

PRIVACY AS A LEGAL PRINCIPLE OF IDENTITY MAINTENANCE

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INTRODUCTION

Privacy occupies a central place in the western liberal tradition as an essential component of self-definition and individual development.¹ The meaning of privacy, however, has proven elusive. Legal scholars and philosophers have variously characterized privacy as a social situation of autonomy, a claim, a psychological state, a physical area, or a form of control.² More specific definitions include: privacy as a psychological condition of “being apart from others,”³ “freedom not to participate in the activities of others,”⁴ “a social ritual by means of which an individual’s moral title to his existence is conferred,”⁵ “a boundary through which information does not flow from the persons who possess it to others,”⁶ “the state of limited access by others . . . to certain modes of being in a person’s life,”⁷ “the exclusive right to dispose of access to one’s property (private) domain,”⁸ “intermediate goods”⁹ involving the “concealment

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¹ See generally ALAN WESTIN, *PRIVACY AND FREEDOM* (1968). For a thorough review of recent legal and philosophical critiques of privacy, see JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* (1997), especially chapters 2, 3, and 4.

² Ruth Gavison, *Privacy and the Limits of the Law*, 89 *YALE L.J.* 421, 424 (1980).

³ Richard Parker, *A Definition of Privacy*, 27 *RUTGERS L. REV.* 275, 276 (1974).

⁴ *Id.*

⁵ Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, 6 *PHIL. & PUB. AFF.* 26, 39 (1976).

⁶ Edward Shils, *Privacy: Its Consequences and Vicissitudes*, 31 *LAW & CONTEMP. PROBS.* 281, 282 (1966).

⁷ C. Keith Boone, *Privacy and Community*, 9 *SOC. THEORY & PRAC.* 1, 6 (1983).

⁸ Ernst Van Den Haag, *On Privacy*, in *PRIVACY: NOMOS XIII* 150-51 (J. Roland Pennock & John W. Chapman eds., 1971).

⁹ Richard Posner, *The Right of Privacy*, 12 *GA. L. REV.* 393, 394 (1978).

of information about themselves that others might use to their disadvantage,"¹⁰ and as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."¹¹

Control seems to be a common concern of many definitions, whether of information, territory, or the self. Thus privacy has been defined as control over: "knowledge about oneself,"¹² "the intimacies of personal identity,"¹³ "acquaintance with one's personal affairs,"¹⁴ "disclosures [of confidential information] by others when disclosures do not, or no longer, serve associational interests,"¹⁵ "decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking,"¹⁶ and finally "control over who can sense us."¹⁷

This Article provides a historical commentary on the meaning of privacy, drawing from various genres, including philosophy, literature, and English and American jurisprudence. Its primary concern is not to provide an authoritative definition of privacy, but rather to consider how existing literature on privacy recognizes, constructs, and otherwise implicates identity and the integrity of the self as legal and/or social values. Integral to this concern is approaching privacy as a regulative principle for constructing and managing relations between the individual and three primary spheres of engagement: society, the market, and the state.¹⁸ Contemporary

¹⁰ Richard Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1, 5 (1979).

¹¹ WESTIN, *supra* note 1, at 7. Westin also describes four states of individual privacy: *Solitude*, in which "the individual is separated from the group and freed from the observation of other persons"; *Intimacy*, in which "the individual is acting as a part of a small unit that claims and is allowed to exercise corporate seclusion so that it may achieve a close, relaxed, and frank relationship between two or more individuals"; *Anonymity*, which "occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance"; and *Reserve*, which entails "the creation of a psychological barrier against unwanted intrusion." *Id.* at 31.

¹² Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968); *see also* William A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305, 306 (1983) (defining privacy as "the condition of not having undocumented personal information about oneself known by others"). Parent combines the idea of privacy as a condition with a concern for control over information. *Id.*

¹³ Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

¹⁴ Hyman Gross, *Privacy and Autonomy*, in *PRIVACY: NOMOS XIII* 169 (J. Roland Pennock & John W. Chapman eds., 1971).

¹⁵ Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change 1890-1990*, 80 CAL. L. REV. 1133, 1151 (1992).

¹⁶ JULIE C. INNES, *PRIVACY, INTIMACY AND ISOLATION* 91 (1992).

¹⁷ Parker, *supra* note 3, at 280.

¹⁸ By society, I mean that sphere of engagement beyond the family where

analyses of privacy tend to concentrate on how privacy protects the individual from state tyranny or the prying eyes of social busy bodies. Much less attention has been paid, however, to privacy as a principle for demarcating a space beyond the reach of market forces. Here is where my concern for identity takes the fore. As privacy recognizes and protects the conditions necessary for proper individuation and realization of the self over time, it stands in stark opposition to the expansive forces of the modern market, which reduces everything that comes within its grasp to a common medium of exchange.

I will argue that the existing literature on privacy lays the groundwork for a consideration of how the law constructs and manages the principle of identity. At the core of this process lies the concern to define and protect certain dignitary interests that some view as critical to maintaining the integrity of the self in the face of modern social, economic, and political forces. Privacy, in short, provides principles for negotiating the legal management of personhood in a manner that facilitates the development and maintenance of a coherent individual identity essential to our liberal polity's commitment to human flourishing.

Among these principles are a commitment to maintaining the conditions necessary for proper individuation and realization of the self over time. In particular, this involves the legal recognition and protection of a sphere of personhood beyond the reach of market forces. In such a sphere, a person may choose to locate aspects of herself that may not be rendered fungible or commensurable with other objects through a market exchange. More generally, the literature also reveals the potential for recognizing privacy as a means through which society itself is constituted. As a principle of community maintenance, privacy casts the construction of the self as a relational, social process that implicates identities drawn from powerful historical and social affiliations. In this context, privacy challenges the notion of the bounded self and provides legal principles that construct identity as contingent, open, and shifting across time and space. Privacy is also ultimately grounded in a concern to protect the basic dignity implicated in allowing a person

individuals join together and interact in a wide array of engagements of a primarily non-economic character. This approximates the sphere of civil society, of Tocqueville-like association, and the general encounters of everyday life. By the market, I refer to that sphere of interaction governed primarily by economic considerations, where individual activity is oriented toward providing goods and services that are rendered commensurable by being arrayed along a continuous common medium of exchange. By the state, I refer to the formal operations of the institutions and apparatus of governance given sanction by the law and backed by the legitimized use of force.

to negotiate this complex terrain with a measure of autonomy and control over the process of developing an individuated self, capable of human flourishing.

I. PRIVACY AND THE INVIOULATE PERSONALITY

During the nineteenth century a framework of privacy law developed around legal concerns ranging from protection of correspondence, to discussions of trespass upon the home, to trademark infringement and protection of the confessional.¹⁹ In his influential treatise on the law of torts, Judge Thomas Cooley referred to “the right to be left alone” as a personal immunity.²⁰ And in 1890, E.L. Godkin, the prominent editor of *The Nation*, wrote of the citizen’s “right to his own reputation” as “the very first form of individual property,” and warned against “violations of the rights to privacy” as a threat to social order and civil peace.²¹ But it was Samuel Warren and Louis Brandeis who first fully elaborated on the principle of privacy as a right deserving of legal recognition and protection.²²

In a now legendary law review article, Warren and Brandeis reviewed the diverse strands of legal, political, and social commentary relating to issues of privacy and wove them together into a coherent argument for a legally distinct right to privacy grounded in a concern for “man’s spiritual nature.”²³ To Warren and Brandeis, privacy did

¹⁹ See Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981) [hereinafter *Right to Privacy*].

²⁰ THOMAS COOLEY, *THE LAW OF TORTS* 29 (2d ed. 1888).

²¹ E.L. Godkin, *The Rights of the Citizen*. IV. *To His Own Reputation*, SCRIBNER’S MAGAZINE, July 1890, at 59-65.

²² For a thorough review of the right to privacy in the nineteenth century, see *Right to Privacy*, *supra* note 19. The Note argues that far from creating a new right, Warren and Brandeis merely provided the clearest articulation of what, by 1890, was a tradition of “ample and explicit protection of privacy in its own right.” *Id.* at 1894. Warren and Brandeis probably would not quarrel with this interpretation. Indeed, they did their best to build their argument on what they saw as existing precedent for establishing a right to privacy. As Ronald Dworkin notes of their work, it may be, however, that the new principle strikes out on a different line, so that it justifies a precedent or a series of precedents on grounds very different from what their opinions propose. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 119 (1977). Brandeis and Warren’s famous argument about the right to privacy is a dramatic illustration: they argued that this right was not unknown to the law, but was, on the contrary, demonstrated by a wide variety of decisions, in spite of the fact that the judges who decided these cases mentioned no such right. *Id.*

²³ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Like all good legends, the article even has its own creation myths. William Prosser, writing seventy years later, attributed the article to Warren’s outrage at the press’ intrusive coverage of his daughter’s wedding. The image of the right to privacy as the product of an outraged brahmin’s delicate sensibilities held sway for years until James Barron debunked it in 1979. Barron showed that Warren’s

not involve property so much as the “more general right of the individual to be let alone.”²⁴ Their goal was largely to “disentangle privacy from property,”²⁵ and their great accomplishment was articulating privacy as a freestanding basic right.²⁶

Warren and Brandeis grounded the right to privacy in principles of human dignity and the “inviolable personality.”²⁷ Similarly, the first case to recognize a right to privacy, *Pavesich v. New England Life Insurance Co.*,²⁸ expressed concern that the use of a person’s name or image for a commercial purpose without his consent constituted an assault upon the integrity of his persona that effectively enslaved a part of him. In this context, privacy rights are rooted not simply in dignity, but more specifically in dignity as manifested in the integrity of one’s individual identity or persona. The court in *Pavesich* clearly expressed a concern that the expansive forces of the modern market threatened to efface individual identity.²⁹ As Edward Bloustein noted in his commentary on the case:

use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interests of others. In a community at all sensitive to the commercialization of human values, it is degrading to thus make a man a part of commerce against his will.³⁰

Writing seventy years after Warren and Brandeis, William Prosser set the standard for modern assessment of the invasion of privacy by

daughter was not married around the time of the article (a cousin of his was married in 1890 but press reports of it were restrained and not out of the ordinary) and that claims that Warren was unduly sensitive to intrusions on private concerns lacked firm support. See James H. Barron, *Warren and Brandeis, The Right to Privacy, 4 Harvard Law Review 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 892-912 (1979).

²⁴ Warren & Brandeis, *supra* note 23, at 205.

²⁵ Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 648 (1991).

²⁶ David W. Leebron, *The Right to Privacy’s Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769, 779-80 (1991).

²⁷ Warren & Brandeis, *supra* note 23, at 205. Bloustein defines the “inviolable personality” as “the individual’s independence, dignity, and integrity; it defines man’s essence as a unique and self-determining being.” Edward J. Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

²⁸ 50 S.E. 68 (Ga. 1905).

²⁹ *Id.* at 80.

³⁰ Bloustein, *supra* note 27, at 988. For more on the origins of the tort of invasion of privacy and its relation to emerging concerns over the newly expansive forces of the modern national market economy, see generally Jonathan Kahn, *Enslaving the Image: The Origins of the Tort of Appropriation of Identity Reconsidered*, 2 LEGAL THEORY 301, 301-24 (1996).

fracturing the concept into four distinct torts: intrusion into private affairs, public disclosure of embarrassing private facts, false light, and appropriation of name or likeness for commercial benefit.³¹ Prosser's taxonomy of privacy repudiated the legacy of Warren and Brandeis by denying the difference between privacy and property interests and "by suggesting that privacy is not an independent value at all but rather a composite of the interests in reputation, emotional tranquility and intangible property."³²

In response to Prosser, Bloustein tried to reunify the tort of invasion of privacy under the umbrella of injuries to human dignity.³³ Bloustein accepted Prosser's four-part division of the tort of invasion of privacy, but in keeping with Warren and Brandeis, he argued that privacy must be recognized as an independent right, implicating not property but one's very self or individuality.³⁴ Bloustein asserted that the basic social value underlying all torts of invasion of privacy was a concern for human dignity.³⁵ In particular, Bloustein also infused Prosser's tort of appropriation of identity with a concern for the commodification of the individual persona.³⁶ The tort, Bloustein argued, was not about the "misappropriation of something of pecuniary value,"³⁷ it was about "demeaning and humiliating" the individual through "the commercialization of an aspect of personality."³⁸

Hyman Gross provides a sympathetic critique of Bloustein, asserting that although Bloustein indicates why privacy is valuable, he never adequately defines it.³⁹ Gross believes that Bloustein's identification of privacy as an aspect of human dignity is apt, but faults his failure to specify *which* aspect.⁴⁰ Gross defines privacy as a function of control over access to personal affairs,⁴¹ but he does not

³¹ William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

³² See Bloustein, *supra* note 27, at 971.

³³ *Id.* at 974.

³⁴ *Id.* at 987.

³⁵ *Id.* at 974.

³⁶ *Id.* at 987.

³⁷ *Id.* at 968.

³⁸ Bloustein, *supra* note 27, at 987. Bloustein's work, in turn, was subject to much criticism; most of it was a sympathetic appreciation of his concern for dignity that nonetheless asserted such an interest was simply too broad and amorphous to be of practical use. See, e.g., Gerety, *supra* note 13, at 250-53, 259; Tim Frazer, *Appropriation of Personality-A New Tort?*, 99 L. Q. REV. 281, 296 (1980); Dianne Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 339 (1983) [hereinafter Zimmerman, *Requiem for a Heavyweight*].

³⁹ Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35 (1967).

⁴⁰ *Id.* at 51-52.

⁴¹ *Id.* at 35-36.

elaborate on the relation between privacy, dignity, and identity. This must be the focus of inquiry if our concern is not so much with privacy per se, but with the evolving status of identity before the law.⁴²

While Bloustein's focus remains on dignity and privacy, he does not fully consider their further relation to identity. The harm to dignity caused by invasions of privacy ultimately implicates the integrity of individual identity. Bloustein is clearly concerned with this, but he tends to assert the relation rather than explore and analyze it. Dignity and identity, of course, are hardly easier to define than privacy. Yet by considering the relation of dignity to privacy, we can develop a more complete understanding of the principles underlying particular rules that implicate the legal recognition and construction of identity.

⁴² Tom Gerety agrees that privacy is one single concept and thus definable. He characterizes it, however, as "an autonomy, or control over the intimacies of personal identity." Gerety, *supra* note 13, at 236. Gerety thus focuses on identity more explicitly than Bloustein, but he also criticizes Bloustein's characterization of privacy as a dignitary interest as being too broad and undifferentiated. *Id.* at 250-59. Tim Frazer, among others, shares this criticism. See Frazer, *supra* note 38, at 296.

Like Laurence Tribe, Gerety distinguishes between public and private aspects of identity. He asserts the following,

Our personalities and our dignities are no doubt most surely and tightly enmeshed in the private world over which we exercise, at times, considerable sway. But whether we like it or not, our selves also extend outside of that world into another in which most of us have very little power or expectation of power over the opinions and impressions others may form of us. Every affront to our dignity in that outer world, while felt, even keenly, in our inner world, is not a legally cognizable assault upon our private selves.

Gerety, *supra* note 13, at 259-260. Gerety rightly raises concerns that Bloustein's conception of dignitary harm may be too broad, but his distinction between public and private selves misses the point by, in effect, conflating what Alan Gewirth identifies as "empirical" and "inherent" dignity. Every day each of us may suffer insult to empirical dignity, to our ability to conduct ourselves in a "dignified" manner. Bloustein, and Warren and Brandeis before him, however, is concerned with deeper insults to our inherent dignity, a kind of intrinsic worth at the core of individual identity. That core of identity is not simply about personal "intimacies," it implicates our very sense of self and deserves protection whether in public or private. Thus, when Gerety goes on to assert that the tort of appropriation of identity does not involve privacy because it is a matter of controlling aspects of the identity that "face outward," he overlooks the fact that the harm of appropriation does not only implicate *how* an individual may choose to present his or her outward identity but also *whether* to present an outward face in the first place. *Id.* at 250-53.

Gerety in effect reduces the harm of appropriation to a matter of reputation or simple unjust enrichment when he asserts that existing law relating to fraud and property rights are adequate to redress any resulting grievances. He wholly fails to consider that appropriation of identity affects not only how others view you, but also how you view yourself: as appropriation renders a unique part of your self into a fungible commodity, it undermines the integrity of your persona, regardless of how others perceive you.

Whereas dignity broadly implicates a consideration of the inherent value of human beings, privacy involves the more focused right to protect the conditions necessary to individuation. That is, where dignity broadly conceived is a condition of personhood, privacy is an attribute of individuality. The liberal tradition connects the two in so far as it posits that the full realization of one's personhood involves articulating and developing one's individual identity.⁴³ Assaults on identity affront dignity insofar as they deny the conditions of individuation necessary to the proper respect for and development of one's personhood. Invasions of privacy, therefore, affront dignity insofar as they undermine the integrity of one's identity by: forcing the manifestation of a partial or reductive version of one's individuality, more thoroughly effacing one's individuality, or otherwise rendering the individual as fungible and non-distinct. Thus, in answer to Gross' criticism of Bloustein, it is my assertion that privacy implicates that aspect of dignity grounded in the belief that a full realization of one's personhood requires the recognition of, and respect for, the conditions necessary for each person to realize her distinct individual identity.

II. PRIVACY AS A DISTINCT INTEREST

In searching for common privacy-based principles, this Article breaks from other theories, like Prosser's, that fragment privacy into diverse rights. It diverges even more radically from scholars such as Harry Kalven or Judith Jarvis Thomson who deny the existence of a distinctive tort of invasion of privacy or characterize it as "petty" at best.⁴⁴ Thomson, for example, argues that the right to privacy never

⁴³ See JOHN RAWLS, *POLITICAL LIBERALISM* 29-34 (1993); see also Reiman, *supra* note 5.

⁴⁴ Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326, 326-31 (1966); Judith Jarvis Thomson, *The Right to Privacy*, 4 *PHIL. & PUB. AFF.* 295, 303-10 (1975). Prosser, too, viewed privacy as essentially a derivative right. Prosser, *supra* note 31, at 389. However, his four-part categorization nonetheless serves to specify, and thereby contain, specific and relatively autonomous privacy rights. Others, such as Dianne Zimmerman, critique the right of privacy as simply irrelevant in a society where the legal protections of the First Amendment have extended to encompass the dissemination of almost all forms of information. Zimmerman, *Requiem for a Heavyweight*, *supra* note 38, at 293-94.

One year before Prosser's article, *Privacy*, Frederick Davis argued that privacy was derivative of existing torts such as defamation, intrusion, and property rights. He criticized privacy and harms resulting from its invasion as subjective and difficult to measure, and concluded that the right of privacy was "a sociological notion and not a jural concept at all." Frederick Davis, *What Do We Mean By 'Right to Privacy?'*, 4 *S.D. L. REV.* 1, 19 (1959). While correct in identifying the sociological component to privacy, Davis provides no convincing argument for bifurcating sociological, or other

stands alone but is largely derivative of a cluster of other property-based rights to resist intrusions.⁴⁵

Thomas Scanlon and Jeffrey Reiman each offer effective rebuttals to Thomson by situating privacy more broadly in its social context. Privacy is a distinctive and independent right that “is an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own. And this is a precondition to personhood.”⁴⁶ Reiman argues that privacy is therefore “necessary to the creation of *selves* out of human beings, since a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his *own*.”⁴⁷ It is here that Reiman recognizes the significance of privacy for the constitution of the self, and for the recognition, construction, and maintenance of individual identity in and through society. He still employs property-based metaphors of ownership that place him in the liberal-Lockean tradition, but he is also open to valuing privacy as a social dynamic. Reiman concludes that Thomson’s derogation of privacy as a derivative right fails fully to consider the distinctiveness of the social role privacy plays and its special place in constituting and respecting the individual in the liberal state.⁴⁸ Trespass and nuisance laws enforce respectful social interactions and protect the physical territory surrounding an individual, but they do not implicate the same concern for personhood and identity that underlie privacy.

Scanlon also focuses on the social context by positing a common foundation for privacy rights “in the special interests we have in being able to be free from certain kinds of intrusions.”⁴⁹ In his analysis, however, Scanlon eschews metaphors of ownership to focus on the transgression of normative boundaries established by social norms and conventions. He asserts that a violation in the right to privacy occurs where there is an invasion of a “conventionally defined zone of privacy.”⁵⁰ Scanlon’s concern for boundaries is also classically liberal, but his focus on the importance of social norms provides

concerns from jural concerns. He takes a classically hermetic approach to the law, sealing it off as an independent discipline, pure and chaste, untarnished by social or historical considerations. Ironically, Prosser’s fragmentation of the tort provided some of the jural logic behind the concept of privacy that Davis felt was lacking.

⁴⁵ Thomson, *supra* note 44, at 303-10.

⁴⁶ Reiman, *supra* note 5, at 39.

⁴⁷ *Id.* (emphasis in original).

⁴⁸ *Id.*

⁴⁹ Thomas Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 315, 315-18 (1975).

⁵⁰ *Id.*

useful insights into the distinctive dynamics of privacy rights.

Robert Post follows up on the work of Reiman and Scanlon, elaborating more fully on the social bases of privacy law.⁵¹ In his analysis of Warren and Brandeis' article, Post distinguishes between descriptive and normative privacy.⁵² He understands descriptive privacy as an amalgam of empirically ascertainable "thoughts, emotions, [and] sensations" that need protection insofar as they comprise personality itself.⁵³ To disturb personality is to cause mental pain and distress. Post alludes to Ruth Gavison's work in separating descriptive privacy into the related concepts of "secrecy," "anonymity," and "solitude."⁵⁴ Normative privacy is less a matter of empirical distance from intrusion than of "moral characterization" of certain social relations.⁵⁵ It involves "forms of respect that we owe each other as members of a common community."⁵⁶ The transgression of these forms of respect violates personality. Post concludes that privacy in this sense is normative "because it ultimately entails the articulation and application of social norms."⁵⁷ Normative privacy, therefore, describes why the invasion itself causes harm. Post argues that the common law conception of privacy is inherently normative. Nonetheless, he recognizes that diverse theories of privacy articulate the relation between normative and descriptive aspects of privacy, emphasizing the one or the other to greater or lesser degrees.⁵⁸

Post's conception of normative privacy is especially useful in assessing how privacy-based concerns for dignity implicate the integrity of individual identity. His elaboration of descriptive privacy, however, also clearly implicates identity interests, even if in a highly psychological form. This creates a problem in analyzing the relation

⁵¹ Post, *supra* note 25.

⁵² *Id.* at 650-51.

⁵³ *Id.* at 650.

⁵⁴ *Id.* at 651.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Post, *supra* note 25, at 652.

⁵⁸ *Id.* at 649-53. Michael Sandel distinguishes between normative and "voluntarist" privacy. He argues that *Griswold's* substantive due process analysis enacted an essentially normative conception of privacy, whereas *Eisenstadt* and *Roe* marked a shift to a voluntarist notion of privacy that focuses on autonomy of individual choice rather than on protecting private space. Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 526-28 (1989). Sandel's distinction between protecting space and protecting choice is useful but it obscures certain deeper principles underlying both approaches to privacy—most significantly the common dignitary concern to recognize, define, and protect the integrity of the individual self.

between law, privacy, and identity insofar as Post posits not only a distinction, but also a disjunction, between normative and descriptive privacy. This aspect of his analysis is unnecessary and potentially misleading. As Post himself observes, various conceptions and applications of privacy may embody both descriptive and normative concerns to greater or lesser degrees.⁵⁹ When focusing on identity, therefore, it is more useful to place them along a continuum than to create a dichotomy between them.

III. PRIVACY AND DIGNITY

Beginning at the normative end of the continuum, let us consider privacy as it explicitly implicates dignity, autonomy, and the integrity of the self. Bloustein's response to Prosser is a good starting point. In his critique of Prosser's fragmentation of the tort of privacy, Bloustein posits a common dignitary interest asserted in various privacy cases as a means to reintegrate the right to privacy.⁶⁰ Thus, where Prosser found the gist of the harm in intrusion to be a species of intentional infliction of mental distress,⁶¹ Bloustein contends that the true harm was "a blow to human dignity, an assault on human personality."⁶² Such intrusions are "wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma."⁶³ Extending this analysis to governmental intrusion, Bloustein sees intrusion as "the primary weapon of the tyrant."⁶⁴

Similarly, Bloustein distinguishes invasions of privacy involving public disclosure from defamation, asserting that "defamation is founded on loss of reputation while invasion of privacy is founded on an insult to individuality."⁶⁵ Moreover, the tort of appropriation of identity did not involve a proprietary interest, but rather caused harm by "demeaning and humiliating" the individual through the "commercialization of an aspect of personality."⁶⁶ Thus, Bloustein recapitulates the original effort of Warren and Brandeis to articulate a unitary interest in protecting the intangible spiritual nature of man.

In his essay *Human Dignity and Constitutional Rights*, Louis

⁵⁹ Post, *supra* note 25, at 653.

⁶⁰ Bloustein, *supra* note 27, at 974.

⁶¹ *Id.* at 967.

⁶² *Id.* at 974.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 981.

⁶⁶ Bloustein, *supra* note 27, at 987.

Henkin argues that “human dignity requires respect for every individual’s physical and psychic integrity, for his (her) ‘personhood’ before the law, [and] for her (his) autonomy and freedom.”⁶⁷ Henkin’s identification of integrity and personhood as central to dignity resonates with the core principles underlying the normative conception of privacy articulated by Bloustein. Privacy is valued insofar as it fosters the conditions within which an individual may establish, maintain and develop her identity as a core aspect of personhood. Thus conceived, invasions of privacy constitute an affront to human dignity by undermining one’s identity. If our primary concern is with such affronts, then acts that are individually experienced and also socially and historically understood as threats to the integrity of one’s identity begin to define the “boundaries” of privacy.

Alan Gewirth sets out two concepts of dignity as the basis of human rights: empirical and inherent.⁶⁸ Dignity in the empirical sense “is a characteristic that is often also signified by its corresponding adjective, *dignified*; it is variously, a kind of gravity or decorum or composure or self-respect or self-confidence together with various good qualities that may justify such attitudes.”⁶⁹ He argues that empirical dignity may be gained or lost. It is contingent and hence a consequence of having rights, but it is not “the *ground* of rights.”⁷⁰ Inherent dignity, in contrast, “signifies a kind of intrinsic worth that belongs equally to all human beings as such”⁷¹ It is non-fungible and inalienable; thus “[h]aving [inherent] dignity is the equivalent of having rights.”⁷²

To a degree, Gewirth’s distinction between empirical and inherent dignity echoes Post’s distinction between descriptive and normative privacy. Normative privacy may be conceived as an arena in which inherent dignity is defined, articulated, and maintained. Each involves assessing (and enforcing) historical and social constructions of particular values about the worth of the individual and the proper boundaries of behavior (both individual and

⁶⁷ Louis Henkin, *Human Dignity and Constitutional Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 210 (Michael J. Meyer & W.A. Parent eds., 1992).

⁶⁸ Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 11-12 (Michael J. Meyer & W. A. Parent eds., 1992).

⁶⁹ *Id.* at 12 (emphasis in original).

⁷⁰ *Id.* (emphasis in original).

⁷¹ *Id.*

⁷² *Id.* at 12-13.

governmental) in a civilized community or a decent state.

Ironically, the very idea of normative “boundaries” may call forth a more empirical or descriptive conception of privacy, especially as the metaphor becomes more spatial. Gewirth, of course, is not literally talking about spatial boundaries, but his characterization of dignity as non-fungible and inalienable places it beyond the reach of market forces. There is an implicit spatial relationship here that echoes Warren and Brandeis’ concerns to keep certain personal matters out of the public eye.⁷³ Dignity demands the maintenance of a space outside of, and perhaps existing in opposition to, the world of the market. Warren and Brandeis defined that space in terms of privacy—it is the arena where the non-fungible aspects of the human spirit are protected from a debasing commodification.⁷⁴ In this respect, according to the Warren and Brandeis model, empirical and inherent dignities intertwine. For these late nineteenth century genteel professionals, privacy enabled one to behave empirically in a “dignified” manner; but such behavior was conceived primarily as an outward manifestation of one’s inherent dignity.

William Parent elaborates on the type of intrinsic worth that Gewirth finds at the core of human dignity.⁷⁵ Parent’s term, “moral dignity,” is characterized as “the right not to be arbitrarily and therefore unjustly disparaged as a person.”⁷⁶ Parent thus characterizes dignity relationally as a function of how we are treated by others. Ironically, however, he does not seem to appreciate how personhood and identity themselves may be constructed relationally through social and historical interaction. Rather, he assumes an autonomous individual who has certain rights respecting her dignity. Moreover, his concept of dignity is ultimately negative, involving a right not to be treated a certain way. There is no sense of dignity as involving a positive right to flourish as a person. The right to privacy, in contrast, was valued by Warren and Brandeis not simply because it allowed the cultured individual to keep out the debasing influences of a crass modernity, but also because it helped to sustain a space and a community within which one could realize his full potential as a civilized individual.⁷⁷ Just as one may conceive the right to privacy as more than the negative right simply “to be left alone,” so too may one

⁷³ Warren & Brandeis, *supra* note 23.

⁷⁴ *Id.*

⁷⁵ William A. Parent, *Constitutional Values and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 47 (Michael J. Meyer and W. A. Parent eds., 1992).

⁷⁶ *Id.* at 66.

⁷⁷ See Kahn, *supra* note 30, at 306-12.

conceive dignity as more than the negative right not to be mistreated.⁷⁸

IV. PRIVACY AS AUTONOMY

Justice William Brennan has argued that “the Constitution embodies the aspiration to social justice, brotherhood and human dignity that brought this nation into being.”⁷⁹ Ronald Dworkin echoes Justice Brennan in identifying a belief in individual human dignity as “cardinal” in our political culture and in the structure of the Constitution.⁸⁰ He characterizes this as a belief “that people have the moral right—and the moral responsibility—to confront for themselves, answering to their own consciences and convictions, the most fundamental questions touching the meaning and value of their own lives.”⁸¹ Among these rights is “procreative autonomy” which, Dworkin notes, has its most available justification in the “privacy” cases.⁸² He thus connects privacy to the notion of autonomy and places both in the context of the broader value of human dignity.

Privacy as autonomy is often conflated with issues of control. Ferdinand Schoeman characterizes privacy in the context of social relations as protection “from social overreaching [that] limits the control of others over our lives.”⁸³ Similarly, Avishai Margalit argues that governmental invasions of privacy humiliate individuals by depriving them of control over their lives, or by debasing the value of such control.⁸⁴ Julie Innes, in contrast, has a fairly de-politicized conception of privacy as “the state of an agent possessing control over a realm of intimacy, which includes her decisions about intimate informational access, intimate access, and intimate actions.”⁸⁵ Innes goes on to define intimacy as involving choices that draw their “meaning and value from the agent’s love, liking, and care.”⁸⁶ Privacy claims, therefore, are claims to possess “autonomy with respect to our

⁷⁸ See William M. Beaney, *The Right to Privacy in American Law*, 31 LAW & CONTEMP. PROBS. 253, 254 (1966) (arguing that privacy as a positive right “is an affirmation of certain aspects of the individual person and his desired freedom from unreasonable intrusive conduct by others”).

⁷⁹ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23 (Jack N. Rakove ed., 1990).

⁸⁰ RONALD DWORKIN, FREEDOM’S LAW 111 (1996).

⁸¹ *Id.*

⁸² *Id.* at 110.

⁸³ FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM 1 (1992).

⁸⁴ AVISHAI MARGALIT, THE DECENT SOCIETY 207 (1996).

⁸⁵ INNES, *supra* note 16, at 69.

⁸⁶ *Id.* at 91.

expression of love, liking, and care.”⁸⁷ Innes reduces the value of privacy to an acknowledgment of respect for persons “as human beings . . . with the potential to freely develop close relationships.”⁸⁸ This sounds appealing, but it is a fairly impoverished conception of privacy. Innes’s definition gives us no reason for such valuations, nor does it explain why relations of “intimacy” are more important than respect for each other as citizens, or simply as human beings. Innes’s approach, ironically, threatens to efface individuality by valuing the individual only insofar as she is capable of intimate relations. This amounts to a sort of psychological reductionism that completely fails to account for the sort of humiliation identified by Margalit, which can threaten to undermine the integrity of individual identity and personhood.

Laurence Tribe, on the other hand, casts autonomy broadly as fully implicating a variety of “rights of privacy and personhood.”⁸⁹ Focusing on the issue of control, he distinguishes privacy from autonomy in his analysis of *Roe v. Wade*. The key issue in *Roe*, he asserts, is not privacy but autonomy, which he defines in terms of control over one’s body and reproductive destiny.⁹⁰ Similarly, Henkin argues that Supreme Court cases from *Griswold* to *Roe* were not really about privacy, but about recognizing a new “zone of autonomy, of presumptive immunity to governmental regulation.”⁹¹ Such distinctions make sense under limited construction, but they depend on a rather cramped conception that replicates privacy as a function of distinct social spheres: private and public (or perhaps, private and not private). This distinction seems reasonable, but it shades into a descriptive, rather than normative, notion of privacy. It looks first to where invasions occur rather than to what values such invasions threaten. If we focus instead on normative privacy as an affirmative right to maintain the integrity of one’s personhood and identity, the distinction between autonomy and privacy becomes less significant.⁹²

Drucilla Cornell takes just such an affirmative approach to privacy rights when she uses psychoanalytic theory to connect the right to abortion with the concept of bodily integrity.⁹³ She argues

⁸⁷ *Id.*

⁸⁸ *Id.* at 95.

⁸⁹ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302-1435 (1988).

⁹⁰ *Id.* at 1340-54.

⁹¹ Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1411 (1974).

⁹² Thus Ruth Gavison, for example, connects privacy to the affirmative right of free speech as both related to values of autonomy and self-realization. Ruth Gavison, *Too Early for A Requiem*, 43 S.C. L. REV. 437, 461-62 (1992).

⁹³ Drucilla Cornell, *Bodily Integrity and the Right to Abortion*, in *IDENTITIES, POLITICS,*

that “the wrong in denying a right to abortion is not a wrong to the ‘self,’ but a wrong that prevents the development of the minimum conditions of individuation necessary for any meaningful concept of selfhood.”⁹⁴ Yet because the conditions of individuation are “social and symbolic,” Cornell hesitates to characterize the right to bodily integrity as the right to privacy “if that right is understood as a right to be left alone.”⁹⁵ There is, however, no need to bifurcate the right to bodily integrity from the right to privacy if, as Post and other scholars suggest, we conceive privacy itself as social and symbolic—a means of constructing community and the individual, not simply of sheltering oneself from intrusion.⁹⁶ Thus understood, the right to privacy implicates a concern for maintaining the conditions necessary to sustain normatively valued individuation through which the integrity of one’s personhood and identity is established and developed.

V. PRIVACY AND CONTROL OVER INFORMATION

Moving toward the descriptive end of the continuum, one may view privacy more specifically as a matter of control over certain types of information. Such control implicates ideals of autonomy but tends to focus on a more empirical evaluation of the type of information at issue and the circle or number of people to whom it is exposed. Thus, for example, we have Tom Gerety’s definition of privacy as “an autonomy or control over the intimacies of personal identity,”⁹⁷ or Tribe’s discussion of informational autonomy as the right to select to whom and for what purposes we divulge information about ourselves.⁹⁸ Richard Parker provides a more purely informational definition of privacy when he asserts that “privacy is control over when and by whom the various parts of us can be sensed by others.”⁹⁹ Similarly, Ruth Gavison argues that invasions of privacy can be measured in terms of “the extent to which we are known to others.”¹⁰⁰

Alan Westin asserts that “privacy is the claim of individuals,

AND RIGHTS 21-22 (Austin Sarat & Thomas R. Kearns eds., 1995).

⁹⁴ *Id.* at 22.

⁹⁵ *Id.*

⁹⁶ See generally Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989); Keith C. Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1 (1983).

⁹⁷ Gerety, *supra* note 13, at 236.

⁹⁸ TRIBE, *supra* note 89, at 1389-90. Tribe, of course, sees privacy as including, but not limited to, control over information.

⁹⁹ Parker, *supra* note 3, at 281 (emphasis omitted).

¹⁰⁰ Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980).

groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”¹⁰¹ Westin therefore casts privacy as a type of withdrawal from society.¹⁰² Following Westin, Randall Bezanson characterizes privacy as “a matter of individual control”¹⁰³ over “identified types of personal information”¹⁰⁴ and seeks thereby to “embed [privacy] in the idea of confidentiality.”¹⁰⁵

Westin and Bezanson’s analyses of privacy are useful for developing a scheme to regulate attempts by the government or news media to gain specific types of information about particular individuals, but they are otherwise quite limited in their conception of the nature and value of privacy. In particular, they have little to say about how or why invasions of privacy may implicate dignitary interests or affect the integrity of one’s personhood or identity. Nor do they fully consider how the harm caused by loss of informational control may implicate these values. In his cogent analysis of Warren and Brandeis’ original elaboration of the right to privacy, Bezanson recognizes that they were trying to protect “the individual’s right to enjoy an identity forged by the existing social institutions of family and community.”¹⁰⁶ He then advocates a contemporary version of the tort based on confidentiality, which raises new questions, such as who determines what appropriately private information is and according to what criteria. He mistakenly reduces Warren and Brandeis’ original articulation of a dignitary conception of privacy as “an attempt to protect the functioning of those discrete social institutions from the monolithic, impersonal and value-free forces of modern society”¹⁰⁷ Warren and Brandeis clearly were trying to impose certain social norms of genteel bourgeois society, but they opposed the forces of modernity not because they were “value-free,” but precisely because of the particular values modernity embodied and enforced.¹⁰⁸

Bezanson understandably rejects aspects of Warren and Brandeis’ culturally chauvinistic view of privacy as unworkable and undesirable in today’s more individualistic, pluralistic, and

¹⁰¹ WESTIN, *supra* note 1.

¹⁰² *Id.* at 7.

¹⁰³ Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change: 1890-1990*, 80 CAL. L. REV. 1133, 1150 (1992).

¹⁰⁴ *Id.* at 1174.

¹⁰⁵ *Id.* at 1150.

¹⁰⁶ *Id.* at 1138.

¹⁰⁷ *Id.* at 1139.

¹⁰⁸ See generally Kahn, *supra* note 30.

democratic society. But characterizing modern society as diverse, pluralistic, and “value-free” allows Bezanson to finesse the problem of privacy as a normative value by situating confidentiality as a matter of individual control independent of “external and social norms.”¹⁰⁹ The problem is that individual control cannot be divorced from social norms without a complete fragmentation of society. Legal recognition of privacy interests itself implies and depends upon the imposition of socially determined limits to privacy. Moreover, modern society certainly is not value-free, nor does respect for pluralism and diversity absolve us of a need to employ values to understand, define, and ultimately enforce a right to privacy.¹¹⁰

Warren and Brandeis understood this. They were certainly elitists and their dignitary ideals might have served hegemonically to enforce certain repressive community norms, but simply identifying such shortcomings does not solve the problem. The challenge, rather, is to engage Warren and Brandeis in a discourse to elaborate an evolving understanding of the relation between privacy and dignity in order to promote legal practices that more fully recognize and respect the integrity of individual personhood and identity.

VI. PRIVATE SPACE AND SEPARATE SPHERES

Finally, privacy is perhaps most concretely conceived as a matter of regulating personal space or boundaries. Privacy is often defined spatially as involving a realm placed beyond the reach or measure of certain social forces.¹¹¹ From this conception arises the notion of a private “sphere” as a bounded area separate and apart from both the world of politics and the market. The notion of “separate spheres,” evokes feminist critiques of the historical construction of the private sphere as an arena of patriarchal dominance over women.¹¹² The public/private distinction arguably lies at the core of liberal political and legal thought, but as Carole Pateman notes, “liberalism is inherently ambiguous about the ‘public’ and the ‘private’”¹¹³

¹⁰⁹ Bezanson, *supra* note 15, at 1135.

¹¹⁰ See Post, *supra* note 96, at 969 (arguing that common law privacy rests “upon a concept of privacy that is inherently normative”).

¹¹¹ See Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 445 (1990); see also Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1497-1512 (1983).

¹¹² CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 93-102 (1987).

¹¹³ CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* 118 (1989).

Perhaps some of the ambiguity lies in the notion of privacy itself. As Anita Allen and Erin Mack observe, “‘privacy’ denotes conditions of physical or informational inaccessibility, such as solitude or secrecy. But it can also designate ‘the private sphere’ and a degree of autonomy within it.”¹¹⁴ Frances Olsen makes an additional and important distinction within the private sphere between the market and the family. She argues that similar conceptions of the private sphere are used to characterize and assess the proper degree and type of state intervention in the marketplace and at home.¹¹⁵

Feminist critiques of privacy tend to focus primarily on power relations within the domestic sphere of family life. Originating in the changing society of early nineteenth century America, the ideology of separate spheres posited a dichotomy between the sacred space of the home and the profane world of the market and political life.¹¹⁶ As the workplace became separated from the home, the world of commerce and industry attained a masculine connotation while domestic life became the special province of women.¹¹⁷ Olsen points out the dual nature of the family/market dichotomy, arguing that while it “tended to mask the inferior, degraded position of women, it also provided a degree of autonomy and a base from which women could and did evaluate their status.”¹¹⁸ The problem becomes acute, however, when the ideology of separate spheres is invoked in legal and political systems to justify state action that effectively ratifies or consolidates the family as a feudal patriarchal structure. In so far as an ideology of privacy is used to perpetuate a status quo of hierarchy and paternalistic dominance of women and children within the domestic sphere, feminist analysis designates the private sphere an instrument of injustice.¹¹⁹ For example, in her critique of the logic of *Roe v. Wade*,

¹¹⁴ Allen & Mack, *supra* note 111, at 445.

¹¹⁵ Olsen, *supra* note 111, at 1497-12.

¹¹⁶ The connection of privacy to “sacred space” hardly ended with the nineteenth century. In 1966, for example, Milton Konvitz presented privacy as a “sacred precinct” where the self is beyond or outside the influence of the state. Milton Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272, 274-77 (1966). In contrast to Warren and Brandeis, however, he used property metaphors to posit a sort of portable private space that a man can carry with him wherever he goes. *Id.* To Konvitz, privacy thus created a breathing space for the survival of the self in the face of society and the state. *Id.*

¹¹⁷ For a discussion of the nineteenth century origins of the ideology of separate spheres of privacy in America, see generally NANCY COTT, *THE BONDS OF WOMANHOOD* (1977); ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1977); SHEILA M. ROTHMAN, *WOMAN’S PROPER PLACE: A HISTORY OF CHANGING IDEALS AND PRACTICES, 1870 TO THE PRESENT* (1978).

¹¹⁸ Olsen, *supra* note 111, at 1500.

¹¹⁹ See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 110-33 (1989);

Catherine MacKinnon characterizes the idea of the “private” as an instrument of women’s subordination, arguing that “when the law of privacy restricts intrusions into intimacy, it bars change in control over that intimacy. The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect.”¹²⁰

Nonetheless, Pateman notes that while feminist critiques argue that public and private spheres “are actually interrelated, connected by a patriarchal structure,” she also notes that “they do not necessarily suggest that no distinction can or should be drawn between the personal and political aspects of social life.”¹²¹ Similarly, Susan Moller Okin notes that “challenging the dichotomy [between public and private] does not necessarily mean denying the usefulness of a concept of privacy or the value of privacy itself in human life.”¹²² Indeed, the concept of privacy has proven particularly useful when invoked to place the domestic sphere outside of or beyond the control of market forces.¹²³ Thus, Warren and Brandeis placed the

see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 206-08 (1992). Frances Olsen offers an affirmative vision of potential state action, arguing that “[state] intervention in the family is desirable insofar as it promotes women’s claims for greater power and tends to undermine formal family hierarchy; it is undesirable insofar as it promotes individualism and particularizes and legitimates hierarchy rather than eliminates it.” Olsen, *supra* note 115, at 1528.

Iris Marion Young points out the tradition in political theory, going back to Rousseau and Hegel, to consign women to the private sphere as representing the body, sensuality, and passion in contrast to their ideal of the universal citizen as rational, rule-bound, objective, and homogeneous. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 119 (1990). She argues for reconfiguring the notion of the “private” as what the public excludes to one that defines private “as that aspect of his or her life and activity that any person has a right to exclude others from.” *Id.*

Young, however, still employs a dichotomous conception of public and private based on notions of control over territory that fails fully to consider the socially constructed nature of those spheres. Nor does her approach to the private sphere take full account of Olsen’s distinctions between the domestic realms, the market, and the public realm. Moreover, Young’s emphasis on individual control provides no basis for evaluating the legitimacy of such claims. For example, an embezzler may want to keep her business record private. Simply defining privacy in terms of her right as an individual to keep that information private completely undermines state power to regulate social affairs. The critical issue is how society determines what type of information may legitimately be withheld from public view. This implicates issues of the relational nature of privacy and autonomy discussed below.

¹²⁰ MACKINNON *supra* note 112, at 101; *see also* CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989).

¹²¹ PATEMAN, *supra* note 113, at 132-33.

¹²² OKIN, *supra* note 119, at 127.

¹²³ Olsen notes that the egalitarian principles of the free market could help to “promote women’s claims for greater power and . . . undermine formal family

“inviolable personality” in such a sphere when they disentangled privacy from property rights and argued that it was not a material value and hence should not be subject to market forces.¹²⁴ The dual nature of privacy is evidenced by the fact that while Warren and Brandeis may have disentangled privacy rights from property rights, their conception of the value of human dignity remained mired in a separate spheres ideology. Their focus on protecting the “sacred precincts of private and domestic life”¹²⁵ valorized the bourgeois patriarchal family as the source and guardian of spiritual values. As Allen and Mack note, “the Warren and Brandeis article initiated a doctrinal revolution in tort law. But the article was business as usual when it came to gender.”¹²⁶ Nonetheless, the fact that their conception of human dignity reflected the patriarchal norms of their social class and historical era does not necessarily undermine the validity of the principle that under the common law of privacy the power of the state may be (and has been) invoked to protect human dignity from debasing commodification by market forces.

The problem was not so much in Warren and Brandeis’ basic conception of privacy as a bulwark against the market as it was their highly gendered notion of the nature of privacy and human dignity. Thus, while engaging in a feminist critique of privacy, we must be careful not to throw out its useful elements. It is necessary, rather, to read principles of privacy in light of our contemporary understandings of gender and power in modern society. Although many feminist critiques focus on how privacy has been invoked for legitimate state action that maintains domestic patriarchy or keeps women out of the world of industry, commerce, and politics, more attention needs to be paid to the ways in which privacy has been used to initiate state action that protects individuals, not only from the state, but from the market.¹²⁷

hierarchy,” but she does not fully consider the possible harms arising from the relentless logic of the market which commodifies all things that come within its ambit. Olsen, *supra* note 115, at 1528.

¹²⁴ Warren & Brandeis, *supra* note 23, at 201-05.

¹²⁵ *Id.* at 195.

¹²⁶ Allen & Mack, *supra* note 111, at 477.

¹²⁷ Ruth Gavison offers a cogent analysis of many feminist critiques of privacy. See Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 43 (1992). While embracing the move to question the public/private distinction, she criticizes what she sees as the tendency to fight “the verbal distinctions between public and private, rather than fighting invalid arguments which invoke them, or the power structures which manipulate them in unjustifiable ways.” *Id.* Gavison resists radical dichotomies between public and private, arguing, in effect, for a continuum along which entities may be placed: “Although most entities are neither clearly public nor clearly private, important normative conclusions may still follow from the

VII. PRIVATE SPACE AS PERSONAL ZONES

Spatial conceptions of privacy not only involve constructions of a private “sphere” within society, but also involve establishing more personal “zones” of privacy around the individual. Thus, Arnold Simmel argues that “every assertion of our right to personal privacy is an assertion that anyone crossing a particular privacy boundary is transgressing against some portion of our self. Privacy boundaries, accordingly, are self-boundaries.”¹²⁸ Charles Fried also remarks upon the “spatial” aspect of privacy as a context that fosters “relations of the most fundamental sort.”¹²⁹ Fried, like Simmel, therefore characterizes invasions of privacy as threats to “our very integrity as persons.”¹³⁰ Similarly, Edward Shils describes one aspect of privacy as “the existence of a boundary through which information does not flow from the person who possesses it to others.”¹³¹ He argues that “intrusions of privacy are baneful because they interfere with an individual in his disposition of what belongs to him. The ‘social space’ around an individual, the recollection of his past, his conversation, his body and its image, all *belong* to him.”¹³² Echoing Warren and Brandeis’ concern for man’s spirit, Shils argued that a person “possesses” these things “by virtue of the charisma which is inherent in his existence as an individual soul . . . and which is inherent in his membership in the civil community.”¹³³ Invasions of privacy, therefore, threaten the very integrity of the self—and the community.

Again, however, we see a mingling of descriptive and normative aspects of privacy. Thus, Thomas Scanlon notes that “zones” of privacy are not necessarily spatial but are defined and bounded by social convention and norms.¹³⁴ For Simmel, Fried, and Shils, invasions of privacy involve transgressing both empirical and normative boundaries. Each invokes empirical spatial concepts to define privacy, yet argues that invasions of privacy threaten the “integrity” of the self. The threat involves far more than causing mere mental distress; it entails the transgression of norms of social respect due to individuals simply by reason of their membership in a

degree of self- or other-regarding.” *Id.* at 15 (emphasis in original).

¹²⁸ Arnold Simmel, *Privacy Is Not An Isolated Freedom*, in *PRIVACY: NOMOS XIII* 72 (J. Roland Pennock & John W. Chapman eds., 1971).

¹²⁹ Fried, *supra* note 12, at 477.

¹³⁰ *Id.*

¹³¹ Shils, *supra* note 6, at 282.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Scanlon, *supra* note 49, at 316-17.

community—hence it also threatens community. Their analyses therefore implicate an understanding of identity maintenance (and, ultimately, community maintenance) as a core concept of privacy.

Robert Post offers a more explicitly normative conception of private space, asserting that “in the common law, as in everyday life, issues of privacy refer to the characterization of human action, not to the neutral and objective measurement of the world.”¹³⁵ For Post, privacy involves basic rules of civility through which a community constitutes itself.¹³⁶ Invasions of privacy “threaten to exclude” a person from the community by denying the protection of rules of civility.¹³⁷ Under such circumstances, a court verdict can serve to vindicate the plaintiff and reestablish her as a full member of the community.¹³⁸

Post draws upon Erving Goffman’s notions of “territories of the self” to elaborate a spatial conception of privacy as normative and socially constructed. Such territories are contextual; their boundaries are socially determined and vary according to a wide variety of factors. Post notes that “Goffman defines a territory as a ‘field of things’ or a ‘preserve’ to which an individual can claim ‘entitlement to possess, control, use, or dispose of.’”¹³⁹

Like Shils, Post invokes metaphors of possession and ownership in approaching privacy. The valorization of possession, however, represents the problem of possessive individualism, whereby the self is defined primarily by the things it possesses.¹⁴⁰ Such a conception may efface any notion of a core self that exists in any meaningful way antecedent to the act of possessing. Thus, for example, just as Anthony Cohen criticizes Goffman’s conception of the performative self as reducing selfhood to the “skill and imperatives of performance,”¹⁴¹ so too does the conception of territories of the self run the risk of reducing selfhood to “possessed” territory.

More specifically, Post construes the tort of intrusion to lend

¹³⁵ Post, *supra* note 96, at 969.

¹³⁶ *Id.* at 970.

¹³⁷ *Id.* at 968.

¹³⁸ *Id.*

¹³⁹ *Id.* at 971 (citing Erving Goffman, *The Territories of the Self*, in RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 28 (1971)).

¹⁴⁰ For an insightful discussion of this problem in the context of cultural property, see Richard Handler, *Who Owns the Past? History, Cultural Property, and the Logic of Possessive Individualism*, in THE POLITICS OF CULTURE 64 (Brett Williams ed., 1991) (discussing C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962)).

¹⁴¹ ANTHONY P. COHEN, SELF-CONSCIOUSNESS: AN ALTERNATIVE ANTHROPOLOGY OF IDENTITY 68 (1994).

“authoritative sanction to the territories of the self.”¹⁴² Conceived of in these terms, the tort of intrusion serves three purposes:

First, it safeguards the respect due individuals by virtue of their territorial claims. Second, it maintains the language or “ritual idiom” constituted by territories, thus conserving the particular meanings carried by that language. Third, the tort preserves the ability of individuals to speak through the idiom of territories . . .

¹⁴³

Post invokes Jeffrey Reiman to echo his conclusion that control over such territories is central to maintaining a sense of oneself as “as an independent or autonomous person.”¹⁴⁴

For Post, privacy helps to constitute both the community and the individual. The distinctive character of each, its “identity,” is sustained through the maintenance of rules of civility. Similarly, C. Keith Boone also seeks to challenge the notion of privacy as a function of opposition between individual and community when he asserts that “like inhalation and exhalation, vital to the functioning of a larger organism, privacy and community should be understood as contrary and cooperative at the same time.”¹⁴⁵ While deeply insightful, Post’s analysis does not fully consider the nature of identity itself much beyond a person’s sense of herself as independent. His attention to the social construction of privacy nicely contextualizes the issue but, like Boone, he still employs a conception of the liberal individual as bounded and separate.

Recent critical legal scholarship, particularly in the area of feminist theory, offers a more radical challenge to the very notion of a bounded self as the relevant focus of rights. Jennifer Nedelsky, for example, argues that “[w]e need a new conception of the tension between the collective and the individual, for which boundary is not an apt metaphor.”¹⁴⁶ She notes that the Constitution’s focus on property has fostered the development of boundary metaphors in rights analysis. Yet she also argues that the boundary of the self is not self-evident. Individual autonomy is not a static characteristic but is relational.¹⁴⁷ Insofar as the individual is defined with reference to the collective, boundaries become problematic. “What is essential to the development of autonomy,” Nedelsky concludes, “is not protection

¹⁴² Post, *supra* note 96, at 973.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Boone, *supra* note 96, at 3.

¹⁴⁶ Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, in *LAW AND THE ORDER OF CULTURE* 162 (Robert Post ed., 1991).

¹⁴⁷ *Id.* at 168.

against intrusion but constructive relationship. The central question for inquiries into autonomy (legal or otherwise) is then how to structure relationships so that they foster rather than undermine autonomy.”¹⁴⁸ To the extent that boundary metaphors obscure the relational aspect of autonomy, they mask critical power relations.¹⁴⁹ Jane Mansbridge notes that political conceptions of connectedness are “coded” as female while separateness is “coded” as male.¹⁵⁰ She also argues that reconceiving autonomy as requiring a nurturing web of relations undermines the either/or character of the opposition between individual and community.¹⁵¹

Nedelsky and Mansbridge add a gender dimension to Michael Sandel’s critique of John Rawls’ “original position” for presupposing a picture of the person as an “unencumbered self.”¹⁵² Sandel notes that what is most important for the personhood of the unencumbered self “are not the ends we choose, but our capacity to choose them.”¹⁵³ Sandel argues that such a view denies “the possibility of membership in any community bound by moral ties antecedent to choice”¹⁵⁴ For Sandel, individual identity is largely constituted through membership in community: we do not realize our personhood simply through the choices we make but through our associations and our place in history and society.¹⁵⁵

This relational understanding of autonomy echoes Post and Boone’s conceptions of privacy as constituting and being constituted by community. Privacy, thus, may be conceived as a principle that recognizes and protects the relations necessary to develop autonomy. More than this, however, privacy involves protecting relations through which one develops a sense of oneself as unique, that is, a sense of identity. Nor is a concern for uniqueness antithetical to a focus on the relational aspect of identity. Rather, each individual may develop a distinctive set of relations within and through which

¹⁴⁸ *Id.*

¹⁴⁹ See also Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, Possibilities*, in *LAW AND COMMUNITY: THE END OF INDIVIDUALISM?* 219-252 (Allan C. Hutchinson & Leslie J.M. Green eds., 1989).

¹⁵⁰ Jane Mansbridge, *Feminism and Democratic Community*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV* 351 (John W. Chapman & Ian Shapiro eds., 1993).

¹⁵¹ *Id.*

¹⁵² Michael Sandel, *The Procedural Republic and the Unencumbered Self*, in *COMMUNITARIANISM AND INDIVIDUALISM* 18 (Shlomo Avineri & Avner de-Shalit eds., 1992).

¹⁵³ *Id.* at 19.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 18-24. See generally MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

he or she negotiates a unique identity.

VIII. PRIVACY AND THE INTERESTS OF IDENTITY UNDER THE CONSTITUTION

Because discussions and applications of privacy in the legal context often cross the boundary between common law and constitutional principles, it is necessary to consider briefly the current status of constitutional privacy. This, of course, remains one of the most controversial areas of modern constitutional law. This is not intended to review comprehensively the controversies surrounding privacy, but merely to highlight some of the key themes enunciated in major privacy cases arising under the Constitution, particularly as they relate to the recognition of legal interests in identity. In his discussion of the social foundations of the law of defamation, Robert Post notes that since 1964 the law of defamation has “been largely responsive to constitutional decisions of the United States Supreme Court,” which “has used the First Amendment as a tool to ‘reshape the common law landscape.’”¹⁵⁶ The same may be said for much of the jurisprudence of privacy. Just as *New York Times v. Sullivan*¹⁵⁷ radically changed common law defamation, so too have constitutional doctrines come to dominate discussions of privacy since *Griswold v. Connecticut*.¹⁵⁸ For Bloustein, this connection is natural, because he sees the principles of dignity as central to both constitutional and common law privacy.¹⁵⁹

Judith Wagner DeCew argues that similar interests are at stake in both constitutional and common law privacy.¹⁶⁰ Justice Brandeis himself provided perhaps the most direct link between them in his famous dissent in *Olmstead v. United States*.¹⁶¹ In this case the Taft Court’s majority opinion found inter alia that a state wiretap did not violate the Fourth Amendment guarantee against unreasonable search and seizure.¹⁶² In an impassioned and somewhat indignant dissent, Brandeis argued first that “clauses guaranteeing to the individual protection against specific abuses of power, must have a

¹⁵⁶ Robert Post, *Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 721 (1986).

¹⁵⁷ 376 U.S. 254 (1964).

¹⁵⁸ 381 U.S. 479 (1965).

¹⁵⁹ Bloustein, *supra* note 27, at 994.

¹⁶⁰ Judith Wagner DeCew, *The Scope of Privacy in Law and Ethics*, 5 LAW & PHIL. 145, 173 (1986).

¹⁶¹ 277 U.S. 438 (1927).

¹⁶² *Id.* at 466.

similar capacity of adaptation to a changing world.”¹⁶³ This echoes almost exactly the tone and substance of Warren and Brandeis’ article on the common law right to privacy, published some thirty-seven years earlier.¹⁶⁴ As discussed below, Warren and Brandeis based their articulation of the right to privacy on the belief that the common law “grows to meet the new demands of society.”¹⁶⁵ According to Brandeis, both constitutional and common law privacy owe their emergence to the adaptation of old legal principles to new circumstances.¹⁶⁶

More specifically, in his *Olmstead* dissent, Justice Brandeis expressed concern that “subtler and more far-reaching means of invading privacy have become available to the [g]overnment . . . by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”¹⁶⁷ The “progress of science,” he concluded, had furnished government with an ever growing power to intrude into the private life of citizens.¹⁶⁸ A similar concern for the intrusive power of new technologies pervades Warren and Brandeis’ article on the common law of privacy—only there the focus is on private parties, such as the media, using technology to expose private affairs to the gaze of the urban masses and the debasing materialism of the market.¹⁶⁹ Finally, whereas Warren and Brandeis spoke of the common law right to privacy as protecting “man’s spiritual nature” and “inviolable personality,”¹⁷⁰ in *Olmstead* Brandeis quoted almost verbatim from his earlier article when he asserted that constitutional privacy was based on the Founders’ recognition of “the significance of man’s spiritual nature, of his feelings and of his intellect.”¹⁷¹ He concluded that “the right to be left alone [was] the most comprehensive of rights and the right most valued by civilized men.”¹⁷² Brandeis saw both common law and constitutional privacy, therefore, as central to a civilized community. Both drew on the sorts of dignitary concerns identified by Bloustein, the former focusing on private actors, and the latter on the state.

In his discussion of the place of privacy in a decent society,

¹⁶³ *Id.* at 472 (Brandeis, J., dissenting).

¹⁶⁴ Warren & Brandeis, *supra* note 23.

¹⁶⁵ *Id.* at 193.

¹⁶⁶ *Id.*

¹⁶⁷ *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

¹⁶⁸ *Id.* at 474 (Brandeis, J., dissenting).

¹⁶⁹ Warren & Brandeis, *supra* note 23, at 196.

¹⁷⁰ *Id.* at 205.

¹⁷¹ *Olmstead*, 277 U.S. at 478.

¹⁷² *Id.*

Avishai Margalit suggests some distinctions between institutional and social encroachments on privacy that may be useful in considering the relationship between constitutional and common law privacy.¹⁷³ Margalit first distinguishes between a decent society and a civilized one:

A civilized society is one whose members do not humiliate one another, while a decent society is one in which the institutions do not humiliate people. Thus, for example, one might think of Communist Czechoslovakia as a nondecent but civilized society, while it is possible to imagine without any contradiction a Czech Republic which would be more decent but less civilized.¹⁷⁴

Margalit asserts that a decent society requires that institutions not encroach on personal privacy.¹⁷⁵ He sees the malicious encroachments of gossip, which are of such great concern to Warren and Brandeis, as “more relevant to the question of whether a society is civilized than whether it is decent.”¹⁷⁶ In each case his primary concern is for the dignity of the individual or, rather, that the individual not be humiliated.¹⁷⁷ Margalit’s distinctions here nicely echo the respective concerns of common law and constitutional privacy in the United States. Constitutional privacy focuses primarily on state institutions; common law privacy focuses primarily on individual social actors. Margalit notes that both types of encroachments on privacy share the power to humiliate.¹⁷⁸ Similarly, constitutional and common law privacy ultimately share a concern to protect the dignity of the individual generally, and the integrity of her identity in particular. We see this connection most clearly in the relation between Brandeis’ *The Right to Privacy* and his dissent in *Olmstead*.¹⁷⁹

It is in its concern for the integrity of the individual’s identity that the jurisprudence of constitutional privacy is most relevant to

¹⁷³ AVISHAI MARGALIT, *THE DECENT SOCIETY* 201-11 (1996).

¹⁷⁴ *Id.* at 201.

¹⁷⁵ *Id.* at 201.

¹⁷⁶ *Id.* Ferdinand Schoeman sees gossip as existing between the public and private realms. He argues that norms of privacy may precondition gossip, but that gossip itself is not the same thing as publicizing something for all to see. *Id.* at 148-50. Rather, it is a controlled dissemination of information within a community, which itself manages and constructs community. *Id.*

¹⁷⁷ MARGALIT, *supra* note 173, at 204-08.

¹⁷⁸ *Id.* at 201, 203-05.

¹⁷⁹ Of course, common law also implicates the power of the state insofar as it involves its institutions enforcing rules of civility. In this regard, Margalit’s line between civilized and decent societies blurs, but it does not disappear. Common law privacy focuses on social interaction among individuals, whereas constitutional privacy centers on the actions of the state.

this discussion. Both common law and constitutional privacy recognize and manage identity. Indeed, it is from common law privacy that much of constitutional jurisprudence derives its approach to assessing the legal status of identity in relation to dignity and individual integrity. Justice Brandeis' dissent in *Olmstead* makes this clear. More recently, a similar linking of common law and constitutional principles of privacy is evident in Justice Stewart's concurrence in *Rosenblatt v. Baer*, where he asserted the following:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.¹⁸⁰

Justice Stewart effectively used the common law tradition of privacy and its concerns for the dignity and integrity of the individual to inform his constitutional reading of the fundamental principles of constitutional jurisprudence. Our common law tradition of privacy implicitly informs the Justice's conception of principles that lie at the "root of any decent system of ordered liberty."¹⁸¹

Laurence Tribe articulates similar considerations to connect two basic aspects of constitutional privacy. Tribe distinguishes between "inward-looking" privacy, which demands secrecy, sanctuary, or seclusion from "outward looking" privacy that relates more to controlling how one is perceived by others in society. Both privacy interests, however, are joined by their common recognition of the need "to be master of the identity one creates in the world."¹⁸²

Thus, when Justice Brandeis construes the wiretaps in *Olmstead* as menacing the "spiritual nature" of man, he is articulating a concern for more than the mere protection of secrets. He argues that the Constitution should be invoked to protect a sphere in which the individual can freely maintain and develop his identity. Some of the early substantive due process cases from the same era articulate similar concerns for maintaining the integrity of institutions and practices, such as the family and child-rearing, that were then perceived as central to maintaining the integrity of individual

¹⁸⁰ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

¹⁸¹ *Id.* at 92 (Stewart, J., concurring).

¹⁸² TRIBE, *supra* note 89, at 1304.

identity. For example, in *Meyer v. Nebraska*,¹⁸³ the Court struck down a state law that prohibited the teaching of foreign languages to schoolchildren. Decided in the aftermath of the virulent anti-German sentiment engendered by the First World War, the Court found that the state had gone too far in trying “to foster a homogeneous people.”¹⁸⁴

Similarly, in *Pierce v. Society of Sisters*,¹⁸⁵ the Court struck down a statute requiring children to attend only public schools; that is, the law prohibited them from attending private or parochial schools. Citing *Meyer*, the Court focused on the right of the parents to “direct the upbringing and education of children under their control” and declared that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children”¹⁸⁶ The Court concluded that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁸⁷ While certainly evoking images of the family as the private province (and property) of the male patriarch, the Court’s language also resonates with Margalit’s construction of the role of privacy in maintaining a decent society. These cases do not forbid all intrusions by the state into the life of the family, but they do forbid acts that are perceived to threaten the integrity of the family and its children. The threats here involved “homogenization” or “standardization;” that is, acts which effaced the individual identity of family members.¹⁸⁸

More recently, the Court expressed a similar concern for the integrity of the family in *Moore v. City of East Cleveland*.¹⁸⁹ In *Moore*, the Court struck down a local housing ordinance that limited occupancy of dwelling units to members of a single family. The ordinance defined “family” in terms of a few categories of individuals related by blood.¹⁹⁰ The lower court had found that Moore violated the ordinance because she lived with her two grandchildren who were

¹⁸³ 262 U.S. 390 (1923).

¹⁸⁴ *Id.* at 402. Jill Norgren and Serena Nanda note that the Court’s decision “can hardly be described as ‘a celebration of cultural pluralism.’ In fact, the Court expressed considerable empathy and approval of the intent of the Nebraska legislature” JILL NORNGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND THE LAW* 187 (1988).

¹⁸⁵ 268 U.S. 510 (1925).

¹⁸⁶ *Id.* at 535.

¹⁸⁷ *Id.*

¹⁸⁸ *Meyer*, 262 U.S. at 402.

¹⁸⁹ 431 U.S. 494 (1977).

¹⁹⁰ *Id.* at 496.

cousins.¹⁹¹ In his opinion for a four justice plurality, Justice Powell asserted that “freedom of personal choice in matters of marriage and family life” was protected by the Due Process Clause of the Fourteenth Amendment.¹⁹² Citing a long list of cases beginning with *Meyer* and *Pierce*, Powell declared that the Court “ha[s] consistently acknowledged a ‘private realm of family life which the state cannot enter.’”¹⁹³ After expounding on the “sanctity of the family” as a source and transmitter of “cherished values,”¹⁹⁴ Powell echoed *Pierce*, in his conclusion that “the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.”¹⁹⁵

The intrusion of the state into the construction of the family unit implicates precisely the type of institutional humiliation that concerned Margalit. Margalit aptly noted that one of the central motifs of the humiliation caused by institutional violation of privacy is “rejection, that is, exclusion from the ‘Family of Man.’”¹⁹⁶ The Court in *Moore* gave this figurative construction of the human family a literal application. The state’s refusal to recognize or respect the integrity of the plaintiff’s familial unit humiliated her as an individual and effaced (standardized) her individuality.

Privacy principles also inform constitutional law in other forms of association.¹⁹⁷ Bloustein in particular proposes an explicit link between individual privacy and the right of association. “The right to be let alone,” he asserts, “protects the integrity and dignity of the individual. The right to associate with others in confidence—the right of privacy in one’s associations—assures the success and integrity of the group purpose.”¹⁹⁸ Perhaps the case most clearly embodying Bloustein’s concerns is *NAACP v. Alabama*.¹⁹⁹ In this case,

¹⁹¹ *Id.* at 496-97.

¹⁹² *Id.* at 499.

¹⁹³ *Id.* (citations omitted).

¹⁹⁴ *Id.* at 503-04.

¹⁹⁵ *Moore*, 431 U.S. at 506.

¹⁹⁶ MARGALIT, *supra* note 173, at 204. Kenneth Karst’s work focuses extensively on the constitutional aspects of the rights and harms implicated by institutional exclusion of individuals from the political community. See KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

¹⁹⁷ There is, of course, extensive First Amendment jurisprudence on the right of association. As with the other areas of constitutional law I touch upon, my purposes are best served simply by highlighting some areas where common law principles seem to inform or overlap with constitutional jurisprudence.

¹⁹⁸ Edward Bloustein, *Group Privacy: The Right to Huddle*, 8 RUTGERS-CAM. L.J. 219, 278 (1977).

¹⁹⁹ 357 U.S. 449 (1958).

the Supreme Court barred the state of Alabama from requiring the local NAACP chapter to disclose its membership lists, asserting that the Court “has recognized the vital relationship between freedom to associate and privacy in one’s associations.”²⁰⁰ The Court then stated that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”²⁰¹ Beyond the explicit references to privacy, the Court’s focus on “dissident beliefs” also evidences a concern to resist the sort of standardization that it decried in *Meyer*, *Pierce*, and *Moore*.²⁰² Whereas personal and familial privacy protect the conditions necessary for people to realize their individual identities, the political context of *NAACP v. Alabama* indicates that respect for one’s associations protects the conditions necessary for a decent society to realize its identity as a democracy.

Perhaps the Supreme Court’s most forceful articulation of the privacy-based identity interests implicated by the right of association is found in *Roberts v. United States Jaycees*.²⁰³ In this case, the Court found that the application of a state law to compel the Jaycees to accept women as regular members did not violate their First Amendment right of association.²⁰⁴ Justice Brennan found that the basis of associational rights lay in a group’s relation to sustaining and developing the identity of individual members:

Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to

²⁰⁰ *Id.* at 462.

²⁰¹ *Id.*

²⁰² Citing *NAACP v. Alabama*, Tribe notes that “[t]he presentation of the self is . . . inescapably linked to rights of association,” but he goes on to caution that associational rights have a dual character “as sources of power to exclude unwanted persons and behaviors while including in one’s circle those with whom affinity is felt.” TRIBE, *supra* note 89, at 1313.

²⁰³ 468 U.S. 609 (1984).

²⁰⁴ *Id.* at 628-29.

define one's identity that is central to any concept of liberty.²⁰⁵

Here Justice Brennan invoked the First Amendment to protect the social processes and relations through which individuals form and sustain their identities. His concern to maintain a buffer between the individual and the state echoes Margalit's concerns regarding the role of privacy in a decent society.²⁰⁶ Justice Brennan, indeed, asserted a type of associational privacy along the lines Bloustein had earlier articulated. Again, as with common law privacy, the basic goal is to legally recognize, define, and protect the integrity of individual identity, or, as Justice Brandeis termed it, the "spiritual nature of man."²⁰⁷

Tribe also notes the identity-based concerns articulated by the Supreme Court in cases relating to vocation, travel, control over personal information, and appearance.²⁰⁸ After analyzing *Hampton v. Mow Sun Wong*,²⁰⁹ Tribe asserted that the state may not constitutionally "take away without clear and focused justification . . . a fair opportunity for an individual to realize her identity in a chosen vocation."²¹⁰

Similarly, in his discussion of *Shapiro v. Thompson*,²¹¹ Tribe notes that travel may be valued both "as an aspect of expression or education, and . . . as a means of changing one's place of residence and beginning life anew. Both dimensions of personal mobility are important in fleshing out the notion of personhood" ²¹² The "fleshing out [of] personhood" by "begin[ning] life anew" directly implicates dignitary interests in the construction and maintenance of one's identity. Tribe moves on to discuss the individual interest in "controlling one's informational traces" largely as a matter of "outward looking" privacy.²¹³ He reviews a wide array of Supreme Court cases relating to "system[s] of governmental information-gathering, information-preservation, and/or information

²⁰⁵ *Id.* at 618-19 (citations omitted).

²⁰⁶ See MARGALIT, *supra* note 173, at 201-08.

²⁰⁷ Warren & Brandeis, *supra* note 23.

²⁰⁸ TRIBE, *supra* note 89, at 1375-89.

²⁰⁹ 426 U.S. 88 (1976) (a case involving heightened scrutiny of a Civil Service Commission rule "barring all noncitizens from employment in the federal competitive civil service").

²¹⁰ TRIBE, *supra* note 89, at 1378.

²¹¹ 394 U.S. 618 (1969) (invalidating the denial of welfare benefits to people who had not resided in the jurisdiction for at least a year as an unconstitutional burden on the fundamental right to travel).

²¹² TRIBE, *supra* note 89, at 1382-83.

²¹³ *Id.* at 1389.

dissemination,”²¹⁴ and argues that when such systems threaten the individual’s control over information about himself or herself, they implicate “a basic part of the right to shape the ‘self’ that one presents to the world”²¹⁵

Tribe is also critical of the tendency by most courts to reject constitutional challenges to state-imposed regulations of appearance, such as hair length and clothing. He argues that “one need not regard a person’s hair length as fully equivalent to speech in order to perceive that governmental compulsion in this realm invades an important aspect of personality.”²¹⁶ Tribe laments the Supreme Court’s decision in *Kelly v. Johnson*,²¹⁷ which upheld a police department’s regulation of officers’ hairstyles and expressed special concern for regulations that affect young people for whom “the freedom to shape one’s personality through appearance” is “fundamental.”²¹⁸ In each of these areas, Tribe is elaborating constitutional doctrines that are ultimately grounded in a legal recognition not only of the general value of human dignity, but of its more particularized manifestation as it bears on maintaining the conditions necessary for individuation—the realization of one’s distinctive identity as a unique human being.

Finally, and most obviously, constitutional privacy has become deeply identified with issues of control over one’s body and reproductive autonomy. Here the issues of control over one’s body raised in *Kelly* are elevated to a higher level of significance. If the literature on other aspects of constitutional privacy is extensive, the debates and discussions surrounding reproductive autonomy are seemingly endless. I will attempt only a brief review of some key aspects of particular cases as they bear on legal interests related to the recognition, protection, and/or construction of identity.

The Supreme Court’s holding in *Griswold v. Connecticut*,²¹⁹ striking down a state law forbidding the use of contraceptives or

²¹⁴ *Id.*

²¹⁵ *Id.* at 1389-90.

²¹⁶ *Id.* at 1386.

²¹⁷ 425 U.S. 238 (1976).

²¹⁸ TRIBE, *supra* note 89, at 1388-89. The relationship between state regulation of appearance and the individual’s interest in the integrity of her persona becomes more problematic when it implicates First Amendment rights to the free exercise of religion. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding a military regulation forbidding an Orthodox Jew from wearing a yarmulke while on duty). This takes us beyond our immediate concerns with privacy into a large area of constitutional doctrine characterized by Tribe as involving “rights of religious autonomy.”

²¹⁹ 381 U.S. 479 (1965).

counseling others in their use, provides a good starting point. Citing such cases as *Meyer*, *Pierce*, and *NAACP v. Alabama*, Justice Douglas posited a general theory of privacy as a constitutional right by alluding to the “penumbras” formed by “emanations” from the more specific guarantees in the Bill of Rights.²²⁰ Like Margalit, Justice Douglas clearly articulates a conception of privacy as a bulwark against humiliating and degrading state intrusions. “Would we,” he cautioned, “allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”²²¹ Indeed prior to the “emanations” from “penumbras,” Justice Douglas asserted that “we deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”²²² Justice Goldberg took up this theme in his concurrence, using the Ninth Amendment to cast “marital privacy” as an unenumerated “fundamental right” derived from the traditions and collective conscience of our people.²²³ Similarly, Justice Harlan found that the law violated “basic values ‘implicit in the concept of ordered liberty.’”²²⁴ These opinions construct privacy as a pre-political value basic to a decent society. In this regard, the principles they invoke share a common genealogy with those first articulated by Warren and Brandeis. Both types of privacy demand that the law recognize and protect the integrity of the individual.

In *Eisenstadt v. Baird*,²²⁵ the Court used Equal Protection analysis to extend the safeguards of *Griswold* to unmarried couples. The case, however, was really about the right to privacy, as was evident from Justice Brennan’s assertion in his opinion for the majority that if “the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a persona as the decision whether to bear or beget a child.”²²⁶

Finally, in *Roe v. Wade*,²²⁷ the Court extended the right of privacy to cover the regulation of access to abortion. The Court held that the right to privacy was “fundamental” and encompassed personal decisions regarding abortion.²²⁸ Therefore, any state regulation of

²²⁰ *Id.* at 484.

²²¹ *Id.* at 485-86.

²²² *Id.* at 486.

²²³ *Id.* at 487-93 (Goldberg, J., concurring).

²²⁴ *Id.* at 499 (Goldberg, J., concurring).

²²⁵ 405 U.S. 438 (1972).

²²⁶ *Id.* at 452 (emphasis in original).

²²⁷ 410 U.S. 113 (1973).

²²⁸ *Id.* at 153.

abortion could only be justified if it served a compelling state interest.²²⁹ Although as a practical matter the right to abortion and access to reproductive health services have been seriously eroded in the years since *Roe*, the Supreme Court somewhat ambiguously reaffirmed the “essential holding of *Roe v. Wade*” in *Planned Parenthood v. Casey*.²³⁰ While rejecting *Roe*’s trimester framework and freeing the states to impose regulations on abortion as long as they do not impose an “undue burden” on the woman’s right of privacy, the unprecedented joint opinion by Justices O’Connor, Kennedy, and Souter nonetheless asserted that “regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”²³¹ Ronald Dworkin praised the decision as a “clear endorsement of a basic right to free choice about abortion until the fetus is viable,” but he also cautioned that “we must not forget that . . . four justices announced themselves still determined to overrule *Roe v. Wade*.”²³² One more vote could significantly alter the terrain of constitutional privacy as we have come to understand it over the past twenty-five years.

In *Bowers v. Hardwick*,²³³ a case upholding the arrest of a homosexual man under a Georgia criminal sodomy statute, the Court set harsh limits on the right to privacy and personal autonomy. In a sharply divided decision, the Court refused to extend the right to privacy to cover acts of homosexual sodomy between consenting adults.²³⁴ Justice White’s majority opinion distinguished the earlier line of privacy cases, asserting that “no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated”²³⁵ In the more recent case of *Romer v. Evans*,²³⁶ Justice Kennedy used Equal Protection analysis to invalidate an amendment to Colorado’s state constitution that forbade localities from enacting ordinances outlawing discrimination against homosexuals. Although not expressly based in the jurisprudence of privacy, the Court’s assertion that “a State can not so deem a class of persons a stranger to its laws” is grounded in a similar

²²⁹ *Id.* at 155-56.

²³⁰ 505 U.S. 833 (1992).

²³¹ *Id.* at 879.

²³² DWORKIN, *supra* note 80, at 117, 128.

²³³ 478 U.S. 186 (1986).

²³⁴ *Id.*

²³⁵ *Id.* at 190-91.

²³⁶ 517 U.S. 620 (1996).

concern to respect the basic humanity of all citizens.²³⁷

William Parent criticizes both *Griswold* and *Eisenstadt* for their failure to adequately define privacy.²³⁸ The “right to be left alone,” he asserts, is too broad to be meaningful.²³⁹ He sees the intrusions involved in the cases as more offensive to liberty than to privacy. Yet he argues against a retreat from the sort of substantive due process analysis found in the cases. Rather, he advocates the need to develop “rigorous disciplined reasoning aimed at constructing credible criteria for distinguishing justifiable from unjustifiable forms of government intrusion.”²⁴⁰

DeCew, in turn, challenges Parent’s claim that post-*Griswold* cases spuriously conflate privacy and liberty.²⁴¹ She argues that Parent’s conception of privacy, because it simply involves personal information that is not part of a public record, is too narrow to encompass the true concerns of privacy jurisprudence.²⁴² DeCew asserts that privacy encompasses “not only information but activity and physical access as well.”²⁴³ She allows for cultural variation in conceptions of privacy by characterizing “the realm of the private” as a function of certain “social conventions” that help establish “whatever is not the legitimate concern of others, where those others are individuals in tort cases, the government for constitutional claims.”²⁴⁴ This is all well and good, particularly the concern for the social construction of the realm of privacy. But DeCew’s analysis leaves unanswered the question of legitimacy, how it is established, and which (and whose) social conventions count in determining it. This can only be done by considering explicitly how the courts have construed the nature of the harm(s) caused by invasions of privacy as a basis for elaborating specific reasons for why our culture has

²³⁷ *Id.* at 635.

²³⁸ William A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305, 316-18 (1983).

²³⁹ *Id.* at 321-22.

²⁴⁰ *Id.* at 312-16, 321. J. Braxton Craven similarly calls for a new embrace of substantive due process analysis as a continuum along which rights can be aligned as more or less “fundamental.” He argues that such a continuum would allow for a constructive balancing of different rights against governmental interests and would, therefore, prevent a reversion to the jurisprudence of the *Lochner* era. Specifically, he asserts that a cluster of rights surrounding the concept of “personhood” may be recognized, in some degree, as “fundamental” without “awakening the long dormant shade of *Lochner*.” J. Braxton Craven, *Personhood: The Right to Be Left Alone*, 1976 DUKE L.J. 699, 700-02 (1976).

²⁴¹ DeCew, *supra* note 160, at 146.

²⁴² *Id.* at 151-52.

²⁴³ *Id.*

²⁴⁴ *Id.* at 146-47, 169-72.

historically valued privacy. This brings us back to the question of human dignity and the integrity of individual identity.

The concern for individual integrity has led many commentators, including Tribe, to characterize the right of privacy as articulated in *Griswold* and elaborated on in *Roe* as more a matter of personal autonomy than of privacy.²⁴⁵ Grant Mindle, however, has been careful to point out some differences between Brandeis' "privacy" and Tribe's "autonomy."²⁴⁶ Regarding the first edition of Tribe's formidable *American Constitutional Law*, Mindle asserts the following:

to Brandeis, the right to privacy is the right to conceal elements of our being from society at large. But to Laurence Tribe, his intellectual heir, privacy so defined is insufficient to guard the dignity of man. In lieu of privacy, Tribe would speak of autonomy.²⁴⁷

He argues that Tribe casts privacy more as a form of public expression—the right to control one's public reputation.²⁴⁸ He identifies "the gulf that separates Brandeis' approach to privacy" from Tribe's by referring to *Stanley v. Georgia*,²⁴⁹ where the Supreme Court invoked the right of privacy to strike down a law that punished private individuals for possessing obscenity. Mindle contrasts Tribe's comment that upholding the statute in *Stanley* would have led "either to a flattening or a repression of Stanley's inner self," with "Brandeis' determination to use the law to guard against the 'lowering of social standards and of morality.'"²⁵⁰

Mindle's contrast is well taken and it is important not to elide

²⁴⁵ See TRIBE, *supra* note 89, at 1340-54; see, e.g., Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974). Henkin asserts that the "new Right of Privacy," elaborated from *Griswold* to *Roe*, "is a zone of prima facie autonomy or presumptive immunity from regulation . . ." *Id.* at 1425. Many commentators construe the right of privacy as autonomy in reproductive rights cases. See, e.g., Elizabeth Beardsley, *Privacy: Autonomy and Selective Disclosure*, in PRIVACY: NOMOS XIII 56-70 (J. Roland Pennock & John W. Chapman eds., 1971); Gross, *supra* note 14, at 169-81; INNES, *supra* note 16, at 91-95; SCHOEMAN, *supra* note 83, at 1-22; Rogers Smith, *The Constitution and Autonomy*, 60 Tex. L. Rev. 175 (1985).

²⁴⁶ Grant Mindle, *Liberalism, Privacy, and Autonomy*, 51 J.L. & POL. 575 (1989).

²⁴⁷ *Id.* at 592.

²⁴⁸ *Id.* Mindle also comments on the difficulty of adequately defining "privacy" and "autonomy." Therefore, he decides "in lieu of defining privacy and autonomy with reference to their subject matter . . . I have focused instead upon their underlying presupposition—that the law should endeavor to protect Americans in their emotions and sensations." *Id.* at 576. While a reasonable approach, I believe that Mindle's identification of the presuppositions of privacy and autonomy is seriously flawed.

²⁴⁹ 394 U.S. 577 (1969).

²⁵⁰ Mindle, *supra* note 247, at 592-93.

the real differences between various conceptions of the right to privacy. But neither should we minimize the deeper continuities. Mindle's conclusion that Brandeis articulated the right to privacy "to guarantee the right of the individual to retire from public life, at least temporarily, and having done so to seek solace and spiritual renewal within the confines of his domestic circle,"²⁵¹ is not inaccurate so much as it is narrow and limited. Such concerns did animate Brandeis' immediate efforts, but his understanding of the law as a living, growing thing led him to place far more emphasis on the deeper principles of recognizing and protecting the dignity and integrity of the individual's persona or "spiritual nature." Similarly, Mindle's assertion that Brandeis' vision of privacy (as thus characterized), "is a far cry from what privacy has come to mean—the right to behave in public with little if any regard for the feelings of others,"²⁵² seems to reduce contemporary concerns for autonomy to a species of ill-mannered narcissism. Mindle's view of autonomy overlooks continuing and vibrant (if occasionally eclipsed) concerns that share, in modified form, Brandeis' concerns for dignity and individual integrity. Indeed, one might argue that autonomy matters to Tribe (and others) precisely because it is viewed as central to sustaining the type of distinctive, unique individual that Brandeis too sought to protect. Brandeis' normative ideal of a cultured, genteel individual might not comport well with Tribe's defense of *Stanley*, but each in his own way sees privacy as a means to protect not only the individual but also individuality—individual identity—from being standardized, repressed, or effaced by the forces of modern life, be they social, economic, or governmental.

CONCLUSION

The concept of privacy, thus, resists any bright-line treatment, such as that given by other commentators and the courts. Their diverse stratification of privacy between differing spheres and differing definitions is not the fault of the individual critics or judges. I am not suggesting that privacy is an amorphous concept, which constantly resists typical classification and definition. Any attempt to bind privacy into one sphere is resisted by its application to another. Attempts to classify and define the right to privacy are, thus, defeated by the underlying needs to diversity and split the concept so as to make it less broad.

First, existent literature on the subject sub-textually points to a

²⁵¹ *Id.* at 596.

²⁵² *Id.*

definition of privacy that protects the person from the intrusive nature of the (external) market. Privacy has evolved into a mechanism for defining identity beyond the forces of the marketplace. Commentators should, therefore, consider privacy with means outside the normative descriptions of property. As a matter of normative conception, then, privacy is the social mechanism for protection of the individual from intrusion, and not merely the descriptive means for the protection of an individual's rights in property.

Despite critical attempts to dissect the concept of privacy along conceived lines of dignity, individuality, and spatial relations, privacy should not be considered as a fragmented reality. Rather, it is best considered as one combined theory of social interaction with the marketplace. Privacy is, thus, not a collection of diverse theories of societal interactions between differing spheres, but rather a unifying principle that is itself the means for creating the notions of dignity and identity that critics often use in defining privacy.

Finally, privacy is best thought of as part of a larger continuum of rights. It is not an encompassing sphere, but rather a point along a line, that is free to move between the normative and descriptive, as well as between concepts of identity and dignity. Privacy should not be conceptualized as the mere means of protecting property, but as a tool for formulating identity. Critics would be better served by formulating individual points along that line, than attempting the unduly broad and onerous task of providing one sweeping definition of privacy.