REDESCRIBING PRIVACY: IDENTITY, DIFFERENCE, AND THE ABORTION CONTROVERSY

*Jean L. Cohen**

INTRODUCTION

It has become quite fashionable to attack the idea of a constitutional right to privacy as well as the specific claim that a woman's decision whether or not to terminate a pregnancy falls within the province of such a right.[1] In the present context, where many feel that *Roe v. Wade* has

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* Jean L. Cohen is Associate Professor of Political Theory at Columbia University in the Department of Political Science. She is the author of two books, Class and Civil Society: The Limits of Marxian Critical Theory (1982) and Civil Society and Political Theory (1992), co-authored with Andrew Arato. I would like to thank Andrew Arato, Martha Fineman, Frank Michelman, Kendall Thomas, and Michel Rosenfeld for their helpful comments on early versions of this text.

[1] The list of critics is far too long to cite in full. This is because the debate over whether we have a constitutional right to privacy—and whether it covers abortion—involves doctrinal, normative, and political issues. I address the normative and political issues from a feminist point of view in the body of the text. But I cannot do justice to the doctrinal issues in the confines of this paper. Briefly stated, the doctrinal issue is this: Since a right to personal privacy appears nowhere in the text of the Constitution, what justification can there be for Supreme Court activism in this area? How can the Court avoid the charge that it is arbitrarily imposing its own substantive conception of fundamental values onto society when it overturns decisions of legislative majorities? See Robert Bork, The Tempting of America 112, 115-16 (1989), for an argument that the right to privacy cannot be justified on constitutional grounds, since it is neither in the text of the Constitution nor attributable to the original intent of the Framers. Accordingly, Bork argues, the Supreme Court has no call to override the outcome of democratic legislative processes. For an argument that rejects both clause-bound interpretivism and original intent as the determinants of our constitutional rights, but which nonetheless maintains that we have no constitutional right to privacy and certainly no right to abortion, see John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920 (1973) [hereinafter Ely, Crying Wolf]. For a summary of the doctrinal issues see John Hart Ely, Democracy and Distrust 1-72 (1980) [hereinafter Ely, Democracy]. For a more recent recapitulation of the doctrinal debate and an alternative assessment of the constitutionality of personal privacy rights, see Bruce Ackerman, We the People 1-33, 150-62 (1991). A useful introduction to the legal issues at stake can be found in Laurence H. Tribe, Abortion: The Clash of Absolutes (1990). See also Constitutionalism and Democracy (Jon Elster & Rune Slagstad eds., 1988) for an interesting debate over these issues.

For a useful collection of articles in political philosophy on privacy and privacy rights generally, see Philosophical Dimensions of Privacy (Ferdinand David Schoeman ed., 1984). See especially Judith Jarvis Thomson, The Right to Privacy, in id. at 272 (claiming that the concept of a privacy right is indistinct and at best a misnomer for some other right or set of rights). For counterarguments, see James Rachels, Why

been eviscerated, not a few are tempted to lay the blame at the door of the privacy justification underlying the Court's decision of 1973.[2] While the privacy justification has, at times, been interpreted inadequately, I remain unconvinced that it is *because* of the alleged intrinsic flaws of privacy analysis that *Roe* was a poor decision, fated to be weakened or overturned. Further, I do not believe that some other justification, be it an equal protection argument, one appealing solely to the freedom of conscience, or one based exclusively on the idea of bodily integrity, could serve as an adequate normative *substitute* for privacy rights in this domain.[3] Nor do

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Privacy Is Important, in id. at 290; Jeffrey H. Reiman, Privacy, Intimacy, and Personhood, in id. at 300.

[2] Roe v. Wade, 410 U.S. 113 (1973). This article was prepared for a conference on "Reproductive Rights in a Post-*Roe* World" at the Columbia University School of Law in Fall 1991. At the time, many of us feared that the decision in Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding a Missouri law whose preamble found that life begins at conception and that the unborn fetus is entitled to all the rights, privileges, and immunities of all other persons), would be used as precedent to overturn *Roe* and grant full personhood to fetuses. The recent decision in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), however, did not do this. Instead, it reaffirmed the "essential" holding of *Roe*—to wit, that women have a fundamental right to decisional autonomy regarding pregnancy and that this cannot be subject to a plenary override in the name of protecting life. Id. at 2804, 2807–08, 2816–17. Moreover, the joint opinion articulated the principles of personal liberty, bodily integrity, and respect for the self-definition of every individual in its arguments upholding *Roe*. Id. at 2804, 2806–08, 2816. In their respective arguments, Justices Stevens and Blackmun explicitly thematized the concept of privacy as the principle that encompasses all of these concerns. Id. at 2840 (Stevens, J., concurring in part, dissenting in part); id. at 2846–50 (Blackmun, J., concurring in part, dissenting in part).

Nevertheless, the *Casey* ruling opened the door to ever-increasing state regulation of abortion by upholding regulations imposed by the Pennsylvania law on abortion from the time of conception, thereby abandoning the trimester framework of *Roe*, and by reducing the standard of review from one of strict scrutiny to the "undue burden" test. Id. at 2818–19. Indeed, it upheld all of the restrictions in the Pennsylvania law under review except the husband notification requirement. Id. at 2822–33. If we consider that Casey, 112 S. Ct. at 2816–17, also overruled important parts of Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (regarding informed consent regulations), and City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (regarding waiting periods), then things do begin to look bad for women's reproductive freedom. It is therefore well worth our effort to clarify the normative issues involved in the abortion debate in the hopes of influencing the courts and legislatures to take them more seriously.

For a pessimistic view of the meaning of *Casey*, see Eloise Salholz et al., Abortion Angst, Newsweek, July 13, 1992, at 16 (quoting Patricia Ireland, President of NOW: "*Roe* is dead, despite the flimsy stay of execution issued today by the court."). For a more optimistic interpretation, see Ronald Dworkin, The Center Holds!, N.Y. Rev. Books, Aug. 13, 1992, at 29.

[3] For examples of equal protection arguments meant to substitute for the privacy justification, see infra part I. For a defense of abortion rights as a First Amendment issue rather than a matter of privacy, see Peter S. Wenz, Abortion Rights as Religious

I believe that the "normal political process," or reliance on the community's "shared values," would serve women better than a constitutional right to personal privacy.[4]

The right to privacy involved in *Roe* and its progeny affirms the principle that every individual woman, defined independently of a family frame of reference, is the bearer of constitutional rights that protect her moral autonomy, the inviolability of her personality, and her identity (which is bound up with her bodily integrity), as her own. Each of these is at stake when a woman faces an unwanted pregnancy. I shall argue below both that a constitutionally protected right to personal privacy is indispensable to any modern conception of freedom and that without reproductive freedom, secured in part by such a right, women are deprived of the good that privacy rights are meant to, and should, protect for all of us. I will also argue that women have not received full protection of their reproductive freedom, not because they have been granted privacy rights, but because these rights have been misinterpreted and/or willfully restricted.

In what follows, I consider two recent challenges to the privacy justification for abortion rights, both of which target what are taken to be its conceptual and normative presuppositions, albeit from opposite points of view. These challenges provide a useful context for rethinking privacy because they unintentionally reveal the importance of privacy rights to women, as well as the paradoxes such rights entail. The first of these critiques, articulated by feminist legal theorists favoring equal protection arguments,[5] charges that privacy analysis reinforces an ideological, liberal model of the public/private dichotomy that has long been used to justify both gender inequality and private male power within the patriarchal family, along with exclusionary and discriminatory treatment of women outside the domestic sphere.

The second, articulated by communitarian critics of liberalism,[6] argues that constitutionalized individual privacy rights undermine community values and solidarity. This, they claim, is due to the atomistic and adversarial conception of the individual that allegedly underlies these rights.

Freedom (1992). For an argument criticizing privacy analysis as applied to the abortion discussion, and especially to homosexuality, which suggests its replacement by principles of bodily integrity rooted in the Eighth Amendment, see Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431 (1992).

[4] See my discussion of Mary Ann Glendon and Michael Sandel, infra part II, for these views. My point here is not that issues of gender equality, freedom of conscience, and bodily integrity are secondary to privacy, but rather that the privacy justification encompasses the latter two principles and should be supplemented, not replaced, by the first.

[5] See infra part I.

[6] See infra part II.

While the first critique offers an alternative justification for abortion rights, the second challenges the very idea of individual rights in this domain.

We seem to be facing what I shall call the "paradox of privacy rights." With respect to the first argument, the attempt to correct the flaws of domestic privacy with more privacy seems quixotic: how can private power be undermined by privacy rights? On the other hand, from the communitarian perspective, to accord decisional autonomy to women in family matters through the vehicle of privacy rights is to purchase individual choice at the price of community solidarity. And there is yet a third dimension to the "paradox of privacy" pointed out by critics in both camps: while privacy rights purport to be the means for protecting individuals from state power, by reinforcing the disintegrative, leveling, individualizing tendencies in modern society, such rights seem to expose people to increased regulation by state agencies, thereby destroying both the solidarity of the family community and the autonomy of the individual.

This article will attempt to counter the objections from both quarters by contesting their interpretations of what is entailed by privacy justifications of the sort found in *Roe*, and by redescribing the good that privacy rights are meant to protect. The paradoxes of privacy are not unavoidable —they stem from the trap of ideology into which both critiques fall. In short, both approaches assume that what they take to be the liberal interpretation of privacy rights is definitive of such rights, and thus, both propose to abandon the discourse of privacy altogether. Their critiques are consequently rather one-sided: the first, because it considers only the subordination of juridical practice to the preservation of a system of domination; the second, because it confuses the symbolic with the ideological meaning of individuality attached to privacy rights.[7] The first approach misses the normative and empowering dimensions of privacy rights because it is preoccupied with unmasking the functional role they can play in preserving inequality and hierarchy.[8] The second is distracted by the old atomistic assumptions subtending many liberal justifications of privacy. Thus it fails to grasp the symbolic and real importance of rights guaranteeing decisional autonomy, inviolability of personality, and a sense of control over one's identity needs to socialized, solidary individuals.[9]

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[7] For an excellent theoretical analysis and critique of both types of reductionism, see Claude Lefort, The Political Forms of Modern Society 239–72 (John B. Thompson ed., 1986).

[8] Such an approach carries out only one half of the task of critique—it "unmasks" the ideological use of concepts (or in more contemporary jargon, it "deconstructs" discursive strategies) which serve the ends of domination, but it fails to suggest a "redescription" or conceptual shift in the meaning of the concepts that could help empower the disempowered. That is the strategy of this article.

[9] The lack of agreement over abortion and over women's standing in society

The task before us is to break with functionalist and ideological interpretations of privacy without jettisoning the principles protected by privacy rights. Precisely because the issues, relations, and arrangements once construed to be private, natural, and thus beyond justice, have become matters of public debate and political struggle, precisely when boundaries are being redrawn, and when meanings have become destabilized, it is time to enter the fray and rethink privacy rights in ways that enhance, rather than restrict, freedom *and* equality.[10] The old certainties are gone, as the heated debate over the very meaning of privacy has revealed. It is up to us to move beyond a hermeneutics of suspicion and redescribe the good that privacy protects in terms that are woman-friendly.

It is plain that among the dimensions of personal privacy recognized by the Supreme Court today, the "right to be let alone" (freedom from official intrusion or prying) and "decisional privacy" (freedom from official regulation) in the domain of intimacy are central. Of the two, the first, especially as concerns the intimate details of one's personal life, is far less contested than the second. The right to be let alone involves control over access or attention by others and control over the possession and spread of

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makes the abortion decision an easy mark for those who wish to challenge the principle that personal privacy rights can limit the community's prerogative to legislate its "shared" values. In part, this is so because the Constitution does not explicitly protect personality rights—accordingly, privacy jurisprudence has become the symbolic shield for individual identity needs against majoritarian intolerance. *Privacy* therefore has become an umbrella term to cover decisional autonomy vis-à-vis crucial personal concerns, inviolability of personality, and bodily integrity, as well as individual control over information regarding the domain of intimacy.

[10] Feminists have long insisted that the "personal is political," meaning that the apparently natural private domain of intimacy (especially the family) is legally constructed, culturally defined, and the site of power relations. The boundaries between private and public, personal and communal, are not natural but conventional, as are the cultural codes that assign specific roles and places to different genders. The principles of justice should therefore apply to the private sphere as well as to the public. But once we reject the traditional ideological understanding of the public/private dichotomy, we are still faced with the question of how to articulate recognition for personal privacy. I, for one, am not ready to abandon the language of personal privacy. I see the debate over the meaning of such a right as part of an ongoing contestation over the vocabularies, idioms, and cultural codes available for interpreting needs, for pressing claims, for constituting identity, and for gaining recognition. Indeed, the meaning of *all* basic rights (e.g., to liberty, to equality, to justice) shifts over time and is, in principle, open to dispute. I present here my own "redescription" of privacy and privacy rights as an intervention in the deeply political battle over the definition of freedom in the modern world. For the concept of redescription, see Richard Rorty, Contingency, Irony, and Solidarity 79–80 (1989). Although I adopt this concept from Rorty, I do not subscribe to his own version of the public/private dichotomy. See also Frank Michelman, Private, Personal but Not Split: Radin Versus Rorty, 63 S. Cal. L. Rev. 1783–95 (1990); Frank Michelman, Law's Republic, 97 Yale L.J. 1493 passim (1988) [hereinafter Michelman, Law's Republic].

information about oneself. This principle, if not its applications, is widely accepted today.[11] The debates are over the extent, rather than the very idea, of our right to informational privacy.[12]

Although informational privacy is at issue in the abortion debate, I am not directly concerned with this aspect of privacy. The controversy I wish to discuss revolves around the second prong of privacy doctrine, namely, privacy construed as involving decisional autonomy vis-à-vis the "zone of intimacy"—marriage, divorce, sexual relations, procreation, child rearing, abortion, etc.[13] This is the arena where the battle rages and where the very principle, rather than the reach, of an individual right to privacy, is being contested.

Part I addresses the critique of the privacy justification for abortion rights by feminists seeking to replace it with a justification based on a "sex-equality" argument. I then turn, in part II, to the communitarian critique of privacy doctrine with special emphasis on the work of Michael Sandel and Mary Ann Glendon. Part III addresses the strengths and weaknesses of the conception of privacy as decisional autonomy. In part IV, I discuss the relation between privacy and identity as articulated in the theory that privacy rights protect one's "inviolate personality." After an excursus on privacy and property in part V, I conclude by "bringing the body back in" and redescribing the meaning of privacy rights for women in part VI.

I. THE SEX-EQUALITY ARGUMENT

Feminist scholars have long argued that more is at stake in the struggle for reproductive freedom than the right to choose an abortion. This struggle also involves a challenge to the social, gendered, and material conditions under which women make such decisions. Often the very need for abortion can be attributed to these factors. Thus, as Rosalind Petchesky argued in her classic work on the subject, any attempt to interpret

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[11] For the classic discussion, see Alan F. Westin, Privacy and Freedom (1967). For an opposed view, see Richard F. Hixson, Privacy in a Public Society (1987); see also Louis Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410 (1974), for a useful distinction between privacy as a right to freedom from official intrusion (informational privacy) and privacy as a right to freedom from official regulation (privacy as autonomy).

[12] For a more pessimistic view that focuses on the threats posed to privacy by organizations using personal data systems, see James Rule et al., The Politics of Privacy (1980).

[13] See Gary L. Bostwick, Comment, A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision, 64 Cal. L. Rev. 1447, 1466–78 (1976). Of course, this "zone" should not be construed spatially but normatively, as a range of intimate personal comcerns.

reproductive freedom simply as a matter of privacy rights is reductive.[14]

On the other hand, Petchesky also insisted that rights which ensure self-determination are indispensable for women.[15] Accordingly, she argued for a double agenda for reproductive freedom: one insisting on the importance of privacy rights protecting a woman's autonomy, and another emphasizing desirable changes in the social, economic, and gender factors of "reproduction."[16]

Recently, however, an important group of feminist legal theorists have advocated the abandonment of the privacy justification for abortion rights. They suggest that privacy be replaced with a "sex-equality" approach based on the equal protection clause of the Fourteenth Amendment.[17] The most

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[14] Feminists rightly point to inegalitarian gender relations, rigidly interpreted and ascribed social roles, allocation of responsibility for pregnancy and child care on the basis of gender, the absence of social supports for bearing and raising children, inadequate availability of health care for women, and distributional inequalities of economic opportunity between women and men as factors structuring the social relations of reproduction in our society and conditioning our choices. See, e.g., Rosalind Pollack Petchesky, Abortion and Woman's Choice 1-15, 326-56 (1985). I agree with Petchesky's basic point that privacy rights are necessary but not sufficient to guarantee reproductive freedom; for this, a wide array of social policies, and cultural and institutional change are also necessary.

[15] Id. at 2. Petchesky thus rejects the opposite sort of reductionism which assumes that women need abortion rights only because the existing socioeconomic division of labor between the sexes ascribes to them sole responsibility for the consequences of pregnancy, to wit, the care and rearing of children, while denying them the economic means to carry out these tasks. It was this standpoint that led some feminists to argue that if the community assumes the responsibility for the welfare of mothers and children, then the community should have a share in judging whether or not a particular abortion may be performed. Petchesky attributes this view to Alison Jaggar. Id. at 13. Petchesky rejects this position because she can neither imagine nor deem desirable a set of social conditions under which women would or should be willing to renounce control over their bodies and lives. Id.

[16] Id. at 14.

[17] Many feminist legal theorists have invoked equal protection principles to protect reproductive rights, including abortion. Although some of these thinkers have flirted with dropping the privacy justification, to do so is not the heart of their position—there is little in their arguments that would militate against a synthetic use of both sets of principles: privacy and equality. It is not this group of legal theorists to whom I address my comments in what follows. However, for examples of this position, see Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375 (1985); Herma Hill Kay, Models of Equality, 1985 U. Ill. L. Rev. 39; Kenneth L. Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984). For a philosophical discussion that invokes equality principles, see Judith Jarvis Thomson, A Defense of Abortion, in The Rights and Wrongs of Abortion 1 (Marshall Cohen et al. eds., 1974).

With the exception of Judith Jarvis Thomson, who makes a philosophical argument, this group of theorists relies on the Equal Protection Clause of the Fourteenth

radical of these thinkers criticize privacy rights not only on the strategic grounds of being insufficient to secure full reproductive freedom, but also for constituting a downright impediment to equality and justice for women in this domain.[18] While I believe that there are convincing normative arguments available for *supplementing* the privacy justification for abortion rights with a sex-equality approach, I am convinced that these cannot serve as a *substitute* without serious normative loss. Moreover, I find the critique of privacy underlying this suggestion to be confused. I shall address only those versions of the position that argue for *replacing* privacy with the sex-equality approach. I will avoid the doctrinal intricacies involved in the proposed alternative by focusing primarily on the critique of privacy analysis in order to highlight the relevant issues.

Catharine MacKinnon, Frances Olsen, and Cass Sunstein criticize the privacy justification of abortion rights for reinforcing a misleading and ideological model of state/society relations that conceals gender hierarchies and obscures the social reality it helps to constitute. The public/private dichotomy is, they argue, the paradigm for the social structure. The state

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Amendment, arguing that denying access to abortion is a matter of sex discrimination because it denies to women, and only to women, rights to self-determination and equal citizenship while reinforcing traditional patterns of gender hierarchy and conceptions of women's place. Indeed, they argue that laws denying access to abortion have a devastating, sex-specific impact because only women become pregnant and only women have abortions. Law, supra, at 981. Denying women access to abortion or to contraception, for that matter, in effect "'prescribe[s] pregnancy and the birth of an unwanted child as punishment for fornication'"—a punishment imposed exclusively on women. Id. at 978 (quoting Eisenstadt v. Baird, 405 U.S. 438, 448 (1971)). Therefore, even though they have at times argued for replacing the privacy justification with an equal protection argument, these theorists aim, above all, to highlight the discriminatory gender issues involved in matters of reproductive rights and to emphasize that it is women who are oppressed when abortion is denied. It is therefore not surprising to me that Sylvia Law now argues for supplementing, not replacing, privacy with equality arguments. See Rachael N. Pine & Sylvia A. Law, Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real, 27 Harv. C.R.-C.L. L. Rev. 407 (1992).

[18] The term "radical" here refers to the mode of critique of privacy analysis, not the politics of the critics. The weaker version of the critique argues that privacy-based arguments are incomplete or insufficient and need to be supplemented by equality arguments. The stronger version of the critique, which I address here, argues that privacy arguments are misleading and ideologically pernicious. I have in mind, in particular, the arguments in the following: Catharine A. MacKinnon, Privacy v. Equality, in Feminism Unmodified 93, 97 (1987); Frances E. Olsen, A Finger to the Devil: Abortion, Privacy, and Equality, 1991 Dissent 377 [hereinafter Olsen, Finger to the Devil]; Frances E. Olsen, Unraveling Compromise, 103 Harv. L. Rev. 105 (1989) [hereinafter Olsen, Unraveling Compromise]; Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1 (1992). All of these theorists reject privacy on both normative and strategic grounds.

is construed as the public sphere, and "society" (a residual category which includes all that is non-state: market relations, religion, voluntary associations, etc.) is construed as the private sphere. Within this model, power is located in the state, albeit circumscribed and limited by basic rights, while the private sphere is deemed to be the realm of freedom, autonomy, and equality of opportunity into which public state power should not intervene. In short, the right to privacy "is based on the assumption that as long as the state does not interfere with private life, autonomous individuals will interact freely and equally."[19] Privacy rights, thus construed, rest on the *ideological* notion of a natural, preexisting, pre-political sphere of life, where relations of sexuality and reproduction, like other "non-political" relations, are located and based on consent between autonomous adults.

But, as many feminist political theorists have pointed out, this dualist model is superimposed in liberal theory upon another boundary between public and private, namely, the boundary between domestic life and the rest of society.[20] This second model is a kind of silent presence in liberal contract theory. When privacy pertains to "the home," it is construed as the sphere of dependency, of natural, hierarchical relationships, and particularistic bonds, not as the locus of rights-bearing, autonomous individuals. Here, of course, women have been—and often still are—positioned like children, as dependents. Yet their subordinate status within the family is considered to be as voluntarily assumed as is their entry into, and chance to exit from, the so-called marriage contract.[21] On this model, then, privacy apparently attaches to an "entity"—the family—shielding its natural, internal, intimate relations from public intervention and scrutiny.[22]

Although they are not often clear about the analytic difference between these two conceptions of privacy, feminist legal theorists who criticize privacy rights argue that both models inform and distort the legal reasoning in privacy doctrine even when privacy rights are being accorded to women.

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[19] Olsen, Finger to the Devil, supra note 18, at 378; see also MacKinnon, supra note 18, at 99.

[20] For a good summary, see generally Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983); Carole Pateman, Feminist Critiques of the Public/Private Dichotomy, in Public and Private in Social Life 281 (S.I. Benn & G.F. Gauss eds., 1983).

[21] See Carole Pateman, The Sexual Contract 154-88 (1988). Pateman shows that many theorists in the liberal tradition, among them John Locke, tacitly exclude the family from the domain of civil society. The philosopher who made this tacit exclusion explicit was, of course, Georg Hegel. See Jean L. Cohen & Andrew Arato, Civil Society and Political Theory 95-96, 628-31 & n.48 (1992), for a discussion.

[22] For a discussion of the distinction between entity privacy and personal privacy, see Martha Albertson Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, 23 Conn. L. Rev. 955 (1992).

Accordingly, they have developed a twofold strategy aimed at attacking the assumptions allegedly underlying the Court's privacy analysis. First they seek to show that there are fundamental inequalities between the genders in the private sphere with regard to control over the decision to have sex,[23] and regarding the degree to which one's sexuality and reproductive capacities are functionalized by others or by the state.[24] Second, they argue that under the guise of privacy rights, relations of domination and exploitation are fostered, protected, and to some extent created by the state.[25] Thus, women are simultaneously deprived of the autonomy and equality that is ascribed to individuals on the first model of the public/private dichotomy, while they do not benefit from the "protections" offered to "dependents" by the entity privacy model.

Indeed, Catharine MacKinnon has argued that "the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor."[26] Cass Sunstein maintains that the privacy doctrine posits a natural, pre-political sphere of sexuality and reproduction which is used as the baseline for distinguishing between government action and inaction in the distribution of benefits and burdens. "Decisions that upset existing distributions are treated as action; decisions that do not are thought to stay close to nature and thus to amount to no action at all."[27] The former are often construed as partisan and interventionist, the latter as neutral and facilitative of independent private relations.[28] Sunstein's point is that "non-intervention" by the state is neither impartial nor inaction, but rather a form of state action that reproduces the status quo of inegalitarian gender relations. Accordingly, the public/private split, presupposed by the concept of privacy rights, constitutes an entire arena of social relations and

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[23] MacKinnon, supra note 18, passim. MacKinnon has been taken to task for her depiction of women as victims and for her dismissal of feminine difference as the standpoint of the powerless. See, e.g., Drucilla Cornell, Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's *Toward a Feminist Theory of the State*, 100 Yale L.J. 2247 (1991) (book review).

[24] Sunstein, supra note 18, at 13–15.

[25] For a general discussion, see Olsen, supra note 20.

[26] MacKinnon, supra note 18, at 101.

[27] Sunstein, supra note 18, at 2.

[28] See e.g., Olsen, supra note 20; Frances E. Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. Ref. 835, 842–44, 862 n.73 (1985). The figure of thought relied upon here is the classic Marxian one: just as Marx exploded the ideology of privacy (in this case, of private property) in the sphere of wage labor by revealing the social relations of domination and inequality within the factory, so the radical version of the sex-equality argument seeks to explode the ideology of privacy in the domain of intimate association by exposing the social relations of domination and inequality pervading family life and sexual interaction. Cultural stereotypes about the role and nature of women are also targeted by this critique.

issues as off limits to the demands of justice through the conceptual sleight of hand that construes them as natural.[29] The critics seek to show, however, that the private is neither natural nor apolitical—it is culturally (and socially) constituted and permeated by power relations perpetuated by the state.

Thus, even though the privacy right articulated in *Roe* was framed as an individual right, according to MacKinnon, it nonetheless shores up the negative aspects of "entity" privacy.[30] Accordingly, the state secures privacy by centering its self-restraint on the home and the bedroom, by staying out of marriage and the family, by not intervening. Privacy doctrine so understood means that no act of the state contributes to, hence should properly participate in, shaping the internal alignments of the private domain or distributing its internal forces. "Injuries arise in violating the private sphere, not within . . . it."[31]

But according to MacKinnon, this conceals the "fact" that even when they are construed as rights-bearing individuals, women have no control over the social conditions of their existence and do not enjoy substantive equality with men in matters of reproduction, sexuality, child care, or economic wherewithal. And the privacy justification for reproductive rights does not give it to them, because it abstracts away from the social conditions under which sexual relations, reproduction, and child care take place.

MacKinnon, Sunstein, and Olsen each claim that unlike the privacy justification, an approach based on the Equal Protection Clause would highlight the issue of gender inequality and allow one to confront the significance that gendered social, sexual, and economic inequalities between men and women have for abortion law.[32] Their arguments for the sex-

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[29] As feminist political theorists have pointed out, the public/private dichotomy reproduces gender stereotypes by virtue of its association with a series of other dichotomies constitutive of the two spheres: nature/culture, body/mind, sentiment/reason, female/male. For an instructive discussion of the feminist reasoning on this point, see Alison M. Jaggar, Feminist Politics and Human Nature 27–50 (1983). For a more recent discussion, see Anne Phillips, Engendering Democracy 92–119 (1991).

[30] MacKinnon, supra note 18, at 100.

[31] Id.

[32] They each offer a revised interpretation of equal protection doctrine because, as it now stands, laws restricting abortion do not amount to sex discrimination in the same way that laws differentiating on the basis of pregnancy do not discriminate—because only women can become pregnant. Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974) (holding that the equality argument was unavailable since women and men are not "similarly situated" with respect to the capacity to become pregnant). For the sex-equality theorist (and here I am in full agreement), this reasoning is absurd. It is clearly based on taking male physical capabilities as the norm; only when women are the same as men do they get equal treatment. Otherwise, unfair treatment does not

equality approach draw on the claim that in restricting abortion rights, the state unfairly limits the efforts of women, but not of men, to control their reproductive freedom. These theorists agree (and so do I) with the more standard feminist equal-protection argument that denial of abortion rights is a form of sex discrimination because of the *sex-specific* impact of laws that restrict access to abortion: only women become pregnant; only women are denied control over their lives and bodies in this way. It is the *selectivity* of the compulsion that is objectionable on equal-protection terms—no similar obligations are imposed by the government on its male citizens, even when human life is at stake. Such compulsion turns a biological capacity to bear children into a source of social disadvantage, unduly burdening women with the difficulties of pregnancy, parenthood, and child care, while denigrating their status as moral agents and impairing their capacity for self-determination and equal citizenship.[33] Moreover, "one should recognize anti-abortion laws as part of the systematic oppression and devaluation of women. . . . [they] are a *result* of the devaluation of women, not just a *cause* of women's inequality."[34] In other words, they are the product of, and reproduce, inegalitarian gender relations. Laws criminalizing abortion thus fail to treat women with equal concern and respect, and reinforce traditional gender norms that devalue women. In short, such laws deny to women equal treatment *and* treatment with equal concern or respect.[35]

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qualify as discrimination. Notably, in 1978, Congress passed the Pregnancy Discrimination Act, amending Title VII of the Civil Rights Act of 1964 specifically to include discrimination on the basis of pregnancy, thereby reversing rulings that pregnancy discrimination is not reached by the statutory bar on sex discrimination. Pregnancy Discrimination Act, P.L. 95-555, 92 Stat. 2076 (1978), Const. U.S. Am. Analysis & Interpretation 1763 n.16 (1987) (codified at 42 U.S.C. § 2000e). See also Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 676-79 (1983).

It is worth noting that the joint decision in *Casey* did invoke equality considerations, although the bulk of the argument rested on the liberty right protected by the Due Process Clause of the Fourteenth Amendment. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992).

[33] Sunstein, supra note 18, at 37. This argument was made earlier by Judith Jarvis Thomson, Sylvia Law, and Donald Regan. Thomson, supra note 17; Law, supra note 17, at 1023; Donald H. Regan, Rewriting *Roe v. Wade*, 77 Mich. L. Rev. 1569, 1571-1610 (1979).

[34] Olsen, Finger to the Devil, supra note 18, at 380. Let me say that I also agree with this point, but not with the critique of privacy analysis.

[35] I fully agree with these two claims. For one of the earliest versions of an equality-based theory of rights to which the notion of equal concern and respect is central, see Ronald Dworkin, Taking Rights Seriously 184-206 (2d ed. 1978). Dworkin's equality arguments could be interpreted as arguments for the protection of difference, i.e., for the equal consideration of various identity needs on the part of the state. On my view, however, this approach can supplement, but not replace, privacy

Indeed, the heart of the more radical critique of the privacy justification for abortion rights is the claim that it reinforces traditional stereotypes about the proper role of women in society while failing to challenge inegalitarian patterns of male dominance. Critics claim that equal protection analysis is preferable to privacy justifications because it places abortion within the broader context of sexual politics. The focus shifts from the individual woman, "isolated" in her right to privacy, to relations of inequality and domination between the sexes and to the disparate impact of a given law on the different genders.[36]

Several recent Supreme Court decisions *seem* to lend support to this critique of the privacy justification for abortion. MacKinnon, for example, attributes the decisions in the series of abortion funding cases that denied a right to public funding, even of medically necessary abortions, to the privacy rationale of *Roe v. Wade*.[37] And indeed, the reasoning in these cases *was* disturbing, for the Court clearly relied on the ideological paradigm of the public/private dichotomy in its reasoning. The Court

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analysis. Note Dworkin's distinction between "equal treatment"—defined as the right to an equal distribution of some opportunity, resource, or burden—and "treatment as an equal"—which is the right to be treated with the same respect and concern as anyone else. Id. at 227. The first requires the identical treatment to all others with regard to a benefit or burden; the second requires neutrality on the part of the state vis-à-vis the acknowledgement of one's identity and of one's conception of the good.

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. . . . It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's.

Id. at 272–73. Therefore, in some cases, people may have to be treated "differently," and their differences acknowledged, if they are to be treated with equal concern and respect.

[36] For an examination of this debate in another context, see generally Catharine A. MacKinnon, Sexual Harassment of Working Women (1979). MacKinnon wants attention turned to the world of sexual inequality in which women live and make their reproductive "choices." She suggests that laws should be scrutinized to see whether or not they perpetuate inegalitarian patterns. MacKinnon, supra note 18, at 93–102.

[37] MacKinnon, supra note 18, at 100–01. The first major abortion funding case was Maher v. Roe, 403 U.S. 464 (1977) (sustaining a Connecticut law which excluded nontherapeutic, medically unnecessary abortions from a Medicaid-funded program). The second major case was Harris v. McRae, 448 U.S. 297 (1980) (rejecting constitutional challenges to public funding limitations barring payments for most medically necessary abortions). See also Rust v. Sullivan, 111 S. Ct. 1759 (1991) (upholding restrictions on providing information about abortion in family planning clinics that receive public funding); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (upholding restrictions on the use of public facilities for abortion services); H. v. Matheson, 450 U.S. 398 (1981) (upholding parental consent provisions); Bellotti v. Baird, 443 U.S. 622 (1979) (upholding parental consent provisions).

argued that since the state is not the cause of the economic inability of poor women to obtain abortions through their own means, it does not impose new burdens on women or violate their constitutional rights in denying them a right to state funding in this domain. By implication, the state renounced responsibility for redressing inequalities in the "private sphere" that are not of its own making, that is, that are not due to state action.[38] Reasoning back to *Roe* from *Harris v. McCrae*, critics have accordingly argued that the public/private distinction presupposed by privacy doctrine turns abortion into a private right to be exercised only by those women rich enough to buy the medical care they need, leaving others in the lurch.[39]

But as the dissents of Justice Brennan in *Maher v. Roe* and Justices Brennan and Stevens in *Harris* show, privacy analysis need not have led in that direction. In *Maher*, Brennan argued that the withholding of financial benefits had already been held to constitute an invalid burden on fundamental rights in other contexts.[40] Moreover, as Justice Marshall argued in his dissent in the same case, the provision of state funding for childbirth, and not for abortion, violates the privacy principle according to which the woman's decision may not be interfered with by the state, because such regulations are "in reality intended to impose a moral viewpoint that no State may constitutionally enforce."[41]

In the abortion funding cases, the state imposed its view *only* upon pregnant women who were too poor to afford a privately funded abortion. Yet this was not due to the internal flaws of privacy analysis, but rather, to

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[38] Rust, 111 S. Ct. at 1775; Harris, 448 U.S. at 316. With respect to this argument, Sunstein's critique of the doctrine of state action and its alleged neutrality is quite on the mark, for here we have a perfect example of the Court's reliance on what I view as the ideological interpretation of privacy rights. Sunstein, supra note 18, at 6-8.

[39] Olsen, Finger to the Devil, supra note 18, at 378. And this has been, indeed, the result of the funding decisions.

[40] Maher, 432 U.S. at 488-89 (Brennan, J., dissenting).

[41] Id. at 544 (Marshall, J., dissenting). Three years later, in his dissent in *Harris*, Brennan argued that the Hyde Amendment, sustained by the Court's majority, violates women's fundamental right to privacy, not because "the State is under an affirmative obligation to ensure access to abortions for all who may desire them; it is that the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion." Harris, 448 U.S. at 330 (Brennan, J., dissenting).

See also Michael J. Perry, The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government, 66 Geo. L.J. 1191, 1236-45 (1978) (arguing that if abortion is a constitutionally protected activity, the government has no right to discourage it, and that since abortions are cheaper than prenatal care and childbirth, the state could have no convincing reason for funding one and not the other, apart from its attempt to impose its "majoritarian" preference for childbirth onto poor women—something explicitly prohibited by the privacy principle).

a non-neutral and restrictive application of this analysis.[42] Privacy rights *are* compatible with non-funding. If the state did not fund either childbirth or abortions, one would be hard put to extract from our Constitution a requirement for funding on the basis of privacy doctrine.[43] There is nothing that constitutionally proscribes such state action, but neither is there anything that demands it. But this restrictive conception of basic rights is not due to the fact that privacy rights that secure personal liberty are constitutionally protected; it is due to the peculiar features of the American welfare state and the fact that we have never constitutionalized welfare rights.[44] None of our established fundamental rights yields constitutional grounds for requiring states to provide, specially, economic support for the poor.

Thus, much as I agree with the argument that the state should have an affirmative obligation to provide support to all women in order to make

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[42] This is made clear in Justice Stevens' dissenting opinion in *Harris*, in which he argues that:

> [H]aving decided to alleviate some of the hardships of poverty by providing necessary medical care, the Government must use neutral criteria in distributing benefits. It may not deny benefits to a financially needy person simply because he is a Republican, a Catholic, or an Oriental . . . . In sum, it may not create exceptions for the sole purpose of furthering a governmental interest that is constitutionally subordinate to the individual interest that the entire program was designed to protect.

Harris, 448 U.S. at 356 (Stevens, J., dissenting).

[43] However, it would also be rather difficult to claim affirmative obligations of the state to fund abortions on the basis of equal protection analysis. The Court ruled in *Harris* that poor people do not constitute a suspect class, and hence, do not receive heightened scrutiny under equal protection analysis.

> An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.

Id. at 323 (quoting Maher, 432 U.S. at 470–71).

[44] For an extreme version of the argument that poverty is a legislative, not a judicial, problem, see Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989). My point here is to argue that the decision in *Harris* did not flow from the privacy justification for a woman's right to choose an abortion, but rather from the Court's consistent and more general refusal to translate justified economic needs into constitutional rights. Of course, the public/private dichotomy mapped onto the state/society distinction reinforces this resistance to social rights. But the right to personal privacy does not have to rest on the dichotomous model of the social structure. See infra note 60 and accompanying text. For an alternative model of a modern society, see Cohen & Arato, supra note 21, at 345–604.

their reproductive rights effective, these arguments do not have a strong foothold in our Constitution, *as it now stands*. The reasons for this can be traced back to the power of market ideology and the property paradigm in this country, but hardly to the privacy justification in *Roe*. My point here is clarificatory: It is not the notion of personal privacy that militates against social supports for rights, but rather a particular version of liberal economic ideology.[45]

This leads me to the core normative problem raised by the arguments of those who wish to *substitute* equality for privacy rights. Is the good that privacy doctrine inadequately protects simply some form of substantive or relational equality with men? What if women's *and* men's reproductive capacities were turned into something for the use and control of others, say, by the state, for purposes of population policy? If we could engage in a thought experiment and imagine a world of sex-equality, without gender hierarchies, without unequal functionalization of women's bodies, and with adequate social supports and public policy provisions for childbearing and care, would this then mean that women would no longer have the right to terminate unwanted pregnancies or that they would not need privacy rights protecting their personal decisional autonomy in this domain? Sunstein implies as much: "[M]ovements in the direction of sexual equality—before, during and after conception, including after birth—unquestionably weaken the case for an abortion right by removing one of the factors that supports its existence."[46] MacKinnon implies this as well.[47] But why? While greater gender equality in substantive and distributional terms may decrease the incidence of abortion, I fail to see why it would weaken the normative case for choice. Why should women have to relinquish their constitutional rights in exchange for governmental benefits or for equal treatment? In the world of sex equality, who decides? Would women have to reveal their personal reasons for wanting an abortion in such a world? To whom would they have to show that they have just cause for an abortion? Whose permission would they have to get, and to whose judgement would they

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[45] One legacy of the liberal model of society/state relations and the market ideology that has accompanied it (what I shall later call the "property paradigm," see infra text accompanying notes 164–93) is that we tend to set up an antagonism between collective solidarity and individual autonomy. Thus, it seems that the state cannot simultaneously guarantee privacy rights, or decisional autonomy, while providing the social supports (in this case, access to public funds and facilities for medical care) that are necessary for exercising these rights. For a critique of this form of reasoning, see Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 Yale J.L. & Feminism 7 (1989).

[46] Sunstein, supra note 18, at 39 n.143.

[47] See generally Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281 (1991).

have to defer? In short, is a woman's right not to be used as a means by others contingent on the degree to which men are or are not so used? Is her liberty to construct and pursue her personal life projects open to state regulation if no issues of gender inequality are involved? Clearly, if this is where the sex-equality argument leads on its own, then it is deficient.

I submit that the equality argument is an important supplement to, but not an adequate replacement for, the privacy justification for abortion rights. For, it is the latter that brings together the normative principles of decisional autonomy, inviolate personality, and bodily integrity and protects these when matters central to one's personal identity are at stake.[48] While gender inequality and disdain of women as a group may be the reason why restrictions in this area are laid exclusively on women, it does not follow that the main thing wrong with such restrictions is that they violate principles of non-discrimination or have a disparate impact on women.[49]

MacKinnon implicitly acknowledges as much when she states that "the legal concept of privacy . . . has preserved the central institutions whereby women are *deprived* of identity, autonomy, control, and self-definition . . . ."[50] By implication, those institutions should be changed so that women are no longer deprived of these goods. But MacKinnon is wrong to argue that privacy doctrine is simply a vehicle for denying women autonomy, bodily integrity, and inviolate personality. Rather, the recent developments in privacy jurisprudence have begun to secure precisely these goods for women—that is why they are so hotly contested. The least convincing part of her analysis (adopted by Sunstein and Olsen) is the claim that the privacy justification in *Roe* reinforces the old ideology of entity privacy regarding the family, along with the notion of a natural sphere of

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[48] Of course, these are also implicit in the principle that government must treat everyone with equal concern and respect. The equality argument could be interpreted as a justification for the equal protection of privacy, understood as decisional autonomy regarding one's constitutive identity needs.

[49] The principles protected by privacy rights are implicit in the language of those advocating the replacement of privacy by a sex-equality analysis. As indicated above, Sunstein insists that what is at stake in the right to abortion is "the interest in ensuring that women's sexuality and reproductive functions are not turned into something for the use and control of others." Sunstein, supra note 18, at 15. But what is this interest, if not an interest in personal autonomy? To be sure, it is an additional and important argument in favor of abortion rights that men's reproductive functions are not so instrumentalized. Therefore, it is doubly unjust to functionalize the reproductive capacities of women. But let us be clear—the wrong here is, first and foremost, the denial of individual agency, self-determination, bodily integrity, and, we shall see, inviolate personality to each woman. Personal privacy is both a dimension of inviolate personality and bodily integrity, as well as the general rubric which captures all of these concerns at once.

[50] MacKinnon, supra note 18, at 101.

freedom and equality beyond state regulation. It was the very decision in *Roe* which guaranteed a right of abortion to women as *individuals*, not as wives, with respect to an activity that does not take place within the home, but in hospitals or clinics! Moreover, the Court has consistently overturned husband notification provisions in state law, thereby challenging the patriarchal model of the family along with gender stereotypes.[51] It is, therefore, hardly convincing to claim that the right to personal privacy articulated in *Roe* entails the ideological, dualistic model of the social structure discussed above or the notion of a sacrosanct natural sphere of sexuality and reproduction, beyond the reach of the principles of justice. Privacy rights of the sort protected here involve immunity from state control of personal decisions and intimate relationships, but this right may be exercised in "public" places, and quite openly.

To be sure, what I have been calling "entity privacy" has had the negative effects on women described by MacKinnon and many others. The old entity approach to privacy, found in the common law, protected privacy for the family unit.[52] We continue to be burdened with the ideology that justified this conception of privacy by associating interdependency and the

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[51] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2830-33 (1992); Planned Parenthood v. Danforth, 428 U.S. 52, 69, 71 (1976).

[52] Moreover, this common-law conception of privacy was, as Martha Albertson Fineman has recently pointed out, related to the domestic ideology prevalent in the nineteenth century which divided life into public and private spheres, with women consigned, at least in principle, to the domestic sphere of the family. Insofar as privacy attached to the family, not to separate family members, and insofar as it was founded on the nature of the protected relationship, not on a conception of the autonomy or dignity of individuals, it meshed quite well with the prevailing conception of the natural family as hierarchical, heterosexual, patriarchal, and internally structured by relations of dependency of children on parents and wives on husbands. This view of the marital relationship rested, in turn, on a conception of women as the weaker sex, different in nature from men and naturally dependent upon them for protection and economic livelihood. The "cult of true womanhood" prevalent in the nineteenth century construed women as selfless, care-oriented, naturally virtuous guardians of the solidary family community. See Barbara Welter, The Cult of True Womanhood, 18 Am. Q. 151 (1966). Indeed, it was on the basis of a conception of women not as individuals, but as wives and mothers incapable of autonomy and with no separate interests of their own either outside or within the family, that married women were denied legal personhood, the participatory rights of citizenship (the vote), and equal opportunity in the labor market. In its strongest form, the doctrine of entity privacy prohibited the state from asserting its protective role, even at the request of one of the spouses or in favor of children. This version of privacy doctrine did indeed shield the place of domestic violence and male power from public scrutiny. It did reinforce traditional gender roles. Nor are we entirely free of the consequences of the entity privacy doctrine today; judges still draw a line at the threshold of the home in cases of domestic violence beyond which state and judicial intervention is not permitted, although recently there have been policy changes in this regard. But domestic assault is still not treated as a crime like any other personal assault. See Fineman, supra note 22, at 966-72.

need for protection with the lack of autonomy and rightlessness.[53] It is incontestable that the ideology of the public/private dichotomy which deployed the term "private" to designate institutions and spheres of life as off limits to the principles of justice (be it the factory or the family) is indefensible. So is its deployment for the purposes of confining women to the domestic sphere and justifying discriminatory treatment of them outside it.[54] This ideology most certainly played a role in preventing the modernization of the family and in keeping important issues out of the public sphere.[55]

To construe the personal privacy rights protected by *Roe* as continuous with the old ideological presuppositions of common law entity privacy, however, is mistaken. Indeed, on this issue, the communitarian critics of "the new privacy" are closer to the truth when they indict *Roe* precisely for *abandoning* the traditional conceptions of family privacy. Instead of viewing the privacy justifications for reproductive rights as the ideological means for preserving the existing distribution of power and resources along with gender stereotypes within the allegedly natural "private sphere" of the family, one could far more convincingly claim the opposite. That is, by granting privacy rights to women *as individuals* (married or not) with respect to reproductive decisions and intimate relationships, the ideology of family privacy that had been used to justify rigid gender norms and patriarchal power relations (predicated on the denial of full legal person-

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[53] For a discussion of developments in tort law toward the protection of individual privacy, see Robert C. Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 Cal. L. Rev. 957 (1989). For a brief survey of such developments on the level of constitutional law, see infra part II.A.

[54] Although feminist theory has taken it for granted that women were, until the twentieth century, confined to the "private" sphere, this belief now is being contested by feminist historians. See, e.g., Mary P. Ryan, Women in Public (Johns Hopkins Symposia in Comparative History No. 15, 1990); Gendered Domains: Rethinking Public and Private in Women's History (Dorothy O. Helly & Susan M. Reverby eds., 1992).

[55] I have in mind a normative conception of modernization similar to that of Jürgen Habermas. 1 Jürgen Habermas, The Theory of Communicative Action (Thomas McCartney trans., 1984). By "modernization" I mean the development of egalitarian communicative relations among family members involving, among other things, the recognition of wives as peers of their husbands and the treatment of all family members with solidarity and equal concern and respect. I would argue that the only firm ground for *solidarity* in the family is the mutual recognition of family members as equals, or potential equals (children), and the acknowledgment of each individual's claims to privacy and autonomy. Force and hierarchy are surely not more conducive to solidarity than freedom and equality! See Cohen & Arato, supra note 21, at 532–48. For an interesting argument regarding the role of the public/private dichotomy in preventing the modernization of religion, see Jose Casanova, Public Religions in the Modern World (forthcoming 1994).

hood to women) is exploded.[56] Far from perpetuating the norms and power of the patriarchal family, women's individual privacy rights serve as an important *corrective* to the flaws of entity privacy. By gaining constitutionalized and individualized privacy rights, women can at last accede to the status of full legal personhood and begin to demand both protection and autonomy, both rights and legal benefits, within, as well as for, intimate relationships. With a full panoply of personal privacy rights, women can demand state action— in the form of protection of their rights as persons *within* the family—while retaining control over the intimate decisions that individual privacy rights afford!

Going one step further, one can argue that *both* sorts of privacy rights involve important protections for women. While entity privacy has shielded the patriarchal family and all its disturbing practices from the demands of justice, this need not be the case. The ideological conception of the "normal" (patriarchal) family has been traditionally presupposed by "entity" privacy but it is not logically entailed by it. Other family forms and other intimate relationships could all benefit from "entity" privacy (i.e., from protection against undue state regulation and intervention).[57] Once we

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[56] The strong argument against husband notification rules made by the plurality in *Casey*, which cites family violence, including battery and rape of wives by their husbands, as well as psychological and economic intimidation, as part of the reasoning against such rules, supports my point. In addition, the decision takes note of the role that secrecy plays in shrouding abusive families. Casey, 112 S. Ct. at 2827–32. The Court explicitly rejects the common-law understanding of a woman's role in the family, along with the view that entity privacy trumps individual privacy within the marital unit. Id. at 2830–31.

This provides the answer to the first paradox of privacy mentioned in the introduction to this text. More privacy does indeed undermine private patriarchal power. By acknowledging women as full legal persons wherever they are and whatever their marital status, personal privacy rights bring the demands of justice right into the home, freeing women from their husbands' control. In short, on this approach, family privacy cannot be invoked at the expense of individual rights of family members.

[57] I thus disagree with the conclusion Fineman draws regarding the limits of privacy. On the one hand, she argues that although entity privacy has shielded the patriarchal "normal" family from the principles of justice, it need not be used in this way. Fineman, supra note 22, at 967–69. Other family forms could benefit from entity privacy. According to Fineman, if feminists would question the concept of the normal family traditionally presupposed but not logically entailed by entity privacy, they would have available to them a conception of privacy that could help protect households headed by women from unacceptable state intervention. Id. at 968–69. Relational privacy rights would thus protect difference and plurality against majoritarian imposition of a particular conception of appropriate forms of intimate association onto minorities. Fineman remains very skeptical regarding the likelihood of this occurring. Id. at 955, 972.

On the other hand, Fineman does not see any such potential for the individualized constitutional conception of privacy. Id. at 955. She believes that privacy construed in terms of individualized constitutional rights leads to the pitting of one family

acknowledge that "the family" is not a natural but a conventional civil association, that what counts as a family varies over cultures and over time, that law plays an important role in constituting families, we can ask what, if anything, about the *nature of the protected relationship* is worth protecting? In other words, once we abandon the old ways of construing intimate associations and their relation to state power and law, we must still address the question of whether and how to draw a boundary within the terrain of the social. If we redescribe entity privacy as relational privacy, or better, as the privacy of intimate relationships,[58] the answer will be

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member's rights against another's, thereby opening up single mothers all too easily to regulation and intervention by state agencies claiming to be acting in the name of their capacity to protect the child against the mother. Id. at 963-64 & nn.22-23. She further points out that poor single-parent households headed by women are subject to intervention and regulation to a degree not tolerated in "normal" families. Id. at 958-59.

But surely the acquisition of legal personality and of individualized privacy rights by women (as well as the attribution of rights to children, against battery for example) must be considered an important gain to all families. If children's rights are invoked in order to justify increased regulation and supervision of mothering on the part of single poor women on welfare, what we have is not strictly speaking a conflict of rights, but the demand that women on welfare relinquish rights for benefits. It can only help women to be able to invoke a privacy right against such intervention. The fact that women are required to undergo mandatory paternity proceedings or reveal their sexual history as a condition of receiving benefits means that their individual privacy rights are being violated, not that they are the cause of such tradeoffs. Individual privacy rights protect against such unwarranted state regulation, while of course relying on the state to enforce such rights.

Herein lies part of the solution to the third paradox of privacy articulated above. See supra p. 46. Entity privacy is not undermined by individual privacy rights. Rather, the lack of a full panoply of rights is what exposes individuals to unwarranted administrative control. Hence, while privacy rights are a necessary condition for individual freedom in this domain, they are not sufficient. In addition, increased "voice" by "clients" in the decision-making processes that establish the "need-oriented" benefits and policies of the state would serve as an important corrective to the leveling, paternalist tendencies of welfare agencies. Private autonomy should be complemented by political autonomy in the sense of democratic participation. Those who will be affected by welfare policies should be involved in the political communication processes in which needs and differences are explicated and constituted. In short, state regulation must respect individual privacy and autonomy while affording voice to those affected by state policies.

[58] See Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624 (1980). Such privacy need not be associated with a place (the home), with a reified conception of an entity (the family), or with any particular set of genders—it should be inviolable wherever and between whomever intimacy occurs. Relational privacy rights are rights of individuals, not entities. Yet they protect, as Karst shows, the interpersonal intimate association of individuals. Indeed, one could argue that even the old "entity" privacy was really the privacy right of an individual—the male head-of-household—the only family member with full legal personality during most of the 19th century. But the right to privacy the male head-of-household enjoyed resembled a

evident. In short, I want to invoke the notion of relational privacy to cover what entity privacy covered without its patriarchal baggage, namely intimate interpersonal relations. As such, relational privacy protects the intensely personal communicative interaction among intimates from unwarranted intervention by the state or third parties, with one key proviso: that the demands of justice are not violated within the relationship.

Intimate relationships are characterized by a particularly vulnerable, fragile sort of interpersonal communication which would fall apart or become seriously distorted if the principles of publicity (open access, inclusiveness, availability of information) were applied to them.[59] While openness of access and general inclusiveness enhance communication within cultural and political publics, they tend to undermine communication within intimate relationships. In other words, information, access, and internal communication, crucial for the special trust involved in intimate relationships, must be under the control of the intimate associates themselves. Intimacy requires privacy, a special boundary vis-à-vis the outside protective of the special bondedness inside. This is what relational privacy rights secure.

Thus, even if we acknowledge all of the criticisms of the ideological versions of the public/private dichotomy, we still need the concepts of privacy and privacy rights.[60] However, any type of intimate association can involve power and exploitation. Whatever the nature of the intimate relationship protected by "entity" privacy rights, the individuals within

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traditional immunity more than the modern notion of a subjective right, for it gave him the power of rule over the household members whose legal statuses were not equal to his. Once at least all adult family members enjoy the same legal status, privacy rights can protect intimate personal relationships from destructive forms of state intervention without shielding male power and injustice.

[59] For the best general discussion of the principles of publicity, see Jürgen Habermas, The Structural Transformation of the Public Sphere (Thomas Burger trans., MIT 1989) (1962).

[60] While I do not pursue this issue further here, I am proposing that we drop the assumption that the public/private dichotomy (in whatever version) can be mapped onto actual societal spheres, or that it can mirror the institutional structure of society. No highly differentiated modern society could be understood in these simple dichotomous terms. See Cohen & Arato, supra note 21 (analyzing the social structure of modern civil societies without relying either on this dichotomy or on the presupposition of a natural, pre-political private sphere).

Nevertheless, we should not throw the baby out with the bath water. I suggest that we assume that privacy rights attach to the individual and pertain to certain forms of her interaction with (and withdrawal from) others. Privacy is thus both a claim for control and a practice of mutual recognition that acknowledges participants in the interaction as individuals worthy of respect. The degree of privacy required by individuals within and for various relationships, associations, or "spheres" of life varies. Therefore, an intimate relationship needs more privacy protection than a political club, though even here, privacy issues exist.

them also need protection within, and not only for intimacy, as we have already seen. Thus, while "entity" privacy ought to serve as a protective shield for the fragile communicative relationships that constitute intimacy, individual privacy rights ought to serve as a protection for the personal and bodily integrity of "family" members, should these relationships become distorted or break down.[61]

On the other hand, as some communitarian critics of liberalism have recently reminded us, individual privacy rights seem to carry their own danger. Especially when constitutionalized, individual privacy rights appear to transpose a flawed conception of the autonomous individual from the sphere of the market to the sphere of the family.[62] Such rights allegedly introduce an adversary relationship into the family community, pitting one member's rights against another's and undermining family solidarity. Moreover, individual privacy rights in the domain of intimacy seem to be the vehicle through which client/state relations replace communicative ties between family members, thereby increasing state regulation rather than limiting it. The communitarian blames the conception of the individual allegedly presupposed by the sort of privacy rights articulated in *Roe* for this tendency. While I believe that they are wrong, it is worth looking into these objections to clarify the stakes of the discussion.

II. THE COMMUNITARIAN CRITIQUE

Two influential communitarian critiques of the right to privacy are provided by Michael J. Sandel[63] and Mary Ann Glendon.[64] Like the advocates of the sex-equality approach, these critics of privacy doctrine

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[61] They can also serve as a vehicle for the "democratization" of intimate associations, which rest on the denial of women's individuality by defining them according to group-specific characteristics only. Legal recognition of the moral autonomy, bodily integrity, and inviolable personality of women is empowering to those who would challenge gender hierarchies and inequities in the home and in the general culture.

[62] Certain "post-modern" feminists raise similar objections. See, e.g., Mary Poovey, The Abortion Question and the Death of Man, in Feminists Theorize the Political 239 (Judith Butler & Joan W. Scott eds., 1992).

[63] Michael J. Sandel, Moral Argument and Liberal Toleration: Abortion and Homosexuality, 77 Cal. L. Rev. 521 (1989) [hereinafter Sandel, Moral Argument]; Michael J. Sandel, Religious Liberty—Freedom of Conscience or Freedom of Choice? 1989 Utah L. Rev. 597 [hereinafter Sandel, Religious Liberty]; Michael J. Sandel, The Procedural Republic and the Unencumbered Self, 12 Pol. Theory 81 (1984) [hereinafter Sandel, Procedural Republic].

[64] Mary Ann Glendon, Abortion and Divorce in Western Law (1987) [hereinafter Glendon, Abortion]; Mary Ann Glendon, Rights Talk (1991) [hereinafter Glendon, Rights Talk].

challenge the liberal understanding of society it allegedly entails. Unlike the former, however, their concern is not that privacy is an ideology that denies to women what it gives to men. They argue against *new developments* in privacy doctrine in this domain because they allegedly rest on an unconvincing claim to neutrality vis-à-vis the question of the value of fetal life and because they privilege individualistic over community values. Both reject the landmark case of *Roe v. Wade* on these grounds.[65]

A. The "Pernicious" Development of Privacy Doctrine

Sandel and Glendon each note, with dismay, the development of privacy doctrine from a "traditional" concern to keep certain personal, intimate facts from public view, or informational privacy, to a contemporary right to engage in certain conduct without governmental restraint in the name of individual choice or autonomy.[66] But for both, the important change is not the application of the notion of privacy to the "zone of intimacy" but rather the shift *within* the intimate zone, from informational privacy to decisional autonomy, and from substantive justifications appealing to communal values and prized traditions or practices, to individualist justifications and/or appeals to neutrality.

Typical of communitarians, Sandel and Glendon are enamored with "the family" and "family values"; thus they do not object to the reasoning in the landmark case of *Griswold v. Connecticut*[67] where the Court, for the first time, explicitly recognized a constitutional right to privacy and found it to apply to the right of married couples to use contraceptives. As Glendon points out, the scope and precise content of the new constitutional right was unclear. Since it applied to married couples, the right to privacy could have been construed as some kind of family right.[68] Sandel argues that the Court justified the privacy right it proclaimed in *Griswold* on

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[65] It is important to note that neither Sandel nor Glendon articulates a substantive pro-life position. Rather, Sandel seems uncommitted, while Glendon opts for "compromise." But in both cases their arguments target the normative presuppositions and internal contradictions in the privacy justification for the pro-choice position.

[66] Glendon, Abortion, supra note 64, at 36–38; Sandel, Moral Argument, supra note 63, at 525–31. Sandel laments the Court's shift away from justifying privacy for the sake of protecting "'certain kinds of personal bonds [that] have played a critical role in the culture and traditions of the Nation'. . . . to view privacy in voluntarist terms, as . . . 'the ability independently to define one's identity.'" Id. at 524–25 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 618–19 (1984)). Does he want the state to define our identity for us?

[67] 381 U.S. 479 (1965).

[68] Glendon, Abortion, supra note 64, at 36; see also Glendon's elaboration of this argument in Glendon, Rights Talk, supra note 64, at 47–75.

teleological rather than on voluntarist grounds. The right to privacy was defended not for the sake of letting people lead their sexual lives as they choose, but rather for the sake of affirming and protecting the social institution of marriage.[69] *Griswold*, in other words, protected the prized institution of marriage and the human goods realized in marriage (intimacy, harmony in living, bilateral loyalty, a sacred association) and affirmed a social practice and tradition valued by the community.[70] Moreover, it remained tied to the traditional notion of privacy as the interest in keeping intimate affairs from public view. The violation of privacy consisted in the intrusion required to enforce the law, not in the restriction on the freedom to use contraceptives. As such, privacy protected an entity—the family as a unit—against intrusion and, as such, it fit the liberal paradigm distinguishing certain spheres of life as off limits to state intervention.[71]

The shift within the intimate sphere to voluntarist, individualist, and neutral arguments began, according to Glendon and Sandel, with *Eisenstadt v. Baird,*[72] which involved a law restricting the distribution of contraceptives to unmarried persons.[73] Here the Court struck down the law through the explicit innovation which "redescribed the bearers of privacy rights from persons qua participants in the social institution of marriage to persons qua individuals, *independent of their roles or attachments.*"[74] Moreover, privacy was no longer conceived as freedom from surveillance or disclosure of intimate affairs, but rather as protecting the freedom to engage in certain activities without governmental restriction. Sandel cites the now famous statement in *Eisenstadt* as proof of these "invidious" innovations: "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[75]

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[69] Sandel, Moral Argument, supra note 63, at 526. Glendon, in her recent book *Rights Talk*, admittedly under Sandel's influence, explicitly takes this position. Glendon, Rights Talk, supra note 64, at 56–57.

For an earlier argument to this effect, see generally Ely, Crying Wolf, supra note 1; Ely, Democracy, supra note 1, at 43–72; John Hart Ely, Foreword: On Discovering Fundamental Values, 92 Harv. L. Rev. 5 (1978) (critiquing the claim that there is a constitutional basis for asserting individual privacy rights).

[70] Sandel, Moral Argument, supra note 63, at 527.

[71] In this sense, then, *Griswold* was continuous with the traditional common law concept of family privacy or "entity privacy." See Fineman, supra note 22, at 966–72. But see Ackerman, supra note 1, at 150–59 for a different interpretation of *Griswold.*

[72] 405 U.S. 438 (1972).

[73] Glendon, Abortion, supra note 64, at 36; Sandel, Moral Argument, supra note 63, at 527.

[74] Sandel, Moral Argument, supra note 63, at 527.

[75] Id. at 528 (citing Eisenstadt, 405 U.S. at 453); see also Glendon, Abortion,

The Court has been quite explicit about this development. While the right to use contraceptives was at issue in both cases, the Court explained: "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[76] *Eisenstadt* clearly brought the idea of decisional autonomy and the focus on the rights-bearing *individual* to the forefront of this prong of privacy doctrine.

One year later this reasoning was applied in *Roe* where the privacy right was extended to "encompass a woman's decision whether or not to terminate her pregnancy."[77] The language of autonomy was explicit in the 1977 majority opinion in *Carey v. Population Services International,*[78] in which Justice Brennan argued that the constitutional protection of individual autonomy in matters of childbearing is not dependent on the element in *Griswold* which forbade the restriction on the use of contraceptives because it would bring police into marital bedrooms. Rather, Justice Brennan maintained that the autonomy rights of individuals were really at the core of what even *Griswold* protected.[79] Later decisions upholding abortion rights also used the language of autonomy to describe the privacy interest at stake: "Few decisions are . . . more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."[80] In his dissent in *Bowers v. Hardwick,*[81] Justice Blackmun clarified his view as to what is at issue in the Court's previous privacy decisions:

> We protect those rights not because they contribute . . . to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the

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supra note 64, at 36–37 (noting the shift from a family right to an individual right).

[76] Sandel, Moral Argument, supra note 63, at 527 (citing Eisenstadt, 405 U.S. at 453).

[77] Roe v. Wade, 410 U.S. 113, 113 (1973).

[78] 431 U.S. 678 (1977).

[79] "*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." Noting that the law overturned in *Griswold* would have involved intrusion into marital bedrooms, Justice Brennan added, "subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element." Id. at 687.

[80] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

[81] 478 U.S. 186 (1986).

> 'moral fact that a person belongs to himself and not others nor to society as a whole.'". . . We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition.[82]

Glendon and Sandel articulate two main objections to this development. First, they contest the idea that leaving the abortion choice up to the private consideration of the pregnant woman qualifies as a neutral decision. The second objection is to what Sandel calls the voluntarist conception of individual agency and what Glendon sees as the emphasis on "separateness, isolation, and selfishness" presupposed by the right to privacy as a general right of individuals.[83] Here what is at issue is the conception of the individual subject or self allegedly underlying the very idea that privacy protects individual autonomy.[84] As it is important to see that these are two different albeit interrelated issues, I shall take up each in turn.

B. Legal Neutrality and the "Value of Life"

According to Glendon and Sandel, the notion that abortion is an individual and private decision is, itself, a substantive moral claim.[85] They contend that the decision to construe the abortion issue as a matter of individual privacy rests on a prior decision regarding the substantive moral issue of the value of life and when it begins.

Sandel widens this claim into a general challenge to the liberal idea of neutrality in jurisprudence and in politics. His explicitly stated goal is to

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[82] Bowers, 478 U.S. at 199, 204–05 (5-4 decision) (Blackmun, J., dissenting) (citation omitted). In *Bowers,* the Court found that consensual adult homosexual sodomy in the privacy of one's home is not protected by privacy rights. Id. at 190–91. The Court upheld a Georgia statute criminalizing consensual homosexual sodomy despite the fact that the behavior at issue took place within the bedroom of the respondent's home. Id. at 195–96. It reversed the Eleventh Circuit Court of Appeals' judgment that "the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association[,] . . . beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment." Id. at 189.

[83] See Glendon, Abortion, supra note 64, at 35 (stating that *Roe v. Wade*, like its predecessor *Eisenstadt v. Baird*, embodies a view of society as a collection of separate, autonomous individuals). For expansion of this argument, see Glendon, Rights Talk, supra note 64, at 47–75.

[84] Sandel seems to be arguing for a return to the entity concept of privacy as the alternative to voluntarism, while Glendon seems to prefer, at least on the abortion question, that we return the issue to the political process where the voice of "the" community can be heard.

[85] Glendon, Abortion, supra note 64, at 36; Sandel, Moral Argument, supra note 63, at 532.

bring out the truth in what he calls the "naive view" regarding questions of justice, which holds that the justice of laws depends, at least in part, on the moral worth of the conduct they prohibit or protect.[86] He opposes this to what he calls the "minimalist" or "pragmatic" conception of liberal neutrality, a view which holds that "because people inevitably disagree about morality and religion, government should bracket these controversies for the sake of political agreement and social cooperation."[87] Sandel, like Glendon, is convinced that the bracketing of moral judgments that is called for by leading theories of liberal toleration is both impossible and undesirable.

As proof of the impossibility of neutrality, Sandel cites the Court's apparent self-contradiction in *Roe v. Wade,* wherein it argued that it could bracket the controversial question of when life begins.[88] Having surveyed a wide range of divergent thinking on this topic throughout American and generally Western tradition, and in the law of various American states, the Court concluded that no consensus exists on the issue, that "'the unborn have never been recognized in the law as persons in the whole sense.'. . . [and thus,] that Texas was wrong to embody in law a particular theory of life." In view of this, the Court did not agree that by "'adopting one theory of life . . . [Texas may] override the rights of the pregnant woman that are at stake.'"[89] On the other hand, in the same decision, the Court affirmed the state's interest in potential life as compelling at the point of viability. Thus, according to Sandel: "It [the Court] does not replace Texas' theory of life with a neutral stance, but with a different theory of its own . . . ." —precisely what the Court said it could not do.[90]

But even if the Court did not embrace the viability standard, or the trimester framework, Sandel would contest the claim that a ruling on abortion which leaves the decision up to the individual pregnant woman, at any point during pregnancy, qualifies as a neutral decision. For he insists that despite "an agreement to bracket [a] controversial moral and religious issue[] for the sake of social cooperation," what counts as bracketing may be controversial.[91] In order to resolve dispute on this level, one must either

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[86] Sandel, Moral Argument, supra note 63, at 521.

[87] Id. at 522.

[88] "'We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer.'" Id. at 531 (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)).

[89] Id. at 531–32 (quoting Roe, 410 U.S. at 162).

[90] Id. at 532.

[91] Id. Thus, on Sandel's account, liberal hopes for bracketing must fail. For a discussion of the conception of autonomous agency allegedly presupposed by privacy

turn to a substantive evaluation of the interests at stake or to a conception of autonomous agency, which is itself not neutral.

Glendon adds another consideration to this communitarian argument against liberal neutrality. It is her contention that to construe the abortion issue in terms of privacy rights of women fosters a disrespect for the value of life. Convinced that the law has a role to play in shaping moral views and expectations, she maintains that

> [a] law which communicates that abortion is a serious moral issue and that the fetus is entitled to protection will have a more beneficial influence on behavior and opinions, even though it permits abortion under some—even many—circumstances, than a law which holds fetal life to be of little or no value and abortion to be a fundamental right.[92]

She clearly views *Roe v. Wade* as an instance of the second type of law. Indeed, she insists that it would be hard to find a country "where the legal approach to abortion is as indifferent to unborn life as it is in the United States."[93] She asks pro-choice advocates to "[p]lease consider what a set of legal arrangements that places individual liberty or *mere life style* over *innocent* life says about, and may do to, the people and the society that produces them."[94] For Glendon, a ruling like *Roe* that privileges the privacy rights of a woman over "innocent" fetal life is not only not neutral, but it communicates a dangerous message about the value of life to the community: it privileges the values of autonomy and toleration over life, preempting moral discussion and compromise.[95]

For both Sandel and Glendon, what is at stake here is not really individual rights but public values. Glendon's concern with the "affirmation of life" leads her to embrace the political process argument against Court activism on the grounds that when controversial community values are debated and decided upon by legislatures, the prospects for reasonable

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rights, see generally infra part III.

[92] Glendon, Abortion, supra note 64, at 61.

[93] Id. at 24.

[94] Id. at 62. Since rhetoric in the abortion debate is crucial, let's look into Glendon's. Why does she refer to fetal life as innocent? Who, unlike the fetus, is guilty? Could it be that the pregnant woman is guilty because . . . she indulged in sex yet does not want to pay the price? And isn't it rather a trivialization of women and the law to state that they place matters of mere lifestyle over life? This kind of rhetoric is manipulative and degrading of the moral judgment and need-interpretations of women.

[95] Id. at 36. Glendon's claim that American abortion law grants absolute rights is, of course, untenable. She seems to believe that a fundamental right is, by definition, absolute. But as any first-year law student can tell you, no right is absolute either in its scope or vis-à-vis other competing rights.

compromise are much higher than when courts make unilateral decisions and articulate "absolute" individual rights.[96] She repeats the well-worn argument that by intervening when it did in 1973, the Court nipped the trend toward the liberalization of abortion statutes by state legislatures in the bud and set the stage for the intense controversy over abortion that is "unique" to the United States.[97]

Sandel, on the other hand, seems less concerned with defending compromise, per se, than with reuniting moral and legal discourse, reaffirming communally valued practices, and criticizing the liberal arguments justifying toleration which appeal to neutrality and/or autonomy. He states that, "[t]he cure for liberalism is not majoritarianism, but a keener appreciation of the role of substantive moral discourse in political and constitutional argument."[98] If the Court knows what the community values, then I suppose Sandel would have no objection to its juridical activism.

The odd thing about both of their approaches, however, is that in the name of preserving tradition, in the name of articulating and protecting "community values," these critics of "liberalism" tend to devalue and undo two principles that have long been central to the American tradition of constitutionalism—the distinction between constitutionally protected individual rights and majoritarian democracy,[99] on the one side, and the distinction between substantive moral discourse about what is right or wrong and constitutional discourse about basic rights, on the other. Glendon and Sandel challenge that tradition. Their respective positions rest either on a confused understanding of legal neutrality or on a mistaken view of what is entailed by the constitutional protection of individual privacy rights.

While this is not the place to address the debate animating contemporary American political theory between "communitarians" and "liberals" over the issue of neutrality, a few points should nonetheless be made.[100]

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[96] Id. at 40–44. As if there were no public debate before, during, and after *Roe*.

[97] Id. at 46, 48–49. But see Tribe, supra note 1, at 49–51, 74 (rebutting and discussing the lessons to be learned from the European approaches to abortion). The recent heated debates and struggles in Germany, Poland, Hungary, and Ireland over abortion indicate that the intensity of controversy is hardly unique to the United States.

[98] Sandel, Moral Argument, supra note 63, at 522.

[99] There is, of course, a debate among defenders of the principle of basic rights against the state over how to justify this idea as well as the specific content to which it is applied. For an interesting discussion of the competing approaches, see Ackerman, supra note 1, at 3–33; see also the various articles in Constitutionalism and Democracy, supra note 1.

[100] For an introduction into this debate, see Liberalism and Its Critics (Michael J. Sandel ed., 1984).

Let me take up the controversy in three steps. First I will argue that (1) while the "naive" view regarding questions of justice defended by Sandel works against a strong conception of neutrality, it ultimately fails against a more modest interpretation, because it misunderstands the difference between constitutional and substantive moral discourse. But since I agree that in the case of abortion, the moral issue of the value of fetal life and when it begins must be addressed (implicitly or explicitly) by the Court in the process of adjudication, I will enter into the substantive discussion. My purpose will be to show that (2) the debate over these questions is inconclusive because the answers depend on quasi-religious worldviews. Consequently we are brought back to the level of what I call "relatively neutral" legal argumentation—precisely the conclusion of the *Roe* Court. I shall then argue that (3) the abortion issue unavoidably raises constitutional questions regarding legal personhood and basic rights, and thus, the proper domain for its resolution is on the level of constitutional rather than normal majoritarian legislative politics.

1. Constitutional Versus Substantive Moral Discourse

Sandel's claim is that arguments justifying rights cannot be neutral towards different conceptions of the good, for rights are legal institutionalizations of concrete, substantive values. They protect practices and human goods valued by the community. The justifications of rights thus depend on the moral worth of the conduct they regulate and these evaluations depend, in turn, on substantive and teleological moral argumentation.[101] Accordingly, he challenges the idea that any justification of basic rights could be neutral vis-à-vis the multiplicity of ways of life and value systems within a society.

These objections are convincing against "ambitious" conceptions of neutrality which claim to refer to legal decisions not informed by value judgments or moral principles of any sort.[102] Since all legal systems institutionalize particular forms of political life that depend at least in part on substantive views about the right or the good, such a conception of neutrality is impossible. However, this does not mean that there is no difference between constitutional and substantive (moral/ethical) discourse. Nor does it mean that what I shall call the "relative neutrality" of justification in constitutional jurisprudence is not possible.

Liberal constitutional democracies do, of course, institutionalize moral principles—at the very least, their constitutions embody liberal and

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[101] Sandel, Moral Argument, supra note 63, at 524.

[102] See Sunstein, supra note 18, at 50.

democratic values. The institution of rights is based on values towards which we are certainly not neutral and which do not flow, as it were, from neutrality.[103] Yet it is misleading to conclude from this that these principles are of the same order or operate on the same level as those concrete substantive values that structure the ethical worldviews and ways of life of particular groups living within modern civil societies. Rather, constitutional norms such as individual liberty, personal privacy, bodily integrity, equality, democratic participation, etc., function as "meta-values"— that is, as highly abstract, generalized, and indeterminate principles that are *constitutive* of liberal democratic constitutionalism. They thus inform our political life in a manner quite different from the way that more concrete substantive values structure the lifestyles of particular groups comprising civil society.

The peculiarity of this form of political life is that it is *compatible* with a multiplicity of ways of life and worldviews within civil society. Indeed, it makes coexistence and mutual acceptance possible among adherents of divergent conceptions of the good.[104] In other words, the discourses in constitutional adjudication justifying interpretations and applications of rights are based on meta-values towards which we are not neutral, but these meta-values are what allow us to be *relatively* neutral vis-à-vis a wide variety of ways of life internal to our society. The very generality and abstractness of constitutionalized "meta-values" is what allows us to reconcile democracy, difference, and plurality. The way in which we are not neutral (we *are* partisans of the form of political association constituted

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[103] See Charles Larmore, Political Liberalism, 18 Pol. Theory 339, 342, 347 (1990) [hereinafter Larmore, Political Liberalism] (abandoning his earlier attempt to outline a neutral justification of political neutrality and acknowledging that political (and legal) neutrality vis-à-vis competing conceptions of the good is itself a moral principle stipulating the conditions on which political principles can be justified). For his earlier attempt, see Charles Larmore, Patterns of Moral Complexity 50-58 (1987) [hereinafter Larmore, Patterns].

According to Larmore, this moral conception relies ultimately on the norms of "rational dialogue" and "equal respect" which are, in his view (and in mine) constitutive of liberal constitutional democracies. Larmore, Political Liberalism, supra. Larmore thus argues that there is a core minimal universalistic morality characteristic of liberal democracies which reasonable people can share although they disagree on the nature of the good and about religious truth. Though he does not attempt to justify these moral principles, others have. See, e.g., Jürgen Habermas, Discourse Ethics: Notes on a Program of Philosophical Justification, in Moral Consciousness and Communicative Action 43 (Jürgen Habermas ed., 1990); Jürgen Habermas, Faktizität und Geltung 151-65 (1992) [hereinafter Habermas, Faktizität].

[104] It is not my task here to provide a philosophical justification of the meta-values of liberal democracy. For an attempt to do so on the basis of an interpretation of Jürgen Habermas' theory of discourse ethics, see Seyla Benhabib, Situating the Self: Gender, Community, and Postmodernism in Comtemporary Ethics 38-46 (1992).

by democratic and liberal principles) is what enables us to be "relatively neutral" towards concrete ways of life and conceptions of the good that differ from that of the majority at any given time.[105] What I mean by "relative neutrality," then, is that the norms invoked in constitutional adjudication must be so abstract and general as to permit the flourishing of many different ways of life and conceptions of the good. Once established, moreover, these norms must be applied in as disinterested, fair, and consistent a fashion as possible.[106] This minimal conception of legal neutrality is basic to the rule of law.

It is by virtue of their very abstractness and indeterminacy that the meta-values of liberal democracy are open to alternative institutionalizations. Nevertheless, *constitutional* meta-values are not totally indeterminate. Ways of life or practices which violate them, and which cannot be justified in terms of these meta-principles, are legitimately trumped by them. Courts cannot be neutral towards those practices or regulations that flagrantly conflict with the constitutionalized meta-principles of autonomy, individual integrity, mutual respect, and equality. But they can accept the wide multiplicity of forms of life that are compatible with this political institution and acknowledge that there is a variety of available interpretations of the meaning of these principles. Thus, liberal democratic constitutionalism *does not* constitute a substantive form of political life that is internally monolithic, either vis-à-vis the types of groups or range of practices within the civil society regulated by its principles or vis-à-vis the types of institutionalization of these principles.

I can now formulate the difference between constitutional argument (which lies under the constraint of "neutrality") and substantive moral or ethical discourse (which does not).[107] To put it simply, Court decisions

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[105] With the proviso, of course, that they do not violate accepted moral principles or the meta-principles of liberal democratic constitutionalism.

[106] See Sunstein, supra note 18, at 50–52; see also Harry H. Wellington, Interpreting the Constitution 79–84 (1990) (discussing legal neutrality). Wellington acknowledges the political factors shaping constitutional adjudication, but nevertheless insists that it also involves constraints that make the disinterested and fair application of constitutional principles possible.

[107] This distinction has specific historical and contextual presuppositions. In short, it presupposes cultural and social modernity. On the cultural level, it is made possible by the differentiation between the spheres of law and morality, on the one hand, and between universalistic moralities and concrete forms of ethical life, on the other. Its sociological presupposition is the differentiated social structure of modern societies and the pluralization not only of life styles, but also of types and loci of public spaces (in civil, legal, political, and economic spheres) that go with it. Structural differentiation is the precondition for distinguishing among the contraints and logics of ethical, moral, legal, and political discourses. For a discussion of cultural and social modernity see Habermas, supra note 55, at 157–271.

have to be framed in terms of the interpretation and application of broad constitutional principles. The latter must be abstract and general enough to permit the coexistence of divergent conceptions of the good, and their application must be fair towards the various groups and ways of life within society.

Now it is almost trivially true that in the process of constitutional adjudication, especially in the domain of privacy jurisprudence,[108] references to public values abound both on the level of constitutionalized meta-principles and on the level of application discourses. But only certain types of arguments or reasons can be entertained in court, namely, those framed in terms that everyone can accept and which invoke secular principles that can be connected back up with constitutional norms. Substantive ethical discourse in the public and private spheres of civil society is under no such constraint. Thus, while discourses on values are part of constitutional adjudication, what should count in these discourses are not, *pace* Sandel, appeals to the "intrinsic worth of a practice" or particular social tradition, since that is precisely what is being contested, but rather the ability to justify a legal decision in terms of the abstract and general constitutionalized meta-values that can be shown to be implicated in a particular law and in the activity regulated by it.[109]

While I cannot deliver on this claim here, I am contending that the various types of public spheres in highly differentiated modern societies have their own typical set of constraints and characteristically appropriate forms of normative justificatory discourse—a point which Sandel fails to consider when he advocates a keener appreciation of the role of substantive moral discourse in political and constitutional argument. As indicated above, in the public spheres of civil society, substantive moral discourse

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[108] See Wellington, supra note 106, at 88–95.

[109] Of course, legal tradition is important here as well. Michael Sandel attempts to prove his point by providing a substantive justification for homosexual privacy that he claims should have been invoked, on the model of Griswold v. Connecticut, 381 U.S. 479 (1965), in Bowers v. Hardwick, 478 U.S. 186 (1986). His strategy is to analogize homosexual intimate relationships to heterosexual marriage, and to argue that the intrinsic worth of the human goods realized on the one set of intimate relationships (bilateral loyalties, harmony in living, a lasting association for a noble purpose) are present in the other, and therefore, both should be protected. Sandel, Moral Argument, supra note 63, at 533–34. But what about sexual encounters that do not involve a lasting intimate association and which cannot be approximated to marriage? Are these not to be covered by privacy doctrine? And what about abortion—what intrinsic worth does that practice have? It can hardly be an accident that after having criticized the *Roe* Court's "voluntarist" justifications for permitting abortion, Sandel does not give us an alternative substantive justification. Id. at 531–33. To do so, he could not appeal to the intrinsic worth of the practice. He would have to appeal to the notions of autonomy, individual privacy, bodily integrity, etc., which he sees as tainted with the voluntarist model of the self. Id. at 522.

that invokes the values and traditions of one's particular way of life or worldview is perfectly acceptable. Here one may adduce whatever reasons one wishes without any constraint other than, perhaps, civility. If one succeeds in convincing others, so be it.

In the institutionalized legal and political public spheres, however, there are unavoidable constraints on what is deemed appropriate discourse, due, in part, to time considerations (decisions have to be reached), in part due to the fact that constitutional and legislative decisions are backed up by legal sanctions. In legal public spheres,[110] especially on the level of constitutional discourse, courts have to invoke constitutional principles explicitly to justify their decisions. It is not their task to mold character ethically, to make public policy, or to provide arguments in favor of one particular way of life over another. To be sure, the kinds of reasons one can give in court decisions, and the weights one gives to distinct principles, change over time as the increased importance given to personal privacy in recent jurisprudence shows. But, as already indicated, constitutional discourse has to justify interpretations of basic rights in terms that ensure fairness, impartiality, and the coexistence of many ways of life within one society.

2. *The Value of Fetal Life*

To be sure, abortion poses a special problem vis-à-vis the debate over neutrality, for there *appears* to be a deep conflict between two values articulated in the Constitution: life and liberty. The *Roe* Court, at first glance, does seem to have favored liberty over life, the rights of the woman to decisional autonomy over the rights of the fetus. However, I argue that this characterization of the decision in *Roe* is misleading, for the Court was not engaged either in articulating a value hierarchy or in balancing competing rights. Rather, it was engaged in protecting the constitutional rights of acknowledged legal persons against majoritarian inroads on these rights. This, after all, is its job.

As we have seen, Sandel and Glendon reject the entire language of

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[110] In the political public sphere proper (legislatures), the constraints on appropriate discourse take the following form: While particular interests and values can, of course, be articulated and compromises reached in legislative debates, *justifications* for laws and public policy (even if they are the result of power compromises) must adduce what Cass Sunstein has called "public-regarding" reasons, especially with respect to the distribution of social benefits and burdens. In other words, government must be able to justify its laws and policies as being in the interest of the public at large, hostage neither to powerful private groups nor self-interested representatives. Sunstein, supra note 18, at 51.

individual rights in this domain, and thus do not frame the abortion issue in terms of fetal rights that might or might not outweigh the privacy rights of individual women. Rather, they insist on the "prior" and "unavoidable" question of whether, in a society where human life is an intrinsic value, the community has the "right," or indeed, the "duty," to protect this value through law. But I contend that even on these restricted terms of debate, the issue is not nearly as clear-cut as they apparently believe. For if we assume that *both* sides in the controversy hold dear the value of individual life in our society, then the disagreement is, in the first instance, over just what practices violate the intrinsic value of life, and over which legal norms protect or threaten it, and not over the hierarchy between the values of life and liberty.

Let me address this issue by drawing from Ronald Dworkin's recent works on abortion.[111] Dworkin takes up the issue of the meaning of life as a community value independently of the separate question as to whether the fetus is a constitutional person endowed with rights. From this point of view, his approach dovetails with that of the communitarians. Dworkin's strategy is to proceed from the assumption that respect for the dignity of every individual human life has become a quasi-sacred value not only for traditionally religious members of our community, but for all of us—atheists, agnostics, and observant believers alike. Assuming that most people on either side of the abortion controversy share the view that human life is of intrinsic value, that each individual life is, as it were, an end in itself, the problem is that this idea lends itself to different interpretations. As indicated above, the disagreement is over how this value should be institutionalized, and over which practices, laws, and regulations offend, and which protect, the intrinsic value of human life.

In other words, the question is, what do we consider "sacred" and of intrinsic value about human life? Clearly we do not mean by this judgment that the more human life there is, the better. Rather, on Dworkin's account, the value we accord to human life is qualitative, not quantitative. Its value derives from our honoring the manner of its creation in three distinct respects: we honor the natural (or divine), cultural, and personal creative processes and investments that contribute to the development of each human life.[112] Each person is a "work" along these three dimensions:

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[111] Ronald Dworkin, Unenumerated Rights: Whether and How *Roe* Should Be Overruled, 59 U. Chi. L. Rev. 381 (1992) [hereinafter Dworkin, Unenumerated Rights]; Ronald Dworkin, Chapter 4: What is Sacred? (Oct. 6, 1991) (unpublished manuscript, on file with author) [hereinafter Dworkin, Sacred].

[112] In reproducing Dworkin's argument in these last two paragraphs, I do not mean to imply that I share his views either on what makes human life of intrinsic worth or the philosophical justification he gives for these views. Nor do I agree with his

> She is, in her genetic inheritance, a triumph of nature. But she is also, in her personality, training, capacity, interests, ambitions and emotions, something like a work of art, because she is, in those respects, the product of *human* creative intelligence, partly that of her parents and other people, and partly that of her culture, but also, through the choices she has made throughout her life, [she is] her *own* creation.[113]

This perspective on the value of human life explains why we consider premature death to be tragic, for it can be understood as a frustration of natural (or divine), cultural, or individual creative processes that make us what we are. It also allows us to account for intuitions which would be inexplicable if only the first, that is, mere natural biological life, were the sole source of its value. Thus, while we intuitively feel that a miscarriage is tragic, we also intuitively feel that the death of a two-month-old child is worse. Moreover, we consider the death of a youth worse than the death of an infant, while we also tend to consider the death of an elderly person less tragic than the death of a younger adult. The decisive metric in these cases cannot be mere life. Rather, it has to be the degree of cultural and personal investment in a life, and the degree to which these have come to fruition in the individual. It is the degree of frustration of life, not its mere absence, that we deplore in premature deaths.[114]

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substantive positions on abortion restrictions. But I do agree that respect for the intrinsic worth or dignity of every individual human life has become an important cultural value in modern civil societies. It is not necessarily the case, however, that we accord dignity to human life because we honor the manner of its creation. We have available to us several moral theories which could supply justifications for the dignity we accord to human life without making any reference to creation at all. A Kantian, utilitarian, or discourse ethical perspective, for example, could each give good, yet different, justifications for human dignity. My purpose here is neither to embrace Dworkin's moral philosophy nor to propose one of my own, but to indicate my agreement with the overall logic of his argument—assuming that individual human life has intrinsic worth for us, we may not only have different reasons for holding this view, but also different interpretations of what it means. Moreover, acknowledging the dignity of human life as a fundamental cultural value does not mean that we all believe it is the highest value. Dworkin's discussion is interesting not because it gives us the best moral reasons for respecting human dignity, but because it shows that even if we all respect human life as an end in itself, very important moral and ethical disagreements remain.

[113] Dworkin, Sacred, supra note 111, at 11. Of course, Dworkin recognizes that, for many, it is respect for God's creation that underlies the value of human life. But he addresses the secularized version of this, namely, an endorsement of the natural processes of evolution and development as having normative significance in order to avoid entering into religious doctrine on the issue. His concern is not to debate fundamentalists but to engage conservatives.

[114] Id. at 15–19. We calculate age from birth, not from conception. Let me add

In what I consider a rather interesting move, Dworkin applies this metric to explain agreements as well as disagreements in the abortion controversy. He notes that both "conservatives" and "moderates" agree that abortion becomes morally more problematic when it takes place later rather than earlier in pregnancy, even though some conservatives believe abortion is always wrong while many liberals believe that very little justification is needed for an early term abortion.[115] On the other hand, differences of opinion on the abortion issue seem to vary with the relative importance each approach gives to the natural and the human contributions toward the value of life. For the most part, the "conservative" position places the divine (or natural) investment in human life above the cultural and the personal; for the liberal, the emphasis is on the cultural and personal investments in life. These disagreements, however, over what it is that makes life valuable and over how best to honor the value of human life, clearly involve conflicting quasi-religious worldviews.[116] They do not, however, involve disagreement over the value of human life itself, despite the different ways they explicate or apply this value.

Thus Dworkin argues: "Procreative decisions are fundamental . . . , because the moral issues on which . . . [such] . . . decision[s] hinge[] are religious in the broad sense . . . . They are issues touching the ultimate point and value of human life itself."[117] Accordingly, a key constitutional issue raised by the abortion controversy is whether the majority of representatives in state legislatures should have the right to decide what is inherently sacred, why what is sacred is so, and how the sacred should be

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that we do not even consider a miscarriage or a stillbirth to be a death in the profound cultural sense—we do not have funerals for the miscarried embryo or the stillborn.

[115] Id. at 16-17. I disagree with Dworkin's assumption that abortion is wrong in principle because it is bad when human life, once begun, is frustrated. Dworkin seems to believe that human life begins with conception; otherwise he could not argue that abortion is wrong throughout pregnancy, though less wrong at its early stages. I would argue that it is a misfortune for a woman to be pregnant against her will and to have to decide to obtain an abortion, but it is certainly not wrong.

[116] Id. at 11-12. Many have argued that the decision over when life begins is ultimately a religious issue. See, e.g., Wenz, supra note 3; cf. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 778-79 (1986) (Stevens, J., concurring) (maintaining that arguments attributing personhood to embryos or fetuses are theological in nature, and that outside of the religious context, "there is a fundamental and well-recognized difference between a fetus and a human being").

However, the exceptions that most conservatives are willing to make in their overall anti-abortion stance, viz., their willingness to allow abortion in cases of incest, rape, and severe fetal deformity, attest to the fact that even for them, cultural and personal considerations enter into the equation. See Wenz, supra note 3, for this position.

[117] Dworkin, Unenumerated Rights, supra note 111, at 417.

respected.[118] The disagreement is not over whether life is sacred, but over what makes it so, and whether abortion is compatible with the right form of respect for human life.

Dworkin seems to be saying that by acknowledging the individual woman's right to choose,[119] the Court does not thereby undermine the value of life nor impose a theory of its own. Rather, the restrictions the Court places on states in this domain, by virtue of constitutional interpretation, are similar to those embodied in First Amendment jurisprudence vis-à-vis strictures against the establishment of religion. These restrictions limit the state's power to coerce individuals to accept the majority's (or a highly vocal minority's) interpretation of community values (a) when such decisions "are matters of personal commitment on essentially religious issues, ([b]) when the community is divided about what the best understanding of the value[s] in question require[]," and (c) when the decision has a very great, direct impact for the person potentially affected by it, and no impact of even remotely comparable importance for other members of the community.[120] Thus, he argues that some of the privacy decisions, including *Roe v. Wade,* can also be defended on the grounds of the First Amendment's guarantee of free exercise, as well as the Fourteenth Amendment's Due Process Clause. Let me add that if no *secular* arguments are available for justifying a given law under such conditions, and if said law violates basic individual rights, then it is surely not the case that the Court abandons legal neutrality when it overturns such a law.[121]

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[118] Id. at 407.

[119] Id. at 429–30. Dworkin seems to embrace the viability standard as set out in *Roe*. For discussion and re-explanation of viability, see infra pp. 91–97 & notes 137, 139–41.

[120] Id. at 415. Since these questions regarding one's conception of the good can be answered only within the framework of a worldview (religious or other), and not on the basis of universalizable moral principles (principles of justice on which everyone agrees), they raise ethical concerns and conflicts that may not be resolvable so long as a plurality of different forms of life and different worldviews exist in a society.

[121] Id. at 419–26. For my argument that constitutionally protected basic rights *are* at stake for the pregnant woman, see infra pp. 52–54. Nevertheless, one could argue that in protecting the choice of an individual pregnant woman to continue or end her pregnancy, the Court is not remaining neutral in this controversy, but favors one side. Accordingly, the analogy with the First Amendment strictures against the establishment of religion would be misleading, for in that case, no side gains any advantage. But while it is true that the outcome of *Roe* works to the benefit of those in favor of individual choice in this matter, this does not in itself mean the Court has violated the principles of legal neutrality. Neutrality of outcome is not the same as neutrality of justification, and it is the latter that is at issue in Sandel's charge that the Court was involved in substantive moral reasoning. See supra notes 86–91 and accompanying text. In protecting a woman's right to choose, the Court, contrary to Sandel, is not choosing sides among two sets of substantive values regarding life and liberty, but rather, it is

But Dworkin does not rest his case here. He also addresses the concern for fostering responsibility vis-à-vis the value of human life.[122] The answer to the question of whether the "community" or the pregnant woman ought to decide what does or does not violate the value of life depends, in part, on whether the goal is to foster a sense of moral responsibility or whether the goal is to achieve conformity with the majority's view. If the goal is moral responsibility, then acknowledging that it is the right of the pregnant woman to resolve moral dilemmas which impinge most directly on her is the only acceptable way to go. To give the decision up to "the community"—to a majority of legislators—when conditions a, b, and c hold is to deny moral responsibility to her and let an external, third party presume to occupy the moral high ground. It is paternalistic in the worst sense.

3. Constitutional or Legislative Politics

Now as indicated above, Sandel seems to think that "bracketing" by the Court of a controversial issue of this sort is fundamentally ambiguous.[123] He argues that it is unclear what counts as bracketing even given agreement to bracket an intractable moral or religious controversy. Accordingly, the Court could bracket the substantive moral controversy over abortion either by letting each state decide the question for itself or by permitting the individual woman to make the decision. Sandel cites Justice White's dissenting argument in *Thornburgh,* that one ought to bracket the abortion controversy in the same way and for the same reasons that Stephen Douglas had "proposed to bracket the intractable controversy over slavery—by refusing to impose a single answer on the country as a whole."[124]

What Sandel fails to note, however, is that in the case of slavery, it was the legislature that was called upon to bracket substantive moral

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protecting a plural universe by securing the conditions for the coexistence of a number of quasi-religious worldviews held by people in the same civil society. It is also protecting one group from having the external preferences of the other group imposed upon them by the state. The decision for pluralism, for preventing the imposition of a worldview onto a group that is abhorrent to them, is thus structurally similar to the justifications against the establishment of religion. Of course, an equal protection argument could also be made here.

[122] Dworkin, Sacred, supra note 111, at 408. In doing so, he addresses Glendon's argument. See supra notes 92-97 and accompanying text.

[123] See supra notes 86-91 and accompanying text.

[124] Sandel, Moral Argument, supra note 63, at 532. Justice White urged the Court to let each state decide the abortion issue. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 795 & n.4, 796-97 (1986).

discussion by Douglas, not the Court.[125] And it is an entirely different matter for Congress to impose gag rules upon itself regarding highly controversial issues for the sake of social peace than it is for the Court to let each state decide an issue. In the latter case *what is at issue is not social peace, but the judgment of whether constitutional principles are, or are not, at stake.*[126] If the Court permits the states to decide whether to regulate or outlaw a practice, this is not a matter of bracketing controversial moral discussion, but the result of a decision that no fundamental, constitutionally protected individual rights are at stake. Or, if such rights are at stake, the Court has concluded that the state has a compelling interest that overrides them. Moreover, once the Court decides that constitutional rights are at stake, and that there is no sufficiently compelling state interest or other right to outweigh them, then there is no ambiguity whatsoever involved in "bracketing"; it is then the function and duty of the Court to protect basic individual rights against simple majorities in state legislatures. For example, the constitutional principle that separates church and state means that essentially religious issues must be left to individual conscience and cannot be decided in the same way for everyone in a state, or nationally, by majoritarian ballot. Applying this principle does *not* involve substantive moral discussion over the relative merits of this or that religious

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[125] Stephen Holmes, Gag Rules or The Politics of Omission, in Constitutionalism and Democracy, supra note 1, at 19, 40–43. Nevertheless, Holmes analyzes abortion in the same terms as the slavery issue, although, unlike Sandel, he supports bracketing for the purpose of achieving social peace, regardless of the moral ambiguities involved. Id. at 50–52, 58.

[126] This is not to say that I agree with Congress' self-imposition of gag rules during the slavery crisis. Nor do I intend to say that Congress is somehow less bound to regulate its proceedings in accordance with constitutional principles than the Supreme Court. Nevertheless, I do maintain that the latter must *explicitly* consider matters of constitutional principle—this is its primary concern. Therefore, while Congress may well decide to avoid an issue for the "public-regarding" purpose of social peace, the Court must protect basic individual rights despite the likelihood of intense controversy and even disruption. I agree with Cass Sunstein's reply to Holmes:

> The traditional justification for removal of issues from politics is that some matters do not belong in the hands of (potentially oppressive) majorities, regardless of whether factionalization would occur. . . . If there is no independent argument that the matter to be removed from politics should be considered a "right," the category of cases justifiably privatized because of the fear of factionalization should be relatively small.

Cass R. Sunstein, Constitutions and Democracies: An Epilogue, in Constitutionalism and Democracy, supra note 1, at 327, 341–42. In the slavery case, the issue was not removed from normal politics but simply shifted from the hands of national to local (also potentially oppressive) majorities. In the abortion case, the matter *was* taken out of the hands of simple majorities, but it was not thereby permanently removed from politics.

worldview.[127]

Thus, when basic constitutional rights are at stake, they should be protected (uniformly) against what fifty-one percent of a state legislature can alter today or tomorrow under the pressure of popular will, special interest bargains, strong vocal minorities, or the desire of representatives to be reelected. The acknowledged constitutional rights of individuals to personal privacy and liberty, to decide what happens to one's body (qualified by context), to freedom of conscience, etc., are all obviously implicated for pregnant women with respect to abortion. So are other values. This is why it was appropriate for the Court to agree to hear *Roe* in the first place.

However, by protecting basic constitutional rights, after having weighed other potentially conflicting rights or public values, the Court is not permanently privatizing the issue, stifling moral debate within the public spheres of civil society, or taking it out of politics completely. Rather, it is withdrawing the issue from what Bruce Ackerman has called "normal" (legislative) politics and placing it on the level of "constitutional politics."[128] It does not, nor could it, suppress the politics or the concern

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[127] This is an example of relatively neutral adjudication.

[128] Here I am using Ackerman's term, "constitutional politics," in a somewhat different sense than he does. Ackerman reserves the term for those rare, periodic moments when a highly mobilized citizenry engages in extensive public debate and widespread collective action over an intensely felt concern, and is able to convince an extraordinary number of its fellow citizens to support its initiative. According to Ackerman, when successful, such movements culminate in the proclamation of higher law (constitutional principle) which remains fixed as constitutional-legal authority until revised by another such episode. On his interpretation, the Court should play a conservative, "preservationist" role—it must protect the past achievements a mobilized citizenry acquired on the higher track of law making (constitutional politics) from erosion by political elites engaged in normal politics. This preservationist role of the Court is, according to Ackerman, the only justification for judicial review (in our system). Consequently, the Court itself should play no creative role in constitutional politics. See Ackerman, supra note 1, at 6-15.

Unlike Ackerman, I want to expand the normative conception of "constitutional politics" to include the decision-making process of the Court. I also want to acknowledge its creative contributions in this domain. By mere virtue of its willingness to hear a case, the Court at least temporarily takes an issue out of the domain of normal politics and places it on the level of constitutional concerns. Moreover, every interpretation and every application of constitutional principle involves innovation. In this sense, the deliberative adjudicative process that generates Court decisions contributes to, and is part of, constitutional politics. Of course, in justifying its decisions, the Court must appeal to "external authority"—it has to claim that it is interpreting and applying *established* constitutional principles. The Court cannot claim the prerogative to assert new constitutional principles ex nihilo. But its interpretive process involves more than mere instruction following. In invoking a constitutional principle and in applying it to a new case, the process of adjudication involves the creative elaboration and development of legal doctrine as well as receptivity to changing interpretations of public

altogether.[129] Moreover, even after the Supreme Court has made a ruling, it is possible (although difficult) to effect political change on the matter. If an issue remains (or becomes even more) controversial after the Court's ruling, the proper political terrain for its resolution is the level of "constitutional politics" normatively privileged by our constitution, namely, the politics of amendment. As Ackerman correctly points out, this form of democratic politics requires basic agreement over a broader spectrum of the population than normal politics, and hence, a more serious consideration and extensive public debate of the matter at issue on all levels of the social structure.[130] If the moral arguments of the other side are strong enough to convince enough citizens or their representatives, such that a constitutional amendment can be passed to support their views, so be it. But until then, it is the Court's duty to protect what it sees as our constitutional rights.

This holds true especially regarding the question of who is a person under the law. This is hardly an issue for normal majoritarian legislative politics on the state level.[131] This is a matter of judicial interpretation of the Constitution, on the one hand, and constitutional politics, on the other. Thus, in denying the state of Texas or any other state the right to decide

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values. Thus, the interpretation and application of constitutional principles always produces something new.

On the level of justification, Ackerman is right—hermeneutic conservatism with respect to established constitutional principle is indispensible to the legitimacy of judicial review in a democracy. This is always so, but it is even more pressing in the absence of constitutional politics in Ackerman's sense. Any Court decision that strongly deviates from past understandings of public values, and which occurs in the *absence* of a clear new (politically expressed) consensus, must be able to invoke established constitutional principle or it will risk having its legitimacy challenged. To be sure, it can invoke constitutional principle in a new way and apply it to situations to which it has not in the past been applied, but it must, nonetheless, invoke such principle in a convincing way. See the discussion of Griswold v. Connecticut, 381 U.S. 479 (1965), infra notes 203-09 and accompanying text.

I want to thank Frank Michelman for alerting me to the complexities involved in this argument. See Michelman, Law's Republic, supra note 10, at 1507, 1519-26 (presenting a stronger critique of Ackerman and proposing an alternative approach to judicial review).

[129] Ackerman, supra note 1, at 6, 295-322. The extensive public debate over abortion since *Roe* is proof of this point. The public spaces of civil society have hardly been silenced by the Court's decision. Nor, for that matter, have those of political society (political parties, state and federal legislatures). Therefore, rights are hardly "anti-political." Indeed, the process of generating basic rights through adjudication is also deeply political. See Wellington, supra note 106, at 79-95.

[130] Ackerman, supra note 1, at 266-68. But it is also so that the amendment process stipulated in Article V of the Constitution is extraordinarily cumbersome.

[131] Since the Civil War, we have not accepted the idea that one may be a legal person in one state and not in another!

that fetuses are persons, the Court did not impose a substantive judgment of its own, but rather insisted that simple majorities in state legislatures are not the proper locus for deciding such a matter. The fetal personhood issue could only legitimately be decided on the level of constitutional interpretation, precisely what the Court did in *Roe*. Of course, the Court's interpretation is not the last word in our system—as just indicated, it too can be challenged and altered through another form of constitutional politics, i.e., by the amendment process.

But the issue before us is whether the Court's reasoning in *Roe*, denying legal personhood to the fetus, adduced constitutional principles or relied on the substantive values of the majority of justices sitting on the bench at that time. I agree here with Dworkin that the former is the case. Given the fact that fetuses have never counted as persons in our constitutional history, or under any other constitution, the Court's refusal to innovate here does not involve the imposition of a personal substantive moral decision by the majority of the Court, but rather a laudable judicial hermeneutic conservatism.[132] However, had the Court attributed legal personhood to the fetus in *Roe*, it would have had to make a very strong argument to override the weight of precedent, tradition, and constitutional practice, and the *only* justification available to it would have had to be substantive, indeed, *metaphysical* religious argumentation. In the absence of any new information about fetal development, and in the absence of any new consensus on the issue, this would have perforce been the case. Moreover, given fetal non-personhood, the Court's decision to bracket the moral argument about the beginning of life and to protect the rights of

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[132] "[T]he law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth, or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth." Roe v. Wade, 410 U.S. 113, 161 (1973). Given the precedent in common law and in statutory law, and given the constitutional language regarding the use of the word "person," id. at 157, the Court's decision regarding fetal non-personhood cannot be construed as based on substantive moral worldviews of the justices, but on sound legal argument. See Ronald Dworkin, The Great Abortion Case, N.Y. Rev. Books, June 29, 1989, at 49.

It is interesting to note that in the *Casey* decision, the plurality argues precisely in this way against overturning what is now clear constitutional precedent laid down by *Roe*. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-12 (1992). (Unfortunately, it then does proceed to overturn a good deal of precedent, but this is not my point here.)

Finally, let me point out that in every case where appeals have been made challenging state assertions of "fetal rights" claimed against the pregnant woman carrying the fetus, the state courts have thrown out the charges. Most recently, the Connecticut Supreme Court ruled that state law gives no legal rights to the unborn. See Kirk Johnson, Child Abuse Is Ruled Out in Birth Case, N.Y. Times, Aug. 18, 1992, at B1, B4.

individual women by leaving the decision with them was entirely consistent with the requirements of judicial neutrality.[133] Thus, in ruling that states may not declare the fetus to be a person or impose a decision as to when life begins (arrived at by *majority vote!*) on its residents, at the expense of the constitutionally protected basic rights of some of them, the Court is not thereby closing the issue or imposing its own value choices on the nation. Rather, it is articulating the proper level at which such issues have to be addressed.

I want to make one final clarification on this issue. It is important to remember that the Court in *Roe* did not argue that a woman has a right to terminate her pregnancy at any time. It introduced the trimester framework to articulate when and what kinds of regulations states may impose in abortion decisions, and it drew a line at the point of viability after which it deemed the state's interest in potential life to be compelling, thereupon permitting even the outright banning of abortion except for reasons of maternal health.[134] As we have seen, Sandel takes this line drawing as proof that, after all, the Court *was* engaged in deciding when life begins. But I believe that his reasoning here is mistaken, due in part to the misleading character of the viability standard introduced by the Court in *Roe*. Let me address Sandel's argument first and then turn to the particular problems with the viability standard.

Sandel seems to believe that there is a contradiction in the Court's denial of personhood to the fetus and its decision to permit the states to

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[133] There *was* clear constitutional precedent for *Roe* with respect to the existence of an individual right to privacy that covers the field of personal, intimate affairs, including decisions whether or not to bear or beget a child. The majority decision in *Roe* cites numerous cases that recognize a right of personal privacy. Roe, 410 U.S. at 152–53. Thus, the *Roe* Court did not create a new privacy right ex nihilo in this decision, but followed precedent, although it gave it a new application. Nor did it add to the population of constitutional persons in acknowledging that a woman's fundamental privacy rights are at stake in the abortion controversy, since her freedom of conscience, moral autonomy, bodily integrity, and personal identity are all quite obviously implicated.

As far as Michael Sandel's and Mary Ann Glendon's arguments are concerned, then, their objections to the notion of individual privacy rights target not only *Roe*, but the entire line of decisions acknowledging privacy as a freedom from regulation.

Of course, there are those who argue that there is no right to privacy articulated in the Constitution. Therefore, to accord such a right to individual women and to argue that it covers their decision whether or not to continue a pregnancy is as arbitrary as it would be to decide that fetuses are persons. However, I cannot enter into this doctrinal discussion and the enormous debate among constitutional law scholars whether or not privacy rights are protected by our Constitution and whether they can be applied to the abortion controversy. For an overview, see Bork, supra note 1; Dworkin, Unenumerated Rights, supra note 111; Ely, Democracy, supra note 1.

[134] Roe, 410 U.S. at 162–65.

regulate and even outlaw abortion after a certain point in pregnancy. It is simply false to assume that by asserting that the state has a legitimate interest in something, even a compelling one, the Court thereby ascribes legal personhood to what is being protected. The "when life begins" issue was significant to the Court because it had to determine whether fetuses qualify as *persons* who cannot be deprived of life under the Fourteenth Amendment. The Court was clear that they do not, and it has not changed its mind on this issue.[135] Thus, in drawing a line at some point in pregnancy after which state regulation is permissible, the Court is not deciding the moral question of when life begins—it is deciding the constitutional question of what counts as a legitimate state interest and when such an interest can be deemed compelling enough to limit the exercise of an individual right. The Court in this case clearly was seeking to give adequate room for the community to articulate its high regard for the value of human life (described in *Roe* as the state's legitimate interest in potential life[136]), while at the same time affording adequate protection for the fundamental rights of constitutional persons, in this case, individual women. To be sure, the precise point at which the line is drawn, after which the state's interest in potential life is deemed "compelling," requires justification. But while the point has to be somewhat arbitrary, it need not be completely so—it can mesh with our general and common moral intuitions. This was one of the reasons for the viability standard.

However, as Sandel points out, the Court's introduction of the viability standard is flawed, and it does seem in retrospect as if this particular standard was based on a covert value judgment. This is because the Court never adequately explained what the state's interest in potential life is or why, upon viability, it becomes compelling.[137] It is clear from *Roe* that

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[135] Id. at 158. As Justice Blackmun indicates in his *Casey* opinion, "[n]o member of this Court—nor for that matter, the Solicitor General . . . —has ever questioned our holding in *Roe* that an abortion is not 'the termination of life entitled to Fourteenth Amendment protection.'" Casey, 112 S. Ct. at 2848 (Blackmun, J., concurring in part, dissenting in part) (quoting Roe, 410 U.S. at 159); see also id. at 2839 (Stevens, J., concurring in part, dissenting in part).

[136] Roe, 410 U.S. at 158.

[137] In his disagreement with the plurality's understanding of the trimester framework in *Casey*, Justice Stevens clarifies, at least, the nature of the state's interest in potential life, if not the viability standard. First, he insists that it is no contradiction

> to recognize that the State may have a legitimate interest in potential human life, and at the same time, to conclude that that interest does not justify the regulation of abortion before viability . . . . The fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty.

Casey, 112 S. Ct. at 2839 (Stevens, J., concurring in part, dissenting in part). Justice

the Court assumed that viability begins at the end of the sixth month, that is, when the fetus "presumably has the capability of meaningful life outside the mother's womb."[138] This meshed quite well with the traditional understanding of when quickening begins and with the state statutes prohibiting abortion, except for reasons of maternal health, in the third trimester. Thus, the viability standard seemed to make a great deal of sense.

On its own, however, viability is a strange standard, since it turns simply on the technological ability to foster the development of a fetus outside the womb and not on serious normative arguments about when or why potential human life becomes an intrinsic value to us. The problem, in short, with the viability standard is that it is both objectivistic and precarious. There is precious little about the technological ability to sustain fetal life in intensive care units of hospitals (at great monetary cost and physical risk to the fetus) that is morally compelling. For viability is not tied to any set of characteristics about human fetuses but only to the stage of development of medical science.[139] There is no normative argument underpinning the decision that a woman should be compelled to carry a fetus to term just because medical technology might be able to keep it alive. So it does seem to be the case that in using this standard, the Court is relying on an unarticulated moral intuition of its own.[140]

Stevens adds that the state's interest, in order to be legitimate, must be secular, and moreover, that it is not in loco parentis, for the fetus is not a person. Id. at 2839–40. The state's interest in potential life is "instead, an indirect interest supported by both humanitarian and pragmatic concerns." Id. at 2840. While this reasoning is not fully adequate in articulating the community value which the state is protecting, it is helpful in explaining the legal status of that value.

[138] Roe, 410 U.S. at 160, 163.

[139] Given potential "advances" in medical science, fetal viability could be pushed further and further back into early pregnancy. Logically, on this basis, a woman could lose her right to abortion altogether. This possibility was the source of Justice O'Connor's fear that the viability standard is on a collision course with the trimester framework. Webster v. Reproductive Health Servs., 492 U.S. 490, 529 (1989) (O'Connor, J., concurring); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 453–59 (1983) (O'Connor, J., dissenting); see Casey, 112 S. Ct. at 2811, 2817–18 (trimester framework abandoned).

[140] Medical technology can keep fertilized eggs and frozen embryos alive, as well. On this reasoning, abortion would *never* be permissible. It is revealing that instead of dropping the viability standard, the *Casey* plurality dropped the trimester framework and changed the pre-viability standard of review from strict scrutiny to undue burden. The decision lamented the insufficient attention paid to the state's legitimate interest in potential life throughout pregnancy and jettisoned the trimester framework precisely in order to be able to permit regulations on abortion not only in the second trimester, but also *prior* to viability, whenever that occurs. Certainly, the Court now insists on viability as the point before which abortions cannot be *outlawed,* but it opens up the entire period of pregnancy to regulation. Casey, 112 S. Ct. at 2816–21. On the

However, there is another way to look at the matter and to draw a line after which states may proscribe abortion that would avoid the problems inherent in the viability standard. This would involve two steps in reasoning. First, if one begins from the woman's fundamental right to decide whether or not to become a mother, a right acknowledged in *Eisenstadt*, *Roe*, and their progeny, then the constitutional issue at stake is whether the woman has had a chance to *exercise* what the Court freely acknowledges is a fundamental, albeit not an absolute, right. Much confusion could have been avoided had the Court drawn a line establishing a time after which states may regulate, and even proscribe, abortion, not on the basis of the objectivistic and shifting technological standard of fetal viability, but on the principled, constitutional ground of assuring to the pregnant woman *enough time* to be able to make her decision as to whether or not to continue her pregnancy, i.e., to exercise her basic right of decisional autonomy. If we reason from the standpoint of the pregnant woman and her rights, this line could not be drawn before the point at which the woman has had ample time to discover that she is pregnant, to make a considered decision regarding her pregnancy, and to carry it out.

And yet this is not all that enters into line drawing, as Sandel correctly surmises. The Court may also take community values into consideration when there is some degree of consensus on a normative issue. Only then may the Court assure the community the chance to institutionalize its values without violating neutrality or the individual's rights. Here Dworkin and others are helpful in pointing out that most people, pro-choice and pro-life, accept putting limits on late abortions because they believe that the fetus shares our humanity in an important way at the late stages of fetal development.[141] The moral intuition underlying this consensus is not a viability standard but a standard of recognized similarity between the fetus and the newborn in developmental terms. And it is here that medical science can play a helpful auxiliary role by backing up our belief in similarity with secular, scientific arguments. Medical science can help us in assessing when the fetus has developed the basic physiological systems that characterize newborns; this will not be changed by advances in medical technology.[142] Using medical information to back up the general consen-

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trajectory of case law from *Roe* to *Casey*, in which regulations prior to viability were eroded, see Linda C. McClain, The Poverty of Privacy?, 3 Colum. J. Gender & L. 119 (1992).

[141] See, e.g., Olsen, Unraveling Compromise, supra note 18, at 131. The main disagreement seems to be over when late pregnancy begins. Since abortion in the third trimester is generally not advocated except for the sake of maternal health, the disagreement over "lateness" revolves around the second trimester, in particular, the fifth to the end of the sixth month.

[142] Peter Wenz has argued that before the end of 20 weeks (5 months), fetuses do

sus on regulation of abortion in late pregnancy, the Court could justify drawing the line around the twentieth week without thereby being open to the accusation that it is violating neutrality by deciding a quasi-religious issue one way or the other.[143]

Thus, we can use Dworkin's approach and argue that the Court's decision in *Roe* remained relatively neutral vis-à-vis the controversy over how we ought to respect the value of life. And one can provide principled secular arguments for drawing a line during pregnancy after which the state's interest in potential life may be deemed compelling. However, it is clearly assumed that there is something that weighs rather heavily on the other side of the controversy. What is at stake here is not only neutrality in the face of religious differences. There is also the issue of the wrong done specifically to the pregnant woman if she is denied agency in this domain and if her constitutional rights are thereby violated.

If the individual directly affected by the abortion decision (the pregnant woman) is denied the right to make this decision according to her own moral lights, then her dignity and self-respect will be most severely threatened, for she may be asked to act in defiance of her own deepest convictions. Thus Dworkin argues that it is on the twin grounds of freedom of conscience (the neutrality argument) and moral autonomy that a woman ought to have the right to make the private choice to have a legal, safe abortion. On the same grounds as First Amendment protections of freedom of conscience in religious matters, a right to privacy along these lines precludes the state from requiring that a woman submit to some

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not develop the basic physiological systems that characterize newborns. While prior to this stage fetuses might have a heart or kidneys, they do not have lungs that can work, and they lack the neocortical functions of the brain that we associate with actual life. In short, they have not yet developed the physiological specializations necessary for human life to be attributed to them on any other than religious grounds. Therefore, one cannot argue on secular grounds that the failure to protect fetal life before that time weakens our cultural taboo against the taking of human life. Since the humanity of the newborn is an agreed upon secular value, the similarity between the fetus in late pregnancy and the newborn is not a religious, but a secular, determination. Somewhere between 20 and 28 weeks the only differences between the fetus and the newborn are in size, location, strength, temporary dependency on their mothers, and so on. Peter S. Wenz, Abortion Rights as Religious Freedom 53-77, 161, 200 (1992).

[143] Happily, the scientific analysis of fetal development and the decision-making standard articulated above roughly converge around the fifth month of pregnancy or thereafter.

The Court could also continue to insist on strict scrutiny of abortion restrictions before that time. As Justice Blackmun points out, "[t]o say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute. Regulations can be upheld if they have no significant impact on the woman's exercise of her right and are justified by important state health objectives." Casey, 112 S. Ct. at 2847 n.5 (Blackmun, J., concurring in part, dissenting in part).

bureaucrat, judge, or board of doctors her reasons for her choice. Insofar as it is her right to decide, then her reasons, her reflections, her personal considerations, and her conception of the good are no more matters of state scrutiny than are other freedom-of-conscience or personal privacy issues.

Far from suggesting the substitution of First Amendment rationales for privacy justifications, Dworkin sees them as mutually reinforcing and structurally complementary. Judicial neutrality vis-à-vis the religious controversies respecting freedom of conscience complements the principle of individual decisional autonomy in personal matters that is protected by privacy doctrine.[144]

Finally, I would like to emphasize something here which Dworkin mentions only in passing. It is, of course, the *pregnant woman* who invests her own life and identity in the life of the fetus. It is *she*, *alone*, who in carrying a pregnancy to term, contributes upon conception all three of the creative components which we honor in life: the natural, the personal, and the cultural. It is she who cares for, nurtures, and establishes a relationship with the fetus during pregnancy. So surely she should be able to decide whether or not she wants to undertake such an investment or to establish such an intimate relationship. To force a woman to undergo a pregnancy and bear a child because she is forbidden an early and safe abortion is not only to deny her control over her own body, but also to frustrate her life plans, to impose a new identity upon her—that of pregnant woman and mother—and to ask her to renounce her moral personality. It is literally to demoralize her. The Court deemed the basic right of privacy to protect women against this outcome.

III. PRIVACY AS AUTONOMY: THE RIGHT TO BE LET ALONE?

Construing the right to privacy in this way turns the tables on the communitarian critique by showing that the value of life is respected more by *encouraging* individual moral responsibility than through state-imposed conformity. It also takes women seriously as responsible, moral decision makers. But it does not go far enough because it fails to address the second communitarian argument leveled against the very idea of an individual right to personal privacy as decisional autonomy; namely, that such a right

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[144] "Since any competent interpretation of the Constitution must recognize a principle of procreative autonomy, states do not have the power simply to forbid abortion altogether." Dworkin, Unenumerated Rights, supra note 111, at 428. For a different view, see Sandel, Religious Liberty, supra note 63, at 610–15.

presupposes an atomistic (Glendon) or voluntarist (Sandel) concept of the individual and a philosophical anthropology of the self that is both incoherent and incompatible with moral responsibility. The appeal to autonomy appears to undermine the claims to neutrality because it seems to rest on a controversial substantive ideal of the person.[145]

Glendon and Sandel each make this charge, albeit with differing degrees of sophistication. Glendon argues that the Court's rulings protecting decisional autonomy embody a view of society as a collection of separate, autonomous, self-sufficient individuals.[146] This "flaw" in privacy doctrine is, according to Glendon, distinctively and deplorably American.[147] She construes the right to privacy in American constitutional law simply as the *right to be let alone*, which in turn presupposes a conception of the individual as autarkic, isolated, and sovereign.

Sandel's critique of the principle of autonomy protected by privacy rights goes much deeper. In his famous argument against John Rawls, he contends that the liberal conception of justice, which privileges the idea of equal rights over substantive conceptions of the good, presupposes an anthropological concept of the self which is not only isolated, atomistic, and autonomous, but also radically unsituated.[148] The essentially encumbered self is a "subject[] of possession, individuated in advance and given prior to [its] ends . . . ."[149] This self adopts a distanced attitude toward all possible life goals and voluntaristically chooses its own conception of the good as if it were one among many dispensible preferences:

> [T]he unencumbered self describes first of all the way we stand toward the things we have, or want, or seek. It means there is always a distinction between the values I *have* and the person I *am* . . . . One consequence of this [is] . . . . it rules out the possibility of what we might call *constitutive* ends . . . .
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> For the unencumbered self, what matters above all, what is most essential to our personhood, are not the ends we choose but our capacity to choose them.[150]

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[145] For Sandel, this amounts to the destruction of the minimalist case for neutrality. Sandel, Moral Argument, supra note 63, at 532.

[146] Glendon, Abortion, supra note 64, at 33–39.

[147] Id. at 51–58. "Our law stresses autonomy, separation, isolation in the war of all against all . . . ." Id. at 58. In her more recent work, under the admitted influence of Sandel, Glendon distinguishes American law from Western European law, not based on its "individualism," but on its view of what the individual is. Glendon, Rights Talk, supra note 64, at 48 n.4.

[148] Michael J. Sandel, Liberalism and the Limits of Justice 179–83 (1982).

[149] Michael J. Sandel, Justice and the Good, in Liberalism and Its Critics, supra note 100, at 159, 166.

[150] Sandel, Procedural Republic, supra note 63, at 81, 86–87.

Accordingly, the autonomous unencumbered self is construed as external to its own identity. It has no constitutive attachments but merely a set of preferences from which it can pick and choose. It is this self that is allegedly presupposed by the new privacy rights protecting decisional autonomy.

Indeed, Sandel has published a series of articles in which he criticizes the idea of freedom of choice in a number of contexts, including First Amendment jurisprudence, the abortion decisions, and the decisions regarding sodomy and homosexuality.[151] In its privacy cases, it is the Court's individualism which Sandel abhors, for the Court seems to conceive intimate relationships as entirely the product of personal choice, instead of as constitutive of the persons who participate in them. In sum, the new privacy rights undermine both community (in this case, family) and concrete identity because they rest on an atomistic conception of the self which is in turn subsumed under abstract universalist moral oughts (rights) that deny, and even undermine, the particular identities of situated individuals.

Against this conception of the self, Sandel insists that everyone is radically situated with identities, self-understandings, and values shaped through community-mediated communicative processes of socialization. Therefore on theoretical grounds, the liberal conception of the self presupposed by individual privacy rights as a solipsistic, pre-societal being is impossible. We are not separate from, but tied to and defined by, our aims and attachments, and these flow from our embeddedness in a specific context and community which is constitutive of who we are and to which we owe duties of loyalty. We also owe particular duties of responsibility to the specific people with whom we have special relationships. Individuals do not create their moral vocabulary ex nihilo; it is inherited from the traditional understandings into which they are socialized and which, in turn, nourish their self-understandings and provide the content of their particular identities. Sandel thus sees us as particular, albeit self-interpreting, beings, able to reflect on our history and to revise to some extent our identities, but situated nonetheless.

Now if Sandel and Glendon were correct about the conception of the self imputed to the "new" privacy doctrine protecting individual choice over personal matters, they would have a strong case indeed. But they are not

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[151] Sandel, Moral Argument, supra note 63 (discussing abortion and homosexuality); Sandel, Religious Liberty, supra note 63 (discussing the First Amendment); see also Sandel, Procedural Republic, supra note 63, at 87 ("What is denied to the unencumbered self is the possibility of membership in any community bound by moral ties antecedent to choice; he cannot belong to any community where the self *itself* could be at stake.").

correct. There is no obvious connection between the voluntarist conception of the self articulated above and the notion of the rights-bearing individual. The institution of personal privacy rights does not automatically entail the particular version of liberalism targeted by this critique. Nor must it presuppose a voluntarist conception of the individual.[152] Finally, the autonomy protected by privacy rights need not be construed so as to involve a metaphysical, unencumbered, atomist, autarkic, or asocial concept of the self. There is no conceptual connection between rights in general, privacy rights in particular, and the ideological version of the self just described. If it has been so interpreted in the past, then it is time to change the interpretation, not to jettison the principle of individual privacy rights.

Sandel's argument is based on a category error: abstract concepts such as legal personality, personal privacy rights, or decisional autonomy are not equivalent to an ontological description of the self or a particular concept of individual autonomy.[153] The principle that individual privacy rights

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[152] See Larmore, Patterns, supra note 103, at 40–90; Larmore, Political Liberalism, supra note 103 (defending the institution of rights without drawing on voluntarist assumptions or on a metaphysical conception of autonomy); see also Lefort, supra note 7, at 250–58 (criticizing the ideological bourgeois or liberal understanding of what rights entail, and articulating and solving the second "paradox" of rights to which critics of liberalism often advert).

> [T]he paradox is this: the rights of man appear as those of individuals, individuals appear as so many little independent sovereigns, each reigning over his private world, like so many micro-entities separated off from the social whole. But this representation destroys another: that of a totality which transcends its parts. It discloses a transversal dimension of social relations, relations of which individuals are the terms but which confer on those individuals their identity, just as much as they are produced by them.

Id. at 257. Lefort's point is that what appears to be separation reinforced or created by individual rights, especially privacy rights, is actually a modality of one's relation to others, but one which escapes all corporate models of the social whole. As such, basic rights, including privacy rights, construct the conditions for interaction and communication; they do not presuppose isolation or individual autarky.

[153] Sandel seems to conflate three different levels of meaning of the word "autonomy": the moral, the legal, and the empirical (psychological or social). But privacy rights securing decisional autonomy to individual legal subjects over "personal matters," however construed, do not describe the ideal properties of moral actors or of moral judgments. Nor do they refer to the empirical ability of concrete subjects to determine their lives without constraint (a matter of psychical maturity and social context). The legal meaning of constitutionally protected rights to privacy with respect to personal matters is that such rights *confer* decisional autonomy onto the individual, thereby acknowledging their agency in the relevant domains. They do not *presuppose* autonomous individuals or any particular ideal of the self. Constituted as the rights holder, it is up to the individual to choose whether and how to exercise her legally recognized agency. That is the meaning of legal autonomy inherent in the concept of basic rights.

Just who is deemed capable of legal personhood in this sense is another matter. In

protect decisional autonomy (choice) regarding certain personal or intimate concerns can go quite well with a recognition of the intersubjective character of processes of personal identity formation and the historical, contextual sources of our values. Decisional autonomy presupposes the communicatively mediated processes of moral development that make practical reflection and reasoning possible. None of these insights, however, obviate the need for privacy as decisional autonomy when it comes to certain choices for the socialized, embedded, interdependent, communicative individual who views her identity needs as constitutive of who she is. Moreover, only if every individual's capacity for moral reflection and justification, along with self-interpretation and partial revision of their identities and moral positions, is protected against coercion by the state or the majority of the "community" can the individual function as a moral agent at all. These values may come from the "community," but our attitude toward them is not thereby predetermined.

To be sure, there have been rather controversial attempts to justify individual rights by appealing to a comprehensive conception of the autonomous individual. But one could accept the critique of the Kantian or Millian concept of autonomy without assuming that privacy rights have to entail this sort of justification or, for that matter, any *comprehensive* conception of the person or overarching substantive moral worldview.[154]

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the past, many groups, including workers, African-Americans, certain immigrants, and women, have been denied legal personhood on the grounds that they are, by definition, incapable of autonomy. But the content of the conception of autonomy operative here was not dictated by the abstract conception of legal personhood. Rather, it was drawn from a cultural and ideological conception modeled on the bourgeois market actor, construed as a male bread winner, and the theory of possessive individualism which construed the "autonomous individual" as self-sufficient and independent of the will or (economic) support of others. This, of course, meant that women were denied recognition as full-fledged individuals. We can extend legal autonomy to natural persons without, however, buying into this ideology. What we must realize is that, by conferring legal personhood, the law constitutes and protects a structure of recognition whereby the individuality of the natural person is acknowledged and confirmed. See Jeremy Waldron, Nonsense upon Stilts?—A Reply, in Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man 151, 166–90 (Jeremy Waldron ed., 1987) (replying cogently to the claims that personal rights, like bodily integrity, liberty, and privacy, entail an abstract or atomist conception of the individual). Excellent references can be found here regarding the earlier stages of the communitarian/liberalism debate. See also Charles Taylor, Cross-Purposes: The Liberal-Communitarian Debate, in Liberalism and the Moral Life 159 (Nancy L. Rosenblum ed., 1989) (acknowledging that such charges confuse different levels of analysis and lead to a dead end).

[154] See Larmore, Political Liberalism, supra note 103, at 350 (granting that the norms of rational dialogue and equal respect do make a certain individualism overriding within the political realm, but do not imply that a broader individualism, concerning the sources of value, must pervade the whole of social life). Just as it is not necessary to saddle privacy rights with atomistic ontologies or abstract conceptions of the self, it is

One could, in other words, argue that the principle of privacy rights rests on the *abandonment* of "the cult of wholeness" presupposed by general philosophies of man. Indeed, it rests on and secures, along with other sets of rights, differentiation between our status as legal persons and our functioning as concrete, unique individuals involved in specific relationships and in particular communities where we may indeed be quite engaged with others, and deeply committed to substantive ideals of the good.[155] Sandel's critique, in short, conflates the legal with the natural person.

In sum, privacy rights are meant to ensure certain domains of decisional autonomy to every individual, not an atomist or voluntarist conception of the individual. They protect one's decisional autonomy vis-à-vis certain crucially personal concerns, they do not dictate the kinds of reasons one gives for decisions or the reflective processes informing the decision. Thus, on the privacy justification for reproductive choice, a woman may decide for or against abortion on the basis of her community's values, her religious worldview, or her discussions with "significant others"—her relation to tradition, community, or loved ones is not in question here. *Her right to decide does not dictate the basis of her decision.* Privacy rights identify the individual as the locus of decision making when moral dilemmas or existential issues are involved; they do not dictate to whom one must justify one's moral choices nor the kinds of reasons one must give. As Hannah Arendt argued long ago,[156] such rights ascribe a legal persona to the individual that serves as a protective shield for her concrete, unique identity providing the formal enabling conditions for her to pursue her conception of the good without unjust interference by the state.

Thus, when the language of autonomy or choice appears in Court decisions, there is no reason to impute to the Court a voluntarist ideal of the person.[157] Ascribing decisional autonomy to individuals over certain

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not necessary to assume that arguments in favor of privacy or other sets of rights assume that all political and moral values can be expressed in these terms. See Cohen & Arato, supra note 21, at 555–604; Waldron, supra note 153, at 183–90.

[155] While I agree with Larmore on this point, I do not follow him in labeling all that is non-state the private realm. For a model of civil society that breaks with the public/private dichotomy as a paradigm for the social structure, see Cohen & Arato, supra note 21, at 421–91.

[156] Hannah Arendt, The Origins of Totalitarianism 267–302 (1973).

[157] Sandel, Moral Argument, supra note 63, at 524. To be sure, there is little agreement today over how to define a *philosophical* concept of autonomy. It is one thing to say that the individual rather than the state has the right to make decisions when intensely personal matters involving quasi-religious worldviews, bodily integrity, and individual identity are at stake. Here one means "self-determination" when one invokes the concept of "autonomy." It is quite another thing to explicate what

issues does not commit the concept of privacy rights to a conception of the disembedded individual, but simply militates against state paternalism, whether in the guise of "community norms" or "majority will."

IV. PRIVACY AND IDENTITY: THE RIGHT TO INVIOLATE PERSONALITY

Even though this interpretation of the privacy right to decisional autonomy can be defended against the above criticisms, it is not sufficient to account for the issue of identity raised by the communitarian intervention. According to Sandel, we must proceed in our moral and legal reasoning on the assumption that we are dealing with concrete selves, not abstract persons; with individuals defined in and through their ends, for whom attachments and beliefs are constitutive of who they are, and whose goals are essential to their good and indispensable to their identity. The self-realization of the individual so understood is indeed tied to a social precondition: shared values and membership in solidary communities in which norms and traditions are transmitted and mutual recognition of concrete identities is granted.

Thus, when Sandel and Glendon speak of the community's conception of the good, and of the "right" of the community to institutionalize its values (community self-realization), they have shifted terrain from issues of autonomy/justice to concern with identity/the good. Clearly, the abortion issue straddles this faultline. But they are wrong to restrict the issue of the good to the integrity of community values or common identity as if there were, in highly differentiated, pluralist, and multicultural civil societies, a single overarching conception of the good, or a single substantive collective

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conditions render choice autonomous, what capacities are entailed, and what "autonomy," as self-determination, actually means. Critiques from Marxist, communitarian, deconstructionist, and feminist points of view of the liberal concept autonomy, targeting the individualistic, metaphysical, and rationalist presuppositions with which it has been burdened, are myriad. More interesting now are the attempts to rethink the concept of autonomy in light of such criticisms.

For recent efforts to develop a non-metaphysical, inter-subjective, and woman-friendly concept of moral autonomy, see Nedelsky, supra note 45; Maeve Cooke, Habermas, Autonomy and the Identity of the Self, Phil. & Soc. Criticism (forthcoming) (manuscript, on file with author); Kenneth Baynes, Autonomy, Reason and Inter-subjectivity (1992) (unpublished manuscript, on file with author). For a critique of this enterprise, see Christine Di Stefano, Rethinking Autonomy (1990) (paper delivered at American Political Science Association Annual Meeting, on file with author). For an attempt to develop an adequate conception of psychological autonomy, see Joel Whitebrook, Reflections on the Autonomous Individual and the Decentered Subject, 49 Am. Imago 97 (1992).

identity upon which we all agree.[158] This sort of philosophical realism vis-à-vis common identity is misleading, to say the least.

It also seems as if these theorists assume that the individual good and the common good, individual and group identities completely overlap.[159] Since they patently do not, the need to protect the integrity of those dimensions of individual identities and conceptions of the good that are *different* from majoritarian interpretations of collective identity, or of the common good on any level, is a crucial one.

If certain versions of liberal theory have operated with a controversial notion of autonomy, the communitarians suffer from the opposite difficulty. They have tended not only to abandon the value of autonomy altogether, but also to suppress the problem posed by the *difference* and potential conflict between individual and group identity, and among group identities within one civil society. Group identity is, of course, part of the identity of the members of the group. But in modern pluralist, differentiated, civil societies, individuals belong to many different groups, play a variety of social roles, and have "communal" identifications that operate on different levels of the social structure. The sources and inputs into individual identity are multiple and heterogeneous. The fact that one is situated within a plurality of communities, that one must act out a number of often conflicting roles, ought to lead back to the acknowledgement of the centrality of individual agency and choice in the shaping of a life. The personal dynamics of shifting involvements among separate spheres, roles, and commitments required by life in a highly differentiated modern society create the need and the possibility for each individual to develop a strong sense of self, along with the ability to form, affirm, and express *her unique identity* as it develops and changes over time in an open multiplicity of contexts.[160]

While individuals do not invent the traditions, patterns, and norms into which they are at first socialized, they do invent and reinvent the unity of their lives and their unique identities (of course, in interactive, communicative processes). They also contribute to reinterpreting norms, and to redescribing traditions and narratives. Both constituted and constituting, the

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[158] For an amusing critique of what he calls "the phantom community," see Stephen Holmes, The Permanent Structure of Antiliberal Thought, in Liberalism and the Moral Life, supra note 153, at 227, 230–31.

[159] For an interesting discussion of this issue, see Nancy L. Rosenblum, Pluralism and Self-Defense, in Liberalism and the Moral Life, supra note 153, at 207.

[160] For an account of the role that privacy rights play in protecting the capacities of individuals to maintain and present to others (for recognition) a coherent sense of self, in highly differentiated modern societies, see Niklas Luhmann, Grundrechte als Institution, 53–84 (1965).

identity of the concrete individual is not just a set of preferences, from which she can pick and choose. Nor is it simply the product of communal values, social embeddedness, shared traditions, or a set of social roles. All of these, in fact, are open to conflicting interpretations by individuals and subgroups within a particular society. Precisely because it is the individual's task to develop and express her unique personality out of the multiplicity of memberships and affiliations she is involved in, precisely because she requires recognition for her concrete personality, her opportunity for self-realization and self-presentation requires protection. Such protection affords to the individual a sense of control over her self-definitions, over the self-creative synthesis that only she can fashion out of her various locations and background, done in part through communicative interaction with others.[161] Thus, I assert that *by narrowing individual privacy rights down to the right to be let alone, by assuming that decisional autonomy must entail an arbitrary relationship between the individual and her ends, by saddling personal privacy rights with an abstract conception of the individual that allegedly ignores the real individuality of members of concrete communities*, the communitarian critics have deprived themselves of an important source of protection for the integrity of individual as well as group identities, which may differ from the conceptions that the state seeks to promote at any given time.

We can take up the concern for the situated dimensions of identity in addition to moral autonomy and argue that the institution of individual privacy rights protects both agency *and* identity, both autonomy *and* self-realization, without prescribing any particular concept of the self on either level. What, if not a right to privacy, protects the variety of identities of individuals and groups living in modern civil societies from being suppressed in the name of some vague idea of community values or the majority's conception of the common good?[162] Personal privacy rights

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[161] I do hope that I shall not be accused of realism and essentialism vis-à-vis individual identity, or of reinscribing a naive "modernist" conception of the unitary, autonomous rational subject because of these statements. I acknowledge the multiple and often conflicting sources of identity, as well as the frequent political contestation over the cultural codes and social practices that go into identity formation. My analysis rests neither on an essentialist conception of identity nor on an individualist ontology. I have discussed the role of social contestation in identity formation at length in Cohen & Arato, supra note 21, at 492–563.

[162] Certainly, provisions for the participation of every group on equal terms in the public spaces of civil and political society, so that no perspective is excluded or discriminated against in deliberations over norms and policies, are indispensable. They empower people (through "voice") to assert and protect their collective identities in public. But individual personal privacy rights are indispensable nonetheless. One can always be outvoted even in the most democratic of public spaces, and certain personal concerns cannot wait for the success in convincing others that they are valid. The need

protect the constitutive components of one's identity as much as they protect one's decisional autonomy. Moreover, they ensure respect and protection for difference—for individual (and group) identities which seem to deviate from the "norm." If one examines the arguments from *Eisenstadt* to *Roe* and their progeny, it becomes clear that the reason why decisional autonomy is considered indispensable for women in the case of abortion and other intimate personal concerns is because one's identity is at stake.[163]

Much more is involved here than the right to be let alone. What is at stake is the protection of concrete, fragile identities, and self-creative processes which constitute who we are *and* who we wish to be. When properly understood, privacy rights protect these as well as the chance for each individual to develop, revise, and pursue her own conception of the good—her identity needs. Let me formulate the standard that underlies this aspect of privacy as *the right not to have one's constitutive identity needs violated or interfered with by the state for non-neutral uncompelling reasons*. This standard is the flip side of decisional autonomy and personal liberty, for it also militates against the imposition of an identity onto one which one does not freely affirm and embrace.

Here, too, nothing is implied about sources of values or the attitude of individuals vis-à-vis the constitutive traditions and memberships to which they are attached. Privacy rights do not prescribe what identities should be like, rather, they secure to all individuals the preconditions for developing intact identities which they can embrace as their own. On the one side, by

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to terminate an unwanted pregnancy is a perfect example.

[163] Let's not forget the language in Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), which articulated "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." See also Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976), wherein the Court struck down a husband-consent provision in a Missouri law, on the grounds that the woman "is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." Cf. Justice Blackmun's dissent in Bowers v. Hardwick, 478 U.S. 186, 199, 204–05 (1986), where he argued for privacy rights vis-à-vis intimate decisions and forms of interaction "because they form so central a part of an individual's life. . . . individuals define themselves in a significant way through their intimate sexual relationships with others." Hence, it is not "liberal tolerance" in the form of voluntarist justifications for privacy rights that denigrates difference, but Sandel's own approach that is guilty of this. Sandel claims that if we replace the privacy justification based on individual autonomy with an approach that focuses on the recognition of socially valued human goods when assessing the legitimacy of sodomy laws, we will come to esteem, and not merely tolerate, homosexuality. To the degree to which homosexual partnerships share the same virtues as heterosexual marriage, they should be accepted. Sandel, Moral Argument, supra note 63, at 534–35. But this is hardly a recognition of difference—it accepts *only* those practices that approximate the norm of heterosexual marriage; it does not acknowledge different identities or conceptions of the good.

securing everyone's juridical personhood and decisional autonomy equally, privacy rights protect the claim of every concrete individual, no matter how different or odd, to be treated as a peer by members of the community.[164] On the other side, privacy rights shield the personal dimensions of one's life from undue scrutiny or interference. As such, they protect the processes of self-development and self-realization that allow each individual to define herself.[165] The principle that articulates this idea in American privacy doctrine is, of course, the principle of *inviolate personality*.[166] It refers to those particular values, projects, attachments, and allegiances of individuals that are constitutive of their identity, over which they must exercise control. It is my claim that "the new privacy" protects decisional autonomy *and* inviolate personality, both the abstract *and* situated dimensions of our personhood.[167]

As Glendon has noted, privacy rights do indeed mark off a protected sphere surrounding the individual, constituting an invisible shield around the person.[168] But this is not a separate institutional sphere—individuals carry their protective shields, their legal personalities with them wherever they are. They are not thereby burdened with an asocial conception of individuality, as Glendon seems to believe. Instead, privacy rights shielding personality development protect the integrity and inviolability of *socialized* individuals.[169]

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[164] See generally Arendt, supra note 156, at 267-302.

[165] Whether this could serve as a basis for claiming affirmative obligations on the part of government to ensure reproductive freedom for women remains to be seen. All that I wish to argue here is that in my redescription, the principle of privacy rights is an enabling one, and hence it is not antithetical to claims for state assistance and facilities if these are necessary for the exercise of the right.

[166] For the classic statement of this principle as the core of what privacy rights should protect, see Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, in Philosophical Dimensions of Privacy 75, 85 (Ferdinand Shoeman ed., 1984).

[167] Nevertheless, Glendon insists on interpreting the American right to privacy only as the right of atomistic individuals to be let alone. But while this stance may with some justice be imputed to the image of the commodity owner rationally calculating market choices, there is little reason to generalize this as a presupposition of the idea of inviolate personality. And surely Glendon's interpretation is a caricature of the conception of identity and inviolate personality that the privacy justification in *Roe* and its progeny meant to protect.

[168] Glendon, Rights Talk, supra note 64, at 40, 52.

[169] Nor do such rights entail a rigid conception of individual identity needs. They in no way preclude the individual from seeking to express and examine her personal identity needs in discourses with others, thereby rendering her need interpretations "fluid" and open to revision. Such rights simply liberate one from the obligation to justify one's needs and actions to everyone by giving reasons which everyone together could accept as their own. For when personal existential matters are at stake, it does not matter whether the reasons decisive for me could be accepted by everyone else. A

It is a commonplace understanding that although the practices and rituals of privacy vary across cultures, *every* society acknowledges the normative importance of privacy.[170] Every society establishes "rules of civility" that safeguard respect for individual privacy and which constitute, in a sense, both individuals and the community.[171] The integrity of individual personality is dependent, in part, upon the observance of social rules of deference and demeanor that bind the actor and recipient together. In following these "rules of civility," individuals establish and affirm ritual and sacred aspects of their own and the others' identities while affirming the social order.[172] The violation of these rules indicates a lack of recognition for personal dignity and can damage a person by discrediting her identity and injuring her personality, thereby disconfirming her sense of self. Thus, the reciprocal recognition of personal privacy is a core dimension of successful social interaction based on mutual recognition of the integrity and inviolability of the participants.[173]

Indeed, the normative nature of privacy lies precisely in the protection of what Erving Goffman has called "the territories of the self"—a preserve to which an individual can claim "entitlement to possess, control, use, dispose of . . . ."[174] Defined by normative and social factors, territories are a vehicle for the exchange of meaning: they serve as a kind of language through which persons communicate with each other.[175] But they are also central to the subjective sense that the individual has concerning her selfhood. What counts is not whether a preserve is

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privacy right entitles one to choose with whom one will attempt to examine one's need interpretations and to whom one will choose to justify one's existential choices. It also assures that the choice is one's own and the interpretation of one's needs is a self-interpretation, not one imposed from without.

[170] See Barrington Moore, Privacy (1984); Robert R. Murphy, Social Distance and the Veil, in Philosophical Dimensions of Privacy, supra note 166, at 34–55.

[171] See Post, supra note 53, at 963.

[172] Erving Goffman, The Nature of Deference and Demeanor, in Interaction Ritual: Essays on Face-to-Face Behavior 47, 90–91 (Pantheon Books 1982) (1967).

[173] See Luhmann, supra note 160, at 53–84.

[174] Erving Goffman, Relations in Public 28 (1971); see also The Sociology of Georg Simmel 321 (Kurt H. Wolff ed. & trans., 1950) (speaking of an ideal sphere around every human being which "cannot be penetrated, unless the personality value of the individual is thereby destroyed"); Edward Shils, Privacy: Its Constitution and Vicissitudes, 31 Law & Contemp. Probs. 281 (1966).

[175] Goffman, supra note 174, at 29–41. Here Goffman mentions eight territories of the self: some of which are spatial, some egocentric. Among these are informational preserves, or what traditionally is treated under the heading of privacy, but also what Goffman calls the body's sheath, a preserve in its own right yet also the purest kind of egocentric territoriality. What characterizes all of the preserves is their centrality to one's self-understanding, to one's identity. I do not share Goffman's focus on the strategic dimension of self-presentation, yet I find his analysis illuminating.

exclusively maintained or shared, or given up entirely, "but rather the role that the individual is allowed in determining what happens to his claim."[176]

On this normative conception of privacy it is clearly the sense of control over one's identity needs, over access to oneself, over which aspects of oneself one will present at which time and to whom, as well as the ability to press or to waive territorial claims, that is crucial and *empowering*. Indeed, this control is the sine qua non for understanding oneself to be an independent person worthy of respect and capable of establishing regard.[177] In our society, the right to privacy thus secures more than the principle of respect for persons as choosers, more than secrecy and solitude: it protects the social rituals by means of which one's identity as a person with dignity is acknowledged, one's selfhood, guaranteed.

> Privacy is an essential part of the complex social practice by means of which the social group recognizes and communicates to the individual—that his existence is his own . . . this is a precondition of personhood . . . . And this in turn presupposes that he believes that the concrete reality which he is, . . . belongs to him in a moral sense.[178]

The language of possession here should not mislead us—what is meant is that by virtue of privacy, one is able to maintain a sense of selfhood and of personal identity, not that these are a form of alienable property. While a right to privacy protects the *inviolate personality* of all individuals, it also protects the communicative infrastructure (the rules and rituals of civility) crucial to their interaction and to their developing and maintaining an intact sense of self.

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[176] Id. at 60.

[177] Again one must note that what counts as a territory of the self varies over cultures, time, and across groups within cultures. There is also obviously a power dimension involved here: The degree of control one has over such territories depends on one's class, race, gender, and position in various hierarchies. It is precisely the near-total violation of privacy in this sense that is so unbearable in what Goffman has called "total institutions." Erving Goffman, On the Characteristics of Total Institutions, in Asylums 1 (1961).

It is thus misleading to think of privacy as negative—as involving solitude, limited access, and anonymity. Privacy as control is a precondition of interaction and respect, because privacy (observance of the rules of civility) is part of interaction.

[178] See Jeffrey Reiman, Privacy, Intimacy and Personhood, in Philosophical Dimensions of Privacy, supra note 166, at 310. Reiman notes that "selves" are created in social interaction rather than flowing innately from inborn seeds. Yet he insists, correctly, that privacy is necessary to the creation of selves out of human beings, for a self regards his existence as his own.

V. EXCURSUS ON PROPERTY AND PRIVACY

Why then do so many critics persist in burdening privacy rights with the possessive individualist model of the self? I believe, as indicated earlier, that the reasons for this lie partly in the historical association of privacy with property. Glendon explicitly addresses this issue. She reminds us that at the time our Constitution was being written, private property was the cardinal symbol of individual freedom and independence in the United States and Europe.[179] As the property paradigm developed in America, however, it acquired a rhetoric of absoluteness, predicated on an image of the isolated, sovereign, possessive individual that is unique to the U.S.[180]

To be sure, Glendon acknowledges Jennifer Nedelsky's argument concerning the decentering of property rights in the aftermath of the New Deal, and the decline of vigorous, direct constitutional protection for entrepreneurial property in the wake of the development of the regulatory welfare state.[181] However, she cites the new constitutional right of privacy as evidence for the continued weight of the paradigm of property in constitutional jurisprudence, albeit under a new guise:

> Much of the attention the Supreme Court once lavished on a broad concept of property including the freedom of contract to acquire it, it now devotes to certain personal liberties that it has designated as "fundamental." Remarkably, the property paradigm, including the old language of absoluteness, broods over this developing jurisprudence of personal rights. The new right of privacy, like the old right of property, has been imagined by the Court and lawyers generally as marking off a protected sphere surrounding the individual . . . the old property rhetoric has been simply transferred to this new area.[182]

Accordingly, the new privacy rights, especially the right to abortion, insofar as they protect the integrity, autonomy, and inviolate personality of the individual, are heavily burdened with the legacy of the property paradigm, i.e., with the notion of the individual as lone rights bearer.

Of course, for Glendon, the perfect example of this "flaw" in American privacy doctrine is *Roe v. Wade*. Glendon traces the problem

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[179] Glendon, Rights Talk, supra note 64, at 24. Of course she is referring here to the fear on the part of the "founders" of a threat posed to property rights by popularly elected legislatures.

[180] Id. at 24.

[181] Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy (1991).

[182] Glendon, Rights Talk, supra note 64, at 40.

back to the influential and pathbreaking 1890 article by Warren and Brandeis, "The Right to Privacy."[183] The authors claimed to have discovered what was really being protected in a range of cases involving victims of unseemly prying, in which courts had previously rested their decisions on property rights. At stake was not property in the economic sense (nor simply the right to be let alone) but inviolate personality: the integrity and autonomy of the individual as a personal right. Clearly afraid that the concept of property rights was becoming an inadequate and too indirect means of protecting something which is not an economic entity at all, Brandeis and Warren argued for protecting inviolate personality in its own right as the core of a right to privacy. In Glendon's eyes, however, this proves that "[p]rivacy was thus, quite literally, pulled from the hat of property."[184] Accordingly, the idea of privacy derives from the traditional idea of property and remains burdened with all of its old presuppositions, insofar as it too constructs a sphere around the individual which no one can enter without permission, in order to provide the most reliable basis for individual independence.[185] For Glendon, then, the American notion that a right to privacy provides an invisible shield around the individual's personality, protecting those areas of decision making that are deemed central to one's moral integrity and identity, is simply a transposition of the prejudices formerly attached to property, over to a new domain.[186]

As seductive as it is at first sight, this interpretation of "the new privacy" is unconvincing. There is not much in *Roe* that confirms the charge that the paradigm of property or possessive individualism underlies the privacy right recognized for women vis-à-vis abortion.[187] The Court explicitly rejected the effort made by some *amici* to link the idea that one has an unlimited right to do with one's body as one pleases to the right of privacy previously articulated in the Court's decisions.[188] Repeatedly, the Court insisted that the pregnant woman cannot be isolated in her privacy and that her right to terminate her pregnancy is not absolute.[189] Neither the rhetoric of absoluteness nor the idea that one owns oneself or one's body as property is in evidence here. What *is* in evidence in *Roe* and its progeny is the effort to protect, through the concept of privacy, personal

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[183] Id.

[184] Id. at 51.

[185] Id. at 52.

[186] Id. at 29.

[187] But see Poovey, supra note 62, at 239-56, for a deconstructionist feminist argument indicting the language of *Roe* for this, and much more.

[188] I shall return to this issue in part VI, infra.

[189] Roe v. Wade, 410 U.S. 113, 159 (1973). As we saw, this was the point behind the viability standard and the trimester framework.

liberty and inviolate personality with respect to concerns that impinge directly upon one's identity and self-understanding.[190]

Glendon remains insensitive to this issue, in part, because she fails to take seriously the doubleness of the original paradigm of property which she is so quick to criticize and to find lurking in every attempt by the Court to protect individual privacy. It is hardly a novel argument that, in the American constitutional tradition, property rights have been associated with a rhetoric of *absoluteness,* and have therefore served to reinforce inequality and injustice. Construed as the most central of civil rights—indeed, as the paradigm of such rights—property, together with the overall constitutional design geared toward restricting, rather than fostering, popular participation in government, served to turn the attention of the people to the pursuit of their private interests rather than to politics and to block state efforts at distributive justice.[191]

Property was also the quintessential instance of individual rights as *limits* to governmental power, symbolizing the boundary to the legitimate scope of governmental authority, and hence, serving as the foundation of American freedoms.[192] The dual role of property was thus to secure, on a pragmatic level, stability and prosperity (along with inequality), on an ideal or symbolic level, the principle that majority rule is not the sole criterion for legitimate governmental action. Because of its concreteness, property was a perfect candidate for playing the symbolic role of limiting government and protecting personal liberty and dignity.

However, as Nedelsky points out, since roughly 1937, property lost its central place in the constitutional structure, and neither it nor its sister concept, freedom of contract, have been invoked by the Supreme Court to challenge legislation for many years.[193] Since the New Deal, property has ceased to be regarded as the first among civil rights, and it no longer plays

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[190] The joint decision in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), reaffirms this argument. Citing the line of cases defending personal liberty as a fundamental privacy right, the Court argued that "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Id. at 2807. That the plurality in *Casey* does not take the principles it articulates seriously enough in their own decision, as indicated in their abandonment of the strict scrutiny standard for laws regulating abortion in the first two trimesters of pregnancy, is of course, another matter.

[191] Jennifer Nedelsky, American Constitutionalism and the Paradox of Private Property, in Constitutionalism and Democracy, supra note 1, at 241, 245. But see Ackerman, supra note 1, for a different view.

[192] Nedelsky, supra note 191, at 241.

[193] Id. at 255.

the role of integrating the entire framework of rights against the state. Nedelsky argues that to the degree to which property has been redefined as a bundle of legal rights with no sacred or privileged status, it neither is, nor can it continue to be, the basis on which the Court draws the line between individual rights and governmental power.[194] In this assessment, she and Glendon are in accord.[195]

While fully acknowledging the ways in which the primacy given to property over personal and political rights skewed our constitutional structure and bred injustice,[196] Nedelsky nevertheless sees a danger in the present situation. She fears that the disintegration of the concept of property will entail the loss of tension between private rights and majority rule, and thus threaten the security of our entire panoply of personal civil rights.[197]

> If property is finally perceived to be merely a legal entitlement, indistinguishable in nature from any other, if it loses its moral force . . . . [e]ither some other concept or value will have to replace it as a symbol of limited government, as the core of constitutionalism, or we may be facing a change in constitutionalism itself.[198]

But she is not optimistic. Unlike Glendon, Nedelsky does not view the new privacy rights as a Trojan horse that smuggles the prejudices and presuppositions of the property paradigm back into our constitutional jurisprudence in a new and invidious form. Rather, she worries that neither privacy rights nor an abstract concept like autonomy can do the trick of protecting our civil liberties in the context of a regulatory welfare state because they lack the material base and the intuitive clarity of property rights.[199] In short, with the demotion of property rights within the overall

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[194] Id. at 247–53.

[195] Glendon, Rights Talk, supra note 64, at 25–32.

[196] See Nedelsky, supra note 191, at 271, for her discussion of the paradox of the decline of constitutional protections of property.

[197] Id. at 246.

[198] Id. at 253.

[199] Id. at 265, 267, 271. While I share Nedelsky's concerns, I do not find this convincing. It is not self-evident that the distinction between civil and political rights will collapse once private property loses its central place in the conception of rights. There is little sign that constitutionalism in the United States has been weakened as a result of the desacralization of property rights. Moreover, protections for personal liberty have been expanded in many domains precisely through the vehicle of privacy rights. For an argument that Nedelsky overstates the decline of private property in American constitutional law, see Sunstein, supra note 126, at 344–48. However, Sunstein does not stress the importance of privacy rights to the preservation of constitutionalism. Id. at 345.

hierarchy of rights, Nedelsky wonders whether we have available to us any conception of individual rights that could provide a countervailing limiting value to democratic majoritarianism.[200] Nedelsky's view is that the problem with "the new privacy" is not that it has the same pretensions to absoluteness as the old property, but rather that it is too weak to play such a mythic role.[201]

What is most striking in this analysis is the claim that property drew its *symbolic* strength from its ability to set a boundary between a protected sphere of individual freedom and governmental authority, thus implying that property was considered quasi-sacred *by virtue of* its association with the core values of personal liberty and inviolability. To be sure, the property paradigm fused these values with the possessive individualist model of the self, especially once property came to refer to the wealth that one could acquire on the market through the means of the freedom of contract. Yet we should not misconstrue this lack of differentiation nor assume that it persists today. As Nedelsky has pointed out, property has become more than ever an economic concept, while it is less and less a source of autonomy for most people.[202]

Instead of interpreting "the new privacy" as being burdened with the legacy of property, i.e., with the possessive individualist model of the self, one should see that privacy rights aim to protect what property can shield no longer, namely, fundamental personal liberties. It is precisely in the *differentiation* of personal rights from the paradigm of property, and their

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[200] To Nedelsky, the very idea of rights as substantive limits to the outcomes of democratic processes seems to be at risk. Nedelsky, supra note 191, at 271. However, this needs to be articulated in a way that avoids the natural rights implications of Nedelsky's formulation. One might follow Habermas and articulate a theoretical justification of basic rights and of principles of democratic legitimacy based on the theory of discourse ethics that does not have recourse to natural rights dogmas, or to the mythic conception of property, liberty, or whatever, but nevertheless articulates, very abstractly, normative principles that can serve as limits to what majorities in legislatures can decide in a democracy. Such an approach acknowledges that even the validity of fundamental rights must be agreed upon in a democratic discourse. It also shows that such a discourse has rather demanding preconditions that are not met within normal parliamentary or congressional politics. Ackerman's discussion of constitutional politics has its place here. See Ackerman, supra note 1; see also Cohen & Arato, supra note 21, at 345–421, for a conception of the "plurality of democracies." Rights to both personal and political autonomy could be justified on these grounds. See Habermas, Faktizität, supra note 103, at 109–67.

[201] Note the striking analogy with Hannah Arendt's analysis of property and civil rights. For a discussion, see Cohen & Arato, supra note 21, at 194–200. I do not see the need for a mythic role for rights in order for them to function as limits on government.

[202] According to Nedelsky, this is especially true in legal commentary. "The language of boundaries has been replaced by the language of distribution." Nedelsky, supra note 191, at 250.

elevation to a higher status, that we are witnessing one of the most important normative developments in contemporary constitutional jurisprudence. Where Glendon sees a lack of differentiation,[203] I see the opposite: an attempt to give the constitutional values once associated with property and freedom of contract a primacy now unencumbered by inegalitarian tradition or by the possessive individualist model of the self, and to protect them in their own right.[204]

Bruce Ackerman propounds a similar thesis in an interesting discussion of this issue. He argues that the new privacy right, far from being an exercise in Court prophecy, arbitrariness, or politicization, is really the result of a complex interpretive process whereby the Court sought to make sense of a Constitution that owes its meaning to the transformative efforts of several generations of "constitutional politics."[205] Moreover, he

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[203] Glendon does acknowledge that in the 1950s, the Supreme Court began to expand constitutional protection for a broad range of personal rights, ranging from freedom of expression to equal protection of the laws and rights of criminal defendents. She even states that Griswold v. Connecticut, 381 U.S. 479 (1965), "pointed toward a partial liberation of privacy from the property paradigm." Glendon, Rights Talk, supra note 64, at 57. But Glendon interprets this case as protecting marriage and familial privacy (entity privacy), not individual liberty or autonomy. In her view, the property paradigm returned in full force with Eisenstadt v. Baird, 405 U.S. 438, 448 (1971), Roe v. Wade, 410 U.S. 113 (1973), and the subsequent abortion cases, with all its individualistic and absolutist rhetoric. Thus, privacy does come to play a role comparable to property in an earlier period. But to Glendon, this is lamentable rather than praiseworthy: in part because it is anti-social; in part because, on her view, the Court's protection of individual privacy rights is an audacious attempt to define anew the scope of our constitutional rights. See Glendon, Rights Talk, supra note 64, at 57-61.

[204] See Nedelsky, supra note 191, at 256. I am not alone in this view. In arguing against overruling *Roe*, the joint decision in *Casey* marked a clear distinction between personal and economic autonomy, between privacy rights protecting individual autonomy or identity and rights protecting property and freedom of contract. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2798, 2812-17 (1992). Moreover, the plurality argued that "[i]t is a promise of the Constitution that there is a realm of *personal liberty* which the government may not enter," and which has been upheld in substantive due process cases regarding intimate personal decisions. Id. at 2805 (emphasis added). Indeed, they cited Justice Harlan's dissent in *Poe v. Ullman*, defending the idea that the liberty guaranteed by the Constitution is not a discrete set of particular liberties enumerated therein, but "'a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgement must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.'" Id. (citing Poe, 367 U.S. 497, 522, 543 (1961) (Harlan, J., dissenting)).

[205] Ackerman, supra note 1; see also Bruce Ackerman, Neo-Federalism?, in Constitutionalism and Democracy, supra note 1, at 153. While I am not in full accord either with Ackerman's conception of constitutionalism or with the details of his analysis of *Griswold,* I find his general approach to be extremely suggestive.

locates the turning point in *Griswold,* not *Eisenstadt.* The project of *Griswold,* he believes, was to detach the Founders' affirmation of personal liberty from the property/contract framework within which it had been embedded before the New Deal and to protect it under the rubric of privacy.[206]

Unlike Glendon, Ackerman insists that it was individual liberty, and not a traditional conception of entity privacy, nor the sanctity of the family, that was at stake on the constitutional level in *Griswold.* The real constitutional question facing the Court was whether the post-New Deal government's authority to regulate markets should be interpreted as obliterating the earlier affirmations of personal freedom previously expressed in the terms of freedom of contract. According to Ackerman, in his majority opinion, Douglas faced the repudiation of *Lochner* head on and distinguished the private ordering of economic relations, which were now no longer immune to governmental regulation, from privacy in the more intimate spheres of life, including bilateral loyalties, which, he argued, remained protected.[207] Looking at the Bill of Rights as expressive of founding principles which retain their constitutional meaning despite transformations of two centuries, Douglas found that privacy served as a leitmotif in modern efforts to make sense of personal liberty and as the basis for a comprehensive reading of the founding text itself.[208] Accordingly, Ackerman sees *Griswold*'s reinterpretation of the founding text in terms of a right to privacy, rather than a right to property and contract, as a brilliant *interpretive* proposal.

> Granted, when the Founders thought about personal freedom they used the language of property and contract; given the New Deal repudiation of this language, doesn't the language of privacy

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[206] Ackerman, supra note 1, at 156.

[207] Id. at 155.

[208] Id. at 155–56. This interpretation is based on the "penumbra" argument in Griswold, 381 U.S. at 483. The constitutional principle identified by Douglas is the right to the protection of personal liberty and privacy from governmental regulation that is either arbitrary or lacks a compelling purpose. Of course, this principle received a new application in *Griswold,* insofar as it was applied to contraception. In addition to protecting the "sacred institution of marriage," *Griswold* also rested upon the Court's interpretation of a change in public values regarding the purpose of marriage and the acceptability of sexual relations not aimed at procreation (a point which Sandel fails to note). In short, *Griswold* did innovate—it did assume a change in public values (absent any clear constitutional politics to that effect) regarding the morality of the use of contraception within marriage and the right of the husband and wife to control over their intimate relationship—but it did so in the name of established constitutional principle. Thus, while Ackerman is correct to stress the hermeneutic conservatism of the decision, he might also have indicated the innovation and creative application of that decision as well.

> provide *us* with the most meaningful way of preserving these Founding affirmations of liberty in an activist welfare state?[209]

Indeed. From this perspective, the continuities rather than the discontinuities between *Griswold, Eisenstadt, Roe* and their progeny are what is significant in constitutional jurisprudence. Moreover, it is in this respect that the Warren and Brandeis article, *The Right to Privacy*,[210] has had its greatest impact. For, as Ackerman argues, the point of this essay was "to use the concept of privacy to carve off values often protected by laissez-faire property doctrine—thereby enabling their preservation in a world in which other dimensions of property would be subjected to increasing regulation by activist government."[211] Thus there *is* continuity between the old property and new privacy rights. But the continuity lies in the commitment to protect personal liberty and inviolability, and not in the revival of a possessive individualist conception of the self modeled on market rationality. Whether or not the effort to reorganize the personal rights complex around privacy, with decisional autonomy and inviolate personality at its center, will succeed, and whether privacy can attain the rhetorical force and symbolic power of the old property, without its drawbacks, remains to be seen. But one thing is certain: Without a symbolic center for personal liberties, without a way to render the discrete list of protected liberties coherent, the activist regulatory state will encounter few principled limits to its reach into the most intimate details and most important decisions of all individuals.

VI. PRIVACY REDESCRIBED—BRINGING THE BODY BACK IN

The problem remains how to establish just what areas should be covered by a right to personal privacy. If such a right secures decisional autonomy to individuals against official regulation, if it protects the inviolability of personality, what is the principle of inclusion of decisions

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[209] Ackerman, supra note 1, at 159.

[210] Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[211] Ackerman, supra note 1, at 159 n.61; see also id. at 158–59. In 1890, Brandeis and Warren worried about the intrusiveness of the news media and the new technology of photography. Today, those concerned with protecting personal privacy have to contend with highly sophisticated surveillance technology, developments in the field of biotechnology, as well as complex and intrusive state *and* capitalist bureaucracies. This is part of the impetus to develop a normative conception of privacy doctrine. Normative learning to the effect that personal privacy is worth protecting in its own right is a healthy response to technological and structural modernization!

or acts under it: To what content do privacy rights apply?[212] Here I can only give part of an answer, not the whole of it. For the answer would ultimately depend on the cultural self-understanding of the members of a society and on the outcome of political contestation over cultural norms, codes, and social relations that constitute the practices of privacy and which shift over time.

I will begin to address this issue by drawing out the implications of the normative meaning of privacy rights for women in the area of procreation —an interpretation that does not proceed on the possessive individualist model of the person, but rather builds upon the notion of situated, embodied individuality. In order to understand *why* abortion rights are central to the concrete as well as the abstract dimension of our selves, we must replace the possessive conception of the relation of self and body that has dominated our thinking for so long with something better.

Since I have no space to make the argument in the philosophical depth it requires, I will simply summarize the results of recent work on the topic with the phrase: We are all embodied selves.[213] We do not happen to have bodies or choose to take them with us where we go like our purses; we are our bodies. By this I mean that our bodies, our symbolic interpretation of our bodies, and our sense of control over our bodies are central to our identity and our personal dignity. My body is not extrinsic to who I am. Of course, this is not a simple physical fact, for we can lose some body parts without losing our identity, and the symbolic meaning we give to our bodies is communicatively mediated, varying across cultures and over time. Nevertheless, our selves, our identities, are intricately implicated in our bodies and in what we make of them—for our bodies are our mode of being in the world.

Indeed, Goffman views the body as one of the core territories of the

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[212] Louis Henkin posed these questions with much clarity. He argues that the mere definition of the concept of privacy will not tell us "why the state may forbid incest but not miscegenation, suicide but not abortion; may sterilize mental defectives but not forbid contraception; may not forbid me to read obscene books in my bedroom but may take me from my bedroom and into a barracks and govern my life 24 hours a day every day . . . ." Henkin, supra note 11, at 1429. I agree with this claim. I do not believe that the question of application can be answered by an analysis of concepts—normative or constitutional. Rather, it depends on shifting cultural self-understandings and shifting perceptions of threats to individual integrity which must be articulated and resolved in the public spheres of civil and political society, and pressed, if need be, on the level of constitutional politics. This article may be construed as a contribution to the application discourses regarding privacy rights.

[213] See, e.g., Zillah Eisenstein, The Female Body and the Law (1988); John O'Neill, The Communicative Body (1989); John O'Neill, Five Bodies: The Human Shape of Modern Society (1985); Maurice Merleau Ponty, The Phenomenology of Perception (1962); Brian Turner, The Body and Society (1984); Thomas, supra note 3.

self. He argues that a sense of control over one's own body is crucial for maintaining an intact sense of self and to the ability to interact with others.[214] Self-confidence is predicated upon the sense that one can dispose freely over one's own body, that one can coordinate its functions autonomously and regulate access to it.[215] Without recognition by others of one's autonomous control over one's body, of one's bodily integrity, without at least this most basic acknowledgement of one's dignity, the individual's self-image is crippled, as is the security she needs in order to interact successfully with others and to express her own needs and feelings. Thus the slogan, "Our bodies, our selves," employed by women to defend their abortion rights, rings quite true—for what is at stake in the abortion controversy is precisely a woman's selfhood and identity. That privacy rights protect bodily integrity should be evident.

To force a woman to endure an unwanted pregnancy is to force an identity upon her—the identity of pregnant woman and mother. Her bodily integrity in the physical and emotional sense is at stake in laws that criminalize abortion. But so is her inviolate personality. Indeed, these are intimately interrelated. This is not because women are identical with or own their wombs, or because a woman is or owns her fetus, but because the experience of pregnancy constitutes a fundamental change in her embodiment on physical, emotional, and symbolic levels, and thus, in her identity and sense of self. An unwanted pregnancy imposes not only a very powerful form of embodiment on the woman, in which she very much fears losing control over her bodily functions and her sense of self, but also a new and undesired identity as well as a new intimate relationship,[216] requiring heavy investments of herself. The implications go well beyond the physical discomfort or mere lifestyle issues which anti-choice thinkers believe sum up the problem of an unwanted pregnancy for women.

Accordingly, I would argue that while the Court was right in *Roe* to reject the possessive individualist assumptions subtending claims to an

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[214] Goffman, supra note 174, at 38; see also Reiman, supra note 178, at 310–14 (discussing the importance of moral ownership of one's body).

[215] For a discussion of the sense of humiliation, indeed of the loss of the sense of self and of all sense of reality that occurs when one's bodily integrity is not recognized by others, such as in cases of torture or rape, see Axel Honneth, Integrity and Disrespect: Principles of a Conception of Morality Based on a Theory of Recognition, 20 Pol. Theory 190–93 (1992). Goffman makes a similar point regarding the loss of privacy due to total surveillance within asylums or certain prisons. Goffman, supra note 174; see also Luhmann, supra note 160. Of course, this sense of control is symbolic and social (we accord it to one another)—no one can actually control her body fully.

[216] See Karst, supra note 58, for an impressive argument that roots the protection of privacy in the freedom to associate with others in intimate relationships.

absolute right of the individual to exclusive control over one's body, it erred in its rather superficial gloss on the connection between issues of bodily integrity and privacy concerns.[217] To assert the importance of bodily integrity to privacy analysis is not to revive the paradigm of property, or to claim an absolute right to do with one's body as one pleases. Rather, it is to argue that bodily integrity is central to an individual's identity and should be protected by privacy rights as fundamental, only to be overruled if a truly compelling state interest is at stake, and only on neutral grounds. In this respect I agree with Kendall Thomas' argument that the emphasis of privacy analysis on protected places, intimate associations, and autonomous choice is insufficient, for it fails to recognize that privacy is always *body-mediated*.[218]

Nevertheless, the idea of embodiment, I would argue, gets at a crucial dimension of our situated identity, but not all dimensions of it. We are also situated individuals in the sense highlighted by communitarians: we develop self-definitions on the basis of culturally available resources in our life-world; we draw on our location in a specific set of institutions, relationships, and contexts; and we make creative use of discourses that prestructure in part what can be said and thought. Out of all this, we fashion our own contribution to our self-formative processes—our identity. Once we recognize that identity formation takes place throughout our lives, we can see that the symbolic meaning we give to our bodies and our selves has many sources, presuppositions, and interpretations. Like the other dimensions of privacy, we need bodily integrity within, as well as apart from, interaction with others. But respect for an individual's bodily

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[217] As indicated earlier, the Court in *Roe* denied the claim of some of the *amici* briefs that one has an *absolute* right to do with one's body as one pleases. Roe, 410 U.S. at 154. The Court proceeded to cite Jacobson v. Massachusetts, 197 U.S. 11 (1905), on vaccination, and Buck v. Bell, 274 U.S. 200 (1927), on sterilization. The point here, however, was not that bodily integrity has no connection to privacy, but that neither the right to privacy nor protections of bodily integrity are unqualified or absolute.

In later cases, however, the relationship of bodily integrity to privacy was explicitly acknowledged. See especially Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting); Carey v. Population Servs. Int'l, 431 U.S. 678, 685-86 (1977).

Most recently, in *Casey,* the joint decision explicitly reaffirmed the relationship between personal autonomy and bodily integrity, arguing that *Roe* protected both, as well as set a precedent for subsequent decisions: "[O]ur cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." 112 S. Ct. at 2810; see also Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

[218] However, I disagree with Thomas' claim that one should abandon privacy analysis. Thomas, supra note 3, passim. I believe his arguments point to the need to redescribe, not to abandon, privacy analysis.

integrity does not exhaust the principle of inviolable personality or the need for protection of constitutive identity needs.

By bringing the body back in, by stressing that bodily integrity is central to an individual's identity, one adds flesh to privacy analysis, especially to the principle of inviolate personality. Yet the emphasis on bodily integrity should not be construed as a substitute for the principle of privacy any more than the sex equality argument. Rather, it should be seen as an integral part of the privacy justification aimed at protecting individual personhood and selfhood.[219]

I maintain that we should redefine and defend *all* of the dimensions of privacy identified by commentators: the decisional, the relational, the bodily, and entity privacy. We should understand that the principle of inviolate personality is at stake in all of them. Instead of rejecting the concept of privacy rights because of the ideological usage that has been made of it in the past, we should redescribe the principle and defend its normative content. We can, in short, show that entity privacy need not be burdened with a pre-political conception about the naturalness of the patriarchal family; decisional privacy (autonomy) need not entail the atomistic, unencumbered self or the property paradigm; relational privacy need not involve a bias toward certain kinds of "normal" relationships while constituting others as deviant; and acknowledging our embodiment need not resuscitate biological determinism. Nor is it necessary to interpret entity privacy as antithetical to individual privacy—one needs privacy (autonomy and inviolability of the personality) within, as well as for, intimate relationships, the home, and communicative interaction. As indicated earlier, acknowledging individual privacy rights for women goes a long way in correcting the flaws of entity privacy.

One's bodily integrity and the other "territories of the self" deserve protection no matter where one is. Without such protection, one is not treated as a full person by the law. Understood in this way, privacy could—and should—replace property as the symbolic principle around which the key complex of personal civil rights are articulated.[220] Once we realize that privacy rights protect the abstract, situated, and embodied dimensions of inviolate personality, then it is certainly worth the effort to fight for the inclusion of a woman's decision whether or not to procreate

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[219] This argument could be supplemented, of course, with those based on the Eighth Amendment, by including it in the penumbra analysis.

[220] If there is insufficient doctrinal basis in the Constitution as it now stands for such a comprehensive right to privacy, then we should correct this, perhaps through "constitutional politics."

under the cover of such a right. If women are to be acknowledged by the law as full persons, meriting equal concern and respect as women, then their personal privacy rights in the domain of intimacy, sexuality, and procreation must be protected.