively small. For the most part, it is far easier to over- rather than underestimate the importance of the courts' own articulations of the rationales for their actions. The meaning even of *Brown*—as a commitment by the courts and the government generally to attack segregation on a systematic basis—was not, after all, created primarily by the opinion that accompanied the holding but by the decade of political agitation for civil rights that followed it. The same is true of *Griswold*. The resolution of *Griswold's* ambiguities and the full constitution of its meaning for privacy awaits further clarification not from the courts, but from the continuing political struggles over social and personal life.