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Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution

By DAVID A.J. RICHARDS*

From its recognition in *Griswold v. Connecticut*,¹ the constitutional right to privacy commonly has been attacked as expressing subjective judicial ideology, as lacking a constitutionally neutral principle, and as being, in substance, a form of legislative policy not properly pursued by the courts.² In particular, critics, both on³ and off the Supreme Court,⁴ have questioned the methodology of the Court in inferring an independent constitutional right to privacy that is not within the contours of the rights expressly guaranteed by the Constitution; in brief, how can the Court legitimately appeal to an unwritten constitution when the *point* of the constitutional design was to limit governmental power by a written text?

The summary affirmance in *Doe v. Commonwealth's Attorney for Richmond*,⁵ which could be read as excluding homosexual acts between

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

2. See generally Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Comment, *Roe v. Wade—The Abortion Decision—An Analysis and Its Implications*, 10 SAN DIEGO L. REV. 844, 848-51 (1973); Note, *Roe v. Wade and Doe v. Bolton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628, 634-35, 642-43 (1973).

3. Thus, Justice Black complained in his dissent that the majority opinion was "natural justice" in disguise. *Griswold v. Connecticut*, 381 U.S. 479, 511-12 (1965) (Black, J., dissenting).

4. See note 2 *supra*.

5. 425 U.S. 901 (1976), *aff'g without opinion* 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court). In *Doe*, two homosexuals challenged the constitutionality of Virginia's criminal sodomy statute as applied to private acts between consenting adults. The challenge was based on the due process clauses of the fifth and fourteenth amendments, the first amendment guarantee of freedom of expression, the first and ninth amendment guarantee of the

consenting adults from the scope of the constitutional right to privacy, may give compelling force to these kinds of objections. The Court may have summarily limited the right to privacy in a way that suggests fiat, not articulated principle, for how can the Court in a principled way sustain the constitutional right to privacy of married and unmarried people to use contraceptives⁶ or to have abortions⁷ or to use pornography in the privacy of one's home,⁸ and not sustain the rights of consenting adult homosexuals to engage in the form of sex they find natural?

This author believes that the constitutional right to privacy is a sound and defensible development in our constitutional jurisprudence that the summary affirmance in *Doe* betrays.⁹ This Article will attempt to explicate the jurisprudential foundations of the constitutional right to privacy and to explain, *pari passu*, wherein *Doe* errs.

The Article begins with a philosophical explication of human rights as that concept is institutionalized in American constitutional law. Such an examination will give solid foundation to the idea of an unwritten constitution underlying the terms of the written Constitution. The Article then examines three interconnecting variables, antimoralism, antipaternalism, and the moral value of autonomy, to explain how the idea of human rights justifies a constitutional right to privacy correctly applied to contraceptives, abortions, and the private use of pornography, as well as to consensual adult homosexual acts.

The Concept of Human Rights as an Unwritten Constitution

The constitutional power of judicial review is marked by two salient structural features. First, such review is intrinsically countermajoritarian. The Constitution clearly was intended to put legal constraints on majority power, whether exercised by the legislature or by the executive. Second, the basis of this countermajoritarian appeal appears to be ideas of human rights that, by definition, government has no moral title to transgress. Under the constitutional order, certain human rights are elevated into legally enforceable rights, so that if a law infringes on these moral rights, the law is not valid.¹⁰

right to privacy, and the eighth amendment proscription against cruel and unusual punishment. Nevertheless, the district court found no constitutional bar to the criminalization of homosexual conduct.

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

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

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

9. See my earlier analysis to this effect. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *FORD. L. REV.* 1281 (1977) [hereinafter cited as *Unnatural Acts*]. The present essay develops the themes of my earlier analysis in the context of a deeper analysis of the constitutional right to privacy.

10. See D. RICHARDS, *THE MORAL CRITICISM OF LAW* 39-56 (1977).

Ronald Dworkin has recently described these structural features in terms of his rights thesis,¹¹ which rests on an analytical claim regarding the force of rights as trump cards that, by definition, outweigh utilitarian or quasi-utilitarian considerations and can legitimately only be weighed against other rights. Moreover, the weighing of *rights* cannot be a sham appeal to vague and speculative consequences. Finally, the force of the rights thesis in American constitutional law is shown by the fact that violation of constitutional rights establishes not merely a permission but an affirmative right and even a duty to disobey the challenged law. This principle derives from the force of the case or controversy requirement for federal litigation,¹² which typically requires that people have standing to make constitutional arguments about violation of human rights only when they have disobeyed the law in question and are about to be prosecuted for violations thereof.¹³ Accordingly, the vindication and elaboration of constitutional rights requires willingness to disobey the law on a suitable occasion.

Dworkin's description of the institutionalization of the rights thesis in American constitutional law directly challenges current constitutional theories that do not take seriously the rights thesis and the consequent proper scope of the countermajoritarian judicial review that enforces constitutional rights. These theories rest either on utilitarianism,¹⁴ which became the dominant American moral jurisprudence in the late nineteenth century with Holmes's *The Common Law*,¹⁵ or on twentieth century value skepticism.¹⁶ Neither moral view can be

11. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-90 (1978) [hereinafter cited as DWORKIN].

12. U.S. CONST. art. III, § 2.

13. See *United Public Workers v. Mitchell*, 330 U.S. 75 (1930) (federal employees held to have no standing where they desired to engage in political activity in violation of the Hatch Act but did not actually do so); cf. *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961) (loyalty oath).

14. DWORKIN, *supra* note 11, at 212-13, 219-20. Dworkin fails to develop this point. For an elaboration, see M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* (1973). Compare the majoritarian appeal in Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), which is implicitly utilitarian. Also compare the implicit utilitarianism in Bickel's later works, A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); A. BICKEL, *THE MORALITY OF CONSENT* (1975).

15. See O.W. HOLMES, *THE COMMON LAW* (M. Howe ed. 1963) (originally published 1881). On its influence on American legal thought, see Richards, *Taking 'Taking Rights Seriously' Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U.L. REV. 1265, 1334-38 (1977).

16. See L. HAND, *THE BILL OF RIGHTS* (1958) [hereinafter cited as HAND]. Compare A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 174-75 (1970), in which a value skepticism similar to Hand's leads to a critique of moral reform through constitutional adjudication. Moral reform and reflection in the light of principles is to be replaced by unconscious moral historicism. These ideas represent a significant retreat from Bickel's earlier work. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Value skepticism

squared with the rights thesis as it underlies American constitutional law. Accordingly, the constitutional theories that assume or presuppose these viewpoints either skeptically question the very legitimacy of judicial review¹⁷ or urge that the scope of judicial review be sharply circumscribed.¹⁸ The American practice of constitutional law, as Dworkin's descriptive thesis shows, does not conform to this theory; American judges, like Holmes and Hand, did not decide constitutional cases in the way their theory of law would require.¹⁹ This dissonance of American theory and practice indicates, I believe, not a defect in the practice of American constitutional law, which rests on sound moral foundations, but a focal inadequacy in American legal theory that has not, in a memorable phrase of Dworkin's, taken rights seriously.

In order to understand and interpret the constitutional design, we must take seriously the radical vision of human rights that the Constitution was intended to express and in terms of which the written text of the Constitution was intended to be interpreted; this author calls this vision the unwritten constitution.²⁰ The idea of human rights was a major departure in civilized moral thought. When Locke, Rousseau, and Kant progressively gave the idea of human rights its most articulate and profound theoretical statement, they defined a way of thinking

and utilitarianism are often inextricably related by these theorists. The idea, invoked by Holmes himself, appears to be one that is skeptical of any nonutilitarian ideas, but that utilitarian ideas are to be invoked in any proper policy analysis of the law. See O.W. HOLMES, *THE COMMON LAW* (M. Howe ed. 1963). For a good statement of the Holmes value skepticism as a theory of the first amendment, see his dissent in *Abrams v. United States*, 250 U.S. 616, 624-31 (1919).

17. See HAND, *supra* note 16.

18. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

19. For example, consider the famous Holmes-Brandeis dissents urging a more expansive vindication of first amendment rights. See *Pierce v. United States*, 252 U.S. 239 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920); *Abrams v. United States*, 250 U.S. 616 (1919). Holmes bottoms this view on value skepticism expressed in the form that the value of controverted ideas is to be judged by the capacity of such beliefs to win the battle for men's minds on the fair terms insured by the first amendment requirement that the state be a neutral observer. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). But, the argument that the first amendment is thus necessary to advance truth is not the best argument to support the result Holmes and Brandeis correctly wanted. The search for truth might be secured by much less expansive constitutional guarantees than Holmes and Brandeis urged. For example, the first amendment could have been limited to certain kinds of educated elites or confined to certain limited categories of communication. This shows not that the recommended expansionist interpretation of the first amendment is wrong, but that Holmes' theory of justification is inadequate to his moral aims. For an attempt to formulate a more adequate account, see Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). For a more extended critique of legal realism along these lines, see Richards, Book Review, 24 N.Y.L. SCH. L. REV. 310 (1978).

20. See Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

about the moral implications of human personality that was radically new. The practical political implications of this way of thinking are a matter of history. The idea of human rights was among the central moral concepts in terms of which a number of great political revolutions conceived and justified their demands.²¹ Once introduced, the idea of human rights could not be confined. In this country it provided the foundation for the distinctly American innovation of judicial review—the idea that an enforceable charter of human rights requires a special set of governing institutions that, in principle, protect these rights from incursions of the governing majority.²² Thus, there is little question that the Bill of Rights was part of and gave expression to a developing moral theory regarding the rights of individuals that had been theoretically stated by Milton²³ and Locke²⁴ and that was given expression by Rousseau²⁵ and Kant.²⁶ The founding fathers believed some such theory²⁷ and regarded the Bill of Rights, *inter alia*, as a way

21. The political revolutions of the seventeenth and eighteenth centuries witnessed such landmarks as the English Petition of Rights (1627), the Habeas Corpus Act (1679), the American Declaration of Independence (1776), the United States Constitution (1787), the American Bill of Rights (1791), and the French Declaration of the Rights of Man and Citizen (1789).

22. Although the idea of judicial review is American in origin, it did have European antecedents. See Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966). The current American form of judicial review is striking in that it is tied to the function of ordinary litigation regarding private rights, whereas judicial review in other countries, which followed the American example in generally adopting the institution, is not tied to private litigation in this way. See Kauper, *The Supreme Court: Hybrid Organ of State*, 21 SW. L.J. 573, 574-76, 590 (1967). For descriptions of non-American models, see M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 45-68 (1971). See also Rosenn, Book Review, 81 YALE L.J. 1411, 1417-20 (1972).

23. See J. MILTON, *Areopagitica*, in *AREOPAGITICA, AND OF EDUCATION* (G. Sabine ed. 1951).

24. See J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (T. Peardon ed. 1952); J. LOCKE, *A Letter Concerning Toleration*, in *TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* (D. Sherman ed. 1937).

25. See J. ROUSSEAU, *The Social Contract*, in *THE SOCIAL CONTRACT AND DISCOURSES* (G. Cole trans. 1930).

26. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965); I. KANT, *Concerning the Common Saying: This May Be True in Theory, But Does Not Apply in Practice*, in *SOCIETY, LAW, AND MORALITY* 159-72 (F. Olafson ed. 1961).

27. Among the more important works that illustrate the impact of European natural rights and general Enlightenment thought on American thought are B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); H. COMMAGER, *THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT* (1977); H. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 282-305 (1969). One important recent book debunks the specific influence of Locke on Jefferson and the Declaration of Independence. See G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 167-92 (1978). The case is probably overstated. See Morgan, *The Heart of Jefferson*, N.Y. REVIEW

of institutionalizing it.²⁸ Nevertheless, attempts to define the specific content of constitutionally protected moral rights are frustrated by the fact that articulation of such rights typically rests on constitutional provisions strikingly general in form (*e.g.*, "freedom of speech or of the press"; "due process of law"; "equal protection of the law") and often lacking any convincing legal history regarding the intended application of the provision. A consensus, to the extent one existed when these clauses were drafted, was reached on the ambiguous generalities of political compromise.²⁹ Even when circumstances at the time strongly suggest a certain interpretation, such legal history has not conventionally been regarded as dispositive.³⁰ In order to understand how consti-

OF BOOKS, August 17, 1778, at 38. Wills does acknowledge general Lockean influence. WILLS, *supra*, at 175, but his main emphasis is on the specific influence of Scottish moral sense theorists, in particular Hutcheson, on Jefferson. *Id.* at 167-255. The emphasis of these theorists on a fundamental moral equality based on the equal moral sense of all persons, *id.* at 207-17, clearly prefigures Kantian ideas of the equality of all persons in respect of the Moral Law. See note 42 *infra*. Jefferson clearly accepted ideas of fundamental moral equality and clearly believed in forms of natural rights. See WILLS, *supra*, at 229-39. Wills' argument is not against Jefferson's belief in natural rights, but against a certain interpretation of his beliefs in the content of those rights, *i.e.*, the primacy of property.

28. Of course, morally informed constitutional provisions have not always been applied uniformly and consistently with their underlying moral principles. For example, the first amendment clearly rests on the substantive moral idea that all men have certain inalienable rights, including freedom of speech and rights of religious tolerance. The Constitution did not consistently extend these basic rights to all persons, however. For example, the institution of slavery was nowhere condemned, but was rather impliedly endorsed by three clauses in the Constitution that refer to slavery in a way which contemplates the continued existence of that institution. See U.S. CONST. art. I, § 9, cl. 1; art. I, § 2, cl. 3; art. IV, § 2, cl. 3. This flaw in the constitutional charter of basic moral rights was resolved only by the Civil War and the constitutional amendments which followed in its wake. Of these amendments, the due process and equal protection clauses of the fourteenth amendment have been especially fertile sources for the enlargement of constitutional rights. The equal protection clause, for example, has been interpreted to require forms of equal protection well beyond the original intent to abolish slavery and concomitant state practices. For an excellent account of this development, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). The due process clause has been interpreted to require not only application to the states of many of the original amendments comprising the Bill of Rights, but has also been viewed as a means of protecting basic liberties not expressly articulated in the Bill of Rights, including, as we shall see, the constitutional right to privacy. See, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to use contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to educate a child in a school of the parents' choice); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right of a child to study a foreign language).

29. For example, the legal history of free speech in England and America prior to the adoption of the first amendment renders doubtful any consensus on the specific application of the amendment. See generally L. LEVY, *LEGACY OF SUPPRESSION; FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

30. Consider the following examples. First, the adopters of the fourteenth amendment quite clearly did not contemplate that the amendment would abolish segregation. See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

tutional provisions of these kinds are interpreted, we must advert to the underlying concepts of human rights that they express.

Often, in order to articulate a hermeneutics of the meanings that language properly bears, we invoke an underlying theory of the kind of communication that a specific form of discourse exemplifies.³¹ When a critic of the arts, for example, interprets the meaning of a complex work of art, he or she invokes, *inter alia*, conventions of communication of the genre in question because such conventions were part of the assumed and well-understood background of shared communicative understandings that the artist invoked in creating the work.³² In the law, the canons of statutory interpretation importantly attempt to specify an underlying theory of the proper communicative purposes that may reasonably be imputed to the choice of legislative language in the context of constitutional values and the institutional separation of powers.³³ Correspondingly, the meaning of constitutional provisions necessarily rests on the background theory of human values that the Constitution assumes as its communicative context.

When referring, then, to the concept of human rights as the unwritten constitution, the author does not mean to suggest that these underlying understandings are in some sense a secret and impalpable mist.³⁴ On the contrary, the idea of human rights is the necessary hermeneutical principle that alone enables us to understand how it is that

Yet, the Court in *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954), expressly put such history aside in reaching its decision. Second, the existence, at the time of the adoption of the first amendment, of laws such as those against seditious libel has never been supposed to conclude the question of the constitutionality of such laws. For a discussion of the crime of seditious libel at common law, see L. LEVY, *LEGACY OF SUPPRESSION; FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960). For the view that seditious libel was abolished by the first amendment, see *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1952) (Black, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). See also *Bridges v. California*, 314 U.S. 252, 264-65 (1941); *Grosjean v. American Press Co.*, 297 U.S. 233, 248-49 (1936) (first amendment prohibits taxes that restrict newspaper circulation, although such taxes were employed in England and America at the time of that amendment's adoption).

31. Even with respect to ordinary word meanings, dictionaries are often only the starting place for inquiries into meaning. Sometimes, historical accounts are useful supplements. See, e.g., C.S. LEWIS, *STUDIES IN WORDS* (1960). In others, we seek deeper philosophical analysis in order to afford an elucidating theory of the underlying concepts invoked by the use of certain language.

32. See, e.g., E. PANOFSKY, *MEANING IN THE VISUAL ARTS* (1955).

33. See generally, H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1144-416 (1958) (mimeographed materials published by Harvard Law School).

34. The famous legal positivist appeal to "wash the law in cynical acid" derives from O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167-202 (1952). Compare Holmes' derogatory reference to viewing the common law as "a brooding omnipresence in the sky" rather than as "the articulate voice of some sovereign or quasi sovereign that can be identified." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917)

constitutional provisions have any meaning at all. Indeed, alternative, legal-realist constitutional theories are notoriously inadequate in that they fail to take seriously the kinds of normative meaning that constitutional provisions conventionally and often unambiguously express. That the interpretation of constitutional meaning should invoke background communicative understandings is *in principle* no more mysterious than the fact of human linguistic communication.³⁵

Accordingly, since the central task of a constitutional theory is to explicate the background understandings that constitutional language invokes, we must take as our central analytical focus the unwritten constitution, the idea of human rights. So far we have only described the form of the rights thesis in constitutional law. Now, we must ask the deeper philosophical question: what is the underlying structure of values that justifies the rights thesis—that rights trump utilitarian considerations, that rights may be weighed only against rights, and that rights justify, *in extremis*, forms of ultimate disobedience.

Autonomy and Equality as the Values Underlying the *Concept of Human Rights*

To think of persons as having human rights is to commit oneself to a way of thinking about them premised on two crucial assumptions: first, that persons have the *capacity* to be autonomous in living their life; second, that persons are entitled, as persons, to equal concern and respect in exercising their capacities for living autonomously. When these assumptions are accepted, so too is the rights thesis. Let us begin with an explication of these concepts, and then we may clarify how they underlie and justify the rights thesis.

Autonomy, in the sense fundamental to the theory of human rights, is an empirical assumption that persons *as such* have a range of capacities that enables them to develop, and act upon plans of action

(Holmes, J., dissenting). For the application of these ideas to constitutional law, see HAND, *supra* note 16, at 1-3, 33-34.

35. The question of the philosophical status of meaning in constitutional interpretation has recently been strikingly raised in Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977). The authors equate constitutional meaning with utterer's meaning, so that constitutional meaning changes as the utterer's meaning (here, Supreme Court interpretation) changes. But even utterer's meaning typically depends on the background conventions that speakers of a language assume, so that analysis of even utterer's meaning often requires analysis of these background conventions. See S. SCHIFFER, MEANING 118-66 (1972). Meaning in constitutional interpretation, which of course expresses a complex legal institution, correspondingly requires analysis of these background conventions that are much more stable than Munzer and Nickel suppose. Dworkin's distinction between concepts and conventions expresses this important truth, namely, that the stability of constitutional meaning rests on quite general concepts which are valid over time. See DWORKIN, *supra* note 11, at 136.

that take as their object one's life and the way it is lived.³⁶

The consequence of these capacities of autonomy is that humans can make independent decisions regarding what their life shall be, self-critically reflecting, as a separate being, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left barren, with whom one will or will not identify, or what one will define and pursue as needs and aspirations. In brief, autonomy gives to persons the capacity to call their life their own. The development of these capacities for separation and individuation is, from birth, the central developmental task of becoming a person.³⁷

36. Sometimes, the exercise of such capacities of autonomy is rational or morally desirable, in other instances irrational or morally wrong. Human beings, in thinking about their own lives, are notoriously subject to tragic self-deception and blindness. But, it is autonomy that gives persons, uniquely, the capacity for finding tragic waste so profoundly meaningful. In educating the exercise of autonomy against tragic mistakes, humans call upon complex capacities for language and self-consciousness, memory, logical relations, empirical reasoning about beliefs and their validity (human intelligence), and the capacity to use normative principles in terms of which plans of action can be assessed.

Harry Frankfurt made this point when he argued that the "essential difference between persons and other creatures is to be found in the structure of a person's will." Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 THE J. OF PHILOSOPHY, Jan. 14, 1971, at 6. For a related account, see G. Dworkin, *Autonomy and Behavior Control*, 6 HASTINGS CENTER REP., Feb. 1976, at 23-28; G. Dworkin, *Acting Freely*, NOUS 4, no. 4 (1970). Frankfurt correctly argues that contemporary discussions of personal identity are not properly discussions of the concept of a person at all, for many animals of lower species can have both predicates ascribing corporeal characteristics and states of consciousness whose unity is the problem of personal identity. Such animals are not, however, persons. The difference between persons, who happen also to be humans, and animals is, Frankfurt argues, neither the capacity to have desires or motives, nor the capacity to deliberate and make decisions based on prior thought, for certain lower animals may have these properties. Rather, besides wanting and choosing and being moved to do this or that, persons, as such, also may want to have or not to have certain desires. As Frankfurt put it, persons "are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for . . . 'first-order desires' or 'desires of the first order,' which are simply desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires." Frankfurt, *supra*, at 7.

The second-order desires and plans of action, which constitute autonomy, mark the capacity of a person, *as such*, to develop, to want to act on, and to act on plans of action which take as their object changes in the way one lives one's life. For example, persons establish various kinds of priorities and schedules for the satisfaction of first-order desires. The satisfaction of certain wants (for example, hunger) is regular; the satisfaction of others is sometimes postponed (for example, delays in sexual gratification in order to develop and educate certain competences). Indeed, persons sometimes gradually eliminate certain self-criticized desires (smoking) or over time encourage the development of others (cultivating one's still undeveloped capacities for love and tender mutual response). On the relation of the notion of a person to rational choice, including choices of these kinds, see D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 27-47 (1971). For an attempt to explicate the notion of a person comparable to Frankfurt's process, see *id.* at 65-68.

37. See M. MAHLER, *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT: SYMBIOSIS*

Autonomy, as a theory of the competences of persons *as such*,³⁸ had a relatively late development. The idea, probably first suggested in the late Middle Ages³⁹ and emerging into secular political practice in the English Civil War,⁴⁰ flowered into a self-consciously powerful political and social idea in the works of Rousseau⁴¹ and Kant.⁴² The thinkers and artists of ancient Greece, or at least the ones whose works remain extant, apparently lacked the concept at least in the form of a conception of the capacities of persons, *as such*.⁴³ Correlatively, the Greeks lacked the idea that people, in view of their capacity for autonomy, are entitled to equal concern and respect, as persons. As a corollary, Greek political theory does not invoke the language and thought

AND INDIVIDUATION (1975); L. KAPLAN, *ONENESS AND SEPARATENESS: FROM INFANT TO INDIVIDUAL* (1978).

38. The idea of autonomy is confirmed by the data and theoretical structure of ego psychology, which has developed Freud's late theory of the independent power of the ego into a well-evidenced theory of ego autonomy focusing on the capacities of persons, as such, to develop and pursue independent adaptive capacities of reality testing in a conflict free zone. Freud's conception of the ego was classically formulated in S. FREUD, *The Ego and the Id*, in 19 *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 87 (Standard ed. 1923). In this essay, the ego appears as the passive mediator between id and superego impulses. This passive battleground ego conception was expressly disapproved by Freud in his important later work, *Inhibitions, Symptoms and Anxiety*, in 20 *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 87-172 (Standard ed. 1926), wherein he seeks to characterize the independent power of the ego to deal with internal and external dangers (both realistic and intra-psychic id and superego impulses) by triggering the protective system of defenses. Freud's theory of the defenses was elaborated by Anna Freud. See A. FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* (1936). Later ego psychology has sought to characterize further the reality functions of the ego in addition to its unconscious defensive mechanisms, on which Freud focused. Heinz Hartmann developed accordingly his conception of ego autonomy, focusing on the capacities of the person to engage in adaptive reality testing in a conflict free zone, *i.e.*, a zone free of the warring id and superego impulses. See H. HARTMANN, *EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTATION* (D. Rapaport trans. 1958). In light of the subsequent work of Piaget, Erikson, and studies of animal and child behavior, these notions of ego functions have been developed into a theory of the competent exercise of the capacities of persons as such with independent desires to exercise these capacities competently. See R. WHITE, *EGO AND REALITY IN PSYCHOANALYTIC THEORY* (1963).

39. William of Ockham appears to be the crucial figure. He develops a radical theory of free will and nominalism (suggestive of autonomy) as the predicate of ideas of inalienable human rights. See 8 *THE ENCYCLOPEDIA OF PHILOSOPHY* 315-17 (P. Edwards ed. 1957).

40. For a remarkable collection of political tracts from this period which crucially invoke these ideas, see *PURITANISM AND LIBERTY; BEING THE ARMY DEBATES (1647-9) FROM THE CLARKE MANUSCRIPTS* (A. Woodhouse ed. 1974).

41. See J. ROUSSEAU, *The Social Contract*, in *THE SOCIAL CONTRACT AND DISCOURSES* (G. Cole trans. 1930). See also J. Rousseau, *EMILE*, (B. Foxley trans. 1961). On the profound connection between Rousseau and Kant, see E. CASSIRER, *THE QUESTION OF JEAN JACQUES ROUSSEAU*, (P. Gay trans. 1963).

42. See, I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (L. Beck trans. 1959); I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965); I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* (J. Ellington trans. 1964).

43. See A. ADKINS, *FROM THE MANY TO THE ONE* (1970).

of human rights.⁴⁴

When the notions of autonomy and equal concern and respect appear as powerful political and social ideas in Rousseau and Kant, it is thus a radical repudiation of the vision of the platonic therapeutic state.⁴⁵ This repudiation was based on an alternative conception of ordinary human competence, summarized in Kant's moving description of persons as sovereign in the kingdom of ends,⁴⁶ namely, as capable of deciding what their ends shall be. The primary consequence of Kant's conception is the idea of human rights, the idea of intrinsic limits on the degree to which one person may control the life of another even for putatively benevolent motives. Persons are now conceived as having a unique capacity, and thus authority, to decide on the form of their lives. Accordingly, the idea of legitimate paternalistic concern among mature, reasonable adults is now subject to moral constraints that were, for Plato and Aristotle, unthinkable. When Freud developed a therapeutic method intended to deepen our capacities for autonomy, he naturally insisted, consistent with the moral vision of autonomy, that the free assent of the patient was the only acceptable or legitimate criterion

44. In saying that Plato or Aristotle lacks the concept of autonomy as a capacity of persons, as such, and the correlative idea of equal concern and respect, one does not, *pari passu*, claim that they lacked the concept of personal identity, nor that they did not significantly foreshadow the concept of autonomy that was later to develop. For example, one of Plato's seminal contributions to philosophical psychology was to formulate and explicate in *The Republic* a conception of the capacity of the philosophical soul for rational self-rule which is the first philosophical description anywhere of what is here called autonomy. However, crucially, Plato views autonomy as a capacity only of a very few, gifted people who, alone having the capacity for self-rule, are the only legitimate rulers of others; Plato, as Greek thought in general, lacks the idea, fundamental to the idea of human rights, that autonomy is a capacity of all persons, as such.

What Plato and Aristotle lacked was not a coherent idea of personal identity, nor the idea that some people have the capacities herein described as autonomy, but the idea that persons, as such, have these capacities and, therefore, are entitled to equal concern and respect. It was, I believe, the common sense of ancient Greece, which Plato and Aristotle understandably shared, that persons as such do not have what contemporary ego psychology denominates a developed ego, *i.e.*, the executive capacity to formulate an integrated plan of life and pursue it as a separate person. The general view of personal competence of the ancient Greeks suggests the fragmented ego, the "divided self"—generally passive, with appetites, emotions, and intellect isolated as independent agencies on the battleground of the body, unintegrated by any coherent, higher-order planner within the self.

The fundamental Greek vision is that of Plato's *Republic*: the ruler, a benevolent physician who alone understands the health of the balanced human organism, and who may *literally* do *anything* to realize this desirable health which most humans cannot realize on their own. Such benevolent intentions could have, Plato and Aristotle supposed, *no* limits; for, given the ideal of personal health which only the physician-ruler incarnates and the radical lack of autonomy of most humans, how could there be limits in effectuating the only good that there was or could be?

45. See note 44 *supra*.

46. See I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (L. Beck trans. 1959).

for the validity of the therapist's analytical efforts.⁴⁷ Since persons have a unique capacity to understand and change their lives, Freud ruled out *ab initio* the Platonic forms of intrusive control, for only the person can have the final say in unravelling the mysteries of the self. Freud, like Rousseau and Kant, thus places the integrity of the self at the core of social theory.

The sense of equality underlying the idea of equal concern and respect is one of fundamental *moral* equality, which Kant expressed by the idea of equality in the kingdom of ends. To attribute human rights to persons is to assess and criticize human institutions and relationships in terms of whether those institutions and relationships conform to principles of obligation and duty⁴⁸ that guarantee to each person equal concern and respect in exercising what is here called autonomy.⁴⁹ The vision, at the last, is one of people who, because of autonomous choice, are able to identify their lives as *their own*, having been afforded to the greatest extent feasible the inestimable moral and human good of choosing their own lives as free and rational beings.⁵⁰ Effective autonomy in this sense may, of course, be perversely abused; it is surely compatible with shaping personality and character structures that are undesirable in myriad ways. But for human creatures, autonomy is the *sine qua non* of exercising capacities of the rational choice of one's life in terms of which we define our notions of the good.⁵¹ Accordingly, the revolution in human thought represented by the rights thesis derives not from *actual* autonomy but from equal concern and respect for the *capacity* for autonomy.

Perhaps nothing can ensure effective autonomy. The process of achieving it is often painful, and the process of maintaining it never completely secure. The rights thesis, however, rests on the idea that

47. See S. FREUD, *Constructions in Analysis*, in 23 THE COMPLETE PSYCHOLOGICAL WORDS OF SIGMUND FREUD 257-69 (Standard ed. 1937). Freud, of course, applied his therapeutic methods only to neurotics who were typically, aside from neurotic symptoms, reasonable and mature people. Psychotics raise different kinds of problems in terms of the legitimacy of paternalistic interference. See D. RICHARDS, THE MORAL CRITICISM OF LAW 216-20 (1977).

48. For an account of principles of obligation and duty, see D. RICHARDS, A THEORY OF REASONS FOR ACTION 92-106 (1971).

49. Autonomy has often been confused with a number of theses from which it is distinguishable, for example, causal indeterminism, wilfulness, egoism, and enlightenment psychology. I have tried to explore these distinctions in a forthcoming article, *Rights and Autonomy: A Prolegomenon to the Theory of Rights*, — HARV. C.R.-C.L. L. REV. — (forthcoming).

50. A similar idea underlies John Stuart Mill's *On Liberty*, especially chapter 3. See J.S. MILL, ON LIBERTY (1st ed. n.p. 1859); cf. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUBLIC AFFAIRS 26 (1976) (the idea of moral title to one's self).

51. For a statement of the classic position of the good as the object of rational choice, with supporting references to the classical literature, see D. RICHARDS, A THEORY OF REASONS FOR ACTION 286-90 (1971).

viewing people in this way and regulating our conduct accordingly can facilitate the moving Kantian vision referred to earlier, of persons as equal and autonomous in the kingdom of ends with servility and non-consensual dependence reduced to a tolerable minimum.⁵²

Intuitively, people often speak and think of a denial of human rights as a kind of affront to human dignity, a form of disrespect.⁵³ The present explication of the rights thesis affords rational foundation for this view. If the idea that people have human rights rests on equal concern and respect for their autonomy, to deny them their rights expresses disrespect or contempt for their capacity for autonomy. Thus, the denial of rights has traditionally been justified on the ground that the persons in question are a kind of permanent child or semi-child, a status which justifies forms of paternalistic interference that would otherwise be improper. The apologists for the enslavement of blacks and the subjection of women standardly invoked such arguments.⁵⁴ The advance of the rights thesis has rested on the repudiation of these arguments, which we now perceive as resting on an unjustified contempt that prevented the realization of the capacity of those suppressed.

Finally, the moral values of autonomy and equal concern and respect explain and justify the distinguishing features of the rights thesis. To see people as having the capacity for autonomy and entitled to equal concern and respect in exercising their autonomy is to deny the propriety of allowing utilitarian calculations to override the range of significant life choices facilitated by the rights thesis, and to require that considerations of rights be weighed only against considerations of rights of comparable weight.

The nature of rights as trumps over utilitarian considerations ensures that persons are afforded conditions favorable to the exercise of autonomy with security from utilitarian manipulations, and that these

52. It is no accident that the progressive enlargement of the rights thesis, since Rousseau and Kant, has rested on an enlarged conception of the class of humans believed to have autonomous capacities, for example, blacks and women. When John Stuart Mill eloquently argued against the subjection of women, he accepted, *arguendo*, that the women of his period were not actually autonomous. See generally J.S. MILL, *THE SUBJECTION OF WOMEN* (1st ed. n.p. 1869). Mill's arguments for women's rights rested not on their actual condition, which he conceded to be in large part slavishly dependent on and vicariously experienced through men, but on their capacities for autonomy. Likewise, the vindication of the human rights of putatively primitive people typically does not rest on the idea that such people are effectively autonomous but rather is based upon the assumption that these people have the capacity for autonomy. I take it to be an analytically distinct question whether the content of human rights varies as applied to the conditions of a primitive society. In my view, it clearly does.

53. Cf. J. FEINBERG, *SOCIAL PHILOSOPHY*, ch. 6 (1973).

54. See G. MYRDAL, *AN AMERICAN DILEMMA* 1073 (2d ed. 1962); J. HALLER & R. HALLER, *THE PHYSICIAN AND SEXUALITY IN VICTORIAN AMERICA* 48-61 (1974); Fitzhugh, *Sociology for the South*, in *SLAVERY DEFENDED* 34 (E.L. McKittrick ed. 1963).

conditions may be compromised only in view of considerations of rights that better facilitate the underlying values of equal concern and respect for autonomy.

The idea of human rights as minimum boundary conditions explains the last feature of the rights thesis, the use of the language and thought of rights in revolution, rebellion, and ultimate resistance. Human rights are defined by ethical principles of obligation and duty expressive of the values of autonomy and equal concern and respect. One of the cardinal tasks of a complete theory of rights would be to discuss the various kinds of coercion which may be used to effectuate human rights (for example, economic boycotts, political pressures, informal criticism, forms of military action, and the like).⁵⁵ We can, for present purposes, say at least this: the term "human rights" in our moral vocabulary connotes a concept that defines minimum moral decency. Accordingly, failure to support these rights is often appropriately regarded as intolerable, and the vindication of these rights is often the proper ground of ultimate and intransigent resistance.

Because autonomy and equal concern and respect are the focal values in terms of which constitutional rights are and ought to be interpreted, it is quite natural that the recent revival of contractarian theory, through the work of John Rawls,⁵⁶ has been regarded of seminal importance in understanding constitutional values in a way in which the existing moral theories of constitutional theorists, utilitarianism and value skepticism, cannot imitate. The great early theorists of human rights—Locke, Rousseau, and Kant—whose ideas clearly influenced American constitutionalism, all invoke, explicitly or implicitly,⁵⁷ contractarian metaphors in explaining the concrete implications of autonomy and equal concern and respect.

The basic analytic model is this:⁵⁸ Moral principles are those that rational persons would agree are the ultimate standards of conduct applicable at large. In this context "rational person" refers to one in a hypothetical "original position" of equal liberty who has all knowledge and reasonable belief except for being ignorant of the specific personal situation.

Since Rawls's concern is to apply this definition of moral principles to a theory of justice, he introduces into the original position the

55. See D. RICHARDS, A THEORY OF REASONS FOR ACTION 137-41 for some specific consideration of this question. See also M. WALZER, JUST AND UNJUST WARS (1977).

56. J. RAWLS, A THEORY OF JUSTICE (1971) [hereinafter cited as RAWLS].

57. Kant did not expressly invoke a contractarian model in the way Locke, see note 24 *supra*, and Rousseau, see note 25 *supra*, did, but he clearly suggested it. See I. KANT, *Concerning the Common Saying: This May Be True in Theory, But Does Not Apply in Practice*, in SOCIETY, LAW, AND MORALITY 159 (F. Olafson ed. 1961).

58. RAWLS, *supra* note 56, at 11-22. See also D. RICHARDS, A THEORY OF REASONS FOR ACTION 75-91 (1971).

existence of conflicting claims to a limited supply of general goods and considers a specific set of principles to regulate these claims.⁵⁹ "General goods" are those things or conditions that would most universally be chosen should one have the opportunity.⁶⁰ Liberty, understood as the absence of constraint, is usually classified as one of these general goods. Similarly, it is natural to identify capacities, opportunities and wealth as general goods.⁶¹ Rational people in the original position have no way of predicting the probability that they will end up in any given situation in life. If a person agrees to principles of justice that permit deprivations of liberty and property rights and later discovers that he occupies a disadvantaged position, he will, by definition, have no just claim against deprivations that may render his entire life prospects meagre and bitterly servile. To avoid such consequences, the rational strategy in choosing the basic principles of justice would be the conservative "maximin" strategy;⁶² one would want to make certain that the worst position in the adopted system is the best of all conceivable worst positions—that is, one would maximize the minimum condition. Thus, if a person were born into the worst possible situation of life allowed by the adopted moral principles, he would still be better off than he would be in the worst situation allowed by other principles.

The rational decision in the original position on such principles requires consideration of the relative weight assigned the general goods by those in the original position. Rawls argues that self-respect or self-esteem occupies herein a place of special prominence.⁶³ People desire general goods in order to attain self-respect through the fulfillment of their life plan; accordingly, we may refer to self-respect as the primary human good. People in the original position would regulate access to the general goods so as to maximize the possibility that each member of society will be able to attain self-respect.

Rawls's notion of self-respect, as the primary human good, is importantly connected to the idea of autonomy. Self-respect is based on

59. If there were goods in abundance, or if people were more willing to sacrifice their interests for the good of others, the need for a moral system might be nonexistent or significantly different. For David Hume's remarkable discussion of the conditions of moderate scarcity, see D. HUME, *A TREATISE OF HUMAN NATURE* 485, 495 (1st ed. London 1738).

60. Rawls describes these general goods as "things which it is supposed a rational man wants whatever else he wants." RAWLS, *supra* note 56, at 92. The notion of rationality considered here is developed in D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 27-48 (1971) and in RAWLS, *supra* note 56, at 407-16. The general view of the good is discussed in RAWLS, *supra* note 56, at 395-452 and in RICHARDS, *supra*, at 286-91.

61. RAWLS, *supra* note 56, at 92. See also Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32, 41-49 (1973).

62. See RAWLS, *supra* note 56, at 150-61.

63. *Id.* at 433, 440-46.

one's ability to exercise native capacities competently.⁶⁴ For human beings, the relevant capacities include the ability to think and deliberate, to use language, to create artifacts of a practical or aesthetic nature, and the like—all of which are crucially employed in the capacity of persons, exercising autonomy.⁶⁵ Deprived of the experience of personal competence and self-mastery of these kinds, humans lack a sense of self-worth, leading to the despairing inner death central to apathy, cynicism, stoical remoteness, and spiritual slavery.

Thus, Rawls's contractarian reconstruction provides an interpretation of the moral weight of autonomy (the interpretation of autonomy as a feature of the primary human good) and equality (the original position of equal liberty), and affords a decision procedure (the maximin strategy) that provides a determinate substantive account for the content of human rights as minimum conditions of human decency. An important feature of the argument is the assumption of ignorance of specific identity. Rawls believes that a fundamental feature of the idea of political right, expressive of the values of autonomy and equal concern and respect, is neutrality between and among visions of the good life. The ignorance assumption assures such neutrality by depriving people of any basis for distorting their decisions (illegitimately) in the favor of their own, possibly parochial vision of the good life. The neutral vision is central to the concept of privacy.

A Moral Theory of the Constitutional Right to Privacy

All discussions of the right of privacy must begin with the famous law review article by Warren and Brandeis in which they recommended the recognition of privacy as an independent legal right.⁶⁶ Warren and Brandeis were immediately concerned with the failure of existing tort law to provide a clear remedy for the public disclosure of private facts. Nevertheless, basing their argument on the rights "of an inviolate personality,"⁶⁷ they spoke more broadly of the human need for "some retreat from the world,"⁶⁸ of the effect of unwarranted intrusion on a person's "estimate of himself and upon his feelings,"⁶⁹ and of the "general right of the individual to be let alone."⁷⁰ The latter sug-

64. See D. RICHARDS, A THEORY OF REASONS FOR ACTION 257, 265-68 (1971). See also R.W. WHITE, EGO AND REALITY IN PSYCHOANALYTIC THEORY (1963).

65. For the notion of a lifeplan, see RAWLS, *supra* note 56, at 407-16; C. FRIED, AN ANATOMY OF VALUES 105-15 (1970); D. RICHARDS, A THEORY OF REASONS FOR ACTION 27-48, 63-74 (1971).

66. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

67. *Id.* at 205.

68. *Id.* at 196.

69. *Id.* at 197.

70. *Id.* at 205.

gestion that the right of privacy is broader than the tort remedies under immediate examination was confirmed by the famous dissent in *Olmstead v. United States*⁷¹ in which Brandeis invoked "the right to be let alone" not in support of a private tort remedy but in support of an expanded interpretation of fourth amendment constitutional rights of private parties against the state.⁷²

Of course, we now perceive the interests of privacy torts and fourth amendment guarantees as analytically similar—rights of information control protected in the one case against individuals, in the other against the state.⁷³ But, the spirit of Brandeis' argument cuts deeper than this analytical point on which he places no great weight. Brandeis, rather, is appealing to an underlying moral argument about the

71. 277 U.S. 438, 471 (1928).

72. The Brandeis view was finally accepted by a majority of the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967). For citation and discussion of the intervening cases on mechanical and electronic surveillance, see J. VORENBERG, *CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS* 628-45 (1975); Parker, *A Definition of Privacy*, 27 *RUTGERS L. REV.* 275, 288-91 (1973).

73. As regards the law of torts, Dean Prosser in 1960 examined three hundred privacy cases in an attempt to discover what interest was being protected. He concluded that no single thing was common to every loss of privacy but noted four characteristics, at least one of which was present in each case: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. Prosser, *Privacy*, 48 *CALIF. L. REV.* 383 (1960). Subsequent commentary has sought to reduce Prosser's list to one unifying theme, privacy as the capacity to control highly personal information about oneself or one's experiences.

The connections between the tort and constitutional concepts of privacy are problematic in the following way. *Griswold* established that married couples have a constitutional privacy right to use contraceptives which the state may not abridge. The Court justified its holding by the ancillary likelihood that anticontraceptive prosecutions would violate conventional privacy interests (bugging the bedroom) which are protected from intrusion against private parties by one of the privacy torts and against the state by fourth amendment guarantees against unreasonable searches and seizures. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). However, the constitutional right of privacy, as developed since *Griswold*, cannot be characterized as merely a right protecting conventional privacy interests in information control. It rests, rather, on affirmative personal rights to act in certain ways that the state, in principle, cannot abridge. This feature of the constitutional right to privacy cases, which commentators had observed even in *Griswold*, was made quite clear in *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the challenged law subjected the person performing the abortion to criminal sanctions and was held unconstitutional because it made it difficult for women to obtain the desired service. There is not the remotest suggestion in *Roe* that the state could cure the constitutional infirmity by removing any criminal sanction from the woman while continuing effectively to restrict abortion by attacking suppliers of the service. Indeed, since *Roe*, the Court has insisted that the *Roe*-defined right extends to "the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973). In short, there is no evidence that the constitution right to privacy depends on outrageous government surveillance violative of conventional right-to-privacy interests.

place of human rights in the American contractarian conception of the relation of individuals among themselves and to the state. In his *Olmstead* dissent, for example, he notes:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.⁷⁴

When Brandeis summarized this foundational right as "the most comprehensive of rights and the right most valued by civilized men,"⁷⁵ he was, I believe, invoking the general conception of human rights, founded on autonomy and equal concern and respect. Certain of the principles of constitutional justice upon which Brandeis relied are concerned with issues having deep connection with personal dignity and the right to control highly personal information about oneself. Such information control is one of the primary ways in which persons autonomously establish their self-conception and their varying relations to other persons through selective information disclosure.⁷⁶ Without some legally guaranteed right to control such information, personal autonomy is degraded at its core. From *personal* self-definition and self-mastery it is debased into the impersonal and fungible conventionalism that uncontrolled publicity inevitably facilitates.⁷⁷ Accordingly, arguments, premised on the foundational values of equal concern and respect for autonomy, justify the protection of conventional privacy interests under tort law, as well as under various constitutional guarantees.

Actions protected by principles enunciated in *Griswold* and subsequent cases are denominated "private" not because they rest on information control but because substantive constitutional principles define conclusive reasons why they may not properly be the subject of encroachment by the state or by private individuals.⁷⁸ Such rights are sensibly called "rights to privacy" in the sense that constitutional principles debar forms of state and private regulatory or prohibitory intrusion into the relevant areas of people's lives: on the basis of these principles, interference in these areas is unwarranted.

74. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

75. *Id.*

76. See C. FRIED, *AN ANATOMY OF VALUES* 137-52 (1970).

77. See Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1003 (1964).

78. I have expanded this thought into a general theory of the public morality as the justification for criminal penalties. See Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*,— U. PA. L. REV.— (forthcoming).

What is at stake here is nothing less than the basic moral vision of persons as having human rights: that is, as autonomous and entitled to equal concern and respect. This vision, correctly invoked by Warren and Brandeis in developing rights to information control, similarly underlies the constitutional right to privacy. In order to explain with care how this is so, the Article now turns to a deeper examination of the content of the moral principles involved in this latter right, and how they express the underlying values of autonomy and equal concern and respect to which Brandeis appeals. This examination will show why the constitutional right to privacy is a natural and defensible development rooted in the unwritten constitution which gives sense to the constitutional design.

The Concept of Morality and the Transvaluation of Values

The constitutional right of privacy cases typically arise in areas where there is a strong conventional wisdom that certain conduct is morally wrong and where the justice of that wisdom is under fundamental attack. It is no accident that the right of privacy is conceived by its proponents not merely as an advisable or charitable or even wise thing to concede, but as a *right*.⁷⁹ Proponents conceive matters involving rights, not as human weaknesses or excusable defects that others should benevolently overlook, but as positive moral goods that one may demand and enforce as one's due. Accordingly, the constitutional right to privacy is, in part, to be understood in terms of a transvaluation of values: certain areas of conduct, traditionally conceived as morally wrong and thus the proper object of public regulation and prohibition, are now perceived as affirmative goods the pursuit of which does not raise serious moral questions and thus is no longer a proper object of public critical concern.⁸⁰

79. See generally Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, 61 J. PHILOSOPHY 628 (1964).

80. When Nietzsche formulated and celebrated the idea of a transvaluation of values, he gave the idea an unwarrantably extreme interpretation by changing the underlying concept of morality from a universalistic concept that embodies equal concern and respect to a perfectionist morality which maximizes the only ultimate moral good—the excellences of military virtue, artistic and intellectual achievements, and the like. For the main works, see F. NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE* (H. Zimmern trans. 1909); F. NIETZSCHE, *TWILIGHT OF THE IDOLS* (1889), *reprinted in THE PORTABLE NIETZSCHE* 465 (W. Kaufmann trans. 1954); F. NIETZSCHE, *THUS SPAKE ZARATHUSTRA*, *reprinted in id.* at 121; F. NIETZSCHE, *THE ANTICHRIST*, *reprinted in id.* at 568. Undoubtedly there have been changes of values at this foundational level. One example is the change from Aristotelian perfectionism, which Nietzsche attempts to reintroduce, to Kantian ethics of mutual respect. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. 10 (M. Ostwald trans. 1962) (shows the special weight Aristotle gave to the excellence of theoretical wisdom); I. Kant, works cited *supra* note 42; F. NIETZSCHE, *TWILIGHT OF THE IDOLS*, *supra*, at 534. However, the transvaluation of values, relevant to the understanding and justifiabil-

How, philosophically, are we to interpret and understand such changes? First, as used here to explain the constitutional right to privacy, transvaluation of values refers to changes in the lower-order rules and conventions, namely, in the light of contemporary evidence and conditions, certain lower-order conventions are no longer justified by ultimate moral considerations. For example, according to one influential model, sex is only proper for the purpose of procreation.⁸¹ Many would argue, however, that the distinctive force of human, as opposed to animal, sexuality is that it is *not* rigidly procreational. To the extent that the traditional model of sexuality is discarded in favor of a non-procreational model, rigid moral rules prohibiting forms of non-procreational sex are no longer perceived as justified by ultimate moral considerations.

In order to provide reasonable criteria to assess the justifiability of such shifts, we must return to our discussion of the foundations of constitutional morality. As we saw, autonomy and equal concern and respect justify the constitutional immunity of human rights from political bargaining. Since one crucial ground for political bargaining is public morality, constitutional values require that the content of the public morality must be squared with the underlying values of constitutional morality. The primacy of the free exercise and establishment of religion clauses shows that at the core of constitutional values is religious toleration, understood as neutrality between those visions of the good life that are fundamental to autonomous capacities. Conceptually, contractarians give expression to this moral value by the ignorance assumption which deprives the contractors of any basis for keying the choice of ultimate principles to their possibly parochial vision of the good life. These values of constitutional morality ineluctably put determinate constraints on the content of the public morality which is the foundation of the criminal law and the enforcement of which pervades the entire legal system.⁸²

What is the constitutionally permissible content of the legal enforcement of morals? Regarding this question, recent moral philosophy has been increasingly occupied with the clarification of the conceptual structure of ordinary moral reasoning.⁸³ The concept of

ity of the constitutional right to privacy, does not describe such a foundational shift in the concept of morality itself, but rather it does so with reference to the lower order conventions that the concept of morality justifies. See text accompanying note 115 *infra*.

81. See notes 92-104 & accompanying text *infra*.

82. For support for this kind of position from constitutional history, see Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976).

83. See K. BAIER, *THE MORAL POINT OF VIEW* 187-213 (1958); A. DONAGAN, *THE THEORY OF MORALITY* 210-43 (1978); C. FRIED, *RIGHT AND WRONG* 7-29 (1978); D. GAUTHIER, *PRACTICAL REASONING* (1963); B. GERT, *THE MORAL RULES* 60-75 (1973); A.

morality or ethics is not an openly flexible one; there are certain determinate constraints on the kind of beliefs that can be counted as ethical in nature.⁸⁴ Some examples of these constraints are the principles of mutual respect—treating others as you would like to be treated in comparable circumstances;⁸⁵ universalization—judging the morality of principles by the consequences of their universal application;⁸⁶ and minimization of fortuitous human differences (like clan, caste, ethnicity, gender, and color) as a basis for differential treatment.⁸⁷ It follows from this conception that a view is not a moral one merely because it is passionately and sincerely held, or because it has a certain emotional depth,⁸⁸ or because it is the view of one's father or mother or clan, or because it is conventional. On the contrary, the moral point of view affords an impartial way of assessing whether any of these beliefs, which may often press one to action, is in fact worthy of ethical commitment.⁸⁹

In similar ways and for similar reasons, not everything invoked by democratic majorities as justified by "public morality" is, in fact, morally justified. From the moral point of view, we must always assess such claims by whether they can be sustained by the underlying structure of moral reasoning—by principles of mutual respect, universalization, and minimization of fortuity. In this regard, constitutional morality is at one with the moral point of view. The values of equal concern and respect for personal autonomy, that we have unearthed at

GEWIRTH, *REASON AND MORALITY* 129-98 (1978); G. GRICE, *THE GROUNDS OF MORAL JUDGMENT* 1-35 (1967); R.M. HARE, *THE LANGUAGE OF MORALS* (1952); R.M. HARE, *FREEDOM AND REASON* 86-185 (1963); J. MACKIE, *ETHICS* 83-102 (1977); J. RAWLS, *A THEORY OF JUSTICE* (1971); D. RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971).

84. See G. WARNOCK, *CONTEMPORARY MORAL PHILOSOPHY* 55-61 (1967); G. WARNOCK, *THE OBJECT OF MORALITY* 35-70 (1971); Foot & Harrison, *When Is a Principle a Moral Principle?*, 28 *PROC. ARISTOTELIAN SOC'Y* 95 (1954); Foot, *Moral Arguments*, 67 *MIND* 502 (1958); Foot, *Moral Beliefs*, 59 *PROC. ARISTOTELIAN SOC'Y* 83 (1958-59).

85. See K. BAIER, *THE MORAL POINT OF VIEW* 187-213 (1958); D. GAUTHIER, *PRACTICAL REASONING* 81-94 (1963); G. GRICE, *THE GROUNDS OF MORAL JUDGMENT* 1-35 (1967); J. MACKIE, *ETHICS* 83-102 (1977); J. RAWLS, *A THEORY OF JUSTICE* 130-32 (1971); D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 75-91 (1971).

86. See R. HARE, *FREEDOM AND REASON* 91-94 (1963); D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 83-85, 216 (1971).

87. This idea is the basis of Kant's theory of autonomy. See I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 65-71 (L. Beck trans. 1959). Also note J.S. Mill's remark that the true idea of distributive justice consists in "redressing the inequalities and wrongs of nature." J.S. MILL, 2 *PRINCIPLES OF POLITICAL ECONOMY* 398 (5th ed. 1864). Mill thus concludes that primogeniture is unjust in that distinctions are grounded on accident. *Id.* at 505. Note also Sidgwick's claim that justice rewards voluntary effort, not natural ability alone. H. SIDGWICK, *THE PRINCIPLES OF POLITICAL ECONOMY* 505-06, 531 (1887).

88. "What is important is not the quality of the creed but the strength of the belief in it." P. DEVLIN, *THE ENFORCEMENT OF MORALS* 114 (1965).

89. See authorities cited note 83 *supra*.

the foundations of American constitutionalism, are the same values that recent moral theory, following Kant,⁹⁰ has identified as the fundamental values of the moral point of view. This kind of moral analysis affords definite constraints on what may permissibly or justifiably be regarded as an ethical belief.⁹¹ In an area where public attitudes about public morality are, in fact, demonstrably not justified by underlying moral constitutional principles, laws resting on such attitudes are constitutionally dubious. There being no defensible moral principle to sustain state interference, the matter is not a proper object of state concern. In this soil, the constitutional right to privacy took root in *Griswold*.

The understanding of *Griswold* and its progeny begins with repudiation of the procreational model of sexual love which was given its classic formulation by St. Augustine.⁹² For Augustine, sexuality was a natural object of continuing shame because it involved loss of control.⁹³ Accordingly, the only proper form of sex was that which was done with the controlled intention to procreate; sexuality without procreation or independent of such intentions was, for Augustine, intrinsically degrading.⁹⁴ It follows from this view that certain rigidly defined kinds of intercourse in conventional marriage, always with the intention to procreate, are alone moral; contraception, whether within or outside marriage, extramarital and, of course, homosexual intercourse are forbidden since these do not involve intent to procreate.⁹⁵

90. See A. GEWIRTH, *REASON AND MORALITY* (1978); J. RAWLS, *A THEORY OF JUSTICE* (1971); D. RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971).

91. For example, equal concern and respect for autonomy clearly rule out as a form of legitimate morality Aristotelian and Nietzschean perfectionism, for such moral systems identify as the only morally relevant factors forms of elitist excellence that most persons lack; such systems show no concern and respect for autonomous persons. See D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 116-17 (1971); G. WARNOCK, *CONTEMPORARY MORAL PHILOSOPHY* 49-51 (1967). Similarly, we may use moral theories, for example, contractarianism, that express the values of autonomy and equal concern and respect, to assess which beliefs are within the constitutionally permissible content of the public morality.

92. See AUGUSTINE, *THE CITY OF GOD* 577-94 (H. Bettenson trans. 1972). St. Thomas is in accord with Augustine's view. Of the emission of semen apart from procreation in marriage, he wrote: "[A]fter the sin of homicide whereby a human nature already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is precluded." T. AQUINAS, *ON THE TRUTH OF THE CATHOLIC FAITH: SUMMA CONTRA GENTILES*, pt. 2, ch. 122(9), at 146 (V. Bourke trans. 1946).

93. "In fact, this lust we are now examining is something to be the more ashamed of because the soul, when dealing with it, neither has command of itself so as to be entirely free from lust, nor does it rule the body so completely that the organs of shame are moved by the will instead of by lust. Indeed if they were so ruled they would not be *pudenda*—parts of shame." AUGUSTINE, *THE CITY OF GOD* 586 (H. Bettenson trans. 1972).

94. See notes 98-100 & accompanying text *infra*.

95. One prominent account of the Catholic view notes that Catholic canon law "holds, as a basic and cardinal fact, that complete sexual activity and pleasure is licit and moral only in a naturally completed act in valid marriage. All acts which, of their psychological and physical nature, are designed to be preparatory to the complete act, take their licitness and

Augustine's argument rests on a rather remarkable fallacy. Augustine starts with two anthropological points about human sexual experience: first, humans universally insist on having sex alone and unobserved by others;⁹⁶ and second, humans universally cover their genitals in public.⁹⁷ Augustine argues that the only plausible explanation for these two empirical facts about human sexuality is that humans experience sex as intrinsically degrading because it involves the loss of control;⁹⁸ this perception of shame, in turn, must rest on the fact that the only proper form of sex is having it with the controlled intention to procreate;⁹⁹ sexuality is intrinsically degrading because we tend to experience it without or independent of the one intention that alone can validate it.¹⁰⁰ Assuming, *arguendo*, the truth of Augustine's anthropological assumptions,¹⁰¹ it does not follow that humans must find sex intrinsically shameful. These facts are equally well explained by the fact that people experience embarrassment in certain forms of publicity of their sexuality, not shame in the experience of sex itself. Shame is conceptually distinguishable from embarrassment in that its natural object is a failure of personally esteemed competent self-control, whether the failure is public or private; embarrassment, in contrast, is

their morality from the complete act. If, therefore, they are entirely divorced from the complete act, they are distorted, warped, meaningless, and hence immoral." Gardiner, *Moral Principles Towards a Definition of the Obscene*, 20 LAW & CONTEMP. PROB. 560, 564 (1955); cf. T. BOUSCAREN, A. ELLIS, & F. KORTH, CANON LAW 930 (1963); H. GARDINER, CATHOLIC VIEWPOINT ON CENSORSHIP 62-67 (1958) (sanctions against immorality by lay persons). For a critique, see R. HANEY, COMSTOCKERY IN AMERICA 88-96 (1960).

96. AUGUSTINE, THE CITY OF GOD 579-80 (H. Bettenson trans. 1972).

97. *Id.* at 578-79.

98. Indeed, Augustine objects to the intensity of the experience in that it overwhelms mental functions: "This lust assumes power not only over the whole body, and not only from the outside, but also internally; it disturbs the whole man, when the mental emotion combines and mingles with the physical craving, resulting in a pleasure surpassing all physical delights. So intense is the pleasure that when it reaches its climax there is an almost total extinction of mental alertness; the intellectual sentries, as it were, are overwhelmed." *Id.* at 577.

99. Augustine speculates that, prior to the Fall in the Garden of Eden, man could will erections for procreation without any lust just as some extraordinary people now can wiggle their ears at will or even pass air musically "without any stink." *Id.* at 588.

100. Indeed, Augustine notes that not only is sexual impulse "totally opposed to the mind's control, it is quite often divided against itself." *Id.* at 577. That is, when we want to experience such feelings, we often cannot; and when we don't want to experience them, we do.

101. The leading anthropological study of cross-cultural sexual practices reports that, universally, sexual intercourse occurs in private. See C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR 68-72 (1951) [hereinafter cited as FORD & BEACH]. This is not a characteristic of animal sexual behavior. "A desire for privacy during sexual intercourse seems confined to human beings. Male-female pairs of other animal species appear to be unaffected by the presence of other individuals and to mate quite as readily in a crowd as when they are alone." *Id.* at 71.

experienced when a matter is made public that properly is regarded as private.¹⁰² The twin facts adduced by Augustine are, indeed, better explained by the hypothesis of embarrassment, not shame. Surely many people experience no negative self-evaluations when they engage in sex in private which is what the hypothesis of embarrassment, not shame, would lead us to expect. For example, people may experience pride in knowing that other people know or believe that they are having sex (the recently married young couple). There is no shame here, but there would be severe embarrassment if the sex act were actually observed. That people would experience such embarrassment reveals something important about human sexual experience, but it is not Augustine's contempt for the loss of control of sexual passion.¹⁰³ Sexual experience is, for human beings, a profoundly personal, spontaneous, and absorbing experience in which they express intimate fantasies and vulnerabilities which typically cannot brook the sense of an external, critical observer. That humans require privacy for sex relates to the nature of the experience; there is no suggestion that the experience is, *pace* Augustine, intrinsically degrading.

The consequence of Augustine's fallacy is to misdescribe and misidentify natural features of healthy sexual experience, namely, the privacy required to express intimate sensual vulnerabilities, in terms of putatively degraded properties of sexual experience per se. In fact, this latter conception of sexuality relies on and expresses an overdeveloped wilfulness that fears passion itself as a form of loss of control,¹⁰⁴ as though humans cannot with self-esteem indulge emotional spontaneity outside the rule of the iron procreational will. Such a conception both underestimates the distinctly human capacity for self-control and overestimates the force of sexuality as a dark, unreasoning, Bacchic possession whose demands inexorably undermine the rational will. It also fails to fit the empirical facts, indeed contradicts them. Human, as opposed to animal, sexuality is crucially marked by its control by higher cortical functions and thus its involvement with the human symbolic imagination, so that sexual propensities and experience are largely independent of the reproductive cycle. Consequently, humans use sexuality for diverse purposes—to express love, for recreation, or for

102. See D. RICHARDS, A THEORY OF REASONS FOR ACTION 254 (1971).

103. See note 98 *supra*.

104. This very conception (that sexuality is a proper object of the will) appears to have disastrous effects on natural sexual function. Masters and Johnson, for example, report that a main feature of certain kinds of inadequate sexual function is the very attempt to will it. See W. MASTERS & V. JOHNSON, HUMAN SEXUAL INADEQUACY 198-99, 202-03 (1970). This conception, thus, of certain religious traditions (namely, that "proper" sexual experience must be accompanied by certain kinds of wills and intentions) may account for the association of defective sexual function with rigid religious sexual conceptions. See generally *id.* at 10, 24, 70, 117-20, 133, 135, 139, 144, 175-76, 177-79, 189, 213, 253-56.

procreation. No one purpose necessarily dominates; rather, human self-control chooses among the purposes depending on context and person.

The constitutional right to privacy was developed in *Griswold* and its progeny because the procreational model of sexuality could no longer be sustained by sound empirical or conceptual argument. Lacking such support, the procreational model could no longer be legally enforced on the grounds of the "public morality," for it failed to satisfy the postulate of constitutional morality that legally enforceable moral ideas be grounded on equal concern and respect for autonomy and demonstrated by facts capable of empirical validation. Accordingly, since anticontraceptive laws are based on the concept that nonprocreational sex is unnatural, the *Griswold* court properly invoked the right of privacy to invalidate the Connecticut statute. For similar reasons, laws prohibiting the use of pornography in the home were invalidated.¹⁰⁵ Subsequently, abortion laws were also struck down because the traditional objection to them rested, in large part, on the procreational model and the residuum of moral condemnation that was not clearly sustained by sound argument.¹⁰⁶

If the right to privacy extends to sex among unmarried couples¹⁰⁷ or even to autoeroticism in the home,¹⁰⁸ it is difficult to understand how in a principled way the Court could decline to consider fully the application of this right to private, consensual, deviant sex acts. The Court might distinguish between heterosexual and homosexual forms of sexual activity; but could this distinction be defended rationally? At bottom, such a view must rest on the belief that homosexual or deviant sex is unnatural. Under this view, such practices would have to be excluded altogether from the scope of the constitutional right to privacy just as obscenity is excluded from first amendment protection. However, an analysis of the application of the notion of the "unnatural" to deviant sexual acts and an examination of the moral force of the consti-

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

106. *Roe v. Wade*, 410 U.S. 113 (1973). For an examination of the Catholic response to the Supreme Court's abortion cases, see Bresnahan, *The Interaction of Religion and Law - A Post-Vatican II Roman Catholic Perspective*, 29 HASTINGS L.J. 1361, 1377-82 (1978). For powerful philosophical arguments against the status of the foetus as a person, see Tooley, *A Defense of Abortion and Infanticide*, in *THE PROBLEM OF ABORTION* 51-91 (J. Feinberg ed. 1973); Engelhardt, Jr., *The Ontology of Abortion*, in *MORAL PROBLEMS IN MEDICINE* 318-34 (1976).

107. The right to privacy is clearly applicable to nonmarital contexts. See *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); cf. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives and the unmarried); *Stanley v. Georgia*, 394 U.S. 557 (1969) (private use of pornography).

108. The constitutional protection for the use of pornography in the home, *Stanley v. Georgia*, 394 U.S. 557 (1969), is arguably protection for the masturbatory practices for which the pornography may be used.

tutional right to privacy seems to compel the clear and decisive rejection of such a view.

The use of so imprecise a notion as "unnatural" to distinguish between those acts not protected by the constitutional right to privacy and those which are so protected is clearly unacceptable. The case where the constitutional right to privacy had its origin was one involving contraception—a practice which the Augustinian view would deem unnatural.¹⁰⁹ Yet, the Court has apparently concluded that the "unnaturalness" of contraception or abortion is constitutionally inadmissible and cannot limit the scope of the right to privacy. In considering the constitutional permissibility of allowing majoritarian notions of the unnatural to justify limitations on the right to privacy, the Court must take into account two crucial factors: (1) the absence of empirical evidence or sound philosophical argument that these practices are unnatural; and (2) the lack of any sound moral argument, premised on equal concern and respect, that these practices are in any sense immoral. In particular, as we saw in the contraception and abortion decisions, the Court impliedly rejected the legitimacy of both the classic Augustinian view of human sexuality and the associated judgments about the exclusive morality of marital procreational sex. The enforcement of majoritarian prejudices, without any plausible empirical basis, could be independently unconstitutional as a violation of due process rationality in legislation.¹¹⁰ To enforce such personal tastes in matters touching basic autonomous life choices violates basic human rights. The moral theory of the Constitution, built as a bulwark against "serious oppressions of the minor party in the community,"¹¹¹ requires that such human rights be upheld and protected against majoritarian prejudices.

For the same reasons that notions of the unnatural are constitutionally impermissible in decisions involving contraception, abortion, and the use of pornography in the home, these ideas are also impermissible in the constitutional assessment of laws prohibiting private forms of sexual deviance between consenting adults. No empirical evidence compels a finding that homosexuality is unnatural.¹¹² Indeed, there

109. See notes 92-104 & accompanying text *supra*.

110. See Justice Stewart's remark, in the context of the permissibility of isolating the harmless mentally ill on the ground that they failed to conform to normal behavior: "One might as well ask if the State, to void public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

111. *THE FEDERALIST* No. 78 (A. Hamilton), at 359 (Hallowell ed. 1857).

112. For a fuller account of the concept of the unnatural here employed, see *Unnatural Acts*, *supra* note 9, at 1287-98. See also Levy, *Perversion and the Unnatural as Moral Categories*,—ETHICS—(forthcoming).

have been cultures that possessed normative assumptions of what is natural that nevertheless did not regard homosexuality as unnatural.¹¹³ Indeed, societies (including ancient Greece) have included or include homosexuality among legitimate sexual conduct, and some prescribe it in the form of institutional pederasty.¹¹⁴ Individuals within our own culture have assailed the view that homosexuality is unnatural by adducing various facts which traditionalists either did not know or did not understand.¹¹⁵ For example, it is now known that homosexual behavior takes place in the animal world, suggesting that homosexuality is part of our mammalian heritage of sexual responsiveness.¹¹⁶

Some have attempted to distinguish between individuals who are exclusively homosexual and the general population based on symptoms of mental illness¹¹⁷ or measures of self-esteem and self-acceptance.¹¹⁸

113. See K. DOVER, GREEK POPULAR MORALITY IN THE TIME OF PLATO AND ARISTOTLE 213-16 (1974); FORD & BEACH, *supra* note 101, at 130-33; J. HENDERSON, THE MACULATE MUSE: OBSCENE LANGUAGE IN ATTIC COMEDY 204-22 (1975); H. LICHT, SEXUAL LIFE IN ANCIENT GREECE 307-498 (1974); J. MONEY & A. EHRHARDT, MAN & WOMAN, BOY & GIRL 125-44 (1972) [hereinafter cited as MONEY & EHRHARDT].

114. *Id.*

115. See W. CHURCHILL, HOMOSEXUAL BEHAVIOR AMONG MALES 267-68 (1971); FORD & BEACH, *supra* note 101, at 264-66; A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 659-60 (1948) [hereinafter cited as KINSEY]; cf. M. HOFFMAN, THE GAY WORLD 100-13 (1968) [hereinafter cited as HOFFMAN].

116. FORD & BEACH, *supra* note 101, at 134-43, 257-59. Contrast the traditional view, expressed by philosophers as disparate as Plato and Kant, that sexual deviance degraded human beings even below animals, since animals were supposed not to be sexually deviant. Thus, Kant argues that homosexuality is unnatural in that it "degrades mankind below the level of animals, for no animal turns in this way from its own species."; cf. VLASTOS, PLATONIC STUDIES 27-28 (1973).

117. See, e.g., Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. OF PROJECTIVE TECHNIQUES 18 (1957); THE WOLFENDEN REPORT 31-33 (1963). In late 1973 the Board of Trustees of the American Psychiatric Association (APA) decided to remove homosexuality from the list of mental diseases. N.Y. Times, Dec. 16, 1973, § 1, at 1, col. 1. The Board's action was approved by a general vote of the APA membership in April, 1974. N.Y. Times, April 9, 1974, § 1, at 12, col. 4. The position there rejected receives its classic statement in I. BIEBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY OF MALE HOMOSEXUALS (1962). See also H. HENDIN, THE AGE OF SENSATION, ch. 4 (1975); C. SOCARIDES, BEYOND SEXUAL FREEDOM, ch. 7 (1975); R. STOLLER, PERVERSION: THE EROTIC FORM OF HATRED (1975). This position has now been repudiated largely on the ground that it is based only on those homosexuals who have sought psychiatric help, many of whom suffer from neurotic symptoms, as do most patients who seek psychiatric help, heterosexual and homosexual. Thus, from the class of neurotic homosexuals who seek psychiatric help, the view argues fallaciously that all homosexuals are neurotic. See M. HOFFMAN, *supra* note 115, ch. 9; J. Marmor, *Homosexuality and Sexual Orientation Disturbances*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1510-20 (Freedman, Kaplan & Sadock eds.). In fact, when correct scientific method is used to test whether homosexuals as a class exhibit neurotic symptoms, no evidence appears. Hooker, *supra*. Freud himself well understood these distinctions. Of homosexuality, Freud wrote: "Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation; it cannot be classified as an illness; we consider it to be a variation of the sexual function." LETTERS OF SIGMUND FREUD 1873-1939, at 419-20

In general, however, apart from their sexual preference, exclusive homosexuals are psychologically indistinguishable from the general population.¹¹⁹

The view sometimes expressed that male homosexuality necessarily involves the loss of desirable character traits probably rests on the idea that sexual relations between males involve the degradation of one or both parties to the status of a woman.¹²⁰ This view, however, rests on intellectual confusion and unacceptable moral premises since it confuses sexual preference with gender identity, whereas, in fact, no such correlation exists. Male homosexuals or lesbians may be quite insistent about their respective gender identities and have quite typical "masculine" or "feminine" personalities. Their homosexuality is defined only

(E. Freud ed. 1961). In the absence of neurotic symptoms, he thus regarded homosexuals as improper subjects for treatment. See A. FREUD, *The Psychogenesis of a Case of Homosexuality in a Woman*, in 18 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (Standard ed. 1920). In the recent Kinsey Institute study of homosexuality, the authors divide homosexuals into five functional categories (Close-Coupled, Open-Coupled, Functionals, Dysfunctionals, and Asexuals) and observe that failure to make such distinctions distorts one's realistic picture of the complex and diverse reality of homosexual relations. The Close-Coupled, essentially monogamous and stable unions, evince considerable psychological health which may exceed that of comparable heterosexual unions. In contrast, the Asexuals appear to be quite psychologically ill-adjusted. The conflation of these distinct categories presents, the Kinsey study proposes, an unrealistic picture of homosexuality which fails to capture fundamental distinctions among forms of adaptation to homosexual preference in a hostile society. See A. BELL & M. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 195-231 (1978) [hereinafter cited as BELL & WEINBERG].

118. See M. WEINBERG & C. WILLIAMS, *MALE HOMOSEXUALS* 148-49 (1974).

119. See BELL & WEINBERG, *supra* note 117; W. CHURCHILL, *HOMOSEXUAL BEHAVIOR AMONG MALES* 36-59 (1967).

120. That is, it would be self-degradation for men to allow themselves to make love to, or to be made love to by a man, which is the proper role of a woman. This conception is also implicit in the idea, pervasive in the ancient Greek and Roman worlds, that while homosexuality *per se* was not wrong, to allow oneself to be the passive partner (*i.e.*, the woman) was shameful and degrading. The aggressively bisexual Julius Caesar, thus, was criticized not for his homosexual connections, but for permitting himself at one time to be the passive partner. See CATULLUS 57 where Caesar is insulted by being called "morbosus," *i.e.*, passive (equivalent to the Greek "pathicus"). This interpretation of the condemnation of homosexuality (degrading a man into a woman) explains why lesbianism was never condemned with the force that was directed against male homosexuality. The Old Testament prohibitions clearly seem to be directed against men. "Thou shalt not lie with mankind, as with womankind: it is abomination." *Leviticus* 18:22. "If a man also lie with mankind as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be upon them." *Id.* 20:13. Note that lesbianism carried far lighter penalties than did male homosexuality under later rabbinical law. See D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 61-63 (1955). For a similar view of the extreme condemnation of male homosexuality, see J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* 83-87 (1976). The same has been true under Christian religious law. *Id.* at 160-65.

by their erotic preference for members of the same gender.¹²¹ The notion that the status of woman is a degradation is morally repugnant to contemporary jurisprudence¹²² and morality.¹²³ If such crude and unjust sexual stereotypes lie at the bottom of antihomosexuality laws, they should be uprooted, as is being done elsewhere in modern life.¹²⁴

Finally, homosexual preference appears to be an adaptation of natural human propensities to very early social circumstances of certain kinds,¹²⁵ so that the preference is settled, largely irreversibly, at a quite early age.¹²⁶

121. See, e.g., Simon & Gagnon, *Femininity in the Lesbian Community*, in *SEXUAL DEVIANCE AND SEXUAL DEVIANTS* 256-67 (E. Goode & R. Troiden eds. 1974).

122. *Stanton v. Stanton*, 421 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (en banc). See generally L. KANOWITZ, *WOMEN AND THE LAW* (1969). On the need for a constitutional amendment to accelerate judicial and legislative developments, see *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. C.R.-C.L. L. REV. 215 (1971); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971). For a review of judicial developments and a commentary on the justifiability thereof, see D. RICHARDS, *THE MORAL CRITICISM OF LAW* 162-78 (1977).

123. See S. DE BEAUVOIR, *THE SECOND SEX* (1952); E. JANEWAY, *MAN'S WORLD, WOMAN'S PLACE* (1971); J.S. MILL, *THE SUBJECTION OF WOMEN* (1869); D. RICHARDS, *THE MORAL CRITICISM OF LAW* 162-78 (1977); V. WOOLF, *A ROOM OF ONE'S OWN* (1929).

124. See authorities cited note 122 *supra*.

125. The origin of homosexual preference is unclear. Some experimental studies claim to adduce evidence that sexual preference is genetically determined. See D. WEST, *HOMOSEXUALITY* 169 (1967). These studies, however, are given little credence. See C. BERG & C. ALLEN, *THE PROBLEM OF HOMOSEXUALITY* 41 (1958); B. OLIVER, *SEXUAL DEVIATION IN AMERICAN SOCIETY* 126 (1967); SEX INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, *SEXUALITY AND MAN* 78-80 (1970). The theory that homosexuality is due to hormonal imbalance has been rejected. BERG & ALLEN, *supra*, at 41; FORD & BEACH, *supra* note 101, at 236-37; MONEY & EHRHARDT, *supra* note 113, at 235-44; OLIVER, *supra*, at 126; WEST, *supra*, at 155-60. The prevailing view now seems to be that homosexual preference results, not from inborn physical characteristics, but from experiences during the individual's lifetime. WEST, *supra*, at 262. See also OLIVER, *supra*, at 126. One psychoanalytic explanation of male homosexuality suggests that it results from a parent-child relationship that includes a seductive, over-attached, domineering mother and a detached, hostile or remote father. I. BIEBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY OF MALE HOMOSEXUALS* 310-13 (1962). Other explanations focus on more general social experience, rejecting the crucial significance of parent-child relationships of these kinds. C. TRIPP, *THE HOMOSEXUAL MATRIX*, chs. 4-5 (1975). The increasing weight of modern evidence points to the importance of very early social experience. See HOFFMAN, *supra* note 115, at 112-27; MONEY & EHRHARDT, *supra* note 113, at 153-201. Thus, one study hypothesizes that gender identity and sexual object choice coincide with the development of language, i.e., from 18 to 24 months of age. See Money, Hampson & Hampson, *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97 BULL. JOHN HOPKINS HOSP. 301 (1955).

126. For the substantial irreversibility of sexual preference, see W. CHURCHILL, *HOMO-*

The cumulative impact of such facts is clear. The notion of "unnatural acts," interpreted in terms of a fixed procreational model of sexual functioning, deviations from which result in inexorable damage or degradation, is not properly applied to homosexual acts performed in private between consenting adults. Such activity is clearly a natural expression of human sexual competences and sensitivities, and does not reflect any form of damage, decline or injury.¹²⁷ To deny the acceptability of such acts is itself a human evil, a denial of the distinctive human capacities for loving and sensual experience without ulterior procreative motives—in a plausible sense, itself unnatural.

There is consequently no logically consistent explanation for the Court's refusal to enforce concepts of the "unnatural" in the case of contraception while permitting statutes based on similar concepts to prohibit sexual deviance. Indeed, the moral arguments in the latter case are more compelling. For one thing, at the time *Griswold* was decided, statutes condemning and prohibiting forms of contraception probably no longer reflected a majoritarian understanding of the unnaturalness of this form of birth control.¹²⁸ Accordingly, the need for

SEXUAL BEHAVIOR AMONG MALES 283-91 (1971); C. TRIPP, THE HOMOSEXUAL MATRIX 251 (1975); WEST, *supra* note 125, at 266. Claimed cure rates by psychotherapists probably include instances in which the individual is merely refraining from homosexual conduct while retaining his or her homosexual inclinations, and fail to indicate whether those alleged to be changed remained heterosexually oriented. W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 227 (1973). For a discussion of change techniques employed by therapists, see L. HATTERER, CHANGING HOMOSEXUALITY IN THE MALE (1970).

127. See note 117 *supra*. Venereal disease is one health problem that might be adduced in this connection on the ground that it is common among homosexuals. In fact, however, there is no necessary connection between homosexuality and the incidence of venereal disease; and in any event, there is reason to believe that the incidence of venereal disease among homosexuals has been fostered, not prohibited, by sodomy statutes. As regards the incidence of venereal disease among homosexuals, two significant classes of homosexuals do not involve the venereal disease problem: (1) Lesbians do not in general suffer from venereal disease in that they "practically never become infected except through contact with men," G. HENRY, ALL THE SEXES 366 (1955); (2) Stable homosexual relations, male and female, do not implicate the disease. In general, the root of the venereal disease problem among homosexuals arises from isolated, promiscuous relations among male homosexuals, not from the form of intercourse itself. This promiscuity among homosexuals is fostered by absolute prohibitions on all forms of homosexual relations and concomitant forms of economic and social discrimination. Indeed, medical attempts to treat the problem are made more difficult by lack of candor by homosexuals about their sexual life and preference, arising from fears of criminal penalties and related forms of discrimination. See generally Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1631-33 (1974).

128. In *Poe v. Ullman*, 367 U.S. 497 (1961), the predecessor case to *Griswold*, an important reason for judicial abstention was Justice Frankfurter's view that lack of enforcement of the Connecticut contraception law evinced complete lack of belief in the law by enforcement officials and the citizenry of Connecticut. See A. BICKEL, THE LEAST DANGEROUS BRANCH 143-56 (1962).

constitutional protection, while proper, was not exigent.¹²⁹ In the case of homosexuality, however, there is good reason to believe that, as a group, homosexuals are subject to exactly the kind of unjust social hatred that constitutional guarantees were designed to combat.¹³⁰

A second way by which the Court might justify its restricted application of the right of privacy would be to focus on the morality of the acts in question. Presumably, the naturalness of homosexual experience would not in itself legitimize such experience, if homosexuality were shown to be immoral. There is, however, no sound moral argument to sustain any longer the idea that homosexuality is intrinsically immoral.

The concept of morality, proposed herein, puts certain constraints—mutual respect, universalization, minimization of fortuity—on the kinds of beliefs and arguments that can properly be regarded as ethical in nature. Certainly, such constraints would dictate certain prohibitions and regulations of sexual conduct. For example, respect for the development of capacities of autonomous rational choice would require that various liberties, guaranteed to mature adults, might not extend to persons presumably lacking rational capacities, such as children. Nor is there any objection to the reasonable regulation of obtrusive sexual solicitations or, of course, to forcible forms of intercourse of any kind. Such regulations or prohibitions would secure a more equal expression of autonomy compatible with a like liberty for all, thus advancing underlying values of equal concern and respect. In addition, forms of sexual expression would be limited by other moral principles that would be universalized compatibly with equal concern and respect, for example: principles of not killing, harming or inflicting gratuitous cruelty; principles of paternalism in nar-

129. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 143-56 (1962).

130. Like racial and ethnic minorities, exclusive homosexuals constitute a quite small percentage of the nation's population. Kinsey stated that four per cent of white males are exclusively homosexual throughout their lives. KINSEY, *supra* note 115, at 650-51. Kinsey's figures may even overstate the incidence of male homosexuality. See PLAYBOY, Mar. 1974, at 54-55. No major political party has yet espoused the rights of homosexuals. American popular and legal attitudes towards homosexuals derive from traditional Christianity's abhorrence of homosexuality. See *Unnatural Acts*, *supra* note 9, at 1292-98. The cases are replete with expressions of judicial revulsion at homosexuality, something now unthinkable in the racial or gender area. See, e.g., *Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970); *In re Labady*, 326 F. Supp. 924, 927 (S.D.N.Y. 1971); *H. v. H.*, 59 N.J. Super. 227, 237, 157 A.2d 721, 727 (1959); *In re Schmidt*, 56 Misc. 2d 456, 460, 289 N.Y.S.2d 89, 92 (Sup. Ct. 1968). Not surprisingly, empirical surveys confirm the attitudes expressed or commented on in judicial opinions. Fifty per cent of respondents in one study, all "from large cities in the United States agree 'very much' that homosexuality is obscene and vulgar." M. WEINBERG & C. WILLIAMS, *MALE HOMOSEXUALS* 84 (1974).

rowly defined circumstances; and principles of fidelity.¹³¹ Thus, as formulated, the relevant limiting moral and constitutional principles permit some reasonable, legitimate restrictions on complete individual freedom.

Statutes that absolutely prohibit deviant sexual acts such as that considered in *Doe*¹³² cannot be justified consistently with the principles just discussed. Such statutes are not limited to forcible or public forms of sexual intercourse, or to sexual intercourse by or with children but extend to private, consensual acts between adults as well. To say that such laws are justified by their indirect effect of stopping homosexual intercourse by or with the underaged would be as absurd as to claim that absolute prohibitions on heterosexual intercourse could be similarly justified. There is no reason to believe that homosexuals as a class are any more involved in offenses with the young than heterosexuals.¹³³ Nor is there any reliable evidence that such laws inhibit children from being naturally homosexual who would otherwise be naturally heterosexual. Sexual preference is settled, largely irreversibly, in very early childhood well before laws of this kind could have any effect.¹³⁴ If the state has any legitimate interest in determining the sexual preference of its citizens, which is doubtful,¹³⁵ that interest cannot constitutionally be secured by overbroad statutes that tread upon the rights of exclusive homosexuals of all ages¹³⁶ and that, in any event, irrationally pursue

131. For a more extended argument for principles of these kinds, see D. RICHARDS, A THEORY OF REASONS FOR ACTION 148-95 (1971).

132. *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976), *aff'g without opinion* 403 F. Supp. 1199 (E.D. Va. 1975) (three judge court). See note 5 *supra*.

133. See P. GEBHARD, J. GAGNON, W. POMEROY, & C. CHRISTENSON, SEX OFFENDERS (1965); HOFFMAN, *supra* note 115, at 89-92. Analysis of imprisonment statistics of homosexuals sometimes shows high percentages of arrests for offenses against children. See, e.g., C. BERG, FEAR, PUNISHMENT, ANXIETY AND THE WOLFENDEN REPORT 33-34 (1959); cf. R. MITCHELL, THE HOMOSEXUAL AND THE LAW 11 (1969). However, these higher percentages probably simply reflect the fact that homosexuals who molest children are far more frequently apprehended than homosexual people who engage only in consensual relations with adults. In general, seduction of the young appears to be more centered on heterosexual rather than homosexual relations. See BELL & WEINBERG, *supra* note 117, at 230. Importantly, the failure to note the distinction between homosexuality and pedophilia is deplored by the majority of homosexual people who "do not share, do not approve, and fear to be associated with pedophilic interests." D. WEST, HOMOSEXUALITY 119 (1967); see Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 860 n.367 (1979). On the impropriety of forbidding adults access to obscene books on the ground that access to such books harms children, see *Butler v. Michigan*, 352 U.S. 380 (1957).

134. See note 125 *supra*.

135. It is not at all self-evident that it has such a constitutionally legitimate interest. See generally *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), which question the propriety of certain types of state regulation of the education of children.

136. Consider, for example, the claims that prohibiting all homosexual conduct and ho-

the claimed interest.

Other moral principles also fail to justify absolute prohibitions on consensual sexual deviance. Homosexual relations, for example, are not generally violent. Thus, prohibitory statutes could not be justified by moral principles of nonmaleficence.¹³⁷ There is no convincing evidence that homosexuality is either harmful to the homosexual or correlated with any form of mental or physical disease or defect.¹³⁸ To the contrary, there is evidence that antihomosexuality laws, which either force homosexuals into heterosexual marriage unnatural for them or otherwise distort and disfigure the reasonable pursuit of natural emotional fulfillment, harm homosexuals and others in deep and permanent ways.¹³⁹ Accordingly, principles of legitimate state paternalism do not here come into play.

homosexual teachers protects the young. In fact, homosexual preference has its origins in very early social experience within the family often prior to any formal education. See note 125, *supra*. Prohibitions of this kind accordingly have no effect on sexual preference and thus are not rationally related to this end, but do inflict great and unfair harms on homosexuals of all ages. Adult homosexuals are often gifted teachers. See J. McNEILL, S.J., *THE CHURCH AND THE HOMOSEXUAL* 135-38 (1976). These prohibitions either penalize their being teachers or allow them to do so only on hypocritical terms which violate their rights of self-respect based on personal integrity. Society is thus deprived of a social asset or secures it only on immoral terms.

In addition, there is a fundamental unfairness in allowing teachers to be publicly heterosexual, which affords the heterosexual young role models of how to build a life around their sexuality, and not to allow teachers to be publicly homosexual, thus depriving the homosexual young of the education that is any person's right in how to build a life of sexual self-respect. The effect of such public knowledge on the heterosexual young is to discourage in them immoral stereotypes and to develop desirable ethical attitudes of tolerance and respect for the diversities of human fulfillment. Present prohibitions, on the contrary, teach and support immoral and inhumane attitudes which are destructive to the young and to society at large.

Consider, as a useful analogy, the first attacks on racial segregation in the area of elementary education, attacks that have since been enlarged to encompass all forms of state-supported racial discrimination. Such constitutional attacks understandably began in the area of elementary education because undoing racial segregation at this point cuts racist isolation and misunderstanding at its roots. A comparable argument of equivalent force could be made regarding the sexist stereotypes that underlie much antihomosexuality prejudice. These sexist stereotypes retain their force because of compelled ignorance about the nature of homosexuality and homosexuals and the failure of people publicly to acknowledge the irrelevance of sexual preference to any fair measure of moral decency, humanity, or good citizenship. In order to cut at the roots of these unjust and immoral attitudes in ignorance and isolation, public acknowledgement and toleration of sexual diversity in teachers and students in early education appears as necessary and useful here as it was and is in the case of racism. Finally, of course, no teacher or guardian of the young, heterosexual or homosexual, has the right to seduce the underage young.

137. See R. MITCHELL, *THE HOMOSEXUAL AND THE LAW* 12 (1969). In fact, there is evidence that homosexuals are less violent than heterosexuals. See HOFFMAN, *supra* note 115, at 90-91.

138. See note 117 *supra*.

139. See text accompanying notes 228-43 *infra*.

One quite relevant set of facts that would justify prohibitions of homosexuality would be empirical support for the view that homosexuality is a kind of degenerative social poison that leads directly to disease, social disorder and disintegration.¹⁴⁰ Principles of constitutional justice must be compatible with the stability of institutions of social cooperation. Thus, if the above allegation were true, prohibition of homosexuality might be justified on the ground that such prohibition would preserve the constitutional order, so that justice on balance would be secured. These beliefs are quite untenable today, however. Many nations, including several in Western Europe,¹⁴¹ have long allowed homosexual acts between consenting adults, with no consequent social disorder or disease.

One final moral argument has been used to justify a general prohibition upon homosexuality—the argument invoked by the district court in *Doe* as “the promotion of morality and decency.”¹⁴² That court believed this to be the ultimate ground for the legitimacy of the Virginia sodomy statute. The argument takes three forms: (1) a general jurisprudential thesis about the relation of law and morals; (2) an interpretation of the moral principles discussed previously; and (3) the point of view of a certain form of theological ethics. None of these views can be sustained.

The classic modern statement of the jurisprudential thesis was made by Devlin¹⁴³ against Hart,¹⁴⁴ repeating many of the arguments earlier made by Stephen¹⁴⁵ against Mill.¹⁴⁶ The Devlin-Hart debate centered on the jurisprudential interpretation of the Wolfenden Report,¹⁴⁷ which recommended, *inter alia*, the abolition of the imposition of criminal penalties for homosexual acts between consenting adults. Devlin, in questioning the Report, focused on the proposition that certain private immoral acts are not the law's business. The criminal law, Devlin argued, is completely unintelligible without reference to morality, which it enforces. The fact that two parties agree to kill one another, for example, does not relieve the killer of criminal liability, for

140. See *Unnatural Acts*, *supra* note 9, at 1294-95.

141. See BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 293, 305-07 (1973). England has also recently legalized sexual conduct between consenting adults. Sexual Offenses Act, 1967, c. 60.

142. 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976).

143. See generally P. DEVLIN, *THE ENFORCEMENT OF MORALS* 9-13 (1965).

144. See H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

145. J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 135-78 (1967).

146. J.S. MILL, *On Liberty*, in *THE PHILOSOPHY OF JOHN STUART MILL* 271-93 (M. Cohen ed. 1961) [hereinafter cited as *On Liberty*].

147. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, *REPORT*, CMMD. No. 247 (1957). See the similar view taken in MODEL PENAL CODE § 207.5(1), comment (Tent. Draft No. 4, 1955).

the act in question if immoral. The privacy of the act (between consenting adults perhaps in the privacy of the home) is irrelevant. Similarly, the criminal law in general arises from morality. Morality, Devlin maintains, is the necessary condition of the existence of society. Thus, to change the law in such a way as to violate that morality is to threaten the stability of the social order. Morality, in this connection, is to be understood in terms of the ordinary man's intuitive sense of right and wrong, as determined, Devlin suggests, by taking a man at random. Just as we prove the standards of negligence for purposes of civil or criminal liability by appealing to the judgment of ordinary men acting as jurors, so may we prove applicable standards of morality. Ordinary men morally loathe homosexuality; accordingly, homosexuality is immoral and must be legally forbidden.

Superficially, Devlin's argument appears to be constitutionally acceptable. There should be no constitutional objection to prohibiting clearly immoral acts that threaten the existence of society. Further, it is surely plausible that law and morals have a deep and systematic connection of the kind Devlin suggests.¹⁴⁸ Nevertheless, such abstractly plausible propositions will not support the specific argument which Devlin propounds. Although Devlin is probably correct in asserting that the criminal law arises from the morality that it enforces, he nevertheless falsely identifies morality with conventional social views in a way that renders unthinkable, if not unintelligible, the whole idea of moral criticism and reform of social convention. Adoption of this view would effectively turn the measure of legally enforceable moral ideas into an interim victory of one set of contending ideological forces over another.¹⁴⁹ Moreover, there is no good reason to make this identification of morality and social convention, since it is based on an indefensible and naive moral philosophy as well as an unexamined and unsound sociology.¹⁵⁰

The attraction of Devlin's theory for judges is its apparent objectivity; it affords a definite criterion for the morality that the law enforces without appeal to subjective considerations.¹⁵¹ But the empirical objectivity of existing custom has nothing to do with the notions of moral impartiality and objectivity that are, or should be, of judicial concern in determining the public morality on which the law rests. The idea that the pursuit of the latter must collapse into the former is a

148. See D. RICHARDS, *A THEORY OF REASONS FOR ACTION*, chs. 7-10 (1971).

149. See Gussfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CALIF. L. REV. 54, 58-59 (1968).

150. See Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967).

151. For the classic statement of this view by an American judge, see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 108-11, 112, 131, 136 (1921).

confusion of inquiries, arising from an untenable and indefensible distinction between subjective moral belief and the public morality of the law. There is no such distinction. Views, to be moral, require a certain kind of justification. Judges, in interpreting legally enforceable moral ideas, must appeal to the kind of reasoning that is moral. They do not as judges abdicate their responsibility for moral reasoning as persons. On the contrary, competence and clarity in such reasoning comprise the virtue that we denominate judicial.

Devlin's theory is for such reasons theoretically and practically unacceptable. Even if it could be defended on such grounds, however, it must be rejected as it is incompatible with the moral theory of human rights implicit in the constitutional order. The Constitution rests on the idea that moral rights of individuals cannot be violated, notwithstanding majoritarian sentiments to the contrary. Accordingly, the Supreme Court has rightly upheld constitutional rights against popular racial and sexual prejudices.¹⁵² Prejudices against the vulnerable, largely powerless homosexual minority must be similarly circumscribed.¹⁵³

That this popular argument for preserving moral standards is objectionable in moral and constitutional principle is then apparent. The district court in *Doe*, however, employed another form of argument, not similarly objectionable, as it rests on an interpretation of the moral principles which do relevantly regulate sexual conduct. It suggested that the moral issue before it was not that homosexuality is objectionable per se, but rather that in the present state of society homosexuality tends to evade certain moral principles, for example, principles of fidelity intrinsic in heterosexual marriage and family obligations.¹⁵⁴ The court's use of this argument is, however, fundamentally fallacious. In support of its proposition, the court cited a case that involved fellatio among a married couple and a third adult and distribution of pictures of the said acts in school by the couple's daughters (aged 11 and 13).

152. Historically, racial and sexual prejudices were interdependent; the inferiority of blacks was used as a ground for arguments for the inferiority of women, and conversely. See note 54 *supra*. For evidence of the psychological interrelationships of racial and sexual prejudice, see T. ADORNO, E. FRENKEL-BRUNSWICK, D. LEVINSON & R. SANFORD, *THE AUTHORITARIAN PERSONALITY*, 399-441, 452-54, 506-17, 866-72 (1950). See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception for unmarried persons); *Loving v. Virginia*, 338 U.S. 1 (1967) (miscegenation); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (segregated education). See also note 122 *supra*.

153. See note 130 *supra*.

154. *Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975). The Court, thus, focused on the analysis of *Lovisi v. Slayton*, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.) (en banc), *cert. denied*, 429 U.S. 977 (1976). This case involved both a breach of the traditional marital bond (a threesome, two of whom are a married couple, engaging in fellatio) and elements of degradation of the young (the children, aged 11 and 13, who distributed pictures of their parents' activities in school).

The latter fact was alleged to show that conduct not immoral in itself may be condemned because "the conduct is likely to end in a contribution to moral delinquency."¹⁵⁵ The citation of a case of apparently heterosexual sodomy, involving clear elements of a waiver of privacy rights as evidence for the propriety of proscribing clearly private homosexual sex is a remarkable nonsequitur, illustrating the kind of shabby reasoning to which courts are driven in order to lend a shred of moral plausibility to these prohibitions.

Aside from this specific argumentative fallacy, there remains the general intuition that homosexuality, if allowed, would violate moral principles implicit in the institution of the heterosexual family. While this line of thought has the general form of an acceptable moral and constitutional argument, its factual assumptions are utterly unsupported by evidence. For example, the argument makes the unsupported assumption that prohibiting homosexuality would encourage heterosexual marriage. But, as Judge Merhige indicated in his dissent in *Doe*, such a claim is so empirically flimsy as to be "unworthy of judicial response."¹⁵⁶ For one thing, historical and contemporary data show that homosexual connections are compatible with heterosexual marriage.¹⁵⁷ The many countries which have legalized homosexual relations show no decline in the incidence of heterosexual marriage.¹⁵⁸ It thus appears that prohibitions of homosexual relations have no effect on heterosexual marriage.¹⁵⁹

The intuition regarding homosexuality and the decline of the het-

155. 403 F. Supp. at 1202.

156. *Id.* at 1205 (Merhige, J., dissenting).

157. For example, in ancient Greece and in many primitive societies, the preferred model was homosexual relations and heterosexual marriage. See note 113 *supra*. The United States data illustrates that this pattern still persists; homosexual and heterosexual relations can coexist in the same person either at one time or over time. See KINSEY, *supra* note 115, at 610-66.

158. See BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 293 (1973).

159. Some homosexuals do marry and have children. P. WILSON, *THE SEXUAL DILEMMA* 52-53 (1971). In general, those whose sexuality is entirely homosexual can function heterosexually for periods of time. D. WEST, *HOMOSEXUALITY* 233-34 (1968); Knight, *Overt Male Homosexuality*, in *SEXUAL BEHAVIOR AND THE LAW* 442-43 (R. Slovenko ed. 1965). By employing sexual fantasies of a person for whom they experience erotic feeling, people can thus have intercourse with people in whom they experience nothing erotic. Note Kinsey's description of how people have intercourse with prostitutes they find unattractive: "As far as his psychologic responses are concerned, the male in many instances may not be having coitus with the immediate sexual partner, but with all of the other girls with whom he has ever had coitus, and with the entire genus Female with which he would like to have coitus." A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 684 (1953). In the case of exclusive homosexuals, the effect of thus frustrating natural feeling to conform to conventional models of conduct is probably to starve and waste resources of spontaneous and individual human feeling. See text accompanying notes 180-243 *infra* for amplification of this idea.

erosexual family is ancient.¹⁶⁰ According to this view, consensual homosexual acts in private are not of social concern, but the way of life that such sex acts exemplify is. To legitimate these sex acts is to legitimate an undesirable way of life; thus these sex acts, even in private between consenting adults, may justly be prohibited.

The substance of this intuitive allegation should be examined with care, for a form of it bears the imprimatur of the Supreme Court itself.¹⁶¹ The suggestion is this: public knowledge of the legitimacy of homosexual acts would undermine the capacity of heterosexuals to sustain the way of life required for the monogamous nuclear family and the personal sacrifices that such a way of life requires. But no one in the Western cultural tradition could reasonably claim that the existence of legitimate alternative ways of life outside heterosexual marriage undermine social stability. The legitimacy of remaining unmarried has not undermined the heterosexual family. Indeed, one form of the unmarried state, religious celibacy, has long been regarded by influential Western religions as sanctified; this fact has not, however, made the heterosexual family less stable.

Why, then, should the recognition of homosexuality as a legitimate way of life be treated in a radically different way? The suggestion must be that homosexual preference is so strong and universal and heterosexual preference so weak (and conventional family life so unattractive) that people would on a massive scale tend not to undertake heterosexual marriage if homosexuality as a way of life were legitimate. But, as we have seen, there is not even a shred of empirical support for these views. While a small minority of the population naturally experiences erotic pleasure exclusively with people of the same gender, the great majority is exclusively heterosexual.¹⁶²

Aside from the facts of natural eroticism, the attractions of heterosexual marriage are deep-seated and permanent features of the human condition. Human beings, generally raised in the nuclear heterosexual family, naturally regard the cooperation and creative sharing that typifies the heterosexual family as the answer, or part of the answer, to the recurrent human problem of loneliness and isolation. For most people, conventional marriage is and will long remain the standard—supplying a natural response to human needs for sexual release, intimacy, and the desire for tangible immortality (child-rearing). It is a bizarre failure of

160. See Plato's suggestion that the prohibition of homosexuality "wins men to affection of their wedded wives." PLATO, *LAWS*, bk. VIII, at 337 (T. Saunders trans. 1970). For commentary, see G. GRUBE, *PLATO'S THOUGHT* 118-19 (1964).

161. See the development of this argument in the obscenity context in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); for critical commentary thereon, see Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 83-90 (1974).

162. See note 130 *supra*.

imagination and perspective so to underestimate the attractions of family life as to suppose that the legitimacy of homosexuality as a way of life would have any significant effect on it at all. Even in this era of growing sexual freedom and rising divorce rates, there is no sign that heterosexual marriage as an institution is in general less attractive. The rising divorce rates show, not a distaste for marriage, but only less willingness to stick with the original partners in marriage. The important and striking feature of this phenomenon is that divorced people typically remarry; they reject their previous partner, not the institution of marriage itself.¹⁶³

Certainly, the crude argument that if everyone were homosexual there would, disastrously, be an end of the human species universalizes absurdly a principle not seriously debated, namely, that everyone should or must be homosexual. Rather, the principle under discussion is whether, given the overwhelming naturally heterosexual majority and the small naturally homosexual minority, the state should, at a minimum, be tolerantly neutral between sexual preferences.

The "way of life" argument cannot be sustained as an empirical proposition, even though it can be understood as the psychological residue of fear and loathing unmistakably left by the long tradition that condemned homosexuality and nonprocreative sex in general as unnatural.¹⁶⁴ The existence and nature of these prejudices, which take the form of homophobia, are interesting and important psychological questions. They are probably significantly connected to a standard masculine fear of passivity and feminine rejection of aggressive activity,¹⁶⁵ of which male or female homosexuality, respectively, is mistakenly supposed the ultimate symbol.¹⁶⁶ Homophobia thus appears as a form of intrapsychic defense against any suggestion of "unmasculine" passivity or "unfeminine" aggressiveness.¹⁶⁷ Such underlying stereotypes are under widespread attack today: many men and women, heterosexual and homosexual, justly refuse any longer to dichotomize and disfigure their natures along poles of conventional masculine-feminine stereo-

163. See generally M. BANE, *HERE TO STAY* (1976). For a discussion of the gravity of the overpopulation problem, see M. MESAROVIC & E. PESTEL, *MANKIND AT THE TURNING POINT, THE SECOND REPORT TO THE CLUB OF ROME 70-82* (1974); for an argument for moral duties to limit population, see D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 134-35 (1971). Given the state of the facts as we have discussed them above and the growing moral concerns for overpopulation, the direction of good moral reasoning appears to support, at a *minimum*, toleration, and suggests that, so far from mandatory universal heterosexuality being the moral course, if any sexual preference is to be *encouraged* by the state it is certainly not heterosexuality.

164. See *Unnatural Acts*, *supra* note 9, at 1292-98.

165. See G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* 1-20 (1972); *cf.* note 120 *supra*.

166. See note 130 & accompanying text *supra*.

167. See note 165 *supra*.

types that are unjust in principle, no longer socially sensible, and inhumanely unfulfilling to individuals.¹⁶⁸ Clearly, as a matter of law, the prejudices based on such stereotypes should have no force independent of the empirical assumptions on which they rest. Undoubtedly, residues of guilt and fear remain long after we reject on rational grounds the beliefs on which those guilts and fears rest. But, this psychological truth does not validate such regressive emotions as a legitimate basis for law. If the life of reason requires us to circumscribe such negative emotions as a basis for ethical conduct, the morality of law can require no less.¹⁶⁹

In any event, it is difficult to understand how the state has the right, on moral grounds, to protect heterosexual love at the expense of homosexual love. Equal concern and respect for autonomous choice seem precisely to forbid the kind of calculation that this sort of sacrifice contemplates.¹⁷⁰ In principle, these values, as we have seen, forbid the sacrifice of the fundamental interests of one group in order to secure the greater happiness of other groups or of the whole. These values prescribe moral and constitutional benchmarks of human decency, resting on respect for the interest of all persons equally in general goods, and thereby the power of majority rule to plough under the interests of minorities is limited.

Finally, there is reason to believe that the argument for protecting marriage and the family is hypocritically proposed. If the argument were meant seriously, state laws against fornication and adultery would be vigorously pressed in addition to the anti-homosexuality laws. But, in many states, such laws either do not exist or penalize homosexuality much more severely than heterosexual offenses.¹⁷¹ This suggests what should by now be reasonably clear: antihomosexuality laws rest not on reasonable moral argument consistently pursued, but on ancient prejudice and the last remaining vestige of ideas, elsewhere eschewed, of unnatural sexual witchcraft and demonology.¹⁷²

The last available form of moral argument in support of absolute

168. For the position of men, see H. GOLDBERG, *THE HAZARDS OF BEING MALE* (1976); H.E. KAYE, *MALE SURVIVAL: MASCULINITY WITHOUT MYTH* (1974); J. NICHOLS, *MEN'S LIBERATION: A NEW DEFINITION OF MASCULINITY* (1975); *MEN AND MASCULINITY* 21-29, 32-35, 35-41, 41-52, 139-49 (J.H. Pleck & J. Sawyer eds. 1974). For the position of women, see C.G. HEILBRUN, *TOWARD A RECOGNITION OF ANDROGYNY* (1973); *MEN AND MASCULINITY*, *supra*, at 134-39; and sources cited note 123 *supra*.

169. Cf. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966), reprinted in DWORKIN, *TAKING RIGHTS SERIOUSLY* 240-58 (1977).

170. See note 136 *supra*.

171. See statutes cited in Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 *MICH. L. REV.* 1613, 1622-23 nn.63-67 (1974).

172. See generally R. MASTERS, *EROS AND EVIL: THE SEXUAL PSYCHOPATHOLOGY OF WITCHCRAFT* (1962). For the more general social significance of notions of witchcraft, see *WITCHCRAFT AND SORCERY* (M. Marwick ed. 1970).

prohibitions of consensual adult homosexual relations, certainly implicit in Devlin's argument, is that of theological ethics—the moral principles enforceable at law are dictated by the Judaeo-Christian God. Since traditional Judaeo-Christian thought appears to condemn non-procreative sex in general and homosexuality in particular,¹⁷³ these condemnations, being by definition moral, may be enforced at law. There are two conclusive objections to this argument: one moral, the other constitutional.

Morally, invoking theological ethics in support of the moral condemnation of homosexuality runs afoul of a philosophical argument of metaethical principle and a normative argument of casuistry. Metaethically, there are powerful objections to a theological analysis of morality without appeal to the constraints of mutual respect, universalization, and minimization of fortuity previously discussed. Certainly, the traditional view of Christian theology has been that moral concepts have a natural authority antecedent to divine revelation;¹⁷⁴ accordingly, moral concepts even for theologians must be explicable without a circular appeal to divine revelation. Metaethically, moral reasoning is logically independent of religious reasoning. Accordingly, it is fallacious to invoke purely theological reasoning to rebut the independent force of a valid moral argument. Psychological studies of moral development suggest that ethical reasoning is, in fact, unrelated to religious training or affiliation.¹⁷⁵ Normatively, the tradition of theological casuistry, on which Devlin rests his case, is now under critical scrutiny from within theology. There is growing controversy within religious groups

173. See Barrett, *Legal Homophobia and the Christian Church*, 30 HASTINGS L.J. 1019 (1979); *Unnatural Acts*, *supra* note 9, at 1292-98.

174. St. Thomas, for example, postulates a "special natural habit, which we call synderesis" which contains the first principles of morality. SUMMA THEOLOGICA, pt. I, at 116 (Fathers of the Dominican Province trans. 1912). These principles of natural law, prior to any divine revelation, are known as true by "one standard of truth or rightness of everybody," SUMMA THEOLOGICA, in AQUINAS: SELECTED POLITICAL WRITINGS 123-5 (D'Entrevies trans. 1959), for "natural law corresponds to the order of our natural inclinations," *id.* at 123. Francisco Suarez similarly argues that the essence of morality is independent of divine will. See F. SUAREZ, *On Laws and God the Lawgiver*, in SELECTIONS FROM THREE WORKS 205-06 (Williams, Brown, Waldron, & Davis trans. 1944). The separation of the concepts of ethics and divine will is explicit in Grotius, who observes: "And what we have said would still have great weight, even if we were to grant what we cannot grant without wickedness, that there is no God," Grotius *Prolegomenon*, in DE JURE BELLI ET PACIS xlvi (W. Whewell trans. 1853). "Natural law is so immutable that it cannot be changed by God himself." *Id.* at 12. Indeed, the view that natural law depended on divine law seems to have been theologically revolutionary and heretical. See Oakley, *Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition*, 6 NAT. L.F. 65 (1961).

For a useful view of the objections to an ethics based on religious authority alone, see R. BRANDT, *ETHICAL THEORY* 56-82 (1959).

175. L. Kohlberg, *Moral and Religious Education and the Public Schools: A Developmental View*, in RELIGION AND PUBLIC SCHOOLS 164, 179-81 (T. Sizer ed. 1967).

as to the proper interpretation of Biblical prohibitions conventionally believed to condemn homosexuality,¹⁷⁶ and indeed invoked to this end by the lower court in *Doe*.¹⁷⁷ This tradition of rational theology, including attacks by Catholic theologians on the procreational model of sexuality,¹⁷⁸ indicates that even the religious foundations on which these laws were constructed are now seen to be jerry-built.

Finally, whatever the constitutional permissibility of the frank invocation of theological ethics in *Devlin's* England where Church and State are not constitutionally separate, in the United States the free exercise and establishment of religion clauses of the first amendment stand as an absolute bar to the enforcement of theological ethics of the form implicit in *Devlin's* argument.¹⁷⁹ Our earlier analysis of the structure of constitutional morality clarifies why this is so. The primary postulate of the American Constitution is the moral principle of religious tolerance, the idea of fundamental constitutionally mandated neutrality between the disparate visions of the good life at the profound level of personal self-definition occupied by religious and philosophical beliefs. Accordingly, constitutional principles require that only those principles may be legally enforced which express the values of equal concern and respect for autonomous self-definition in terms of the many permissible

176. Thus, the Sodom and Gomorrah episode, *Genesis* 19, traditionally taken to show that homosexuality is contrary to God's will in that He punished those cities by fire and brimstone, is apparently not about homosexuality at all. See D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 1-28 (1955); J. McNEILL, *THE CHURCH AND THE HOMOSEXUAL* 42-50 (1976). Even the seemingly clear *Leviticus* prohibitions, *supra*, note 120, have been analyzed by Biblical scholars as not being about homosexuality per se. See, e.g., S. DRIVER, *DEUTERONOMY* 264 (1896); McNEILL, *supra*, at 56-60; N. SNAITH, *THE CENTURY BIBLE: LEVITICUS AND NUMBERS* 126 n.22 (New ed. 1967). Other scholars, however, disagree about this latter prohibition. See BAILEY, *supra*, at 30. Even Catholic theologians have argued that these prohibitions do not attack or condemn exclusive homosexuals: "[The Scriptures'] aim is not to pillory the fact that some people experience this perversion inculpably. They denounce a homosexuality which had become the prevalent fashion and had spread to many who were really quite capable of normal sexual sentiments Lack of frank discussion has allowed a number of opinions to be formed about [homosexuals] which are unjust when applied generally, because those who have such inclinations in fact are often hard-working and honourable people." A NEW CATECHISM 384-85 (K. Smith trans. 1967), cited in *In re Labady*, 326 F. Supp. 924, 930 (S.D.N.Y. 1971); cf. BAILEY, *supra*, at x-xii (similar distinction between the invert and pervert).

177. 403 F. Supp. at 1202 n.2. Such citation of Old Testament texts in support of the intrinsic evil of homosexuality is common in American judicial opinions. See, e.g., *Dawson v. Vance*, 329 F. Supp. 1329 (S.D. Tex. 1971), which cites the Sodom and Gomorrah episode at *Genesis* 19:1-29 in support of the proposition that the "practice is inherently inimical to the general integrity of the human person." *Id.* at 1322.

178. See, e.g., M. VALENTE, *SEX: THE RADICAL VIEW OF A CATHOLIC THEOLOGIAN* (1970); J. McNEILL, S.J., *THE CHURCH AND THE HOMOSEXUAL* 89-107 (1976).

179. See *Epperson v. Arkansas*, 393 U.S. 97 (1968); W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 74-93 (1973); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

visions of the good life compatible with these values. These principles require, *inter alia*, that any legally enforceable standards of conduct must rest on generally acceptable empirical standards and must not contravene the underlying values of equal concern and respect.

Sexual Autonomy, the Rational Choice of One's Self, and Human Rights

It is elementary that moral principles define the boundaries within which a person may rationally pursue her or his ends.¹⁸⁰ For example, human beings clearly possess much larger capacities for aggressiveness than it is morally appropriate for them to develop and cultivate either in themselves or in others. Accordingly, since applicable moral principles forbid the full development and display of these capacities, we do not regard it as appropriate that individuals design their lives to give such capacities full and untrammelled expression, however much in the individual's interests this might be. An uncontroversial truth is the extraordinary adaptability of human psychology compared to that of the lower animals.¹⁸¹ Sacrifices of personal interests, regarded as unthinkable onerous and burdensome in a later historical period, are undertaken with natural facility in an earlier period. To the extent that applicable moral principles demand it, human nature can sustain quite onerous demands, or, at least, demands eventually perceived to be onerous.

Such shifts in the concept of morally permissible demands are well illustrated by the kind of transvaluation of values that underlies the development of the constitutional right to privacy. Certain ranges of conduct, previously conceived as tightly regulated by moral principles, are now no longer morally determined in the same way. For reasons previously discussed, forms of sexual intimacy once judged immoral *per se* are no longer so judged.¹⁸² To the extent that moral principles no longer rigidly prohibit certain forms of conduct, the scope of permissible liberty in rationally designing one's life is enlarged. Human capacities, previously narrowly and rigidly confined, are now permissibly cultivated and explored.

The right to privacy was recognized because it is associated with and intended to facilitate the exercise of autonomy in certain basic kinds of choice that bear upon the coherent rationality of a person's life plan. Ordinary people, uncontaminated by philosophical discussions

180. See D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 75-91, 212-41 (1971).

181. On the contrasts of animal and human intelligence, see J. BENNETT, *RATIONALITY* 35-43, 80, 85, 94 (1964). For examples of the instinctive rigidities of animal behavior, see N. TINBERGEN, *THE HERRING GULL'S WORLD* 28-32, 140-41, 144-45, 153, 186-210, 232-33 (1953).

182. See generally B. RUSSELL, *MARRIAGE AND MORALS* (1958); R. ATKINSON, *SEXUAL MORALITY* (1965); J. WILSON, *LOGIC AND SEXUAL MORALITY* (1965).

of personal identity,¹⁸³ typically identify other people (in response to the query, who is x?) in certain characteristic ways. Certain choices in life are taken to bear fundamentally on the entire design of one's life,¹⁸⁴ for these choices determine the basic decisions of work and love, which in turn order many of the subsidiary choices of human life. Obvious examples of such choices are matters of whether and where to be educated, choice of occupation and avocations, choice of whether and whom to love and befriend and on what terms, and the decision whether and to what extent children will be a life's concern. Classic studies of the human life cycle make clear that the exercise of autonomy in life choices of these kinds occur throughout the life cycle.¹⁸⁵ Different sorts of choices cluster at different age periods: adolescents struggle with basic questions of identity;¹⁸⁶ persons in their twenties make basic decisions on the form of sexual love;¹⁸⁷ the thirties appear to mark crucial struggles for vocational competence and recognition;¹⁸⁸ the forties appear to call for realistic stock taking, concern for aiding and teaching the young,¹⁸⁹ and so forth. From the earliest life of the infant to quite old age, the development and exercise of autonomous choice underlies the deepening individuation of the person.

Clearly there has been a transvaluation of values whereby many traditional moral judgments regarding the proper exercise of these life choices are no longer justified. In such cases, where reasonable moral argument no longer can sustain absolute prohibitions and the issue in question is one among the fundamental life choices, the constitutional right to privacy, understood as a right of personal autonomy, finds its natural home. It is natural to call this autonomy a right of privacy in the sense that moral principles no longer define these matters as issues of proper public concern but as matters of highly personal self-definition. The constitutional right to privacy as an autonomy right is premised on principles of obligation and duty that secure equal concern and respect for autonomy. The right to privacy does not merely signify that it is no longer not morally wrong to do certain things, but that

183. See note 44 & accompanying text *supra*. For examples of recent philosophical discussions of issues of personal identity, see B. WILLIAMS, PROBLEMS OF THE SELF 1-81 (1973); PERSONAL IDENTITY (J. Perry ed. 1975); THE IDENTITIES OF PERSONS (A.O. Rorty ed., 1976).

184. See note 65 *supra*.

185. The major works include the following: E. ERIKSON, CHILDHOOD AND SOCIETY (1963); E. ERIKSON, IDENTITY AND THE LIFE CYCLE (1959); D. LEVINSON, THE SEASONS OF A MAN'S LIFE (1978); G. VAILLANT, ADAPTATION TO LIFE (1977); R. WHITE, LIVES IN PROGRESS (1952).

186. See E. ERIKSON, IDENTITY AND THE LIFE CYCLE 101-64 (1959).

187. See E. ERIKSON, CHILDHOOD AND SOCIETY 263-66 (1963); D. LEVINSON, THE SEASONS OF A MAN'S LIFE 71-135 (1978).

188. See D. LEVINSON, THE SEASONS OF A MAN'S LIFE 139-88 (1978).

189. *Id.* at 191-313.

there is an affirmative moral right to do them which it is, by definition, a transgression of moral duty to violate.

In order to understand this claim, let us recall the contractarian interpretation of the ultimate moral values of equal concern and respect.¹⁹⁰ It is argued that in the deliberations of the original position, self-respect based on one's ability to exercise personal capacities competently would have a special prominence and thus could be called the primary human good. People desire general goods—liberties, opportunities, wealth—in order to attain the self-respect that those conditions facilitate. People in the original position would regulate access to the general goods so as to enhance the possibility that each member of society will be able to attain self-respect.

Another conclusion of contractarian theory is that, in reaching an agreement upon a system of morality and justice, at least in an economically advanced society like the United States, people give priority to the maximization of liberties. After a minimal level of wealth has been secured to all people, the original contractors would not accept limitations on their freedom in exchange for enhanced economic well-being. Maximization of liberty best enables *all* people to attain self-respect by opening up myriad possible areas of experience and endeavor.¹⁹¹

The liberties distributed by the principles of justice typically include liberties of thought and expression (freedom of speech, press, religion, and association), civic rights (impartial administration of civil and criminal law in defense of property and person), political rights (the right to vote and participate in political affairs), and freedom of physical, economic, and social movement. The importance of these liberties rests on their relation to the primary good of self-respect, since these liberties nurture personal competences, for example, full expression of the spirit, self-direction, security of the person, and the possibility of unhampered movement.¹⁹² In the United States, this has been accomplished through the constitutional guarantees of the Bill of Rights and the fourteenth amendment.¹⁹³

Contemporary understanding of the strategic importance to self-respect and personhood of sexual autonomy requires that we similarly guarantee full liberty to enjoy and express love. At the core of this understanding lies Freud's central idea, independently confirmed by comparative ethology and anthropology,¹⁹⁴ that human sexuality,

190. See text accompanying notes 56-65 *supra*.

191. See RAWLS, *supra* note 56, at 544.

192. For a fuller development of the moral theory of free speech, see Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

193. See generally, D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977).

194. See FORD & BEACH, *supra* note 101, at 199-267 (1951).

rooted in the high degree of cortical control of sexuality, serves complex imaginative and symbolic purposes, and thus is extraordinarily plastic and malleable.¹⁹⁵ Freud thus introduced into scientific psychology what artists have always known and expressed: that for humans to experience sex is never, even in solitary masturbation, a purely physical act, but is imbued with complex evaluational interpretations of its real or fantasied object, often rooted in the whole history of the person from early childhood on.¹⁹⁶ Freud's theory of the defenses clarifies some of the imaginative manipulations of sexual feelings that are sometimes destructive,¹⁹⁷ but are also sometimes adaptive.¹⁹⁸ For the latter, consider Freud's own celebration of the eroticism of work that he called sublimation.¹⁹⁹

Understanding of unconscious imaginative processes was, for Freud, not a concessive plea for irrationalism but a deepening of our understanding of the concept of autonomy and of the person; for knowledge of the unconscious mind and its processes deepens the range and strength of the ego or self in controlling id and superego impulses: "Where id was, there shall ego be."²⁰⁰ Through our self-conscious retrieval and investigation of the fantasy data of the unconscious (dreams, free associations, slips, and the like), we may achieve a remarkable capacity to deepen our control and understanding of mental processes that are otherwise inexplicable, and often stupidly, rigidly, and self-destructively repetitive. Through our knowledge of the unconscious defenses and their form in our own lives, we are able to assess consciously the work of the unconscious, deciding whether desires disowned by the unconscious should be reclaimed (repression) or desires promoted by the unconscious should be cut back (sublimation and pro-

195. "The sexual instinct . . . is probably more strongly developed in man than in most of the higher animals; it is certainly more constant, since it has almost entirely overcome the periodicity to which it is tied in animals. It places extraordinarily large amounts of force at the disposal of civilized activity, and it does this in virtue of its especially marked characteristic of being able to displace its aim without materially diminishing in intensity. This capacity to exchange its original sexual aim for another one, which is no longer sexual but which is psychically related to the first aim, is called the capacity for *sublimation*." S. FREUD, "Civilized" *Sexual Morality and Modern Nervous Illness*, in 9 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 181, 187 (Standard ed. 1908).

196. For an exploration of the importance of fantasy in human sexuality, see A.K. OFFIT, *THE SEXUAL SELF* 206-19 (1977).

197. See note 38 *supra*.

198. For a recent treatment of the changing and adaptive functions of defenses in the context of the life cycle, see G. VAILLANT, *ADAPTATION TO LIFE* 75-126 (1977).

199. See note 195 *supra*. See generally, S. FREUD, *Civilization and its Discontents*, in 21 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 64 (Standard ed. 1930).

200. See S. FREUD, *New Introductory Lectures on Psycho-Analysis*, in 22 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 80 (Standard ed. 1933).

jection).²⁰¹ We may, in addition, render ourselves self-conscious and independent of our earliest most intense emotional identifications, achieving an understanding of our life history so that we may see our lives and what we want from them individually as our own and not as the unconscious derivative of the wishes of significant others; with this kind of understanding, we deepen our autonomy to decide with what or with whom in our life history we will or will not identify or continue to identify.²⁰²

To see human autonomy in this deeper way and to understand the powerful role of sexuality as an independent force in the imaginative life and general development of the person is to acknowledge the central role of sexual autonomy in the idea of a free person.²⁰³ This view of autonomy has necessary implications for the widening application of human rights to sexuality. Sexuality, in this view, is not a spiritually empty experience that the state may compulsorily legitimize only in the form of rigid, marital procreational sex, but one of the fundamental experiences through which, as an end in itself, people define the meaning of their lives. Consider the following specific ways in which this is so.

First, sexual love is profoundly misdescribed by the sorrowing Catholic dismissal of sexuality as an unfortunate and spiritually concomitant of propagation, for sexuality has for humans the independent status of a profound ecstasy that makes available to a modern person experiences increasingly inaccessible in public life: self-transcendence, expression of private fantasy, release of inner tensions, and meaningful and acceptable expression of regressive desires to be again the free child—unafraid to lose control, playful, vulnerable, spontaneous, sensually loved.²⁰⁴ While people may choose to forego this experience, any coercive prohibition of it amounts to the deprivation of an experience central in human significance.

Second, sexual love is sometimes a crucial ingredient in forming lasting personal relationships and thus can facilitate the good that these relationships afford in human life.²⁰⁵ Such durable relationships founded on sexual intimacy are happily denominated a form of knowl-

201. See A. FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* ch. 4 (C. Baines trans. 1946).

202. For an example of a possibly self-destructive identification that may profitably be undone, see the discussion of identification with the aggressor, *id.*, ch. 9.

203. The argument here interprets the idea of sexual autonomy in terms of sexual love, but it may be interpreted to apply to eroticism per se without lover either in noncommercial or commercial forms. See Richards, *Commercial Sex and the Rights of the Person: a Moral Argument for the Decriminalization of Prostitution*,—U. PA. L. REV.—(forthcoming).

204. See M. BALINT, *PRIMARY LOVE AND PSYCHOANALYTIC TECHNIQUE* 109-17 (1952).

205. On the values of these relationships, see S. Benn, *Privacy, Freedom, and Respect for Persons*, in *PRIVACY* 16 (J. Pennock & J. Chapman eds. 1971).

edge, in Biblical locution, for they afford to people the capacity for a secure disclosure of self, not only through exposure of sexual vulnerabilities, but also through the sharing of recesses of the self otherwise remote and inaccessible.²⁰⁶ Accordingly, choices involving these relationships are among the most important strategic decisions in one's life plan.²⁰⁷ The choice of one's lover, whether in or outside marriage, involves one's entire self-conception. As one major recent study of the human life cycle clarifies, the choice of one's lover is one with one's life "dream";²⁰⁸ as the "dream" changes, so must the relationship.²⁰⁹ The disclosure of self that love involves, the mutual shaping of expectations and life styles, the sharing of common aspirations and hopes—all these, and others, suggest the extraordinary significance of decisions about matters of love in the design of a human life.

Third, the force of sexual love in human life expresses itself in the desire to participate with the beloved in the development of and care for common projects created by the relationship.²¹⁰ Some of these projects take on a durable character in terms of objects or activities or even persons who survive the relationship. In so doing they embody the lasting value of the relationship and perhaps thus satisfy, in some measure, the longing of human self-consciousness for evidence of the immortal and imperishable self.

In summary, one may appeal to the plausible thought that love is part of what is commonly meant by the meaning of life. Surely, such love may not necessarily take sexual forms; it may, for example, take the form of a diffuse benevolence toward larger or smaller groups of people, or even devotion to an abstract entity. But, the absence of love in any form from a human life renders a life plan incoherently empty at its core and the life of the spirit deformed and miserably twisted.

Love plays a role, too, in the contractarian model. As noted earlier, that choice in the original position is choice under uncertainty: rational people in the original position have no way of predicting the probability that they may end up in any given situation of life. By definition, none of the contractors knows his or her own sex, age, native

206. See C. FRIED, *AN ANATOMY OF VALUES*, ch. 9 (1970).

207. The gravity of this choice was stressed as early as Aristotle's seminal discussion of friendship. See ARISTOTLE, *NICOMACHEAN ETHICS*, bk. 8 (H. Rackham trans. 1926); cf. D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 266-67 (1971).

208. See D. LEVINSON, *THE SEASONS OF A MAN'S LIFE* 91-111 (1978).

209. *Id.* at 237, 245-51.

210. The thought that falling in love involves thinking of the love object as the parent of a common child, understood physically or metaphorically as a common interest fostered by the relationship, is as old as Plato. PLATO, *SYMPOSIUM* § 206c; for other statements of this view, see M. SCHELER, *THE NATURE OF SYMPATHY* (P. Heath trans. 1954); A. SCHOPENHAUER, 2 *THE WORLD AS WILL AND REPRESENTATION* 531-67 (E. Payne trans. 1966).

talents, particular capacity for self-control, social or economic class or position, or in general the particular forms of his or her personal desires (e.g., whether one likes asparagus or spinach; or is homosexual or heterosexual). Each contractor will be concerned not to end up in a disadvantaged situation with no appeal to moral principles to denounce deprivations that may render life's prospects bitter and mean. To avoid such consequences, the rational strategy in choosing the basic principles of justice would be the "maximin" strategy.²¹¹

As we have suggested, the contractors in the original position would regard self-respect as the primary good. Accordingly, their focus would be on principles that would ensure that people have the maximum chance of attaining self-respect. Sexual autonomy, the capacity to choose whether or how or with whom one will have sexual relations, is, for reasons previously discussed, one crucial ingredient of this self-respect; it is one of the forms of personal competence in terms of which people regulate basic issues of what kind of person they will be. Because liberties, opportunities, and capacities relating to love figure so importantly in the quest for self-respect, the rational contractors would not agree to any principle that would permit restrictions upon these liberties, opportunities, and capacities which were not compatible with the greatest equal liberty for all. Use of the "maximin" strategy in choosing principles relating to liberty, opportunity, and capacity to love, then, tends to eliminate the disadvantaged class: the lowest (as well as the highest) condition is equality for all persons.²¹²

Because of the profound relation of sexual autonomy to basic self-respect, the following principle of obligation and duty, defining correlative human rights, would be accepted in the original position—the *principle of love as a civil liberty*. Basic institutions are to be arranged so that every person is guaranteed the greatest equal liberty, opportunity and capacity to love, compatible with a like liberty, opportunity and capacity for all.

The derivation of this principle, being a specification of the more general principles of justice, depends on the preliminary assumption that the contractors are ignorant of their specific identity and can only take into account facts subject to general empirical validation. The contractors thus cannot appeal to special religious duties to procreate to override the equal liberty to love; nor can there be appeals to any taste or distaste for certain forms of the physical expression of love in order to override the equal liberty to love; nor can they appeal to concepts of love that illegitimately smuggle in covert premises or prejudices of such kinds. The concept of love says nothing about the form of its physical expression other than, for example, that it involves forms of intimate

211. See text accompanying note 62 *supra*.

212. Cf. *Unnatural Acts*, *supra* note 9, at 1310-12.

closeness expressing the evident intention of good to another. There is no ideal, exclusive, or proper physical expression of sexual love, because a large and indeterminate class of forms of sexual intercourse is compatible with the aims of love.

This principle explains and justifies the sense in which the constitutional right to privacy is a *right*. The constitutional concept expresses an underlying moral principle resting on the enhancement of sexual autonomy, the self-determination of the role of sexuality in one's life which protects the values foundational to the concept of human rights, equal concern and respect for autonomy. Accordingly, in the absence of countervailing moral argument, laws which determine how one will have sex and with what consequences are constitutionally invalid. Such considerations explain the unconstitutionality of laws proscribing contraception, abortion, and the use of pornography in the home.²¹³ They also explain why antihomosexuality laws violate a constitutional right.

Freedom to love means that a mature individual must have autonomy to decide how or whether to love another.²¹⁴ Restrictions on the form of love imposed in the name of the distorting rigidities of convention that bear no relation to individual emotional capacities and needs would be condemned. Individual autonomy, in matters of love, would ensure the development of people who could call their emotional nature their own, secure in the development of attachments that bear the mark of spontaneous human feeling and that touch one's original impulses. In contrast, restrictions on this individual autonomy would starve one's emotional capacities, withering individual feeling into conventional gesture and strong native pleasures into vicarious fantasies.²¹⁵

Antihomosexuality laws egregiously violate these considerations. First, laws prohibiting homosexual conduct inhibit persons inclined toward this form of sexual activity from obtaining sexual satisfaction in the only way they find natural. Second, these laws probably encourage blackmail by providing a means by which homosexuals can be threatened with exposure and prosecution. Such vulnerability to blackmail may discourage employers from hiring homosexuals, on the ground that they are security risks.²¹⁶ Third, laws prohibiting consen-

213. See notes 105-06 & accompanying text *supra*.

214. Compare Fourier's striking conception that, just as the utopian state has a duty to supply a minimum of food, it has a duty to supply a minimum of sexual gratification to all citizens. C. FOURIER, *THE UTOPIAN VISION OF CHARLES FOURIER* 336-40 (J. Beecher & R. Bienvendu eds. 1971).

215. See also the similar arguments in *On Liberty*, *supra* note 146, ch. 3.

216. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 829-37 (1979); Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 410-11 (1973).

sual adult homosexual activity provide a ground for discrimination against people of homosexual preference in employment, housing, and public accommodation.²¹⁷

Consider the effects of such laws on exclusive homosexuals who alone find homosexual relations naturally satisfying. Traditionally, these individuals do one of three things. First, they may utterly disown sexuality and the sexual aspect of their selves, dedicating themselves, perhaps to an impersonal benevolence.²¹⁸ Second, they may heterosexually marry, using homosexual fantasies when engaging in sex with their spouse.²¹⁹ Third, they may be practicing covert homosexuals either exclusively or in some combination with the second alternative.²²⁰ Each of these options, compelled by the state of the law, outrageously violates human rights.

First, the legal compulsion of celibacy, in the absence of any good reason, unfairly compels homosexuals to personal sacrifices which would be regarded as unthinkable if demanded of heterosexuals. Of course, celibacy may be, for some people, a rational life choice. But, to compel people to disown their most basic emotional propensities is to demand that life be only gesturally lived behind impersonal masks, that expression be always artfully choreographed and never naturally spontaneous, and that the body be experienced as an empty sepulchre.²²¹

217. See N.Y. Times, Dec. 23, 1973, § 4, at 5, col. 1. Engaging in any homosexual activity still conclusively bars an individual from admission to the military. R. MITCHELL, *THE HOMOSEXUAL AND THE LAW* 49-50 (1969). Some courts have allowed a general presumption that the commission of homosexual acts makes one unfit for government service. See *Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969), cert. denied, 397 U.S. 1039 (1970). But cf. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), aff'd on other grounds, 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974); *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). See generally Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 829-37 (1979). For an argument that homosexuality should be a constitutionally suspect classification, see D. RICHARDS, *THE MORAL CRITICISM OF LAW* 162-78 (1971).

218. See, e.g., J. McNEILL, *THE CHURCH AND THE HOMOSEXUAL* 164-72 (1976).

219. See note 159 *supra*.

220. See notes 157 & 159 *supra*.

221. Of the conventional idea "that all who do not contract a legal marriage shall remain abstinent throughout their lives," Freud observed: "The position, agreeable to all the authorities, that sexual abstinence is not harmful and not difficult to maintain, has also been widely supported by the medical profession. It may be asserted, however, that the task of mastering such a powerful impulse as that of the sexual instinct by any other means than satisfying it is one which can call for the whole of a man's forces. Mastering it by sublimation, by deflecting the sexual instinctual forces away from their sexual aim to higher cultural aims, can be achieved by a minority and then only intermittently, and least easily during the period of ardent and vigorous youth. Most of the rest become neurotic or are harmed in one way or another. Experience shows that the majority of the people who make up our society are constitutionally unfit to face the task of abstinence." S. Freud, "Civilized" *Sexual Moral-*

Second, the experience of heterosexual marriage without natural eroticism is hollow, frequently leading to marital instability and divorce, both of which may be damaging to the children.²²² In the place of the kinds of relationships found natural, homosexuals fail to experience forms of deep personal release, pointlessly and sometimes dishonestly inflict harms on others, as they inflict on themselves unnecessary burdens of self-sacrifice.

Third, the cumulative effect of antihomosexuality laws is to deprive practicing homosexuals of the experience of a secure self-respect in their competence in building personal relationships. The degree of emotional sacrifice thus exacted for no defensible reason seems among the most unjust deprivations that law can compel.²²³ Persons are deprived of a realistic basis for confidence and security in their most basic emotional propensities. Criminal penalty, employment risks, and social prejudice converge to render dubious a person's most spontaneous native urges, dividing emotions, physical expression and self-image in a cruelly gratuitous way.²²⁴ The deepest damage is to the spiritual and imaginative dimension that gives human sexual love its significance. Persons surrounded by false social conceptions that are supported by law find it difficult to esteem their own emotional propensities and natural expression. Without such self-esteem love finds no meaningful or enduring object. Instead of being assured a fair opportunity to develop loving capacities and fair access to love, the homosexual's capacity to express such feelings is driven into a secretive and concealed world of shallow and often anonymous physical encounters.²²⁵ The achievement of emotional relationships of any depth or permanence is made a matter of heroic individual effort when it could, like heterosexual relations, be part of the warp and woof of the ordinary social possibility.²²⁶

ity and Modern Nervous Illness, in 9 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 193 (Standard ed. 1908).

The recent Kinsey Institute study of homosexuals indicates that the Asexuals are a relatively dispirited and depressed lot. See BELL & WEINBERG, *supra* note 117, at 226-28.

222. There is evidence that heterosexual marriages of exclusive homosexuals typically end unhappily for all concerned. One authority, for example, reports that one-third of the divorce cases he handled arose from the homosexuality of one of the parties. See J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* 136 (1976). The recent Kinsey Institute study confirms the short-lived character of homosexual marriages. See BELL & WEINBERG, *supra* note 117, at 160-70.

223. See generally H. HART, *LAW, LIBERTY, AND MORALITY* 22 (1963); G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* 78-82, 142-43 (1972).

224. See generally HOFFMAN, *supra* note 115. For an account of the damaging effects of prejudice on the self-conception of the group discriminated against, see G. ALLPORT, *THE NATURE OF PREJUDICE* ch. 9 (1954).

225. See BELL & WEINBERG, *supra* note 117, at 81-102; HOFFMAN, *supra* note 115; L. HUMPHREYS, *TEAROOM TRADE* 1-15 (1970).

226. See Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973). *But cf.*

In thus forbidding exclusive homosexuals to express sexual love in the only way they find natural, the law deprives them of the good in life that love affords.²²⁷

Inappropriate Paternalistic Arguments

Even if no other moral judgment may appropriately be made about the probity of certain conduct, we may still believe that such conduct is sufficiently irrational to permit interference on paternalistic grounds.

Clearly, the contractarian model as used to articulate a structure of reasons expressing mutual concern and respect, universalization, and minimization of natural fortuity, would justify a principle of paternalism and explain its proper scope and limits. From the point of view of the original position, the contractors would know that human beings would be subject to certain kinds of irrationalities with severe consequences, including death and the permanent impairment of health, and they would, accordingly, agree on an insurance principle against certain of these more serious irrationalities in the event they might occur to them.²²⁸

There are two critical constraints on the scope of such a principle. First, the relevant idea of irrationality cannot itself violate the constraints of morality. Legally enforceable moral ideas must be formulated with ignorance of specific identity and must be based on facts capable of empirical validation; in particular, idiosyncratic personal values cannot be smuggled into the content of "irrationality" that defines, *inter alia*, the scope of the principle. Rather, the notion of irrationality must be defined in terms of a neutral theory that can accommodate the many visions of the good life that are compatible with moral constraints. For this purpose, the idea of rationality is defined relative to an agent's system of ends, as determined by the agent's

Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971).

227. See notes 204-212 & accompanying text *supra*. The recent Kinsey Institute study of homosexuality indicates that the Close-Coupled, who maintain relatively monogamous stable relationships, appear to be psychologically better fit, on the whole, than other homosexuals. BELL & WEINBERG, *supra* note 115, at 219-21. Male homosexuals appear to have more difficulty in forming and maintaining such unions than lesbians. *Id.* at 81-102. Bell & Weinberg suggest that this difference appears to be due to the greater societal condemnation of male homosexuality which inhibits men from forming such unions either expressly through fear of various legal, economic, or social sanctions or psychologically through internalization of self-hating stereotypes which defensively overvalue the sexist masculine role as sexual predator, not sensitive lover. *Id.* at 101-02.

228. For similar arguments to this effect, see D. RICHARDS, A THEORY OF REASONS FOR ACTION 192-95 (1971); G. Dworkin, *Paternalism*, in MORALITY AND THE LAW 107-26 (R. Wasserstrom ed. 1971); cf. Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105-24 (1971).

appetites, desires, capacities, aspirations, and the like. The principles of rational choice specify the most coherent and satisfying plan of accommodating the agent's ends over time.²²⁹ Accordingly, only those acts are irrational which frustrate the agent's own system of ends, whatever those ends are. Paternalistic considerations come into play only when irrationalities of these kinds exist (for example, the agent's jumping out the window will cause his death, which the agent does not want but which he falsely believes will not occur). Second, within the class of irrationalities so defined, paternalistic considerations would only properly come into play when the irrationality was severe and systematic (due to undeveloped or impaired capacities, or lack of opportunity to exercise such capacities) *and* a severe and permanent impairment of interests was in prospect. Interference in irrationalities outside the scope of this second constraint is forbidden in large part because allowing people to make and learn from their own mistakes is a crucial part of the development of mature autonomy.²³⁰

When we examine the application of paternalistic considerations of these kinds to basic life choices, we face the question of how to assess the rationality of these kinds of choices. Again, the idea of rationality, employed in the context of life choices, importantly takes as the fundamental datum the agent's ends, as determined by his or her appetites, desires, aspirations, capacities, and the like. In such contexts principles of rational choice call for the assessment of basic life choices (for example, choice of occupation) in terms of effects over time, since such choices determine a number of subchoices having effects throughout the agent's life and indeed may determine the duration of that life.²³¹ Such choices are assessed in terms of the degree to which they satisfy the system of the agent's ends over time (for example, whether they call upon the exercise of competences which the agent could take pleasure in over a lifetime, the degree to which human contacts satisfy whatever one's desires for sociability are, the level of remuneration in relation to the level of satisfaction of other wants, the degree of leisure to pursue and cultivate avocations or personal interests, and the like). Since the agent's ends over time are often quite complex and difficult to anticipate with exactitude, a number of such choices may be or seem equally rational. Nonetheless, there is a coherent sense to the application of

229. For a more detailed development of this account of rationality, see D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 27-71 (1971).

230. In addition, this requirement is justified by the fact that the agent is typically in the better position to judge his or her own ends, and thus a person's interests are best advanced by limiting any principle of paternalistic interference only to where the probability of third party error is clearly outweighed by extremes of palpable irrationality and severe harm. See *id.* at 193.

231. For an exploration of the role of mortality in life plans, see C. FRIED, *AN ANATOMY OF VALUES* 155-82 (1970).

rationality criteria to such choices. Some such choices are clearly irrational if they, compared to other available alternative plans, frustrate the agent's every significant end.²³² Such choices, if they satisfy the stringent constraints of the principle discussed above, may be the proper object of paternalistic interference.

As we have seen, one radically inappropriate form of paternalistic interference is that which is grounded in the substitution of the interferer's own personal ends for the ends of the agent. This form is objectionable because it does not take seriously the fundamental datum of proper paternalism—that the agent's ends are given and that the agent acts irrationally only when his action frustrates those ends. This form of inappropriateness is, I believe, a general problem in the paternalistic assessment of life choices, for in this context people find it all too natural facily to substitute their own personal solutions for the kind of imaginative understanding of the perspectives of others required properly to examine these matters. The temptations to such paternalistic distortions are irresistibly strong in cases properly covered by the constitutional right to privacy, which is, in part, to be understood as a prophylaxis against such abuses.

No good argument can be made that paternalistic considerations would justify interferences in basic choices such as whether to marry, bear children or be heterosexual. Indeed, in many cases such choices seem clearly rational. There is widespread consensus that it is rational for many people to limit family size by contraceptives; in such ways, people satisfy their desires for having children and have additional resources better to advance their ends in general. It is no more irrational, I believe, to suppose that for some people not having children would better advance their ends; whatever ends having children advances can be secured in alternative ways (for example, being in a profession that cares for the young, investing one's immortal longings in other forms of enduring projects, etc.) and not having children may free people to advance their own and others' good in ways otherwise improbable. Finally, the idea that it is *per se* irrational to engage in homosexual relations is no more defensible. Suppose one is an exclusive homosexual, who from early age has experienced natural eroticism either in fact or in fantasy,²³³ only with people of the same gender. Such an individual experiences spontaneous self-expression and fulfillment and meaningful relations only in homosexual relations. Since love is such a fundamental good in human life, it would surely be rational to develop a personal life in which one's natural sexual self can find meaningful expression. The idea of change of sexual preference is unacceptable

232. One plan dominates the other in terms of rationality criteria. See D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 28, 40-3 (1971).

233. See note 125 *supra*.

not merely because it is painful and probably doomed to failure²³⁴ but because, given the depth of sexuality, it would transmogrify the self in which one has self-esteem. The appeal to social opprobrium rests on a circular appeal to the still extant force of invalid and unjust moral judgments. It is simply not irrational to refuse to sacrifice the foundations of one's personal happiness to vicious social prejudices, for such sacrifices degrade the foundations of autonomous self-respect and thus reduce freedom to cowardly, servile, and fear-ridden conventionalism. For many, such a life is simply not worth living. How, then, are we even to *understand* the invocation of paternalistic arguments of irrationality in this context? The answer, I believe, is that in making such judgments people do not take seriously or responsibly what it is to be the agent, in this case, an exclusive homosexual. They suppose that these people are somehow real heterosexuals who must be prodded to realize their latent desires. This fantasy cannot be sustained as an empirical proposition; it is simply a make-weight psychiatric correlate to already accepted moral judgments.²³⁵ This substitution of personal

234. See note 126 *supra*.

235. A striking form of this fallacy appears in one psychiatric formulation of the aetiological theory that homosexuality originates in very early parent-child relationships. In the case of male homosexuality, that theory hypothesizes a seductive, over-attached, domineering mother and a detached, hostile or remote father. See I. BIBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY OF MALE HOMOSEXUALS* 310-13 (1962). From such an aetiological explanation, Bieber fallaciously infers that homosexuality is a disturbance of people's naturally heterosexual underlying impulses which can easily be given expression if certain fears are overcome. *Id.* at 220-54. Freud, of course, had originated this form of aetiological explanation of homosexual preference. See generally S. FREUD, *Leonardo da Vinci and a Memory of his Childhood*, in 11 *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 63-137 (Standard ed. 1910). But, he insisted throughout his writings that there was no original or natural direction of sexual preference, but rather an undifferentiated original bisexuality. See, e.g., S. FREUD, *Three Essays on Sexuality*, in 7 *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 219-20 (Standard ed. 1905); *An Outline of Psychoanalysis*, in 23 *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 188 (Standard ed. 1940). This original bisexuality was shaped, for Freud, by early social experience into the relevant forms of sexual preference in later life. Let us assume, *arguendo*, that this general form of aetiological explanation is true. See S. FISHER & R.P. GREENBERG, *THE SCIENTIFIC CREDIBILITY OF FREUD'S THEORIES AND THERAPY* 231-54 (1977); cf. note 125 *supra*. It does not follow that because Male homosexual preference originates from a domineering mother and remote father that there is a latent heterosexual bent underneath any more than the origin of male heterosexuality in a domineering father and affectionate mother shows a latent homosexual bent beneath. Nothing follows from either aetiological explanation about the natural underlying primacy of either preference, as Freud well understood. For Freud, it is a general truth that sexual development originates in primitive conflicts in the family. The form of these conflicts, whether leading to homosexual or heterosexual preference, was of therapeutic interest only in the presence of neurotic symptoms. See note 117 *supra*. Bieber's interpretation and the correlative "disease" theory of homosexuality have now been largely repudiated by psychiatrists. *Id.* They represent, I believe, a striking example of Kinsey's caveat: "Nothing has done more to block the free investigation of sexual behavior than the almost universal acceptance, even among scientists, of

values for the ends of the agent is, of course, improper paternalism. The development of the constitutional right to privacy is, in part, to be understood as a bar to such arguments, allowing the agent the scope of personal autonomy in these matters that is their moral and human right.

It is fair to regard the judgments of conventional family life as "the meaning of life" as a kind of metaphysical familism. It is, however, important to see the limited force that such normative judgments should be accorded. Certainly, such normative judgments are important and deeply significant; indeed, nothing can be more important to individuals than basic life choices. But it is crucial to see that such judgments are not properly regarded as ethical or moral judgments, in the sense of expressing moral requirements applicable at large on the basis of mutual concern and respect, universalization, and minimization of fortuity.²³⁶ Undoubtedly, in making basic life choices, we assume moral principles of such kinds as background conditions; we assume, typically, that none of the available life choices violates moral requirements. But the substance of such life choices is not dictated by such ethical boundary conditions. Rather, typically, we are morally *at liberty* to adopt any of a number of life plans. In an important sense, then, metaphysical familism is an expression of a nonethical judgment, a view of the more satisfying, and thus more rational, basic life plan. Accordingly, such judgments are entitled to no more legal or constitutional force than any other ideological vision of the good life not dictated by ethical principles. In particular, it is *deeply* mistaken to confuse the moral depth of the constitutional right to privacy, as a right to autonomy, with the ideology of metaphysical familism.²³⁷

Such confusions are, of course, familiar to many moral traditions. One thinks, for example, of the many religious codes of detailed casuistry that regulate, in the name of "morality," the most detailed features

certain aspects of that behavior as normal, and of other aspects of that behavior as abnormal. The similarity of distinctions between the terms normal and abnormal, and the terms right and wrong, amply demonstrates the philosophic, religious, and cultural origins of these concepts . . . and the ready acceptance of those distinctions among scientific men may provide the basis for one of the severest criticisms which subsequent generations can make of the scientific quality of nineteenth century and early twentieth century scientists." KINSEY, *supra* note 115, at 7.

236. See D. RICHARDS, A THEORY OF REASONS FOR ACTION 231-32 (1971).

237. This deplorable confusion arguably underlies the Supreme Court's recent statement that the constitutional right to privacy had never been found to protect the private consensual sexual relations of adults. *Carey v. Population Serv.*, 431 U.S. 678, 688 n.5 (1977). If the constitutional right to privacy is limited to family-linked rights of child rearing, the ideology of metaphysical familism will become the measure of constitutionally enforceable morality in violation of the deepest constitutional values of autonomous self-definition and self-respect.

of people's quite personal lives.²³⁸ In an earlier discussion, I discussed a philosophical form of this confusion, namely, Plato's idea that there are no limits to legitimate state paternalism.²³⁹ Against such views stands the radical vision of autonomy and mutual concern and respect, which accords to persons *as such* the right to create their own lives on terms fair to all. To see people in this way is to affirm basic intrinsic limits on the degree to which, even benevolently, one person may control the life of another. Within ethical constraints, people are free to adopt a number of disparate and irreconcilable visions of the good life. Indeed, the adoption of different kinds of life plans, within these constraints, affords the moral good of different experiments in living by which people can more rationally assess such basic life choices.²⁴⁰ Since rigid moral prescriptions in many of these areas are no longer appropriate, people *should* make these choices in as imaginative, creative, exploratory, and inventive a way as human wit can devise, consulting one's personal desires, wants, needs, competences and how one most harmoniously wishes them concurrently and complementarily to develop and be satisfied over a life time. Perhaps, people fear freedom in this sense,²⁴¹ preferring conventional solutions. That is their right. But, such choices deserve no special moral approbation; they do not help us more rationally and courageously to choose our lives. In this sense, the constitutional right to privacy protects not only the autonomy rights of individuals, but facilitates the social and moral good that experiments in living afford to society at large—refreshing and deepening the social imagination about the role of children in human life, about the improper force of “masculine” and “feminine” stereotypes in human love and work,²⁴² and about the varieties of humane sexual arrangements.²⁴³

In Conclusion: The Judicial Methodology of the Constitutional Right to Privacy

We have proposed a theory of the *form* of considerations which must be assessed considering issues involving the constitutional right to privacy, namely, (1) whether, in the light of contemporary evidence, there is any good moral reason to believe that certain conduct, traditionally conceived as morally wrong, is wrong at all; (2) whether the conduct relates to basic life plan choices; and (3) consequent on (2), whether paternalistic considerations are radically inappropriate. I do

238. See, e.g., T.L. BOUSCAREN, A. ELLIS & F. KORTH, CANON LAW (1946).

239. See notes 44-7 & accompanying text *supra*.

240. See *On Liberty*, *supra* note 146, ch. 3.

241. See E. FROMM, ESCAPE FROM FREEDOM (1941).

242. See note 168 *supra*.

243. See, e.g., R. BRAIN, FRIENDS AND LOVERS (1977).

not mean to suggest that these considerations *must*, concurrently, determine the future development of the constitutional right to privacy. Perhaps, for example, if (1) and (3) are clear, that should suffice for constitutional invalidation on the ground if not of the constitutional right to privacy, then the total lack of sensible due process rationality.²⁴⁴ Nevertheless, I believe the above considerations do explain the proper development to date of the constitutional right to privacy²⁴⁵ and the proper direction of its continued development.

This Article began by taking up the familiar challenge that the constitutional right to privacy is unsound in principle and methodology. The author has discussed at some length the substantive basis of constitutional principles on which the constitutional right to privacy

244. Cf. Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699.

245. How does this analysis apply outside the sexual context, for example, to allegations of a constitutional right to privacy to use drugs, see note 9 *supra*, to wear certain styles of dress or hair length, see note 8 *supra*, to the right to die, see note 10 *supra*? Certainly, there is no good reason why the constitutional right to privacy must be limited to sex though it understandably began there. Nonsexual applications of the right to privacy may be analyzed on the same model earlier applied to sex. This model most clearly would justify the idea of a constitutional privacy right to die. As regards (1), absolute moral prohibitions on forms of voluntary death are, I believe, unjustified. See D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 1976-85 (1971). Such absolute prohibitions can only be sustained on the theological assumption that God has a supervening property right in our bodies which we, the person in that body, have no moral title to alienate. *Id.* at 179-80. For reasons previously discussed, such purely theological assumptions cannot properly be the basis for legally enforceable morality. Accordingly, in certain cases, voluntary death is not morally wrong. (2) The duration of one's life is a basic life choice, if anything is. Certainly, many of the choices in our life are informed by our decision on this question, for example, our choice of job with its predictable effects on the duration of our life, our concern for personal health and diet, our present prescient planning for old age, and the like all bear on the duration of one's life (see note 231 *supra*). No one would question the right to control the duration of one's life in these senses. In certain kinds of cases of terminal illness, and the like, there is no moral difference in principle. To refuse people the right to die in such cases is to fail to accord them equal concern and respect for their autonomy. (3) Paternalistic judgments in certain of these cases are radically inappropriate. In particular, fear of one's own death often unwarrantably distorts one's perception of another person's rationality in wanting to die. Compare the distortions of judgment of physicians regarding whether terminally ill patients want to be told of their probable deaths. See S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 220-47 (1978).

Other nonsexual applications of the constitutional right to privacy (dress and hair length, drug use) may satisfy (1) and (3), but may be controverted on the issue of whether they bear on basic life choices. Perhaps a good argument could be made that dress and hair length are important ways in which human beings define themselves and must thus be regarded as basic life choices. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 958-65 (1978). Perhaps, soft drug use could be regarded as a form of autonomous control of internal psychic space and attitudes, and thus be fit within the rubric of (2). *Id.* at 905-10. On the other hand, these arguments may be strained. In such cases, as I suggested above, the invalidation of such laws may sufficiently rest on their violation of (1) and (3), as egregiously lacking any semblance of minimal due process rationality. See note 244 *supra*.

rests, and this analysis may now be used in explaining why the judicial methodology, used in inferring the right, is sound.

Substantively, we have argued that there is an inner moral coherence in the development of the right to privacy. Beginning in the interstices of tort law, used in the interpretation of specific constitutional guarantees, finally invoked as an independent constitutional right—the right to privacy has appealed to a common moral argument, that is, the interpretation of basic rights in terms of the foundational values of autonomy and equal concern and respect. When Warren and Brandeis invoked ideas of the inviolate personality in their seminal article,²⁴⁶ they appealed to underlying concepts of human rights that, in their view, most deeply explain the moral foundations of tort law and the proper direction in which tort law should judicially evolve. When Brandeis invoked similar arguments in his dissent in *Olmstead*,²⁴⁷ he made an argument of basic moral principle that he supposed to underlie the fourth amendment and the constitutional design in general. These arguments express the ultimate moral vision of human rights—that there are intrinsic limits on the power of individuals and the state to violate basic interests of the person. Legal doctrines, expressing ideas of human rights, are thus interpreted in terms of the underlying moral concepts which give these doctrines some ultimate coherent sense. Accordingly, when Justice Douglas inferred the constitutional right to privacy in *Griswold*,²⁴⁸ he correctly appealed, like Brandeis, to an underlying argument of moral principle that he took to explain a number of constitutional provisions and the constitutional design in general. This underlying argument is here called the unwritten constitution, a body of understandings that gives a coherent meaning to the constitutional design. This meaning is the basic constitutional commitment to the ultimate values of human rights, the guarantee to persons of effective institutional respect for their capacities, as free and rational beings, to define the meaning of their own lives. Like the Warren and Brandeis article and the Brandeis dissent and like good judges in general,²⁴⁹ Douglas thus made sense of existing legal materials in terms of underlying principles and showed how those principles make sense today. Constitutional principles, insuring equal concern and respect for autonomy, require the invalidation of state prohibitions and regulations in matters not properly of public concern (antimoralism and antipaternalism) and implicating basic issues of the

246. See note 66 *supra*.

247. *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

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

249. See Richards, *The Theory of Adjudication and the Task of the Great Judge*,—CARDOZO L. REV.—(forthcoming). See generally B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

definition of the self. Accordingly, the constitutional right to privacy was inferred.²⁵⁰ Whether derived as an implication of various amendments,²⁵¹ as a right reserved to the people by the ninth amendment,²⁵² or as a substantive right required by due process of law,²⁵³ the constitutional right to privacy makes ultimate moral sense of the constitutional design.

Of course, as we have noted, the constitutional right to privacy is analytically distinguishable from the informational control issues of the tort and fourth amendment concepts.²⁵⁴ The unity of these disparate rights is not in the definition of the ultimate rights, but in the common moral arguments they invoke: the concern for the exacting protection of matters not properly of public concern, in the interest of protecting the ultimate resources of individuation that lie at the heart of the concept of human rights. Accordingly, the judicial methodology of *Griswold* and its progeny is eminently proper. Analogies are properly drawn to the privacy interests protected by tort law and the fourth amendment, not because the constitutional right to privacy is the same right as these but because there is an underlying moral principle that the analogy clarifies.²⁵⁵

The critics of the constitutional right to privacy are wrong.²⁵⁶ It is they, not the Court, who have lost touch with the moral vision underlying the constitutional design. The institutional protection of moral personality requires that this right be recognized. A case like *Doe*²⁵⁷ shows not that the constitutional right to privacy is incoherent, but that the Court has failed consistently to apply or articulately to understand

250. This account is an attempt to render more philosophically precise accounts with which I am morally sympathetic. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, ch. 15 (1978); Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699; Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976).

251. Thus, Justice Douglas inferred the constitutional right to privacy as being in the "penumbra" formed by emanations of specific constitutional guarantees. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

252. *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring); cf. Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962).

253. Due process of law should be explicated as the ultimate and most general requirement of constitutional reasonableness, requiring that all laws have reasons compatible with basic constitutional morality. Accordingly, any laws incompatible with such reasons should be subject to possible invalidations. Cf. Scanlon, *Due Process*, in *DUE PROCESS: NOMOS XVIII*, at 93 (J.R. Pennock & J.W. Chapman eds. 1977); see *Griswold v. Connecticut*, 381 U.S. 479, 499-502 (Harlan, J., concurring). See also *Poe v. Ullman*, 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting).

254. See note 73 & accompanying text *supra*.

255. See *Unnatural Acts*, *supra* note 9, at 1318-19 for elaboration of these analogies.

256. See note 2 *supra*.

257. *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976).

its underlying principle. *Doe* is deeply, morally wrong. Sexual autonomy is a human right in terms of which people define the meaning of their lives. In particular, the persecution of homosexuals, for that is the name we may now properly give it, deserves not constitutional validation, but systematic and unrelenting attack. To appeal to popular attitudes, in the way in which *Doe* implicitly does, is precisely to withhold human rights when, as a shield against majoritarian oppression, they are most exigently needed. Homosexuals have the right to reclaim the aspects of the self that society has traditionally compelled them to deny; they, like other persons, have the right to center work and love in a life they can authentically call their own.